VOLUME 6: 2011

# California Legal History

Journal of the
California Supreme Court
Historical Society

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# ORAL HISTORIES

THE FOUR REMAINING UNPUBLISHED
ORAL HISTORIES CONDUCTED BY
THE FORMER STATE BAR COMMITTEE
ON HISTORY OF LAW IN CALIFORNIA,
EACH WITH AN INTRODUCTION.

# ORAL HISTORY

# LEON THOMAS DAVID

(1901–1994)

LEON THOMAS DAVID
(1901–1994)

*Courtesy Contra Costa County Historical Society*

*Oral History of*

# LEON THOMAS DAVID

**(1901–1994)**

## EDITOR'S NOTE

The oral history of Superior Court Judge Leon Thomas David is one of four oral histories conducted by the former California State Bar Committee on History of Law in California in 1987. These were the final oral histories conducted by the committee, and they are published for the first time in the present volume of *California Legal History* (vol. 6, 2011). Judge David served as chair of the committee in 1977, and he was interviewed by committee member Raymond R. Roberts on January 16, 1987.

The oral history has been reedited for publication. Citations have been verified or provided, and the spelling of names has been corrected wherever possible. Explanatory notations in [square brackets] have been added by the editor. The sound recording and original transcription are available at The Bancroft Library, UC Berkeley. The oral history is published by permission of the State Bar of California.

A biographical sketch of Judge David by Superior Court Judge Roger Alton Pfaff was published in 1962 by the *Los Angeles Daily Journal*. It is reproduced below as a brief introduction to Judge David's life and career.

— SELMA MOIDEL SMITH

# LEON T. DAVID[1]

Judge Leon T. David has led a busy life since his birth in San Francisco, August 25, 1901. His early years were spent in the Bay Area. He attended Alameda, Berkeley and Vallejo High Schools before entering Stanford University in 1921.

In 1924 he received his A.B., and in 1926 his Juris Doctor from Stanford. Thereafter, he migrated to Southern California where he studied Public Administration at USC, from which institution he received his M.S. degree in 1935 and in 1957 a doctorate in Public Administration.

In 1926 he was admitted to the California Bar and engaged in the private practice of law under the firm name of Malcolm and David. He also accepted an appointment the same year as deputy city attorney and city attorney pro tem for the City of Palo Alto, a position he held until 1931. In 1931 he became assistant professor of law at USC law school. For one year, 1930-31, he was retained as deputy city attorney for the City of Lakeport, California. In 1934 he accepted an appointment as assistant city attorney for Los Angeles, a position he held, except for his absence during World War II, until 1950.

In 1927 he married the talented Henrietta Louise Mellin. The Davids are the proud parents of two children, Mrs. L. Perry Holmes, Jr., of Lafayette, California, and Leon Colby, of Honolulu. They have three grandchildren. Mrs. David majored in music at USC and for many years sang professionally in church. She is a past president of the Women's Auxiliary, Society for Cancer Research at UCLA, and is listed in *Who's Who of American Women*.

While a student at Stanford, Judge David was on the staff of the *Daily Palo Alto* and *Stanford Quad* and actively engaged in intramural athletics, including track and football. In 1921 he was discus champion and record holder of the California DeMolay track and field.

As a student at Stanford, Judge David took ROTC training and was commissioned a 2nd lieutenant, Field Artillery, ORC [Officers' Reserve Corps], in 1924. He maintained his reserve status, and in July, 1941, he was called to active duty by the War Department and thereafter served in a

[1] P.A.R. [Roger Alton Pfaff], "Leon T. David," *Los Angeles Daily Journal*, June 22, 1962, p. 1. Reprinted in *Judicial Profiles of the Superior Court of Los Angeles County, California* (Los Angeles: Los Angeles Daily Journal, 1963), p. 23 (in which articles signed "P.A.R." are credited to Judge Roger Alton Pfaff).

number of command posts, including chief of Special and Morale Services, NATOUSA [North African Theater of Operations, United States Army] on General Eisenhower's Special Staff in Algiers in 1943. He was honorably discharged in 1945 with the rank of colonel, and was retired from the AUS [Army of the United States] as colonel, Artillery, in 1961. Judge David is the recipient of the [U.S.] Legion of Merit; honorary officer [of the Order of the] British Empire; Brazilian Medalha de Guerra; French Médaille d'Honneur; Italian Commander [of the Order of the] Crown of Italy; European Theater Medal and three Battle Stars.

Upon his return from service, he resumed his duties as a senior assistant city attorney for Los Angeles, which he held until 1950 when he was appointed to the municipal court by Governor Earl Warren, who elevated him to the superior court in 1953, a position to which he has been continually reelected.

Throughout Judge David's career, he has engaged in many varied activities, including journalism and teaching, both in Law and Public Administration, at the University of Southern California, and also as an instructor at Command and General Staff School at Fort MacArthur, San Pedro; and the Presidio, San Francisco.

The Davids attend the Westwood Presbyterian Church. Judge David is a member of many professional, fraternal and civic organizations, including the Los Angeles, American, and Westwood Bar Associations, American Judicature Society, Phi Alpha Delta, Order of the Coif, American Legion, Reserve Officers Association, Acacia Club, Masons, and Shrine.

Tracing his ancestry back to early American colonial days, Judge David is a member of the Sons of the Revolution and a vice chancellor of the Society of Colonial Wars for California. He is chairman of the Los Angeles County Bar Association Legal Aid Committee and president of the Kiwanis Club of Los Angeles for 1962. He is a member of the Jonathan Club and numerous civic organizations.

Judge David is an amateur radio operator, holding General License W6QFA, and a student of portrait painting. Other interests are speaking and writing on historic and legal subjects, travel, and the study of foreign languages.

He sums up as one of his philosophical guideposts, the following maxim:

"Time is our priceless commodity which never can be replaced; use it, don't waste it."

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*Oral History of*

# LEON THOMAS DAVID

## (1901–1994)

Q: I am in the home of Leon T. David, who has graciously consented to reminisce with me on his observations of the history of law in California. Before we go into any of the particular details, he has offered to play a tape that he made of reminiscences that will be by way of introduction to the formal interview.

* * *

DAVID:[1] As of August 26, 1976, I was in the practice of the law and on the bench for a total of fifty years. Over that period of time, there have been many experiences it may be well to record, particularly as I now serve as chairperson of the State Bar Committee on History of Law in California. I was born on August 25, 1901, in the 300 block of Leavenworth Street in San Francisco, where my parents, Ella Thomas David and Leon Kline David, lived upstairs in Mrs. O'Halloran's flat. My father at that time was a bookkeeper and teller in the old First National Bank. Shortly after my birth, the family moved to Alameda at 1109 Pacific Avenue, down the block from my grandfather's residence, Edward E. David, at 1223 Pacific Avenue.

[1] "The Practice of the Law" by Judge Leon Thomas David, recording on July 31, 1977.

I remember the 1906 earthquake. My crib rolled across the bedroom floor, and struck the opposite wall. Above, the chimney collapsed and the bricks hitting the roof made a fearsome clatter. The green Antikamnia pain pill calendar, with its life-size portrait of the president, Teddy Roosevelt, with his eyeglasses and big-toothed smile, fell on the floor. The little sheet iron stove made a rasping noise as it slid along the floor. My father dashed in to see if I was all right. I think I was more mystified than scared. Our house stayed on its brick foundation, with only the bricks at the top of the chimney to be replaced. When permitted to go out, I saw a house around the corner on Bay Street where the main floor was sitting down on a collapsed basement. I remember my father setting off for San Francisco with a shovel over his shoulder to aid in digging out the remains from the bank.

People displaced by the San Francisco fire came to Alameda, looking for places to stay. Our house was not very large, but mother and father made the rear bedroom available to a homeless couple. They stayed for a year. After they left, mother was scandalized! The couple were not husband and wife.

The following year, of course, there was a panic. There were hard times, and my father found another situation at the Henderson Bank in Elko, Nevada. The family thereupon moved to Elko. It was a frontier town. Indians gathered upon its wide main street. Sheepmen and cattlemen gathered in town — the cattlemen on the one hand, and the sheepmen on the other — keeping discreetly apart, and each patronizing a separate large saloon at opposite ends of the block.

There was an Indian camp about one mile north of the town. There were some Shoshone Indians still living in teepees. Others had built small cabins and cottages. These were said to be the small cabins of Indians who went to Indian school but who had, nevertheless, come back to live the life of their people. The Indian squaws came to town to work in washing and other household chores. The Indian bucks would come in on the weekend to collect their wages. I remember seeing Indian squaws sitting down on the high curbs in the main street, chewing large wads of gum, pulling the gum out a great distance from their mouth, sprinkling it with cheap cologne and then putting it back into their mouths and chewing again. This was a cheap way of getting a jag on, since the sale of liquor to Indians was prohibited.

The street to the school passed the county courthouse, a large structure with a broad stairway leading to the courtroom. My father had not been in town very long before he was summoned for jury duty on a murder trial. The county judge was Judge Brown, who afterwards, I believe, was a justice of the Supreme Court of the State of Nevada. The defendant was found guilty in the murder case, and I remember that my father reported afterwards that he had shaken the hand of the defendant. The defendant had loaned him a horse to ride around and see the country shortly after my father arrived in Elko, Nevada, right after the first of the year 1907.

The bank shortly afterwards was rebuilt. Inside, the cashier and other attachés of the bank served behind the counter. The entire counter was surmounted by a latticework, which was supposed to be bulletproof. Under the teller was a trapdoor, which he could use to drop out of sight in case there happened to be a holdup.

My schooling began in Elko, Nevada. I attended school in the first grade in a little two-story brick schoolhouse in a room presided over by Miss Rose Gardner. Upstairs, Mr. McQuinney, the principal, conducted classes. I made rapid progress in the first grade, thanks, first of all, to the fact that in the family I had been presented with a blackboard with a scroll, which carried all the letters on it. I had learned to read after a fashion from the Sears Roebuck Catalog, where the names of items were given and little pictures were shown of the items themselves. My brother, Persis Anderton David, was born in Elko, Nevada, on December 28, 1907, and my grandmother, Ella Thomas, from Vallejo, was present. When she returned to Vallejo, I accompanied her and was entered in the Jefferson School in Vallejo. Thanks to my reading ability, I was placed in the high second grade. When I returned to Nevada in the fall of 1908, I was placed back in second grade there. As a matter of fact, although this was a pioneer community, Miss Gardner had been using the Montessori system of instruction, particularly in reading, and I was simply keeping pace with the class there.

In the spring of 1909, my father, along with other young men in the community, went prospecting. In doing this, they waded up through icy creeks and he came down with inflammatory rheumatism, rheumatic fever, which he once had before as a boy. This was so severe that he almost died. He ultimately went back to the Alameda hospital in order to fight for

life. Unfortunately, right in the midst of this, while playing with boys on a road scraper in front of the school, I was pushed into the wheel and my leg was broken near the hip. I came home and was immobilized in bed, cared for by my mother along with my bed-bound father. With three other children in the household, this was a tremendous chore for her.

Recovered a bit, my father was warned that he could not return to that climate, and secured a position in Gustine, California, where a Miller & Lux Bank was maintained. This was a branch of the Bank of Los Banos. My father was placed in charge of the Gustine bank. Gustine was a company town, named after the wife of Henry Miller of Miller & Lux fame. The bank was in a building owned by Miller & Lux, and in which a general store was conducted. The town had about 400 inhabitants at that particular time. As far as I can recall, there were no lawyers in the town.

We attended a little one-room school, a white schoolhouse in the south of the town where Miss Hoyt and Mrs. McClusky were the teacher and principal. Back in California, I again skipped a grade and was placed in the high third. This posed certain difficulties for me, in that the students were in the multiplication table and doing fractions, ahead of what we had had in the second grade in Nevada.

There was a Kerr family in town, father and son. The son, as I recall, was called Frank Kerr and I believe was the express agent in the town. On my ninth birthday, August 25, 1910, I had my first ride in an automobile. Mr. Kerr gave me a ride up to the town of Newman, seven miles away. We seldom saw any other automobiles at that particular time, and those that did come into town and needed repairs or new batteries, were taken care of by the village blacksmith, who I believe was a chap by the name of Jensen. In 1911, my father was offered the position of auditor for Miller & Lux, headquartered in San Francisco, traveling the length and breadth of the Miller & Lux holdings, auditing accounts at the banks and the various ranches. We moved back then to Alameda.

With my brother Edward and my sister Dorothy, we were enrolled in the Porter School. The Porter Grammar School was an old school in an old building where my father had attended back in 1896 or 1897, where my aunt Juanita David had attended and in which, for a period of years, my maternal grandmother, Alice White David, had been a teacher. The principal was Sam M. Cohn, a one-armed, black-eyed, black-haired man of great

vitality and energy with a great interest in his students. Mr. R.H. Bosshard, as I recall, was the vice principal. The teachers I remember were Miss Mamie Hunt and Miss Edna Patterson. I ran into trouble right away with my arithmetic, but my other studies were reasonably good, I believe. In fact, I was quick enough with my lessons so that from time to time I got into little bits of devilment. After one such incident, I recall that I was called to see Mr. Cohn in the office, and I expected something severe to happen. However, what he did say was that he had asked me to come down because he wanted to send me to the public library. He wanted me to go over to the public library, a couple of blocks distant, and come back and write a paper on the origins of Thanksgiving. He had called up the librarian and told the librarian I would be there and the librarian had agreed to show me how to use the Dewey Decimal System and the card indices and to undertake that little research project. This, I believe, was a wonderful demonstration of pedagogy as it was practiced in those days. He took me out of mischief, he gave me something to do, and over the years that one learning experience in using the library and its resources was to be most valuable.

At that time, at some twenty-minute intervals, a red electric car came by the school on the tracks on Encinal Avenue, behind the schoolyard, and proceeded then to make a loop and go back to Alameda pier, carrying commuters to the Alameda pier and the ferry to San Francisco. Before the Fourth of July, a group of us had acquired a stock of caps and other assorted pyrotechnic devices, and thought it would be a swell show if we put caps on the tracks for three or four blocks before the car reached the school. We did, the train did, and there were bangs all along the way. We visited Mr. Cohn. Again, he gave us a lecture, saying he recently had been to San Quentin and had visited all the men who were there for misdeeds. He said he was impressed by one fact — they were not there because they were *not* bright, but because they were *too* bright. He cautioned us all that we should direct our energies toward lawful activities and explained that train men use caps and torpedoes on the tracks as signals and so this prank was a very dangerous thing to do. So that was that.

Another incident we recall of Porter School was this: we had all to take manual training, which consisted of woodworking. The woodworking class was conducted in the seventh and eighth grades by a woman teacher, whose name I unfortunately do not recall. We were upset because

we thought that carpentry was a man's occupation and wondered why we didn't have a man teacher. Again, we dreamed up a situation and so we went to Mr. Cohn as principal and said that since we did not have a man teacher for manual training, we thought we ought to be enrolled in the girl's class in domestic science, so that we could learn to cook. He didn't ridicule the idea or put it down directly, but I recall he turned to me and said, "Leon, think probably you want to be a lawyer, and if you're a lawyer you're going to have to handle a lot of cases that may involve land and boundaries. Now, if you answer a question I'm going to ask you correctly, right off, I'll let you go over to the domestic science class, but here it is: A man has a field, and one side of it is a hundred rods long. He wants to put a fence up. Now, quick, if he puts a fence up and puts a post every ten rods, how many fence posts would he need? And I said, right away, "ten." And he said, "Ah, no, the correct answer is eleven — so you go back to manual training."

Had I determined to be a lawyer at that time? Not exactly. A group of boys, by name Harold Newman, Gordon Gould, Willy Condon and I, had all become interested in wireless. Willy Condon and I ran a telegraph line along the neighbors' rear fences over on Park Avenue where he lived and buzzed dots and dashes. Harold Newman was quite devoted to the new art of wireless and had money enough to buy equipment, including rotary spark gaps and things of that sort, which were far beyond us, but which entranced us no end. I had the idea that I would like to be an electrical engineer. That idea persisted after I entered Alameda High School but died, when, at the end of my freshman year, I flunked algebra. I was assured that perfection in mathematics was necessary to an engineering career, and from that time on, I shifted toward becoming a lawyer.

From Alameda, our family moved to a new home which they started to buy in North Berkeley, over at San Lorenzo and Ensenada in what was then called Thousand Oaks. My father continued to travel for Miller & Lux. He made the acquaintance of Mr. Edward F. Treadwell, who was the attorney who had been in charge of the Miller & Lux legal interests, particularly in the realm of land and water law and water rights. From time to time, my father brought home bits of information he had gathered from Mr. Treadwell about legal practice and more or less encouraged the idea that perhaps someday I might become a lawyer.

At the close of 1915, old Henry Miller, the cattle baron who had put together this empire, died, and there was a great commotion in the readjustments made by such an event, not the least of which was the necessity of paying a tremendous inheritance tax at a time when the company was land rich but cash poor. One of the readjustments was that Mr. Treadwell was said to have collected a million dollar fee for his work in reference to taxes and inheritance and water rights. In the midst of the readjustments, my father left Miller & Lux.

We moved to Vallejo from which my mother had come and where my maternal grandparents, Mr. and Mrs. J.W. Thomas had lived ever since 1883. My father became the vice president and manager of a new bank, called the Central Bank of Vallejo, which opened up its doors in May of 1916. Across the street from us where we resided at 909 and then 915 Georgia Street, lived W[illiam] T. O'Donnell, the superior court judge of Solano County. Judge O'Donnell talked to me about the practice of law and loaned me a two-volume edition of Story's *Commentaries on the Constitution of the United States*. While still in my junior year in high school I read this from cover to cover. Mr. L[ewis] G. Harrier was the attorney for the bank, practicing with Harry Gee, who was city attorney, and with Harlow Greenwood. Harlow Greenwood, a Stanford graduate, had acquired quite a reputation in regard to matters of land law and land titles, and later became a judge on the Superior Court of Solano County; and at a later period lived across the street from my mother's home on Camino Alto in Vallejo. All of them were friends of mine, with whom I talked about law practice.

My father decided that he wanted to know more about the law, and so he enrolled in the LaSalle Extension University [of Chicago] correspondence course and got the texts and proceeded to write his lessons. At the time, Arthur Lindauer was district attorney and one of the younger attorneys in town was Russell O'Hara, "Pat" O'Hara, who was to become president of the State Bar and who was well known to us.

In my senior year in high school, 1917–1918, of course we were involved in war. In this particular year, I wrote an essay for the statewide contest of the Sons of the American Revolution on "America in the War" and won the first prize. Later on, the proprietor of one of the town's theaters hired me to memorize and deliver every night for a week the entire text of President Wilson's war message to Congress. This I did, for which I received $35 plus

a pass for two to the theater for two years. I think I valued the last more than I did the first. I could take girls along on that pass.

Father died in the influenza epidemic on November 2, 1918, and most of the family, including me, ended up in the influenza hospital, hastily improvised and set up at the Boys' School in Vallejo, watched over by the nuns of the local parish. I had been working on Mare Island Navy Yard doing a number of jobs but from high school days on had been writing sports and other items for the *Vallejo Times*. My career as a workman on Mare Island Navy Yard and all the events there were very interesting and instructive, but I shall pass on to the matters which pertain ultimately to the practice of law. Well, a lot of my experiences pertained ultimately to the practice of the law.

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Q: I don't think that there's anything that a person does that doesn't eventually become useful in law practice.

DAVID: I became a writer and full-time newspaperman for the *Vallejo Times* in 1921, and also became correspondent for the *San Francisco Call-Bulletin* and the *Sacramento Bee*.

At my father's death I suffered what amounted to a nervous breakdown, plus various infirmities which attended the recovery from the influenza. During the period 1918-1921, I was treated, among others, by Dr. J.J. Hogan. Dr. Hogan was a forward-looking doctor in Vallejo and became a legislative representative before the Congress relative to the naval base controversy and the status of Mare Island Navy Yard. He was a Stanford graduate, and he began to tell my mother that I should go to Stanford, as did Robert McPherson, assemblyman from Vallejo and who was one of the few Stanford graduates in the city. At this time, Mr. Robert Walker was the proprietor of the *Vallejo Times*, and the shop foreman in the printing shop was Mr. Luther Gibson. Bob Walker, under Governor Frank Richardson was to become state printer, and Luther Gibson was to become state senator of many years' service in the state legislature, of considerable political stature as well as building up a substantial business interest in Vallejo, including the ownership of the *Vallejo Times* which became the *Vallejo Times-Herald*.

In the course of my newspaper work, I made the acquaintance of Captain Edward L. Beach, who was the commandant of Mare Island Navy Yard. He and his wife also became members of the Vallejo Presbyterian Church, of which we were members, and which I attended, as well as my wife-to-be, Louise Mellin. In the late spring of 1921, I was doing well in my newspaper work and was very interested in my young lady, and so my mother and friends got together and decided a crisis was at hand — I would have to decide whether I was going on to the university or not, and they prevailed upon me that I should. At that particular time, it was thought best that I should attend the university summer session to refresh myself after the three years I spent following high school in other pursuits. At the time in question, it was too late to enroll for the summer session at the University of California, toward which my efforts had always been pointed, and where most of my friends were. It was possible, however, to enroll in the summer session at Stanford, and so that was what happened. Off I went to Stanford University in the summer of 1921. Before this time, I had corresponded with LaSalle Extension University, and they agreed that I might go ahead and continue with the law course that my father had not completed. And this I did for a considerable spell, covering their generalized text.

When I arrived at Stanford University, my aim was to be enrolled in the law school forthwith, and I sought to be enrolled as a special student. At the law school I met the acting dean for the summer session who was Professor Arthur Martin Cathcart. Sitting in his office and urging my case to be admitted as a special student, I was comforted by noting a set of the LaSalle Extension text high up on a shelf in his office, and I remarked that I had noted his particular contributions to it. He immediately disabused me, saying that "that is what we lawyers call "farmer's cyc" [cyclopedia] to be used by laymen and artisans but not for the professional study of the law. He informed me that I could enter as a special student, but that it would cost full tuition, I would not have the benefit of any corrections or examinations on the part of the instructors, and I would not go forth formally to a bar examination with the blessing of the school. On the other hand, I could enroll if I wished. However, his recommendation was that I proceed promptly to cover the two years' instructional requirement necessary for

entry into the law school and that that would be the best for me and my career. So I set out to do it.

I had saved $700 when I hit Stanford. Although tuition was $66 a quarter, that was enough to tide me over most of the year, and I soon found enough jobs of all sorts to produce a little income. My first quarter in Stanford was rather reassuring. I took 17 units to bridge this two-year requirement fast. I passed all of them and acquired something like 17 plus 21 grade points which was regarded to be very good. Suffice it to say that in four quarters, instead of six, I presented myself for enrollment in the introductory course to law which was given by Dean [Charles Andrews] Huston. In this was presented some of the old common law cases and some more modern cases that had been decided by the courts. He used these as a method of introducing us to the legal method, the case method, and also a little bit into the history of the English law. I remember particularly that in the introduction we studied the case of *Turberville v. Stampe* — the escape of fire from one man's premises to another. And secondly, we discovered the basis of the master and servant liability was control by the master in the family over the servant in the family in which he served, and so forth and so on.

In fall, 1921, my roommate was Daniel W. Evans. Dan Evans was the son of the county clerk of San Bernardino County, a returned war veteran, of an engaging Irish disposition, with a good sense of humor, a great talent in writing which he exercised in writing up some of the campus plays and eventually becoming student body president. He launched me into a number of activities on the Stanford campus, such as that of being on the *Stanford Daily* where, for a number of years, until I abandoned journalism, I stood at the top of the roster in terms of seniority on the staff. He also got me into the Glee Club. He also saw that I became a member eventually of the law fraternity, Phi Alpha Delta, and into which I was initiated in 1923. Many of the members then achieved legal greatness in future years, including Philip Grey Smith of Los Angeles and C. Victor Smith of Oakland and Homer W. Patterson who served many years as judge of the superior court in Contra Costa County with whom I've met frequently since our removal to Danville in Contra Costa County.

There was an annual debate between Phi Alpha Delta and Phi Delta Phi in which I participated in one year when I was opposed from the other

fraternity by Lon Luvois Fuller, a classmate who later was for many years on the Harvard Law School faculty. Mr. Justice [Frank] Angelotti of the California Supreme Court was among the debate judges and I made his acquaintance at the particular time. That, at a later period was a key to becoming acquainted with other members of the California Supreme Court. In the early Stanford years, I had been supporting myself by journalism, and carrying on as correspondent for the *San Francisco Call-Bulletin*, the *Fresno Bee* and the *Sacramento Bee*, with some barnstorming with freelance contributions to NEA (Newspaper Enterprise Association) and other publications.

In the fall of 1923, I became the publicity man, so to speak, for the Board of Athletic Control, and for a year's time put out bulletins praising the rise of Stanford football under Andy Kerr, looking forward to Pop Warner's arrival. I covered the small and large newspapers all over the state of California, but toward the end of the year it became evident to the graduate manager, Paul Davis, that this was not quite what was wanted or expected. It was good for promoting the name of Stanford generally, but what Stanford wanted to do was to promote Stanford football and the recruitment of Stanford football players and other athletes. The only place where football in high school had any substantial footing was in Southern California and Southern California high schools. Therefore, it was felt that the campaign for that year had not been effective, and therefore I was relieved of my job as publicity director. In the summer of 1924 I took the only vacation in my career in Stanford University in order to attend the final ROTC training camp at Fort Lewis [Wash.] where I received my commission as second lieutenant in the field artillery.

In the following fall, I was driving my old 1914 wreck of a Model T Ford along Palm Drive toward the university when Professor Cathcart was walking on the sidewalk, and I hailed him and he took a ride. After some preliminary remarks, he said, "Well, Mr. David, I hear rumors downtown that you are thinking of running for the Legislature. I assured him that I neither knew anybody downtown nor had I any such ambition, after which he replied, "Well, I wasn't too surprised. In my classes you showed a great ability to determine what the law ought to be. I can't say you know as much about what it is."

A little time after, he summoned me and my roommate, Mr. Andrew R. Boone (both of us were writing articles and features for our support), and told us directly that he thought we had a choice to make, that it was necessary for us to decide whether we were going to be lawyers or journalists. He advised us that he thought we could have great success with the law if we would abandon our journalistic efforts and put in all our time to our law studies. Andrew Boone, or as we called him, Dan, and I went to our rooms and debated most of the night as to what should be done. Dan decided to stick with journalism, and up until the time of his death he did, and was a frequent and valued contributor to *Popular Science* magazine and others of that particular sort in which he then specialized. I abandoned my journalistic career, but at that time still retained my job as a hasher at the Stanford Union and also as custodian of the Stanford Union where I collected the rents, stowed the baggage and handled the keys for the tenants, and so forth. I studied very hard for a quarter on the subjects of sales and negotiable instruments which were thought to be hard courses, and soon found that I was running very short of funds, and it did not seem likely that I could come back the next succeeding quarter and proceed with my law studies. There was an unwelcome break. I consulted Dr. Barnett, the men's physician at the gymnasium, about my red spots; measles, again? He looked me over at the Palo Alto Hospital. Immediately, he said, "They will not thank me for bringing you here. You have scarletina." For three weeks, with a nurse in attendance, I lay banished in solitary isolation in a house on the Searsville Road. After every inch of my skin had peeled away, I was permitted to read, and to write letters which were baked in the oven before mailing. This was a serious break in my law school studies. I was advised to withdraw in all classes, retaking the subjects the next time given. Add another quarter, when I was almost broke and anxious to finish? I gambled. I borrowed some lecture notes, read the cases, and completed the courses. I passed in the end-quarter examinations, at the probable expense of some grade points. But I was nervous and somewhat weak after the disease and the catch-up effort. It was some time before I could recite in class without faltering.

When I left the Navy Yard as a woodworker's helper, I'd received an "excellent" discharge which, presumably, I could present again and be employed over the summer or employed during the ensuing spring, and I had

in mind that this was what I would have to do. I sold my typewriter, I sold my spare books and was prepared to leave school to go back to work for a spell. I went in to see Dean George Bliss Culver, the dean of men to whom I reported in connection with my job as custodian of the Stanford Union, told him of my plight and of my probable resolution; and then he said, "David, there's only one thing that you haven't learned. When you have done the best you can, you haven't learned the knack of saying 'to hell with it.' I want you to go back and take your Christmas vacation and not make any determination, but come back in here at the beginning of the quarter in January, and we'll see what is to be done."

I went back home to Vallejo and in three days wasn't quite sure what was going to happen next. Then the mail came with my grade slips and I found that I received 17 hours of A's or A-minuses in my law school courses for the preceding quarter. It seemed to prove that the study of the law had paid off so far as results in the law was concerned, but it still didn't answer the other question. But quite unexpectedly, in the succeeding mail came an announcement that I had been awarded the Mrs. Ira S. Lillick Scholarship in the sum of $500 for the ensuing semester. This scholarship and that given by her husband, Ira S. Lillick, were the best ones available in the law school. I was awarded it a second time and with university scholarship and tuition loans had managed to finish the university course although the demands for work still cut into time that perhaps should have been devoted to my law studies. My attention was somewhat diverted by the opportunity I had to go to San Francisco in the afternoons to the office of Sawyer and Cluff, where my friend Dan W. Evans was located. Harold Sawyer and Alfred T. Cluff were engaged in the admiralty law practice and it was interesting to do small tasks, to run errands around San Francisco, to check jury lists in the federal court, to serve witnesses subpoenas and the like, all of which satisfied an urge to be in on the action when I was still supposed to be putting all my attention on the books.

Dean Huston had a heart attack while at the swimming pool and died shortly after. Marion Rice Kirkwood was named dean to succeed him. Dean Kirkwood was brilliant in his field, particularly in real property, was entirely professional in his manner, in his dress, and in his language, and held up to us the highest ideals of being a professional man. He was a disciplinarian in one respect, however. One had to be in his classroom

and seated when the bell rang. From that time on, the door was locked. We have visions of students standing out in the old quadrangle outside of the classroom itself, with the windows raised, with their notebooks on the window sills, taking notes through the open windows. One of these we recall particularly was [Walter A.] "Pete" Starr, later a Sierra Club devotee who fell to his death while mountain climbing. I took Professor Kirkwood's courses in real and personal property. In Real Property, of course, a great deal of attention was given to the different types of estates in land. I found in an old copy of Blackstone that I purchased for twenty-five cents at a bookstore that the footnotes carried a great number of the examples which Dr. Kirkwood had given us, and therefore, I studied some of the footnotes greatly to my advantage. Chester Garfield Vernier was a long lanky hoosier who never quite forgot his Indiana twang. We took Criminal Law from him and also Domestic Relations. His lectures were quite matter-of-fact. However, someone studious read some of the cases cited in his lectures, and reported they were "hot stuff," either in their language or the facts: 111 Atl. 599, "Men are still cavemen in the pleasures of the bed," where, in an annulment suit, his plea of non-intercourse was rejected in colorful language; or where a husband was held guilty of raping his own wife, having inspired his coachman to do so.

Professor George Osborne, with his stentorian lectures and Socratic dissection of the rationale of the judicial decisions studied, became a legendary figure, both at Stanford and at the Hastings law school, where he taught after his Stanford retirement, until his death. I benefited a great deal from his instruction, and his friendship extended long after my graduation.

Considering a legal proposition, a student might be called upon to present arguments supporting it; but having done this, Professor Osborne would require him to argue for the opposing view. Or he might express a view and ask the student to argue against it. Then there would follow evaluation of the diverse points of view. This battering give-and-take took well-prepared students to stand up to it and appreciate the mental gymnastics. It was a good firm basis for lawyerlike assuming and lawyerlike procedures, and he had a very high regard and reputation among practicing lawyers who had been subjected to his courses. He was not without his sense of humor, however. On a dreamy summer afternoon we were gathered in one of his classes which happened to be on the subject of quasi-contracts. He

went down the line on the question of unjust enrichment. "If John invited Mary out to dinner for a period of time after which they became engaged following which she broke the engagement, could John go ahead and sue her for the value of the entertainment he had afforded, Mr. Jones?" Well, Mr. Jones would answer, "No, this was not intended in any other way than a pure gift and, therefore, he could not recover." "Well, John gives Mary an engagement ring and when the engagement is over, can he get the ring back from Mary? It was a good ring, diamond all of half a carat." And the same answer came again. "Well, Mr. Smith, suppose John invites Mary to his home and thereupon gives her a series of dinners in the home and the engagement is broken, can he thereafter recover from that?" "No, he cannot." In the back row was Brown, sitting very quietly and half sleeping; "Mr. Brown," the name came out, and the man next to him hit him with his elbow to wake him up. "Mr. Brown, suppose Mary was invited to his home and while there for a period of some months she got free room and board. Could he, thereafter, on breaking the engagement, sue her and recover?" Mr. Brown stuttered and stuttered and finally said "No, he could not." "Well, why is that?" said Professor Osborne. "Well, because he would have been amply repaid." With that, there was laughter in the classroom and Professor Osborne slammed his book shut and left the room for the day.

Professor Cathcart, in addition to having taught us in Torts, taught Common Law Pleading, and it was certainly a very worthwhile and important course in our later law practice. We were forced to analyze and determine what the elements were that were actionable in any given legal situation. He was very matter-of-fact but had a very dry sense of humor and was on top of a situation all the time. One day in our Torts class we had the case where a pregnant woman aboard a train was injured when the train collided and the question came up as to the railroad's responsibility. Professor Cathcart called upon the lone young lady in the class to recite the facts of the case. And when she got down to the word "pregnant," that sort of thing not being generally discussed in those days, she stuttered around it, whereupon he drew himself up and said, "Miss Cox, the word is 'pregnant.' Do not shrink from it. It refers to a definite human situation you will meet many times, a condition desired by many women, acquired by a great many, and sometimes not desired by a few."

Professor Joseph Bingham, known generally as "Smokey Joe," seemed to have less student contact than other members of the faculty, who, like George Osborne, would pause on the law steps to smoke a cigarette between classes and talk back and forth with members of the law classes. Bingham was one of the early "realists," so called, in the law. The law was what the court said it was; the law was what the courts actually did in the given controversies. He was actually reported to be a brain whose major activity was playing chess at the faculty club. He lived in Palo Alto and walked to and fro the mile or mile-and-a-half to his home every day, at a brisk pace, bare-headed, and thereafter, was holed in his office at the law school, and was rarely seen by any except the students in his immediate classes. He was very informal, but very pointed in his comments. One day, after I had made an explanation, I think perhaps on the cy-près doctrine, he said, "Mr. David, that is just as clear as mud." I retorted, "We can only reflect what we get as mirrors from the faculty." Now this is very cheeky, of course, and after class I went around and apologized for my statement. He dismissed it curtly, with a wave of his hand, saying "harmless persiflage, harmless persiflage." I believe I got a "C" in the course. I was very much upset because I thought I had done very much better in the examination. I went back to see him, and was greeted cordially, and said, "Mr. Bingham, I'm very disappointed in the mark I got in this course." He said, "Mr. David, so was I. Good day." And that was all there was to that. Some three or four years later, when I was deputy city attorney of Palo Alto, Joe Bingham was suddenly found to have built an addition to his house into the forbidden setback line area on his particular street. He came up the steps in our office in the Thoits Building and said he was very sorry that this had occurred and wondered what could be done about it. We said, of course, that he would have to apply for a variance and see whether or not the city fathers would authorize it by way of a variance. He apologized again as he was leaving and as he left, I said, "Well, think nothing of it, it was only harmless persiflage."

Professor William Owens, of course, taught Practice. His "California Form Book" [*Forms and Suggestions for California Practice* (1924)], in which forms were set out in full for the benefit of lawyers and their stenographers, became a bible for us in class and also for us after we began

our practice. He was very approachable, had a nice smile and was a very pleasant friend to all of us.

Clark B. Whittier taught Evidence and had at one time, I believe, taught Contracts. I was very interested in his course, and one day, as I was coming in from Palo Alto with my old flivver, I met him walking on Palm Drive, and I picked him up and gave him a ride. We entered into conversation and I happened to say that I'd been pondering over the doctrines of consideration and particularly the old doctrines in regard to livery of seisin. It seemed to me that ceremonies such as livery of seisin were purely evidentiary and designed to impress unlettered people that the parties had been in earnest when they entered into their agreements. He immediately was greatly pleased. He said that was exactly so, and that if we understood that, we understood a lot of the mysteries of the early doctrines of consideration and livery of seisin, like exchange of rings before witnesses to a marriage ceremony. I took a seminar course from him in the Administration of Justice and do not remember much about the course except that one of my classmates was J.A.C. Grant, who later became a professor of political science at the University of California at Los Angeles. My research and papers in this course related to quiet title under sections 738 and 749 of the California Code of Civil Procedure. In my conversations with him, I remember one occasion I was wondering about the progress of young lawyers in the law after they got out of the law school, and he said, "Let me assure you, Mr. David, that within five years after you get out, you'll be making $5,000 a year." That seemed like a princely sum at that particular time. And as it was, he was very nearly right.

The average law school class at this time was about thirty-five students, with a trifle greater number in the first year. In the entire law school during this period, there were only five women whose names I recall. There was Ruth McBride Powers, Frances Sheldon Bower, Carolyn Loeb Boasberg, Pauline May Hoffman Herd, and Hope Cox Lefferts. Carolyn Loeb Boasberg got her J.D. degree in 1926. The others were of different classes.

The Stanford Union Dining Hall at this time was manned by student waiters or hashers including a great number of law students. They were a rather remarkable group. Among those who served as hashers were Calvin Conron, later a leader of the bar in Bakersfield, Clarence J. Tauzer (Red Tauzer) of Santa Rosa and Charles E. Beardsley of Los Angeles, who later

became president of the State Bar. Then, Leonard Avilla, Anthony Brazil, Norman Main, William Bradshaw and I all became judges of the superior court and all served for many years. Norman Main and Bill Bradshaw were both judges in the superior court in Kern County. Anthony Brazil was in Monterey County. Leonard Avilla was in Santa Clara County before his untimely death. I served on many court assignments in Los Angeles County and on appellate court assignments, and Percy C. Heckendorf, who had some administrative experience with the State of California, later became a judge of the superior court in Santa Barbara County.

In the Juris Doctor class of 1926 there was Milo E. Rowell, later to become a leader of the bar in Fresno, and who would have a distinguished career in military government in World War II when he served in Japan and helped to draft the new Japanese constitution. Another in this class was Claude R. Minard, who practiced in Fresno and served in the Legislature. Claude became secretary of the State Bar and served for many years up to the beginning of World War II, when he went into military government and again had a distinguished career, coming back to represent railroad interests before the legislature until his final retirement. He was also a member of the Committee on the History of Law in California. Gilford Rowland was the youngest president ever elected to head the State Bar. He was in law school at this time and received his J.D. the following year.

The Stanford campus at this time was divided into what were known as the Hall men and the Row men — as between those that were residents of the dormitories and those that were members of the social fraternities. Encino Hall was the largest hall in 1921 and 1922, and the aristocracy of Encino Hall was found in three eating clubs established nearby, chief of which were El Campo and El Taro and Breakers. Daniel W. Evans was a president of the El Campo Club, and I and Claude Minard became members of it. We, together with Dan Evans and Wardwell Evans, his brother, formed the legal contingent of this club. Board at that time was one dollar a day, based upon a rather simple but substantial diet. The club employed a cook and a manager who saw to all of the arrangements for the maintenance of the little building and also for the supply of meals. In the summertime, when most of the members of the club had dispersed, the manager was sometimes permitted to receive summer boarders, and this was done at El Campo. Late in the fall of 1926, the club was presented with a fuel bill by

Mr. Worrell of Palo Alto which had not been paid by the summer boarders and their summer manager. The club demurred at paying this bill and Mr. Worrell sued in the justice court in Palo Alto. Minard and David were employed, though not attorneys, to represent the club before the justice court as they were then permitted to do under the law. They worked together and produced a magnificent brief on the law of unincorporated associations, showing that the liability could not be asserted against any of the members of the club that were not present during the summer session. This was presented before Isabel Charles, who was then justice of the peace, and in due time and no doubt duly impressed by the voluminous briefs, she gave judgment for the club. The club thus being vindicated, proceeded to pay Mr. Worrell his bill and as a fee, Claude Minard and I each were given one month free board. This probably was our first legal fee.

Moving on into 1926, I and Minard decided that we might like to practice law together. Minard was suggesting that Fresno was a proper place to begin, that being his home town, and we having a friend also in Gilbert Jertberg, who was ahead of us in law school and who had gone down there and had started a successful practice.

During the last year in law school, I and Minard studied together, looking forward to the anticipated bar examination in June, 1926. A method of study was first of all to take a copy of Wigmore's "Pocket Code of Evidence" [*Pocket Code of the Rules of Evidence in Trials at Law* (1910)], which was annotated to the California codes in respect to evidence and also to Clark Whittier's lectures on evidence. Then, the same thing was done in regard to the Civil Code and the Code of Civil Procedure, which were cross annotated to the class notes from the courses given in practice and also in pleading. We proceeded to study the codes, section by section. At this time it was customary for law students to go to quiz courses where a few bright people reviewed particularly the late cases in the advance sheets with the idea that this would anticipate questions which might be given in the bar examination. Indeed, by making a review of the California law, particularly the late cases, the good review courses offered a considerable chance of success. Neither of us had the money to put into any review course, and so we conducted our own.

In regular law school study, pre-legal, as it were, I had accumulated a considerable background in courses in history — English Constitutional

History, American History with Edgar E. Robinson, who was an exceedingly wonderful teacher, Reginald Trotter in English History, Carl F. Brand, later teaching English History. I had also taken Russian History under Professor Frank Golder. Russian History was a new course and was a matter of curiosity at that time, since we had had our first taste of Russia following World War I and of all the propaganda put out regarding the Communist state.

About this time, in my junior year at least, Captain Edward Latimer Beach, who had been Commandant at the Mare Island Navy Yard and whom I knew, came to the Stanford faculty to teach military and naval history. Therein lies a story, of course. Captain Edward Latimer Beach and Curtis D. Wilbur were both classmates at Annapolis about 1888. Curtis D. Wilbur, as one will recall, had become the chief justice of California after being a judge of the superior court in Los Angeles County. Also he was a brother of Ray Lyman Wilbur, the president of Stanford. I renewed my old acquaintance with Captain Beach, and I took both of his courses in military and naval history. Before I had finished my law course, Captain Beach had retired from the faculty and had been appointed city clerk of the City of Palo Alto and held forth in an office in the City Hall on Ramona Street with Mrs. Kidd, his secretary and assistant. The City Council at that time, of a membership of fifteen, was largely composed of University professors and University oriented people.

Dr. Frank Golder, who taught Russian History, being a resident of the Stanford Union, became a personal friend, and after taking his course, or enduring it, he employed me to become his reader in Russian History. That was a very interesting job and, as it turned out in future years, a very rewarding one. The reader had the task of correcting the theme books and exercises and also the examinations in the first instance for the professor. Whereas each student was required to read one book on a recommended list of readings, there being ten on the list, the reader had to read all ten, so I got well acquainted with *War and Peace* and *Crime and Punishment* and a lot of the famous books in Russian history and literature. That provided some little stipend as I went ahead to finish my law course.

Minard and I went to San Francisco together to take the bar examination and registered at the Clift Hotel. We studied hard and even carried with us copies of the latest advance sheets just in case we might find something

there that might light our way. We finished our first day of written examinations and were very tired and sleepy. Claude rolled over and was prepared to go to sleep and I was reading advance sheets, and all of a sudden I shook him and said, "Wake up. Here are two we should pay attention to." Here were two late cases in the advance sheets, one of which I still recall. It happened to be a case involving the doctrine of *Rylands v. Fletcher* [House of Lords 1 (1868)] where a swimming tank had collapsed in a building in Long Beach during or after the earthquake. The California doctrine was established that *Rylands v. Fletcher* as such did not apply. The other case was a community property question that I do not recall. But sure enough, the very next morning in the examination, a question was asked on each of those cases, and we were very happy that we had been forewarned, even at the last minute. We finished our written examinations for the second day, and then we were conducted on the third day to the oral examination. The oral examination was conducted by members of the Board of Bar Examiners who received students in groups of ten or fifteen and proceeded to question them much as the justices of the appellate courts had done before for candidates who had been presented for admission upon motion. Our particular examiner was Mr. George F. McNoble of Stockton. He had the reputation of being a classicist, and he believed that a lawyer should be an educated and accomplished fellow as well as a legal technician. He came around the class asking a broad scope of questions. He reached me and his question was, "Mr. David, can you state the doctrine of *McCullouqh v. Maryland*?" Well, if there was one case that I had learned under Professor Arthur Martin Cathcart, it was *McCullouqh v. Maryland*, fortunately, I believe I did very creditably. Then he said, "Mr. David, I suppose you studied a foreign language — Latin, perhaps?" I said, "No, sir, I did not study Latin, but I studied Spanish." "Well," he said, "will you please say for me in Spanish, 'Will you kindly step out and get me a glass of water?'" The examination over, Claude and I celebrated. My sweetheart, Louise Mellin, came down from Vallejo and Claude's apple-of-the eye, Dolly Paulson, came up from Palo Alto, and we joined forces and danced and dined that night in the Redwood Room, I believe it was, at the Clift Hotel.

Then came a period of waiting for the results of the bar examination. I spent some time in San Francisco with Dan Evans of the office of Sawyer and Cluff. A little earlier, I had attended a trial in the federal court before the Honorable John Partridge. It was an admiralty insurance case.

The vessel had burned at the dock in one of the Northern Coast cities. The question at issue was whether or not the heat had been such as to render its engines unsalvageable although they apparently were intact after the vessel was scuttled at the dock. In this particular case, there was a good deal of testimony of experts about the condition of the boat and a great deal of speculation about the degrees of heat to which the engines had been subjected. It had been conceded that if that heat had exceeded a certain figure, the engines thereafter would be unsafe and unserviceable. The experts had been on the stand for a couple of days when I happened to look at a picture of the engine. I had become acquainted with marine engines in a way when I worked on Mare Island Navy Yard and particularly the boat shop. I knew some of the parts of the engine, such as what we would call in an automobile the connecting rod that came down to the crankshaft, and that those particular shafts had to be oiled. And they were oiled by means of an oil box on the side of the engine, the oil being conducted by a tube of copper down to the particular bearings. After the debate had gone on for a couple of days about the degree of heat to which the engine had been subjected, I called Mr. Sawyer's attention to the fact that in the picture of the engines, these copper tubes were still intact and indicated that from what I knew of the testimony, if there had been a temperature as great as that which had been claimed, the copper tubes would have melted, and they did not. "Out of the mouth of babes," he yelled. "Are you admitted to the bar, Davy? If you are, I will hire you right now." So I admitted I was not, but the marine surveyors who were working on the case verified the fact that I had pointed this out, and Mr. Sawyer sat down and wrote me a check for, I believe, fifty dollars, which was the first legal fee I ever got for any expert testimony.

While waiting for the results of the bar examination, I lived with Dan Evans in Palo Alto during the absence of Ellowene Evans, his wife, in the Southland visiting her relatives. It was while I was living with him, cooking the breakfast and relaxing, that the postcard came through, announcing that I had passed the bar examination. As I recall, this was a birthday present, received on or about August 25, 1926, my twenty-fifty birthday.

We were sworn in by the District Court of Appeal, the Honorable Presiding Justice [John Frederick] Tyler and his division. Following that, we went almost en masse to the federal court where we were admitted to the Federal District Court of the Northern District of California, and then

proceeded on to the Circuit Court of Appeal and were admitted then to it. When it was over, I went back to Palo Alto, packed up my trunk locker and got ready to go to Fresno, where Claude Minard had preceded me, hoping to find a way to start practice there and some way to eek out the small amount of change that still remained in my pocket. As I was walking along the main street in Palo Alto, I came face to face with Captain Edward Latimer Beach. Captain Beach exclaimed when he saw me: "Hello, Leon, I was just looking for you. You're just the man I wanted to see." He said, "You're to be the next city attorney of Palo Alto." I said, "What?" He said, "Well, come on to the office and I will explain." Well, I went on over to the office and he told me that the city attorney, Norman E. Malcolm, had served the City for many years, that the City Council was desirous of retiring him, and that before they did that, they wanted to have some understudy come in and learn the ropes in regard to city business for a year, and that he was recommending me for that particular opportunity. At that time, of course, my old professor, A.M. Cathcart was a member of the council; so were J. Pearce Mitchell, Edwin A. Cottrell of the political science department, with whom I had worked while at the University, and others of the fifteen members.

Norman E. Malcolm was a greying man with mustaches and watery eyes who looked a great deal older than he probably was. He had been admitted to the bar at about the turn of the century, had been in the California State Legislature, had been one who helped get a nomination through for United States Senator [George C.] Perkins, and as a reward for it, was made a United States commissioner for Alaska. He went to Alaska during the Klondike rush and was United States commissioner there, where he had an appetite to learn the law but also an appetite for liquor, which proved his periodic undoing. He had been a schoolteacher and at one time was offered the job of becoming a superintendent of schools for Hawaii when Hawaii was made a territory, but had gone to Alaska instead. He had married one of his pupils, Mrs. Vernelia D. Malcolm, and had been practicing in Palo Alto for some twenty years, and had been city attorney for some time. During that period, he had been the president of the League of California Municipalities and had been active in its proceedings. He was a good man to be a preceptor in municipal corporation law as I found out over the next five years. The office he occupied first was in the Bank

of America building in which also was the office of Egerton D. Lakin, and one of my late classmates, Lewis Hayd Leve, from Stanford Law School. The secretary was a Miss Laura Vaughn, who related that she had been the secretary for Mr. Gary of steel fame in earlier days. She sat in the outer office in a rocking chair and rocked and knitted, which should have been a sign to me that the promise also held out by Mr. Malcolm that there would be a lucrative private practice which we might share in association was not quite the fact.

The arrangement was made and I entered his office with his full knowledge and consent to what the city had in mind. He was kindly and a good teacher in matters involving the city, whereas I picked up a certain number of cases of the sort that lawyers ordinarily get when they first start, justice court cases, automobile claims and the like. He had only one big case in the office, which was the Estate of Morgan [200 Cal. 400 (1927)]. Ynez Morgan had been a bank clerk in the bank below where our offices wore. She had died, I believe, of consumption. Upon her desk by the side of her bed was written what she had set forth by way of a will. It began, "I, Ynez Morgan, do hereby . . . ," and so forth and so on, vesting her estate in her nieces Alma and Renette Prior. It bore no signature at the bottom, but otherwise it was entirely written, dated and signed in the handwriting of the testator. She had been abandoned by her father in her infancy, and now that some fourteen to fifteen thousand dollars was in the offing, he suddenly appeared out of the woodwork and laid claim to the patrimony on the ground that this was not a valid holographic will. Norman Malcolm appeared on behalf of the executor, and Lakin appeared on behalf of the two wards. Malcolm permitted me to write the brief in support of this will, and in doing that, I researched the law for holographic wills through all the civil law countries, and we published a book of some 180 or 190 pages, where the law from the Philippines and everywhere else was gathered in regard to this kind of testamentary disposition. So we filed a brief in the Supreme Court and, likewise, Lakin's office (by Lewis Hayd Leve) wrote a brief, a very short compass, simply saying that this will comported with the tests laid down by *Estate of Manchester* [174 Cal. 417 (1917)] which had preceded it, and that it sufficiently appeared from its form, and so forth, that it was intended to be the last will and testament. Whichever was persuasive, or if both were persuasive, the fact is that the will was sustained, and out of

the situation, the attorneys were to receive roughly $3,000. Norman Malcolm shared $1,000 with me; another share was for him, and another cut was made for the Leve and Lakin firm. The guardian of Alma and Renette Prior was not quite happy about this, so there was a hearing before Judge Brown in the superior court in San Jose, and he convinced him that this was reasonable under the circumstances. With this $1,000 in hand, I was able then to proceed and get married and set up housekeeping with my wife, Louise Mellin David.

In the first year of my association, I was not formally recognized as an attorney for the City of Palo Alto as a deputy or otherwise, but I was employed to codify the ordinances of the City of Palo Alto. This I did in an editorial way, collating and codifying them and also correlating them with the provisions of the charter upon which they were based or to which they related. This was published, and I believe for that whole effort I got something like the banner sum of $300. For this first year, 1926 down to the *Estate of Morgan*, when it came through in 1927, my brother Edward had supplied me from time to time with the funds necessary to keep going. At the end of the first year of practice, I found that the net of the whole business had cost me $75. On July 1, 1927, I was made a deputy city attorney of Palo Alto.

Q: Leon, I think it might be of interest to tell me the particular date on which you got married, and if anything else besides your marriage was of importance that day.

DAVID: Well, that would be May 22, 1927. We were married in the Stanford Church. Louise's vocal teacher came down from San Francisco to sing the solos, one of which is still in mind, "On Wings of Song." Warren D. Allen, the university organist, played it as his wedding present. As we came into the city, Sergeant Curley Greeb of the Police Department of the City of Palo Alto came ahead of us with his motorcycle and the sirens blaring. We had to take up residence then, after we made a brief honeymoon trip in a Chrysler I rented for the sum of $100 for the week. We traveled to my grandmother's and grandfather's in Lodi, and went down to Yosemite, then went on over to Carmel. And when I came back and paid the $100 for the Chrysler rent, the dealer was a little perturbed because he said "$500 more will give you the Chrysler," and I loved it — it made all of 40 miles an

hour on the road. But I didn't have the $500. But while we were being married, Lindbergh was flying the Atlantic and his landing in Paris coincided, more or less, with our wedding day. So we've always remembered that.

Q: We haven't talked of your Palo Alto experiences, contributing to your reputation and advancement. Did you ever formally become city attorney, or why not?

DAVID: It was generally understood that after a year of apprenticeship, so to speak, provision would be made for Mr. Malcolm in retirement, and I would be appointed. Appointments were made at the first city council meeting in July of each year. But on July 2, 1928, no pension plan had been enacted, so old friends of Mr. Malcolm on the council were implored not to take action without one, and his termagant wife campaigned against the young man who was "going to take the bread out of our mouths." From the start, Mr. Malcolm knew that I was to replace him, and never raised one word against me in our association, designed from the start to lead to my appointment. So on July 2, 1928, he was reappointed; but my salary was increased and his reduced by $25 a month. The situation was the same on July 1, 1929. He was reappointed, my salary as deputy city attorney was raised, and his was reduced as before.

By 1930, it was no secret that the bulk of the work of the office had fallen on me, as well as the trial of a condemnation suit and defense of the city officers in *Black v. Southern Pacific Railway*, a personal injury suit against city officials based upon an automobile collision with a wigwag signal standard at the Embarcadero [Road] crossing. Mr. Malcolm refused to have any part in this litigation, the plaintiff being a prominent clubwoman and friend of his wife. Approaching July, 1930, there were caucuses of council members considering the city attorney appointment. They faced again the absence of any retirement plan; some felt that it would be set up if the changeover occurred. I had no part in any discussions. A majority, eight votes, was required for the appointment of city officials. Returning from vacation to attend the council meeting, one councilman died of a heart attack and another was hospitalized. Only thirteen were present, and thirty-one ballots taken, seven to six, six to seven, without electing either Mr. Malcolm or [me; so he held over] pending the appointment of a successor.

By late spring of 1931, membership on the council had changed. There was no more certainty than before that the council would face up to the situation on July 1st. Personal attacks launched against me unsettled my wife. The Depression was under way, and I was embedded in the community. I was the president of the Palo Alto Kiwanis Club; I had been initiated in Palo Alto Lodge #346 of the Masons, and was at the lowest step of advancement in its hierarchy; I was an elder in the Palo Alto Presbyterian Church, and had been its Sunday School superintendent; I belonged to the local Parlor of the Native Sons of the Golden West; a charter member of the new Stanford Golf Club; and an interested and active member in the California Taxpayers Association.

There was a banner headline in the *Palo Alto Times* when it announced that on July 1, 1931, I would join the faculty of the Law School of the University of Southern California, as assistant professor and director of the legal aid clinic.

Q: You had already gained some prominence in municipal law practice throughout the state, had you not?

DAVID: Yes, I had, in several respects. As of 1930, I was chairman of the city attorneys section of the League of California Municipalities. The league was organized into functional sections, city councilmen, city planning, public health, etc., and the city attorneys throughout the state were in the city attorneys section. The league's board of directors were past chairmen of the sections. Thus, in 1931, I was a member of the board. In the 1931 meeting at Santa Cruz, the league was reorganized by the directors as the League of California Cities. At this meeting, the young city attorney of the City of Montebello, Louis Burke, was appointed legal counsel for the new league. (My friendship with him continued through all the years until his death after retirement as an associate justice of the California Supreme Court. In retirement in Marin County, he continued oil painting of scenes of the environment. I had introduced him to this hobby through the Business Men's Art Institute, where also Judge Aubrey Irwin and I were painting.)

Attorneys from all over the state participated in the city attorneys section. At that time, there were two major legal concerns: (1) The increase in claims brought against cities and their officers for personal injuries, arising

from alleged defects in streets and sidewalks. Suits were brought long after the event, when witnesses had dispersed, and where the physical condition had changed, and the lapse of time made investigation and defense difficult. (2) In the apparent prosperity before the panic of 1929, cities and counties, large and small, undertook ambitious local improvement projects, principally street opening, widening and improvement. Special assessments for the cost of such work were made against adjacent properties, at least theoretically benefited. It was settled that there was no general municipal liability for delinquencies where bonds were secured by direct liens against specific properties. But under the Improvement Bond Act of 1915, bonds were issued secured by collective assessments in a district, and two methods of meeting delinquencies were provided. Suits could be brought to foreclose delinquencies. This had been done by the City of Burbank, represented by James H. Mitchell, and the Brown-Crummer Company was very dissatisfied with the sum produced, and suit against the city was pending in federal court. The bond act also provided, in effect, that the delinquencies could be foreclosed by tax sale procedures, and that cities were authorized to buy in the delinquent properties, and to levy a ten-cent tax to provide the funds. The fight was on. Did cities have to levy the tax and buy in the delinquent properties? If so, how many times? Companies and banks holding 1915 bonds were insisting there was this quasi-general liability. The city attorneys assembled considered that cities had the option to choose. They also knew from experience that a test case would soon be brought, and that it would be brought against some small town where the amount involved would be small, and the town's resources too small to resist adequately.

Q: Did this happen, and did you get into the controversy?

DAVID: It certainly did. The target was the little city of Lakeport in Lake County. A short section of road by the land of one Blakemore was improved, and the payment due became delinquent. The American Company brought suit. Lakeport attorney [George D.] Hazen called for help. James H. Mitchell, Burbank city attorney, and I responded.

Q: What experience did you have in street proceeding matters?

DAVID: I began a study of street improvement laws when the City of Mountain View requested Mr. Malcolm and me to review an entire street

proceeding, to determine compliance with the statutory requirements. I read all of the decisions relating to the requirements, and also those which covered the constitutional issues and construed antecedent improvement statutes, and did all the checking. In Palo Alto, I utilized the Improvement Act devised by Everett Mattoon, county counsel of Los Angeles County, for the widening of California Avenue, and the levy of assessment for the work. In the work, we did house-moving and relocation in connection with the eminent domain assessment of damages. I went to Los Angeles to check with Mr. Mattoon concerning this operation. He was aghast at the work included in the project. The work was completed and there was never any challenge.

Q: What happened in the litigation?

DAVID: We tried the case in Santa Rosa, and won. There was the appeal to the Supreme Court, two hearings in which I argued the case, supported by amici briefs in which city attorneys throughout the state appeared. Ultimately, it was held that the remedies of foreclosure and purchase on tax sale were cumulative, not separate remedies; and that the cities were obligated in default of other purchasers to buy in the delinquent properties to the extent of funds made available by the ten-cent tax levies.

There were other suits involving the issue of general liability for delinquencies. Had certain cities followed the law in levy and collection of taxes, and sales for delinquencies? Liability might follow failure to do so. I went afield and checked procedures. In King City, I found that for years the tax procedure was that which prevailed when it became a city. For fifty years, no one questioned it, until there were street bond delinquencies and outsiders came in. In Monterey, City Manager [R.M.] Dorton accepted payments in any sum, toward payment of taxes. Only seasonally did fisherfolk have any money. Payments went into a trust account. When amounts credited to X were sufficient, they were transferred to meet his tax liability. These examples indicate that there was latent home rule, statute or no statute, so long as no one questioned it.

Q: Did you carry on street bond litigation after you left Palo Alto? After you joined the law school faculty at USC?

DAVID: It was understood when I accepted appointment there that I might conclude the bond fund litigation. Though over thirty cities cheered us on

in the several appellate cases, they were not very remunerative when expenses were considered.

In the summer of 1934, I was the speaker at one of the spasmodic meetings of the nebulous City Attorneys Association of Los Angeles County. The topic was the 1915 Bond Act litigation, flavored a bit with tort liability considerations. Los Angeles City Attorney Ray L. Chesebro attended. He had been police judge, and was drafted for his office by reform-minded businessmen in the municipal election of the year before. This was my first, and eventually momentous, meeting with him.

Q: What about the law school appointment and your activities from 1931 to 1934?

DAVID: I had set my sights on the city attorneyship in Palo Alto. With my time through five years primarily devoted to city government, I had built up little private practice, shared with Mr. Malcolm, and he had almost none shared with me in our association. For the summer of 1931, my close friend, Professor Cathcart, was acting dean of the Stanford Law School. I asked him if any information about possible placements had come to him. He said that Dean William Green Hale of the USC law school was searching for a lawyer to manage the legal aid clinic, and be responsible for other courses. "If you are interested, I will find out if he would care to interview you." "What is a legal aid clinic?" I asked: "Dean Justin Miller, now at Duke University, by analogy perhaps to medical school clinical instruction, set up a legal clinic. Third year students, under supervision of the staff and volunteer attorneys, interview indigent clients, record the pertinent information, and decide what action may be taken or advice given. This is checked by the supervising attorney, and advice given accordingly. If court action is involved, the student prepares the necessary papers, and assists a volunteer attorney when he goes to court. The course, I understand, is mandatory for all third year students. Some other teaching may be involved."

I was intrigued at once. I had a glimpse of university instruction as reader in Dr. Frank Golder's Russian History course. I had been brash enough to earn a little money by conducting a paid seminar in Agency for first year law students. When the wolf was at the door, banker friends in Palo Alto induced me to conduct American Institute of Banking classes for banking personnel at San Jose. Starting first with a course in negotiable

instruments, I was hired to teach economics and commercial law; and thanks to what I had learned by osmosis from my banker father, standard banking also.

In Los Angeles, I was interviewed by the dean, by members of the Legal Aid Foundation (which raised the money to operate the clinic while the University provided the facilities), and by Dr. Rufus B. von KleinSmid, president of the University. The new director would succeed Professor John S. Bradway, who would follow Dean Justin Miller, to set up a clinic at Duke University Law School. Bradway had worked up a manual of procedures. I had sat up all night reading the manual, coming down to Los Angeles on the Lark.

I was appointed director and assistant professor of law for $4,000 a year, one month vacation. Law review articles by Bradway and myself have described the legal clinic work, I need not repeat it here. The legal aid clinic was ahead of its time, so far as law schools have been concerned; extern training now is the vogue.

The demand for legal aid services grew and outran the ability of the law school to provide the facilities. The demand on student time perhaps impaired their other studies. Concededly, there was not great variety in the subject matter. But over fifty years, lawyers who had the experience under my directorship assigned high value to the instruction. From the graduates in that era have come many judges and celebrities, including U.S. Senator Tom Kuchel.

Q: Besides managing this law office for poor people, did you teach other courses?

DAVID: I taught at various times Municipal Corporations, Damages, and Research and Briefing. The latter was a basic course: how to find law in law books, how to analyze cases to separate ratio decidendi from discussion and dicta, how to prepare an appellate brief.

Q: Did much of your legal writing originate in this period?

DAVID: Yes. With cooperation of Professor Robert Kingsley, faculty adviser to the *Southern California Law Review*, my series of articles on "Municipal Liability for Tortious Acts and Omissions" was published; it was later published in book form by Sterling Press [1936]. It was cyclopedic rather than an analytical work, and had wide circulation. Articles on specific topics, or

in reference to specific officials, appeared in *Western City* magazine. Then came the various published articles relating to the legal aid clinic. The *Review* published a number of book reviews I wrote, including a review of Professor John Pfiffner's new work on public administration. This not only attracted his attention, but that also of Emery Olson, dean of the new School of [Citizenship and] Public Administration. The dean had been an old friend of mine in Palo Alto days, and had organized institutes attended by public officials, from which the School of Public Administration was established.

Out of this arose a colloquy about the role of lawyers in government. Were they merely hired technicians or active policymakers in governmental positions? Until his death, my friend John and I debated this. Contacts with him and the dean led to my enrollment and receipt of an M.S. in Public Administration in 1935; and ultimately Doctor of Public Administration in 1957. The title of my lengthy thesis was, "The Role of the Lawyer in Public Administration." For many years, while assistant city attorney and as a judge, I was a lecturer in the Civic Center division on public administration topics, including taxation and administrative law.

Q: Apparently, you were quite satisfied to be on the USC law school faculty, and with the management of the legal aid clinic. Why did you choose to become an assistant city attorney? How did your appointment come about?

DAVID: 1934 was a Depression year. A salary of $6,000 a year looked better than $4,000, already subjected to a "voluntary donation" to the University of a ten-percent reduction. In August 1934, I delivered a paper at the Municipal Law Section of the American Bar Association at its annual meeting in Milwaukee. The subject was tort liability. In the middle of the session, there was a telegram from Ray Chesebro, city attorney: "Please see me immediately on your return." I met Ray in person when I addressed the city attorneys group in Los Angeles County. Some time before, the City Council requested USC and UCLA (unpaid) to survey the organization of the Los Angeles city government, under the charter, and recommend changes. Professor Leon T. David was one of the three on this committee. To place the City Attorney's Office under civil service was one of the recommendations.

Ray Chesebro, in the election the year before, defeated incumbent Pete Werner for the office, aided by rumors of Werner's misfeasance, which proven,

sent him to jail. When Chesebro took over the office, he made a clean sweep of perhaps seventy-five of Werner's appointees. Some three or four top echelon attorneys, of undoubted integrity who had served under prior city attorneys were retained. Chesebro said: "I couldn't have cleaned house if the office was under civil service; it was corrupt also." But having cleaned house, he had been able to fill vacancies with many able attorneys willing to serve since the Depression left them struggling without clients. They were now struggling to become competent in municipal corporation law.

One of my legal aid students, Leroy Garrett, called his attention to my articles in the *Southern California Law Review*. Upon my return from the convention, I was curious to know what Mr. Chesebro wanted, and called at his office. I thought perhaps he wanted to talk about the organization survey. Without preliminaries, he asked if I would accept an appointment as assistant city attorney, at $500 a month. This took my breath away. As I had signed a contract with the University running until July, 1935, and though I was inclined to accept, the University would have to release me, and that was doubtful, as the fall term was beginning. "I will hold the offer open," he said, "and I hope you can accept soon."

Q: Just by way of background, although it is not part of legal history, I wish that you would give me a brief summary of your military career, especially with reference to World War II.

DAVID: Before sketching my military career generally — it was not wholly disassociated from law — in the Morale Branch of the Adjutant General's Office, I was assigned the revision of the Army's manual of courts martial; and to make a study of disparity of sentences for the same offense in different commands. Likewise, where the offenses were identical or parallel to those handled in civil courts, the study was to study disparities.

Only the results in general courts martial were on file in the War Department. Reports of special and summary courts martial in corps areas and major commands were requested to be sent in. I started to work with the material at hand. There were conferences with officers in the Judge Advocate General's department, with Mr. [James V.] Bennett, director in charge of federal prisons. But by October, there was general belief that conflict was imminent. While awaiting the reports, I was pulled over into the planning section of the Branch, and after December 7th, 1941, into other assignments.

Within two weeks after my arrival at AFHQ [Allied Force Headquarters] in Algiers, the judge advocate general, Adam Richmond, phoned me, requesting me to serve on a general courts martial. Due to my recent arrival I was excused. If I had ever paraded my legal background, I would have ended up in his department. In a group departing for the U.S. after the war, he asked what I would be doing. I told him, and he exploded. "In all our contacts, you never told me . . . !"

As you say, my military career is not "legal history"; it had its effect on my legal career, and I will try to summarize it, from 1927 to 1961, when I was retired in my rank as colonel, particularly from 1941 to 1946.

I was just below the age of some of those of my classmates in high school who went off on the draft under the 363d Infantry, and so forth, from Vallejo in 1917. I went to work on Mare Island Navy Yard as a boy at $1.58 a day to do my war effort at that time. However, when my comrades came back, they told me what a terrible experience it had been, that some of them had served under the so-called "ninety-day wonders"' who didn't really know what to do, and therefore, they swore if another war came, they wanted officers to know what side was up. At that particular time, I asked for an appointment to Annapolis.

Congressman [Charles F.] Curry was the chairman of the House Naval Affairs Committee, but he said he had so many applications at that time he wasn't going to grant any of them. But in preparation for any appointment, I had taken Mr. Wells's *Algebra*, which I mentioned was my high school nemesis, and I worked every problem in the doggoned book. It had answers in the back, so I knew my algebra and I thought that would get me by. But, no, that approach to the naval side failed, although at work I got well acquainted with boats. I drove oak pegs in the teak decking of the battleship California before it was launched and helped build the submarine chasers that were built there at Mare Island Navy Yard. So anyway, the other report I got from my friends coming back was that November 11th, after all, was only an armistice. And they were sure that hell would break loose again. And how right they were. We expected things to be better under the League of Nations, and we all became ardent Democrats for Woodrow Wilson. He was quite my hero for some time. And of course, he made the mistake of not asking the advice and consent of the Senate before he went abroad, and you know the story politically from there on.

I thought that if war were renewed, I would be of draft age. I would be an officer who would not be unprepared. Anyway, when I got down to Stanford University, I decided that I would enter the ROTC, which was the field artillery unit. And I began my training with the ROTC. We had some very fine officers who were in that detachment, and even the non-coms who were part of the detachment were World War I veterans, and had been commissioned, in some cases, in the war. So I went through the ROTC. It normally was a four-year course. I took it in three years. I did not make my summer camp after the second year. I was interested after the first two basic years in it, because, among other things, the advanced students got their uniforms, which were nice leather puttees and nice serge suits, and they got $16 a month, which was the equivalent of the commissary costs for board or which we could have taken by boarding out with the detachment at Stanford.

So, in the summer of 1924, the only one I took off from Stanford till I graduated from law school, I went to Fort Lewis and there, after a month's training at Fort Lewis, I was given my commission as second lieutenant Field Artillery. General [Charles T.] Menoher of the Army Command presented us with the commissions. I came back to Vallejo. I remember the first participation I had in my uniform with my gold bars, in October of 1924. There was a Defense Day. By that time I had been assigned to an aerial reconnaissance unit. But I didn't reconnoiter, I marched in the parade that particular day. The Army had a very good system of correspondence instruction, and there were unit instructors in Los Angeles to whom I reported, after I came down there. However, before that, I went to the Presidio of Monterey and had duty with the 76th Field Artillery for training. The training was actual, real training. I was put in as a junior lieutenant in the D Battery. The junior lieutenant had to be the mess officer. He went on out and fired his required problems with the other officers. He rode the horses, and [so] I conducted battery drills, drilled the whole battery out on the parade ground. We learned our horsemanship fairly thoroughly under our instructors at Stanford. Some of the officers of the 76th Field Artillery asked me why didn't I apply for a commission in the regular Army. But I was intent on the law and I didn't do such. I had other periods of service at a later time down there, actual service, and put right in as an officer in a regular outfit and was supposed to do what they were supposed to do. I

early was made the officer of the day of the whole post, and I had to go down and inspect the guard, and I got all the treatment that you would expect. I inspected the guard mount. You were supposed to pick out the likeliest looking soldier who then would be sent up to be the orderly for the commanding officer of the post. So I inspected the guard as officer of the day. And I picked out a fellow who seemed to have the brightest buttons and the shiniest shoes. And afterwards I found out that I had picked out a recruit. They said, "Don't you know what you should do? You should always consult the sergeant who is in the guard detail and knows the men. He can tell you who is the sharpest." I went down the line, inspecting the weapons and doing all of that sort of thing. They also told me at that time that the officer of the day had to inspect the guard between midnight and morning. And on the morning before he was relieved, he had to stand and take reveille. Each unit would report the number present and absent and so forth. So I was gung ho on that. So I decided that I would really do it. I went out around midnight, went out back of the post hospital in Monterey. I came up to the guard on that post and he met me with a raised pistol, and as he did he tripped the little button, which sent the magazine sailing out towards me. I remembered that, and of course I had to report it. And then I found out again that I didn't know what I was supposed to do. The officers of the regular garrison would make their inspection trip just before reveille, and then go right on and take reveille and make it all one deal. And of course, that's what those who were posting the guard at the other end of the place had figured out. Therefore, the trained men who knew all the orders, who could repeat, "My duties are to walk my post in a military manner," and so on, would be on that shift. Well, anyway, I really learned the hard way.

We had a fine artillery instructor in Los Angeles by the name of Colonel Louis Daugherty. We actually got up in a loft and had a little pneumatic gun and would conduct firing practice shooting large ball bearings — gunnery practice. I was originally in the 439th Field Artillery as long as I was in Palo Alto and a Colonel [Arthur L.] Keesling from Santa Rosa — a World War I man — commanded it. I remember some of the names of fellow officers that are not important. But there was one that was, and that was Homer Spence. Homer Spence at that time was secretary to the governor, and later became judge of Alameda County and an associate justice of the Supreme Court of California and was my friend over all the years.

Q: Where were you militarily in 1940?

DAVID: In 1940, I was at that time in the 426th Field Artillery (Res.) in Los Angeles. I was a major and was executive officer of the regiment.

Q: Was your outfit called to active duty in 1940?

DAVID: With the Selective Service Act, most of the men in that outfit were called to active duty, but the Army was a little laggard in calling up the field officers. I was a major at that time, and furthermore, I was an assistant city attorney and was special counsel for the Harbor Department. We were fighting with the federal government over the harbor at Terminal Island. The Navy Department wanted to condemn the whole thing, and brought a suit called "339.6 Acres of Land" to do it. The only trouble was, the engineers for the Army had spent seventy-five million dollars building up the harbor and the City had spent a lot more trying to develop this area as a deep-water terminal, which didn't please the Harbor Department at all. So I was charged with the defense. So in 1940, they gave me an exemption from coming out then since this was a matter in which the U.S. Navy was interested as well as the City.

Q: When were you called to active duty?

DAVID: July 4, 1941. The circumstances were not very good. I went back to Washington in this harbor condemnation case. I had done something nobody had ever done before — outrageous! I actually wrote a history of the Los Angeles Harbor. Every time the federal government had asked anything of the City or got any permit to berth a ship or put sand behind a bulkhead, I had it listed. And furthermore, I illustrated it. I got particular photographs of the development of the whole Los Angeles Harbor. Among others, there was a deed authorized by an act of Congress for the exchange of the lands of the City of Los Angeles with the Army for part of Fort MacArthur. And I had that in there, too. My friend, John Preston, lately associate justice of the [California] Supreme Court, was my opponent on the other side of this case. Right in the middle of it, after I had filed this answer in response, he called me up and said, "Leon, you know you can't estop the federal government." I said, "No, I can't, but how about the Congress of the United States exchanging land down here when we eliminated Dead Man's Island?" Well, about that time, I had a call from the naval intelligence in

the federal building, right across from the City Hall, and I came over to see them. An officer said, "We've had a look at this document you filed in the court. And what do you mean? You've got photographs there of the whole harbor and here off at one corner is a picture of the big gun placement for our 16-inch gun up at Fort MacArthur." I said, "Well, I realize your concern for security. I'm a major, Artillery, ORC [Officers' Reserve Corps], but I wonder why it's taken this long. That picture has been on sale down here at the Fairchild Flying Service for the last three years and that's where I got it." Well, they knew then that I had military connections. Finally, we got a telegram that said the attorney general, Robert Jackson, wanted to have an interview in Washington about this case. So I was sent in June of 1941 to have this interview. We spent a week in the interview with Robert Jackson and his other men. It was determined that the Navy was not only interested in the site because of the possibility that there was oil, but also because they had documented the fact that more than a thousand illegal aliens had come in with the fishing fleet, largely Japanese. And the Japanese were all organized. A magazine or sheet which, as I recall was called the "Jiji Shimpo" [*The Rafu Shimpo / Los Angeles Japanese Daily News* ?] was published, saying that Japanese who had served in the Japanese army were organized into reserve units right in Los Angeles. There were Japanese gardeners running around with little leggings which went up half the leg which were Japanese army leggings, and the Navy men were very much concerned about the whole business. But anyway, I said, "We want to settle this case, but you know . . . ."

Q: I want to interrupt, because I think from a historical standpoint we should mention something. And that is that, in 1941, two who were considered the most liberal politicians in the country, one of them being Earl Warren and the other Franklin Delano Roosevelt, both agreed that the Japanese should be excluded from the Pacific Coast. And ten, twenty, thirty, forty, and fifty years later, we can see the folly of such actions. But I lived through those times and you just mentioned it. And I think it would be interesting if you would elaborate, for just a minute, on perception of the danger as we saw it at that time, whether it was true or not.

DAVID: Well, let me finish this, and I'd be glad to. I've written long letters on the subject because I had other viewpoints to express. Anyway, we had

this conference with Attorney General Jackson. When it was over, Hugh MacDonald, who had been in our City Attorney's Office in Los Angeles, and had been called to duty, was serving over at the Adjutant General's Office. I decided that on Friday when I was to go out on the "Chief" that night back to Los Angeles, that I would go over to see Hugh. I came through the front door of the Munitions Buildings Office and went in. I met Hugh, and Hugh said, "Well, here's Major [K.D.] Pulcipher. He would like to know you." Major Pulcipher stepped up to me and handed me an order that Leon David, now being in Washington, will report to duty immediately, there. And to myself, I said, "dirty pool, dirty pool!" Why? Well, any person in the armed services guilty of prosecuting a claim against the United States can go to Leavenworth for an indefinite period or a $10,000 fine. But worse than that, they ordered me here to duty without the possibility of bringing my family or bringing my goods or anything else for the one-year term that we were supposed to have. So they went clear to the adjutant general, James Ulio, and they rewrote my orders so that I could go back home, report and take the train on July 4, 1941, to come back to Washington. So that's what I did. I stayed up all the night, writing all this report to the Harbor Commission, and when I got home I found that they weren't around. But I had to tell them that I wasn't going to be there any longer. Anyway, I got on the train on July 4, 1941, and started for Washington. I reported then to the adjutant general. Under MR1-10 Mobilization Regulations, it was provided on the basis of World War I experience that there would be an officer appointed at all major commands to look after matters of morale and welfare of the soldiers. So there I was in Washington, D.C., and I was placed in a little branch which had expanded, called the Morale Branch of the Adjutant General's Office. Anyway, by October, it was well assumed that things were going to happen in the Pacific.

Q: What year?

DAVID: October of 1941. In the Philippines, my two unit instructors in field artillery had both been sent down the year or so before to train the Philippine army, and they were due to come home in July, 1941. The Army extended their duty there, and they got the Philippines to initiate their selective service in October of 1941. They also started to build up our forces in the Philippines and also to send them materiel and everything.

On December 7, 1941, those were on the ocean. The men were diverted to Australia. The supplies and so forth were all diverted to Batavia and New Guinea.

Going back to my own experience, in the course of this negotiation with the City, a second act came when the Navy Department asked to have some representative come before them, before Secretary [Frank] Knox, to talk about the case. We'd said that the City had already leased the Reeves Field for a period of years for a dollar a year for Navy aviation and that, therefore, instead of destroying the terminal facilities for the City, they ought to negotiate with the City for some leasehold, which would not give up what the City owned, and they could have it for a reasonable fee. Why try to condemn and take away the big asset of the port? So anyway, the Harbor Commission telegraphed me, asking if I could appear before Secretary Knox to present the case. I said, "A military officer before Secretary Knox?" "Well," they said, "can't you go as a friend of the court or something like that?" I went to the adjutant general and told him about the situation, and I got the go-ahead, not as a representative of the City, but as an officer of the armed forces, intent on giving whatever information I could to aid the armed forces. I went to the office of Secretary of the Navy Knox, and was received by him along with a couple of admirals, one of whom I believe was Admiral [Stuart H.] Ingersoll and he asked me to relate to him the story of our dealings in regard to the harbor at Los Angeles. So I spent some little time covering the various steps of the development of the harbor and the fact of the exchange that Congress had authorized and so forth. I finished and one of the admirals said, "You've just left out one thing." He added some other little detail. They'd studied my answer from Hell to breakfast. Well, anyway, there wasn't any conclusion at that time. But the next fact is that they asked to have the officials come in and sign an agreement. So the Harbor Department Commissioners came to Washington to do so, headed by Ray Chesebro, city attorney.

During the interim, the summer, I had been history-minded. With Hugh MacDonald, likewise a major at that time, I traveled the whole country, and had gone up particularly to Gettysburg. All of our training maps and problems were based on the old terrain of the Gettysburg Quadrangle running through Pennsylvania and Maryland and so forth. So it was quite familiar to us from our studies. So I went up frequently and became quite well

versed in the Battle of Gettysburg. When the port commissioners came up with Ray Chesebro in December (in fact, they were there earlier; I think Ray was even there during Armistice Day and went to a memorial service at that time). They wanted to see the place, and on December 7, 1941, they said that they would like to go up to see the battlefield of Gettysburg. We entrained in my old Studebaker and another car and went to Gettysburg and got there real early, smelling the apple fields as we went through Maryland, and I went over the battlefield, bit by bit with them, and the net result was that we got dinner somewhere, but didn't get news of Pearl Harbor. At 9 P.M. we came rolling in to my little place in Arlington and as we came to the front door, my daughter rushed out and said, "The Japanese have bombed Pearl Harbor! The Japanese have bombed Pearl Harbor! What does that mean, Daddy?" And Ray Chesebro said, "That can't be, that can't be," But it was. The next thing over the radio, everybody was directed to report for duty the next day, which was Monday, in uniform. We'd been out of uniform all the time. So, we reported in uniform, and there we were.

During the interim between July and December, the section I was in had expanded from about eight or ten people to some eighty and our little section was then called the planning group. And so I started doing planning, all kinds of planning. These were still Selective Service days. The main idea, among other things, was how to make Johnny happy and make his folks happy while he was away in Selective Service, and how to keep his congressman happy. So the department was engaged in building field houses. We worked on the camp newspapers, we worked on radio, we worked on telling people why this special service operation was necessary, and among other things, we were faced with the expansion of the army by the selective service system, and the question was, where do we get the morale officers who have not even the slightest idea of what we were after, to man them? So, it was decided that the Army didn't have qualified officers but a lot of officers were already assigned around the country. So we had a big conference in Washington in December, and those officers came. During this time, I'd made studies of different things. The first was to find out what the cost would be of taking the National Guard divisions that were harbored in their own home states and moving out of the state to get them out of the political deal of always writing their Congressmen and raising hell. So I made that study, and what happened? I had to go through

the different departments to get the prices and everything of that sort. On that deal, I presented the plan. General [James] Ulio looked at it and said, "David, did you write that?" I said, "Yes, sir." He said, "Thank you very much. I congratulate you." He put it on his desk. Two weeks later, it came back, disapproved. Among other things, besides having made up training schedules for troops, I made up a program for establishing a school where we could give training to some of these new morale officers, and I worked it out in some considerable detail, and sent it up to General Ulio and it came back with a compliment, "Disapproved." Back in the drawer it went.

The war broke on the 7th of December. The first thing that happened of personal interest to me was that as of the first of February, all of the officers on active duty were to be promoted. Originally, it was provided that all of the regular army officers were promoted as of February 1st and all reserve officers on duty would be promoted as of February 7. Well, that didn't last, and very shortly we were all promoted, and so I became lieutenant colonel on February 1, 1942. And at that particular time, the War Department was now convinced that we had to have a school. So right away, orders came buzzing back to our branch, "We've got to set up a school." Somebody said, "Well, David worked out a plan for the school." So out it came, out of the drawer. Colonel Taylor E. Darby, an old wartime veteran, who had been an instructor in the Command and General Staff School, had been the executive officer of the Surgeon General, was the head of my particular section. He was made commandant and I was made an assistant commandant of the new school to be set up at Fort Meade, Maryland, on February 4, 1942.

So anyway, we went over to Fort George Meade and opened up a school. We opened it up for a hundred officers a month. We had to improvise our studies pretty much. We found that we could bring in a lot of physical training people, that being one of the things that we were charged with. We had an education group, and so forth and so on. So the school got running and I was assistant commandant, and Colonel Darby was the commandant. As it turned out, he was more interested in what was going on in the classroom than I was, so I, with some false steps, was helpful in running the school. We had a faculty that we gathered out of the more promising people out in the field. In October, 1942, we were sending the first contingent over to England which was II Corps, reinforced. The planners immediately said to us, at the school, "We want to know the officers in

the school that can be sent to the Corps." We scratched our heads and said, "well, we've got a bunch of lieutenants, and we've got a bunch of captains, but no lieutenant or captain is going to set up a program with the generals in the Corps; he has to have some rank." So, actually, we stripped the faculty of four of our majors and sent them over with the II Corps to England.

Later in the year, the brass understood that 100 officers a month were not enough — they wanted a 500-officer school. So Colonel Darby and I went around at that time inspecting civilian institutions that had been denuded of their male contingent by the war and which wanted to be put to work by the Army. We ended up at Washington and Lee University in Lexington, Virginia. Colonel Darby and I had arranged to come down and open the school on December 5, 1942, and I was sent to Fort Benning, Georgia, to see the training methods there and to meet General Manton Eddy who was then the commandant. I had just returned to Washington when I found that Colonel Darby had been recalled and was going to take charge of the big new Army hospital down in San Antonio, and I was to be the acting commandant of the 500-officer school at Lexington.

So I went down to Lexington, brought the family down and we started in to set up the school. But we didn't have faculty, we didn't have an Army installation to support us, and so it was quite a wrestle. In the meantime, we were trying to develop courses that would be apropos to overseas. All those majors who had gone to II Corps from the school at Fort Meade ended up in November in North Africa. So I received personal letters from them. I asked when I wrote them, "Tell us which of these things that we have been trying to teach the men have been of use?" Well, they came back with some very pungent comments about some courses. A lot of activities, however, related to physical training. After their landings they were able to take troops out for some training or let them play volleyball or active games, to take tension off and to steady them down. As fast as I got the letters from these officers, I sent them on to the then Special Services Division in Washington.

On December 21, 1942, I was promoted to the rank of colonel. We carried on with the school, trying to struggle along to set it up shorthanded and work out a curriculum. But one day, two generals came down from Washington. They said, "You know, David, we've been trying to find out what the situation is over in North Africa, relative to the special personnel

services. Almost the only information we have is from these personal letters that came to you from North Africa. They sent a major to Ike's headquarters in Algiers to explain the functions morale and special personnel services were to do. Then a cable came stating a long list of things the command wanted. After things they needed to set up a program, the cablegram asked for "one qualified officer to take charge." The generals came down again and said, "Colonel David, you seem to know more about this than anybody else, you are it."

I went to Washington for a brief spell to prepare. Among other things, I worked out a multi-million dollar procurement list of things that had to be sent, and the staff was really astounded. But General Osborne, who had been promoted to head this operation, regretfully signed it, and then I took off and I went to North Africa by way of South America. We flew out and went down to French Guinea, British Guinea, and ended up at Natal and then over the South Atlantic into Dakar in West Africa. I then flew over the Sahara to Marrakesh and then to Casablanca, and ultimately, in April, I reported in Algiers.

Q: I want to get back to your legal career just as fast as I can, but I just noticed on the wall of your den some pictures from Bob Hope and Irving Berlin. Were they associated with you in any of your activities overseas?

DAVID: Yes. Bob Hope and associates were the first of over 100 USO entertainers that we cared for and routed. "This is the Army" was a unit of Army personnel which came to Italy.

Q: Tell me the particular awards that you got, especially from foreign countries.

DAVID: I received the Legion of Merit from the United States; honorary Officer of the British Empire, military division (O.B.E.); Commander of the Crown of Italy; Medalha de Guerra (War Medal) from Brazil; and the Mèdaille d'Honneur d'Or (Gold Medal of Honor) from France.

Q: Did you ever supervise the firing of a gun in anger, after all of your field artillery experience?

DAVID: All the colonels of field artillery were staff officers. The field artillery was reorganized into battalions that served individual infantry or armored units and so the artillery as a regiment didn't exist. Battalions were

commanded by lieutenant colonels. So we were spare parts. And I didn't fire, although I did pull the lanyard of a gun when I was at a unit firing at Monte Cassino.

But anyway, you asked about USO performers. Among others, I had a section which originally came over as so-called theatrical specialists. The plan was that they would teach the soldiers to put on soldier shows. Well, it was fine in the training and service areas, but we wouldn't set up such activities except in the back areas and the men there weren't the fellows who needed such diversions the most. So they ended up as being officers that moved USO people as mobile units around the Theater. There were over a hundred of those different USO troops that my section took care of. Among them, of course, was Bob Hope's unit. Bob Hope was one of the best. He was in North Africa just at a time when we could move his unit about by air. We had just chased the Germans out of Tunisia and were getting ready for Sicily. So he had good audiences and had a good reception. On my 42nd birthday, August 25, 1943, he was broadcasting from Radio Algiers, back to the United States. I remember that quite well, because that night we got a big bombardment from the Krauts and Italians. So I saw quite a bit of him. He stayed at the Hotel Aletti in Algiers. When his troupe arrived. and the first time he left the hotel, he was waving his arms as we came down the steps and he said, "Here comes Arab Bob Hope." I said, "Yeah, take a look at yonder fellow out here in what looks like a bed sheet. There's your Arab." Then he said, "He looks like a walking lister bag." He used that comparison later as an army gag. Bob Hope had a great knack of sensing the temper of a crowd and ad-libbing. He didn't write all of his stuff, although a chap by the name of Block came down from Britain and put out Hope's broadcast from Algiers to the States.

Irving Berlin, of course, in the United States, organized the show, "This is the Army." The show was destined to have a great deal of acclaim through the camps and training stations. But the time came when "This is the Army" was a bunch of Army guys who had never seen a battlefield and had never been where the fighting was; so it was decided to send them over to us. They arrived after we'd taken Rome. I worked with Irving Berlin and his manager, Ben Washer. So we later brought them to Rome and gave a big performance there. In fact, you see there wasn't any place outside of that where you could take 100 men, or even 75, under security. But in the

Brancaccio Theater of Rome they put on a show. So the men filed in and went up tier after tier of seats, all in helmets and carrying their guns, to sing their songs. And I had the then ambassador to Rome and the admirals and everybody else to witness the show. And they just got started, "This is the Army," and putting on some skits that in fact they really were soldiers, when some jerk in the back row let go his rifle and it went bump after bump down to the stage. That turned out to be the hit of the show. But anyway, I asked Mr. Berlin if I could have a photograph. He said, "Gladly, if my manager says it's all right." So he did, and he wrote this, and he wrote it for Louise — he autographed it. I have pictures of Bob Hope along the line in several situations. But the one that hangs up here with his autograph on, I got back from him more recently, when he had his big anniversary party. And I wrote him a nice letter and he came back with that picture you see there and to decipher what he wrote, it's, "Thanks for the Memories." Then, of course, he wrote his little story, *I never Left Home* [1944], about his trip over there. He wrote about borrowing Colonel David's big-bottomed suit. I was told when I got aboard the airplane to be prepared with civilian clothes. So I had a loose summer suit that I took, thinking perhaps they would land in neutral Portugal on the way, but no, instead went to Natal and Dakar. So, I loaned it to him. So it was immortalized in the book.

Q: What date were you discharged from active duty after the war?

DAVID: February 26th, 1946. We had V-I day in Italy before V-E day in Europe and V-J day in Japan, and after the time we got the Germans out of Italy, we'd been getting ready to ship everybody to Japan. I'd initiated tours for the troops up through Italy and Switzerland and that sort of thing, but headquarters around August of 1945 began releasing men to the States on the basis of the time overseas. So my number came up, and so I came back to Fort MacArthur in Los Angeles and then was given all my leave, so actually I was not discharged until February 26, 1946.

Q: Leon, I've got a list here that I've acquired on some of the writings that you have made and some of the things that you have published, and I see from my list that you began publishing in law reviews as early as 1934. Is that substantially correct?

DAVID: Yes.

Q: I noticed that most of the time prior to World War II that your writings were concerned with the clinical lawyer, with the formation of legal aid societies, and in general, the clinical work of lawyer reference and legal aid. Is that substantially correct?

DAVID: No, because, you see, I had my articles and my book on tort liability. I had written articles on taxation, municipal organization and planning and zoning. In 1935, I received an M.S. degree in Public Administration at USC. After the war I received the degree of Doctor of Public Administration. My thesis was on "The Lawyer in Government."

Q: Well, I'll get to the tort liability.

DAVID: It was in that interim, I authored and published a survey of the handling of tort claims in the City Attorney's Office. Then I had some in eastern law reviews, all dealing with the general subject of tort liability.

Q: Well, I'm going to intrude in your memory a little bit and tell you that this includes not only the *Hastings Law Journal* and *Hastings Constitutional Law Quarterly*, to which you contributed several articles. According to this list, you have written for the *UCLA Law Review*, for the *USC Law Review*, the *L.A. Bar Bulletin*, and then in the East, the *Minnesota Law Review*, the *Annals of the American Academy of Political and Social Sciences*, the *American University Law Review*, *University of Pennsylvania Law Review*, the *Tax Digest*, and at least two chapters in the CEB [Continuing Education of the Bar] book, *California Civil Procedure During Trial*. According to my notes, you began writing law review articles in 1934, and at least the last one that I see published was in the spring of 1980. Is that correct, or substantially so?

DAVID: Of course, the big one written and compiled in the last part of the eighties was the State Bar history, not published.

Q: Well, during this period of some forty years, you have certainly written on many, many aspects of public tort liability and the role of city government, so far as tort liability is concerned. Can you tell me what general fields you consider that you've contributed the most in?

DAVID: You have named them in general. I would add my California constitutional law articles and my doctoral dissertation on the lawyer in government [*The Role of the Lawyer in Public Administration*]. I have also

entered the historical field. For instance, my great aunt went to Reverend Jason Lee's mission in Oregon in 1839. She wrote letters back home which I suddenly came upon and so I edited them, annotated them historically, and published a volume called, *The Raymond Letters* [1959]. The letters themselves are regarded to be the only account extant by any woman who'd written at that time from Oregon.

Q: And this was what year?

DAVID: 1839-40. So the Oregon Historical Society was interested, and I spent some time up there with them. Aside from my gathering up my things here, my various perpetrations in prose and poetry, called, *Old 89, My Horse,* [*and Other Tales, Essays and Verse*, 1974]. I wrote a 25,000-word novel which made its rounds to several publishers and finally to a well-known critic who persuaded me that I'd better try again. It was a story of the *Sun Traveler.* The *Sun Traveler* was a tuna fishing boat out of Los Angeles that burned off of the Galapagos Islands one Christmas Eve. The insurance company sought after some years to try and recover the insurance money they paid for it on the ground that a man by the name of Musgrove had confessed that he had set the fire and had been paid $5,000 by the owners of the boat to do it. I tried that case and it came out as a verdict in favor of the boat owners. I rolled that into a novel involving a mythical fisherman and his sweetheart who, however, decided she wasn't going to marry a fisherman, and his various pursuit of her till finally they caught up with each other in Hawaii. She, in turn, had been left an orphan by her mother and didn't remember her father or her father's death. And her father's death was revealed to her when she went to the Islands and it turned out that he, all along, had been one of the crew of the fishing boat who had lost his mind by amnesia and had known his daughter for several years without recognizing her. The main objection to the novel was that it was a large number of well-written scenes, according to my critic. "But," says he, "the public now is used to television. The first scene in television must show the actors; it must immediately show the problem that they are going to meet, and when they meet one problem, it has to lead itself logically to the next. All the pretty descriptions of life on the sea and Hawaii and so forth, are overdone from the standpoint of the current public, and they won't pay you for that."

Q: Well, aside from your novels and non-legal writings, you have written a published history of the first 128 years of the City Attorney's Office in Los Angeles, haven't you?

DAVID: I did that in 1950 [*One Hundred Twenty-Eight Years in the History of Los Angeles City as Seen from the City Attorney's Office,* republished in the present volume of *California Legal History* (vol. 6, 2011)].

Q: What else have you published, either orally or in writing, as far as the history of law in California is concerned?

DAVID: The California Judges Association, through its committee on the history of the association, wanted to have a history of the judges, and so I undertook to start in on that. In the course of time, Judge Mark Thomas, whom you know, was the chairman, and you also were on that committee. I made some preliminary starts on that, but based on my family situation for the last year and a half, and the fact that these latter days of the California Judges Association all occurred really after I retired, led me to sign off that project.

Q: Well, didn't you write some sort of a history of the State Bar of California?

DAVID: Yes, I wrote a draft of a history of the State Bar of California, and that is one that I have described in a way to you, which, however, never saw normal publication for various reasons.

Q: What year did you write that?

DAVID: Research and writing on this took almost three years. And it really began on the fiftieth anniversary of the State Bar in 1977.

Q: You began your history with 1927 on the formal organization of the State Bar?

DAVID: I began earlier than that, insofar as the judges were concerned, because in the judges section I tried to get together what I could find out about the activities of the judges from the time that the old California State Bar was in being. From the very start of the bar associations, it was recognized that when a man became a judge, he wasn't quite on the same plane as the attorney. His interests led him in a different direction. The attorney was interested in winning the case, and the judge was interested in achieving justice, if you want to use some trite terms. Therefore, the judges were

encouraged to have a section of their own at the early bar meetings, and they did. That carried on through to the organization of the California Bar in 1927. I, having been admitted in 1926, attended that first meeting of the State Bar.

Q: Where was it held?

DAVID: I recall it was held at Del Monte. I may be in error, because another one of the very first ones was held at the Hotel Del Coronado in San Diego. But the judges were active in that meeting, and some were very active. Then, there appeared on the scene the feminine lawyers — Clara Shortridge Foltz, being one of the first.

Q: What political office did she hold, do you remember?

DAVID: None. Her father [sic; brother], Sam Shortridge, of course, was a United States senator from California. She was admitted very early, and some other women were admitted early and were active. Let's see what I can find here for you. You want to hear particularly about the judges?

Q: No, whatever you have written — the reasons why you wrote it, so far as the State Bar or the judges are concerned.

DAVID: The State Bar, at the start, of course, was puzzled by the fact that the purpose of organizing the State Bar was really to get a procedure to discipline lawyers. Some judges in San Francisco had been recalled on account of their activities, and attorneys wanted to discipline them. And that precipitated, coalesced, the idea to get the local bars together, because there wasn't any formal way of discipline. Each court could discipline the attorneys. The bar associations as such had no standing before a court to initiate the proceedings.

Q: Certainly among your close acquaintances were some of the early leaders of the State Bar. Can you tell me some of those names?

DAVID: I'm trying to recall the time frame, because I attended these State Bar meetings rather religiously for a number of years. I have in the draft of my history for the State Bar, Chapter Nine, "The State Bar and the California Judiciary." There had been a Judicial Section in the California Bar Association. That section in 1925 secured the introduction of a bill in the Legislature to establish a conference of judges. My old friend, Judge J.R. Welch of Santa Clara County Superior Court, was the chairman of that particular

section. That bill passed in the Senate but was killed in the House. In 1926, Judge John Perry Wood in Los Angeles had been the chairman, and Judge Harry Holzer of that superior court served as a secretary of that organization of judges. For several years, Holzer had been very diligent in reporting judicial and legislative matters to the judges. And on formation of the Judicial Council in 1926, Holzer became its all-important first secretary. And later on, that passed. In 1926, before the State Bar was started, there was a movement for a constitutional amendment providing for judicial retirement and retirement pay. That was defeated in a general election. Some said the title on it was misleading. I don't know. The amendment was supported by the California Bar Association, and the brief of Chief Justice [William R.] Waste was put in, examining the statutes of seventeen states, or something like that, providing such systems, and that was published in the *State Bar Journal* in 1926. I remember Chief Justice Waste presiding over a meeting of the State Bar, and the Morrison Lecture. This one was definitely at Coronado. The Lord Chief Justice of Canada, as I recall it, was to be the speaker. But Chief Justice Waste got up, and absolutely forgot the name of the speaker, and he fumbled for his notes and said, "I have the name here, somewhere, my secretary must have provided it. Oh yes, here it is . . . ." And he introduced the Lord Chief Justice that way. Well Chief Justice Waste was reaching the age of retirement, and shortly he actually did.

Before the State Bar met at Del Monte in 1929, the so-called Hardy decision had come out. Carlos Hardy, a judge of the superior court in Los Angeles, was a very active member of Aimee Semple MacPherson's Angelus Church Center. I made the point, as I think in my correspondence with you, that that was quite a vigorous evangelical concern. It was, however, embellished by the showmanship of Aimee Semple MacPherson. She was hailed as being the prime advertiser of the time by Bruce Barton, or somebody of that sort. She was always putting on the bizarre. She was allegedly caught in a love nest at Carmel with the radio announcer of the Temple, and thereafter disappeared for a time, and a story was given out that she had been kidnapped and was down in the Arizona or some other desert. She reappeared. Then Asa Keyes, as district attorney of Los Angeles County, tried to make something of it, and indicted her for fraud of some indefinite sort. So Judge Carlos Hardy rose to her defense. Allegedly, he was paid $2,000 for the services. The State Bar sought to bring him to answer the

charge. This was resisted, and the Superior Court of the State of California, the presiding judge of that time being Marshall McComb, in the case held that judges were not members of the new State Bar and couldn't be disciplined by them, which very greatly distressed leaders of the Bar. He held also that impeachment was the only remedy. And impeachment of Judge Hardy was initiated, as you know, and failed.

Q: Let me pick up a note that you neglected to say, and that is that the State Bar started disciplinary proceedings against Judge Carlos Hardy, and that's what gave rise to the lawsuit in Judge McComb's court.

DAVID: That's right. He refused to honor the summons to appear, among other things. And I guess they wanted to remand and compel him.

Q: When that case was finally decided by the Supreme Court it was definitely stated then that judges were not subject to State Bar discipline and, in fact, were not truly members of the State Bar. Is that correct?

DAVID: That is correct. After that, the Hardy decision was one of the chief things that was discussed at the 1929 meeting at the Del Monte convention. I was there. I seem to remember that, in the general bar session, the motion to have a committee appointed to determine how judges should be brought into the State Bar, integrated, was laid on the table. The judges at that time ran their own Judicial Section. C.J. Goodell, San Francisco Superior Court, was their chieftain. Presiding Justice [Nathaniel] Conrey of the Second Appellate District, and Judge William Finch, of the Third District, urged that judges should find some way of returning to State Bar membership. After all, they were lawyers. Presiding Judge [Lewis R.] Works of the DCA argued that judges were lawyers and hence were required to be members of the State Bar, but were not subject to its discipline. But the Supreme Court Justices [William H.] Langdon and [John E.] Richards, who came before the State Bar meeting, explained their court's position that judges should be dissociated from the State Bar. Well, therefore, the judges founded a new Association of Superior Court Judges. Judge Raglan C. Tuttle of Nevada County was president of it, and Judge Homer Spence, of the Alameda County Superior Court at that time, was on the executive committee, and Judge [John F.] Fleming of Los Angeles was on it, and also Judge [C.E.] Beaumont of Fresno was on it.

Q: He was later a U.S. district judge, wasn't he?

DAVID: Yes. In October at the State Bar Convention, it was decided that all judges should be retained as honorary members of the State Bar, with all privileges except the right to vote and hold office, and to be free of dues and assessments. And they let that be known in the Judicial Section. Though I almost quoted that back to them when, for a brief time, I became a member of the State Bar after I retired and reneged, and went back to being a judge, retired.

Well, the first program of the 1930 Convention (now I have my notes) was the first meeting of the association which was formed, called the Association of Superior Court Judges. Judge Raglan Tuttle of Nevada County was the president. Morris T. Dooley was there, I know, and later on he gave his impressions, which I think were published in the *State Bar Journal* or the *L.A. Bar Journal*. There were some thirty or forty judges present at these original meetings. In 1933, the organization became known as the Judges Association of California, so that they would include if they wanted to, to have them there, the appellate judges, because although there is a differentiation between the State Bar and judges, there was also a distinction between judges of the superior court and of the other courts who were superior to them.

The Judges Association organized its own committees; they had one on legislation, and they were primarily concerned with legislation affecting the practice of the law and things that affected the courts. And the judiciary began to expand about that time, after the depression and so forth; the population increased and judges came on up along the line. However, the Association of Judges meeting, held at Yosemite in 1941, found only fifty-seven judges present, according to the report.

Q: That entire association meeting was held at the Awahnee Hotel. And the hotel hasn't increased in size since then.

DAVID: Well, there came in some people that I got very well acquainted with. Robert Scott of Los Angeles was made chairman of the Association. That September I'd already departed for the Army but got to know him on our court. And Judge [Andrew C.] Scottky of Mariposa County and Judge A.P. Bray of Contra Costa County were supposed to work with the California Youth Authority to assist in its development. That was the kind of

thing they were in. Well, by 1946, five years later, they changed their name again, and then it was known as the Conference of California Judges. And at that particular meeting, in 1946, which I attended, Mr. Justice Raymond Peters declared, "The Conference of California Judges is a judges union. It has all the municipal, all the superior and all the appellate court judges of the state as members."

Q: I think now would be an appropriate time to put a personal note in, because I want to get back to Leon David. In the memoirs that Earl Warren wrote, he mentions, to the best of my memory, only one judge as being associated with him early in his career, and that was a man later made judge, by the name of Victor Hansen. But somehow or other I associate Victor Hansen and Leon David and Louie Burke as a triumvirate. Can you tell me a little about the three of you working together?

DAVID: In my legal aid work, one of the first people I met was Kimpton Ellis of Los Angeles. He was very much interested in it. His office mate at that time was Joe Vickers, who had resigned from the court and become a practitioner. (He was later reappointed to the court.) Over the years thereafter, I was perpetually a member of the State Bar Committee on Legal Aid, and its chairman on various occasions. In that connection, Earl Warren was a member of the Legal Aid Committee of the State Bar in one year, which year I do not recall exactly. But I do recall that I came north to meet with the Northern California members and I met with Earl Warren in his office as district attorney of Alameda County. And that was my first connection with him. Victor Hansen was a Los Angeles attorney, and I did not know him particularly until after the war, and then I met him in Los Angeles, the first time, because he had been the adjutant general of the state [National Guard] under Earl Warren, and was a brigadier general in the National Guard. I was interested in the National Guard. We participated in Earl Warren's campaign for governor . . . .

Q: What year was this? Not his first campaign, was it? His first campaign was 1942, so the next campaign would be 1946 or 1950.

DAVID: The campaigns that I took part in were in both those years. I became a member of the Republican Assembly in Los Angeles, with Ed Shattuck, with whom I had been associated in the Junior Chamber of Commerce, before the war, before I outgrew the age of thirty-five. So I was the

vice president of the Los Angeles Republican Assembly. And interestingly enough, one Edmund G. Brown was vice president of the Republican Assembly in San Francisco at the same time.

Q: I just wanted to make a note here that you weren't misquoting or misspeaking yourself, because, in fact, Edmund G. Brown, Senior, was at that time a Republican. Is that correct?

DAVID: That's right, yes. I ran and was elected to the County Central Committee of the Republican Party, and I was elected twice to that committee and I got very handsome votes, because at that time, we were listed alphabetically, and I ran out in the Santa Monica area. We had some other legal lights who were in that operation, and I was still a member of the County Central Committee when I was called to active duty. So I had that background, at least, in the political scene. And I came back in 1945 and 1946. In the 1950 campaign, I was asked whether I would go and be a speaker in the [Warren-for-Governor] speakers bureau, and there was where I first came in contact with Victor Hansen.

Q: Was Louie Burke on that speakers bureau with you?

DAVID: I don't recall that he was. He may have been. That was the campaign of 1950, it comes to my mind now, because when Governor Warren phoned me and told me he would appoint me to the municipal court, he said, "Of course, I'm sorry to do that because I'm losing one of my best speakers."

Q: When were you appointed to the municipal court?

DAVID: In October of 1950. That was a rather interesting operation, anyway. It had been suggested to me, long before that time, that I should go and let my friends put me up for a position on a court. That was even before the war. In fact, one or two municipal court judges at the time suggested that. The salary didn't attract me.

Q: But at that time you were still assistant city attorney in the City of Los Angeles.

DAVID: That's right. And furthermore, I sat in the office next to the chief, and it was generally assumed that I was aiming to be the next city attorney of Los Angeles. When the initial suggestions were made, the municipal courts weren't making very much money, and the city attorney of Los

Angeles was making at least $10,000 a year, which was pretty good in those days. Cabinet members in the U.S. Cabinet didn't get much more at that moment, as I recall — $12,000 or something like that.

Q: But that was considerably more than what judges were making at the time?

DAVID: Yes. So anyhow, be that as it may, a number of my friends after the war were concerned about what I was going to do — whether I was going to take a regular Army commission and go out that way. But in the City Attorney's Office another situation had arisen. Here I was away for practically five years. When I went away, I was a crown prince, and when I came back, there were a lot of others who had their mind set on that office and had spent their time working.

Bill Neal was in our office, one of the old timers and a very fine lawyer, who had been the advisor to the City Council over the years, although I'd been his substitute when he was gone and had generally worked on the opinions that went to the city officers. Bill had been in Sacramento as part of the city lobby for many years and knew the governor quite well. The governor offered him an appointment to the municipal court and told Bill that he was capable and deserved more, and would be advanced at the proper time, but Bill turned him down. So one day, before we went to lunch, Bill Neal and Ray Chesebro and perhaps one or two others were all seated in his office discussing things, and he told Bill he thought Bill had made a mistake in turning this down. But Bill didn't think so. And actually, of course, he was well entrenched in the city government and looked forward to retirement under the city plan. And then I said, "Well, I wonder what I'd do if the governor made me an offer." "Oh," Ray Chesebro said, "don't be silly — you'd take it." Well, I got back from lunch earlier that day than the rest, and lo and behold, here's a call from Governor Warren. He wanted to know if I'd accept an appointment to the municipal court. I could have plenty of time to discuss it with my associates and with my wife, and I said, "Well, Governor, I won't take that time, but I accept your invitation right now." So, they came back from lunch. I went in and saw Ray, and Bill was there, and I said "Well, that man called while you were away." He said, "What do you mean?" I said, "The governor called me and asked me if I'd accept an appointment to the municipal court, and I told him 'yes.'" "You

did what!" The net result was that I did, and I was inducted into the municipal court. Governor Warren expressed to me again that he was quite confident of my ability, and that in the course of time, if things went well, that I might make superior court.

Q: So you were on the municipal court when? October . . .

DAVID: Of 1950.

Q: All right. Then, in September of 1953, you were appointed to the superior court. I think that the largest group of judges ever appointed at one time was appointed by Governor Warren. I think that through legislation and other reasons, there were some nineteen vacancies.

DAVID: Eighteen. The Legislature increased the number of judges to eighty in the superior court. The appointments were made by the governor in September.

Q: September of 1953?

DAVID: Yes. At that particular time, I had been serving on the superior court by assignment for two years or a little less. I served in the Brunswick Building [843 S. Spring Street, Los Angeles], and in September 1953, I'd spent six months being the Criminal Department in the Long Beach branch of the superior court.

Q: Just to jump ahead a minute — something very drastic happened in October of '53. The chief justice of the United States, [Fred] Vinson, died. And shortly thereafter, Warren became chief justice. So you were among the last of his appointments.

DAVID: That is correct. As a matter of fact, he had to chase me around. At that particular time, I was the assistant commandant of the United States Army Reserve School at Fort MacArthur. And he caught me at Fort MacArthur and told me he would be pleased to appoint me, and I said I would be very happy. And I congratulated him on his prospective appointment to the U.S. Supreme Court. I saw him on occasions after that. I remember he came and talked to the L.A. Bar Association one day. He came by and said, "Well, Leon, how do you like this business of judging we are in?" So I had to tell him it was going well. He said, "I've had good reports on you." I said, "That's fine." Then, of course, he came for the dedication of his portrait in the Los Angeles courthouse. After that ceremony, when I chatted

with him, I asked, "Would you autograph photographs of your portrait for all of the judges that you appointed?" So I got the photographs, and I got them all autographed, and I have mine hanging up upstairs. That was the last official contact I think I had with him. I had other informal contacts, which were a surprise, because of my son. He met the daughters down on the Santa Monica Strand and sparked around with them, and brought them to our home where we had lunch together.

Q: According to some notes that I have, you served in the Appellate Department of the superior court for two years.

DAVID: That's right. I went in and served with Ed Bishop and Frank Swain for those years. When Ed Bishop retired, Harold Huls joined the Appellate Department. After retirement, I served on a further appointment.

Q: Well, I don't want you to be unduly modest, but who was the better author of trivia, you or Frank Swain?

DAVID: That's a sad story, my friend, and I'll tell you why. Frank Swain and the other two of us (Ed Bishop and I) for a long time before we had the judges' lunchroom in the new courthouse used to meet in a little cubbyhole and eat our lunches. And at every lunch, Frank would say, "Well, when I was coming in this morning a little rhyme occurred to me, and it goes like this." And so he would rhyme it out. And then the next time, I'd come in and give a rhyme, in competition with him. I didn't realize that maybe that was a little irritating because he thought he was pretty good. Then, one rhyming occurred which was connected with our Christmas celebration. You remember, three judges, namely, Swain, Huls and David, came up and sang a ditty, called "The Man on the Flying Trapeze," where we talked about the man above us and where the end result was a quatrain with "ninety day flitting, they all call old Witkin and our judgments go floating away." Well, the Chief didn't like that very much. He thought that was disrespectful to the Supreme Court. The judges and lawyers thought it was great. Anyway, I was not reappointed and A. Curtis Smith took my place after that.

Q: That was in 1960. When did you actually retire from the Superior Court?

DAVID: On July 1, 1967.

Q: And you didn't stay retired from judicial activity very, very long, did you?

DAVID: I may have told you how rapidly Louise and I became pedestrians, had our house sold out from under us, so to speak, and came north. Shortly after that, I had a call to go down and sit in San Luis Obispo County. The situation was this: there were three judges on the court, but they had Cal Poly in San Luis Obispo, the whole student population. They also had the California Men's Institution there, and they were deluged with writs for habeas corpus and everything else. They got so far behind, they wanted help. I found Justice A.P. Bray on the appellate court had been down there sitting pro tem, and I followed him for a month. The judges down there were very canny. They tried through their supervisors to get another judge and they couldn't. They had to rely on Judicial Council assignment. So anytime anybody offered a disqualification, they automatically accepted it. So the result was that there was a whole flock of divorce cases that hadn't been tried because one or the other or both had disqualified himself from hearing it. And so, I went to work on them. That was assignment number one. Then, again, out of Berkeley, where I was temporarily, I was assigned to sit in Napa County. And I sat up there for a spell. Louise and I moved over here to Danville, and then I was the impartial visiting judge who could be called in to hold all the hot rocks for the Martinez Court. And I did.

Q: How about on the Court of Appeal?

DAVID: In the Court of Appeal, my assignment came from a compound of various circumstances. One was that I had been recommended for the Court of Appeal appointment, and it actually had been carried up from the State Bar. And at the last moment, in a political move, I didn't get appointed. But the chief justice, Roger Traynor, knew it. I'd known him when he was working on the State Board of Equalization. And then, A.P. Bray, presiding judge of the First District and whom I had followed down into San Luis Obispo, spoke a good word for me. I had made his acquaintance down in Los Angeles where he served on appointment down there. So, I came in to the First District Court of Appeal to temporarily fill the vacancy of Byrl Salsman, who had been elevated to that court from Santa Clara County, and had retired. Byrl Salsman, incidentally, had been the thirteenth lawyer to hit Palo Alto when I practiced there and was pounding the pavement when I left. So, that was the start. Then a succession of events happened in the First District where Justice [James R.] Agee was incapacitated, and

I served then and after he died in office because of cancer. I temporarily filled that vacancy. Then Justice [Daniel R.] Shoemaker retired. The net result was, I spent three years on that court. Also, retired Justice Bray had been assigned and was serving, helping out, up in the Sacramento District. I don't think he liked to make the long trip from Martinez, he not driving. So he suggested that I be assigned up there, and I was. I spent a month there, and I was assigned down to Fresno, when a vacancy occurred there. Then back again to the Sacramento District.

Q: Again, on the appellate court?

DAVID: Again, on the Court of Appeal.

Q: A printout shows that you wrote some fifty or so opinions. Is that substantially correct?

DAVID: I haven't stopped to count them, but I don't know whether you have all the printouts. Anyway, I served down in Fresno and I went back to the Sacramento Court a second time for another month. Frank Richardson, who went to the Supreme Court, was then the presiding judge, and I served under him at that particular time. In each of those instances, particularly in Fresno and Sacramento, I had some very involved cases.

Q: Tell me about what you consider one or two of the most important for which you wrote opinions.

DAVID: Well, importance is in the eyes of whoever is concerned.

Q: Well, what do you consider important?

DAVID: In Fresno, we had a very interesting case involving timber rights and the transfer of timber rights down the line in a series of alleged powers of attorney. Parties, relying upon an opinion of the title company, went in and took out $50,000 worth of timber on a particular timber claim, and the heirs of the original owner came in and wanted it. And so in *Jay v. Dollarhide,* in 1969, which is 3 Cal. App. 3d 1001, I went through the whole thing. Its ramifications were so involved that I had to diagram them on a blackboard and explain them to my fellow justices. My research assistant was a Mrs. Leonard at that time, who now is on the very court she served, the appellate court in Fresno. The result was that I found more points than the appellants, and I got in the David habit of retrying the case. So having raised up all these points, we called for a second hearing, whereupon these

new points were presented for argument. The net result was that the title company had to pay $50,000 on their title policy. But *Jay v. Dollarhide* is still remembered by the people who were there. The presiding justice at that time, after the death of his predecessor, which was the reason I was sent there, was Fred Stone, and he also had been active in our conference of judges at the time.

We had another case, in 1970, in San Francisco, called *Sousa v. Freitas* (that's in 10 Cal. App. 3d 660), that has been embedded in some textbooks before we met palimony of live-in spouses. Mr. Freitas lived in the Azores, and he came to Oakland. And his wife in the Azores wouldn't follow him. So, in the course of time, he got a divorce from her in California, and married again, and then died. But in the meantime, his son by the first marriage had known of the second marriage and no doubt advised his mother of it. After Freitas died, the first wife came in with her claim for the estate. And the second wife claimed under the putative spouse doctrine. So, it really got involved because Mrs. Sousa, back in the Azores, apparently knew what was on. In fact, she wouldn't go to the post office to draw down registered mail which was sent to her in constructive service in the divorce suit.

Then we had another case in Sacramento, which involved taxation. And the case involved taxation of computers which had been rented to the State of California. They, having been rented for about ten years, the valuation at the end of ten years had become minimal because of technical obsolescence, so the owners claimed. But the Board of Supervisors refused their claim, and it went to a Board of Tax Appeals. And the Board of Tax Appeals was advised by the county counsel, who also advised the Board of Supervisors that there wasn't anything to it. Some of the members from the Board of Tax Appeals said, "That's not so. We're independent. We're going to decide this on our own." And so they went out and hired counsel on this question of valuation. So this taxation went on for about three years, as l recall it. And the nub of the opinion was that the Board of Tax Appeals is not an agency of the county government; it's an independent quasi-judicial body which is entitled to have its own attorney, since there was a conflict of interest where the county counsel was concerned. Therefore, I had to do justice without any particular precedent by ordering the whole matter to go back to the boards of appeal for three different years, and they were to pass on the assessments, and the assessors were to conform accordingly.

Well, it was so complicated, I had to diagram it on the blackboard and explain it to my fellow justices. The opinion went up and it was affirmed on appeal.

Q: How about when you were on trial court? Were there any trials that stand out in your memory as being particularly interesting or significant?

DAVID: Well, I think the most interesting one was where the insurance company came in and tried to recoup their insurance on the ground there had been deliberate burning of the boat insured.

Q: It was while you were an attorney that you were responsible for legislation that set up a time schedule for filing tort claims against a public entity?

DAVID: That went to the Legislature, I guess, in 1931.

Q: What was your role in that legislation, or what led up to it?

DAVID: We had this case of *Black v. City of Palo Alto,* wherein the lady had sued the city officials of Palo Alto for alleged injury at a railroad crossing. A complaint was filed on the last day of the statute of limitations, and the summons was filed on the last day it could have issued.

Q: You're talking 364 days after the accident?

DAVID: Summons wasn't taken out at that particular time, I don't think. But the net result was that the city officials and the railroad company were faced with a $100,000 lawsuit for alleged injuries for Mrs. Black. And it came up on trial almost three years after the event. In the meantime, the witnesses, such as there were — the flagman at the crossing — had disappeared and had to be found. The membership of the Board of Public Works had changed. Circumstances and the physical condition had changed because the Railroad Commission had finally granted permission to open the Embarcadero [Road] as it passed Palo Alto High School, across the tracks at that time.

Q: You got a trip up to Idaho out of that, though, didn't you?

DAVID: I didn't go to Idaho, but the Southern Pacific finally found their flagman up in Idaho, and I went down to Santa Monica to check up on a previous lawsuit that the plaintiff instigated and pulled out of; and threw away a crutch after an alleged injury in a department store in San Francisco. So we were just mad about it, and knowing about claim statutes, we

said, "Well, anybody who wants to make a claim such as this should do it in a timely fashion." And one of the main points of timeliness is the ability to go out and find the facts of what happened. That's particularly true with sidewalk injuries, where somebody says, "I hit a one-inch dip in the sidewalk and I fell down, I did all of this, that, and the other thing." So, the attorneys section of the League of California Municipalities went to work on that. I was a draftsman of the 1931 statutes and I think Earl Sinclair, of Berkeley, and I collaborated on it. It went to the Legislature and was enacted. The General Laws, I think 5618, 5619 and 5621 were the claims statutes that resulted because of it. We did something else. We went to San Francisco and hit the underwriters. If we're going to be subjected to liabilities like this, why can't cities and counties get insurance against defects, like any other landowner? So we dealt at length with Mr. Cleverdon, representing the underwriters. The net result was that the first insurance policies against such tort liabilities were made available to municipal corporations.

Q: Prior to that time there were no insurance policies?

DAVID: There were no insurance policies.

Q: My memory seems to say that there was a doctrine of sovereign immunity that took care of most of the situations then. Is that really correct?

DAVID: In 1923, the Legislature enacted the Public Liability Act which was based upon a case called *Chafor v. Long Beach* [174 Cal. 478 (1917)] involving the auditorium of Long Beach, where the court drew the distinction between proprietary and governmental functions. Defects in public property could be the basis of liability if two things occurred: one, that the officials in charge had notice of the condition and had reasonable time to repair, and the funds were available to do it. Those were the conditions. Then, when it came to the liability of the individual officers, practically the same conditions were stated. It wasn't until much later, you see, that the present general public liability act was drafted by the California Code Commission, I believe, and adopted after the California Supreme Court negated the sovereign immunity doctrine, forcing the Legislature to spell out the bases of liability or limited immunities.

Q: In the sixty years that you have been associated with the practice of law, I think it would be fair to state that the changes in tort liability have been

greater than any other field. And in the field of tort liability, the field of tort liability of municipalities and other government agencies is certainly far different now than it was then.

DAVID: Well, it's the same story with the municipal corporations, let's say, as it is with other corporations. When we first established that they could be insured, that was not an unmixed blessing. Because now, with insurance for automobiles or anything else, jurors say, "Well, the municipality is insured." The courts also began to get that way. In other words, they are down to this business of expanding liability and spreading the "social cost" of injury. In workmen's compensation, the idea of fault disappears there. But the relationship there is enough to satisfy liability as part of the cost of doing business. So then others turn around and say to the public agency, "These kinds of accidents are inevitable, and therefore, as part of your cost of doing business, why not be subject to the liability?" And courts have had that idea. You will find in one of my law review articles, the alternative to municipal tort immunity and liability is more or less based on that principle. And judges, trying cases, have no doubt the juries have the same idea. I remember one case I tried, arising down in one of the residential subdivisions of Los Angeles. There were streets and banks up alongside it. A lady was driving about ten or fifteen miles an hour through a subdivision, keeping a good watch out, because she thought there might be children at play. And sure enough, up on the bank there was an infant of one or two years who was playing, who came rushing down the bank and ran into the rear wheel of the automobile. So they sued. And we tried the case.

Q: You mean the parents of the child sued?

DAVID: Yes, they sued. That jury got hung up interminably. And I gave them the instructions two or three times. And finally I called them in and said, "This jury has heard my instructions. Is there any instruction I can give, or is there any clarification I can make that will help you reach some verdict, because I think by now you should have reached one." Well, one lady hesitantly put her hand up and said, "Judge, if we follow your instructions, does it mean we can't give this little baby something?" And that was true, although in some cases — a criminal case — I don't know about the jury. I got prejudiced a bit. But I'd always kept, in my cases, a little guess under the blotter of what the jury might award in a given case. And

I accumulated those over some seventeen years. And I found out actually that high verdicts weren't given in Los Angeles. If I had decided the jury cases, on the average, the verdicts did not exceed my estimate more than ten or fifteen percent.

I found out something else, though. When I was out in the branch court in Inglewood, we tried some liability cases. And the jurors were largely the wives of people who worked down at the airplane factories where a good wage was, say, $500 a month. An attorney would come out there in that court and come in with all kinds of claims of injury and so forth, and you could just see that the staid ladies sitting around there were figuring, my old man doesn't get so much for pain and suffering for each of these days that the plaintiff took healing up. So they came out with a conservative jury. Normally attorneys wouldn't set the case for trial there. They did set one, though, that I remember very well. The case was brought by a man who was working down in the foundry and claimed that he lifted a heavy casting and, what happened, way up and down? He was all broken up. Plaintiff's attorneys brought in their expert witness and put the plate on the screen. He pointed out this little white spot, and that little white spot, and so forth. "That's the injury." Then one of our perpetual defendant doctors came on, whose name you might recall. And he testified, "There's no such thing. What they pointed out are the normal cartilages, the intercostal cartilages and so forth on the chest." That particular jury was largely made up of women. The habit at that particular court at that time was to try to qualify a jury at least by the interrogation in the morning so attorneys could go to real trial in the afternoon. So, they meticulously went down, qualifying the jurors, and they got down to juror number eleven. "What is your occupation, ma'am?" "I'm chief nurse at suchandsuch hospital." "Do you always follow the directions that doctors give you?" "We do." "Would you discount the testimony of one of the doctors and prefer it to one of another? Or could you differentiate between these two doctors?" Well, she allowed as how she could, but they excused her. Then they got to juror number twelve. "What are you?" "I'm a housewife." "Where do you live?" "I live in Torrance." "Are you presently employed?" "No." "Have you fixed any opinion of the merits of this case at all?" "No." Passed juror number twelve. It turns out that juror number twelve is a retired nurse in the very same hospital. But that was not the point. The attorneys got down

to argue this case. The argument was that all plaintiff's injuries were real. The defendant's attorney was young [William C.] Wetherbee. And like the plaintiff's attorney, he thanked the jurors by name in the usual fashion. He said, "Ladies and gentlemen, my argument is very short — a single sentence. All I have to say is 'city slickers.'" The basis for that was that he had shown in evidence that this particular lawyer and doctor had appeared together in sixty-nine personal injury cases in our court inside of a year and a half.

Right away, motion for mistrial. "I won't deny it, I'll hear your motion." So they came in to argue the motion. And the argument was that this really was very highly prejudicial conduct on the part of the attorney, and then plaintiff's attorney made an impassioned pitch to me. "Oh, the judge is always the thirteenth juror, and the judge can give his independent judgment and we think your independent judgment will show that we were prejudiced and that we ought to have a new trial." And so I said, "Well, you think that the statement was prejudicial, do you?" "Yes, we do." "Well," I said, "yes, I can rule a mistrial but I must confess that the judge, or the thirteenth juror, was thinking the same thing!" It was right after that that I was transferred to the Civic Center and went up to the Brunswick Building. The first day I went to my courtroom, I looked into an adjacent courtroom and here was the same doctor, same attorney in another personal injury case.

The very first case I tried was an interesting one about the jury, too. Max Gilmore in Hollywood was suing for his fee in the famous case in which the furrier Teitelbaum was found to have robbed himself by taking stuff out the back door and collecting insurance on the loss. Gilmore, was suing for his fee. Well, the attorneys started to impanel that jury and it wound up, I think, with eleven women and one man. Any woman with any business experience or who had a husband engaged in business received a peremptory challenge. So we ended up with eleven women and one man. So, Max Gilmore came in and brought in bigwigs from the Bar Association who testified his fee was quite reasonable and that, in fact, he was entitled to more in this criminal defense. So it went, and we came down to the jury argument. The argument began and, of course, the defense attorney got up and said, "You know, ladies and gentlemen, how these lawyers stand together. You've listened to this man and that man and that man, and they're

all testifying to give their fellow lawyer this amount of money. But I want to tell you, ladies and gentlemen of the jury, I'm sure the judge will instruct you that out of your own experiences you can fix the value of these services." Now, when he said, "out of your own experiences," eleven ladies just laughed out loud. I never forgot that.

But anyway, another of the interesting cases involved a woman from Camarillo. She filed habeas corpus to get out from the mental institution, which she could do, and have a jury trial as to her competency and release. So, she came before ME! and testified, and she was quite an imposing lady, you could say of the "grand dame" type, and very precise in her English and very accomplished. The doctors from Camarillo said, "Mrs. soandso has made great progress, but we are afraid she might not hold up under any little strain. She needs to continue treatment." Well, they finished all the arguments about this, and I was looking at my notes. All the time I was looking at my notes, she was looking at the judge, me, and all of a sudden, she burst out in a great tirade. She began to think the judge wasn't going to let her out. That triggered the outburst and defeated her bid for freedom.

In another trial, a very prominent attorney, later a member of the Board of Governors, represented the plaintiff. Every time I made a ruling against him, he would make an aside to the jury. My stenographer was Trudy Jankey. Trudy used the stenotype, but she and I worked out a deal where she also tape recorded all the testimony and the arguments. So, I wanted to get a hold of this lad and I called him in, and said, "This must stop. You know that's contempt of court, and you should know better than to do all of that." "Judge, I haven't done anything," I called in Trudy who brought in the tape recorder, and out it comes, loud as can be, everything he said. After that, he always was good and he always was my friend. So I found that very handy. When one talks about tape recording, I think it's excellent, providing the stenographer can make a differentiation between the parties that speak. If she herself, or he himself, transcribes it soon, they can do it well, because they remember the names. If they have to do it cold, it's something else.

I had another trial up here which also took the cake. It involved a libel suit against a prominent subdivider, for telling around that a man who claimed to be a joint venturer and partner was a liar, and wasn't entitled to a share in the profit, and all that sort of thing. We went the whole round in

that case, and the defendant's attorney began a course of conduct I'd never seen the likes of before. Every time I made a ruling, he would say, "An offer of proof, Your Honor." I said, "All right, we will meet at an appropriate time and decide your offer of proof." Well, during the course of the trial, he did it a hundred times. So, I took him out in the anteroom and followed a practice of Judge Joe Vickers. When he made his offer, I said, "You have to offer to prove by a certain witness that he is going to testify to a certain thing. So we are going to have the witness right here, and you make your offer of proof; you ask the witness if he would so testify. If he will so testify, we will then allow you to restate it in court." So, we did that. And, of course, practically every one of those offers of proof went down the drain. But then five years, five years, almost, after all this had been decided, and an appeal taken, the defendant came back "because there were gaps in the transcript." And by gosh, the way the reporter wrote it up, there were gaps in the transcript. Every one of these offers of proof showed that it had been denied, all right, but didn't say what the offer was. So defendant came in and wanted to revise the transcript. This was the one time that I got a "Bird call" back to duty. After much deliberation on the Judicial Council, they called me back, because I always kept an almost verbatim copy of answers and everything else in my own type of shorthand. And all the stenographer did was put a paper clip on the tape when she typed it up, it didn't show what the question was. So I went back to my paper notes and refilled all these missing parts. But that sort of stalling procedure I thought was worthy of being reprimanded except that the case was on appeal and I had lost jurisdiction in reference to counsel's obstructive comment. It seemed apparent that the defendant had a lot of money and was trying to wear out the other attorney who was on a contingency basis. So, that kind of behavior on the part of the counsel was so noteworthy that I remembered it. Ordinarily, it was evident the minute a counsel tried to take advantage of the judge, the jury were on the side of the judge. And the judge didn't have to do anything. If he was courteous and still tried to keep counsel harassment down, by and by the jurors would try to react to it. Our juries would, anyway.

The only jury I got hung up with in Los Angeles was one where two colored men, I should say black men, were called on the jury. And the jurors took a ballot to elect a foreman, and one black man who thought he

ought to be elected wasn't, and the other one was. The one who wasn't elected went over to the corner and said he would have nothing more to do with it. And by and by, one of the other jurors thought to tell the bailiff, so I had to discharge the jury.

Q: Well, we have come to the end of a very wonderful day.

DAVID: It has been a pleasure to recall the events of my rather varied life, with you to spur on my recollections and to patiently listen to them.

* * *

# ORAL HISTORY

# RUTH CHURCH GUPTA

(1917–2009)

Ruth Church Gupta
(1917–2009)

*Oral History of*

# RUTH CHURCH GUPTA

**(1917–2009)**

## EDITOR'S NOTE

The oral history of Ruth Church Gupta is one of four oral histories conducted by the former California State Bar Committee on History of Law in California in 1987. These were the final oral histories conducted by the committee, and they are published for the first time in the present volume of *California Legal History* (vol. 6, 2011). The interview was conducted on September 28, 1987, by committee member Rosalyn Zakheim on behalf of the committee (which she chaired in 1988-89) and the Women Lawyers Association of Los Angeles (of which she was president in 1983-84).

The oral history has been reedited for publication. The spelling of names has been corrected wherever possible, and explanatory notations in [square brackets] have been added by the editor. The sound recording and original transcription are available at The Bancroft Library, UC Berkeley. The oral history is published by permission of the State Bar of California.

Gupta served as president of the Queen's Bench Bar Association in San Francisco in 1953, and Ruth Rymer, who served as president in 1976, agreed to prepare the brief reminiscence of Gupta that appears below.

— SELMA MOIDEL SMITH

# RUTH CHURCH GUPTA

RUTH RYMER*

I was admitted to practice in 1971. Everything in law school had been part of a male-oriented paradigm and at first glance the Bar appeared similar. Suddenly, when I joined Queens Bench, I was surrounded by sympathetic sisters-in-the-law and aunts-in-the-law. One of my new aunts was Ruth Church Gupta who had been admitted the year before I graduated from high school. We developed an immediate rapport when we discovered that we had both attended Mills College.

Ruth and her husband, Kamini, had a general practice in the Marina District in San Francisco where they served their clients through decades, if not generations. In one case, Ruth represented a widow who was a life tenant in a condominium. The remaindermen incessantly harassed her to release her interest. Ruth not only restrained the bad guys but obtained damages for the client's psychological trauma.

In the early 1970s, the California Legislature was host to a multitude of new bills which demanded a major change in the way women were treated by the law. Both Ruth and I frequently appeared before its committees to represent organizations in support of this proposed legislation. Chief among the bills was the Equal Rights Amendment. Our opponents insisted that equal rights would prohibit gender-separate toilets. Ruth convinced the Legislature that the concept of privacy would prevent that disaster.

A major women's focus was to eliminate the husband's management and control of community property and his right to "designate any reasonable place and mode of living, and the wife must conform thereto." Until no-fault divorce this statute had often been used by the errant husband who abandoned his wife, demanded she join him in a place where he knew she would not, and then petitioned for divorce on the grounds of desertion. We thought that even after no-fault, the statute should go. It did, partly through Ruth's efforts.

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*Ruth Rymer (formerly Miller), JD, PhD, served as chair of the Family Law Advisory Commission to the Board of Legal Specialization, State Bar of California, (1977–1982), and is the author of the historical novel, *Susannah, A Lawyer* (2009).

The male legislators were astonished that there could be such a thing as a woman lawyer, or that she could make logical arguments. Ruth was particularly effective as a lobbyist for women. On one occasion, a legislator asked Ruth an irrelevant question and she, a good actress, replied, "Well, Your Honor . . . ." She pretended to be flustered, but Ruth had so charmed him that he voted for our bill.

Ruth was a wonderful mentor to me. It was my privilege to have known her.

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*Oral History of*

# RUTH CHURCH GUPTA

(1917 – 2009)

Q: Thank you very much for allowing us to interview you. We really appreciate it.

GUPTA: I'm certainly glad to be a part of history.

Q: I'd like to start asking you something about your childhood and your background. I think you were born in California, weren't you?

GUPTA: Yes, I'm one of those strange persons that was born in California. So were both my parents in the 1880s, and both my grandfathers in the 1850s.

Q: What part of the state did you grow up in?

GUPTA: I grew up in Northern California. I was born in Orland. Went to school in Yuba City. Then I went to college at Mills College.

Q: Were either of your parents attorneys?

GUPTA: Neither of my parents were attorneys. In fact, neither of them had a college education.

Q: How then were you inspired to go into law?

GUPTA: I had no intention whatever of going into law when I was in college. I was inspired to go to college by my parents who insisted that I have

an education. And I went into the business world out of college. When I married my husband, he was a law student at Hastings. He was drafted and went off into the Army. I was working for a lady who was an attorney in the business world. She inspired me. One day I marched into her office and said, "I quit. I'm going to law school," because I saw there was no future for me in that particular business world and decided to go to law school, just out of the blue.

Q: You said you went to Mills College. That's a women's college, isn't it?

GUPTA: That's correct.

Q: Did you receive any special encouragement for yourself, either in the business world or towards the professions at Mills?

GUPTA: Yes. I give Mills a great deal of credit for inspiring me to do whatever I wanted to do. Many of our class, although we graduated in 1938, which was before the women's revolution, were all encouraged to use our talents to the greatest of our ability. We had a really marvelous inspiration there.

Q: What was your major in college?

GUPTA: I had a double major of math and economics.

Q: Do you think that helped you at all, later on?

GUPTA: I think math is a marvelous preparation for law, because you learn logic and reasoning, the solution of problems, and it's quite similar to the law in many ways.

Q: Have you kept in touch with any of your classmates from Mills or from high school?

GUPTA: I kept in touch with Mills classmates. In fact, we have our fiftieth reunion coming up, and I'm the one who is supposed to be raising the money and organizing it. My college roommate and I have kept in very close touch, although she lives in Washington, D.C.

Q: What did your mother and father think when you decided you wanted to go to law school?

GUPTA: They were very pleased and very proud. When my husband came home from the Army I caught up with him, and we did the last two years

of law school together and graduated together. And when his mother and my parents were at the graduation, they were bursting with pride.

Q: If it isn't too personal, how did you meet your husband?

GUPTA: At a political meeting. We both were active in politics and involved in the Young Democrats.

Q: Once you graduated from law school, did you immediately begin your practice together?

GUPTA: We opened our office right here, where we still are. I continued to work for a few years and spent only part time in the office. My husband was keeping the office going. But we've been here at this same address since January 1949.

Q: For the record, that's 2237 Chestnut Street in San Francisco. Did you have any brothers or sisters?

GUPTA: I had two brothers, both of whom died in their twenties.

Q: Did your mother work outside the home?

GUPTA: Yes, she was a pioneer woman. In fact, she grew up in Mariposa and came down to San Francisco, went to secretarial school, got herself a job up in Quincy in the country, and that's where she met my father. She was very independent, in 1910 or so.

Q: I think we're finding in these interviews that lots of the women had very independent mothers. When you were in school — in grammar school and high school — did you have favorite subjects and things that you thought were especially interesting to you?

GUPTA: I was generally an A student, valedictorian in high school. I enjoyed Latin, Spanish, geography — everything, I think, was special. I wasn't an officer in any of the student organizations in high school. It was during the Depression and I spent some of my time working, as I did all through college.

Q: What kind of jobs did you have?

GUPTA: Anything I could get — babysitting, hashing, whatever.

Q: What years did you go to law school, and what was it like at that time?

GUPTA: When I started law school, it was during the war and it was a very small class of about twenty-five, of which there were about five or six women. Then the veterans came back and merged with our class, and we were then about a hundred. We didn't add any more women, so we were still only about four or five women in a class of a hundred. The class was in the mornings, and I would work in the afternoons. My husband would work from midnight to six, driving a truck for the newspapers. He would come home, we'd have breakfast together, go to class, have lunch together, he'd leave me off at work, he'd go home and go to bed, he'd have dinner ready when I got home, we'd study a bit, I'd go to bed, he'd go to work — for two solid years! We often joked that that's why we didn't have time to have a fight after he came back from the Army.

Q: Do you remember who the other women were in your law school class?

GUPTA: Jean Johnson, who later became Mrs. Jesse Carter, was one who finished, and Joel Brand, who I think practiced in San Bernardino for some time — I've lost track of her. And I don't remember any of the others.

Q: How were the five women in your class treated?

GUPTA: Well, some of the professors sort of ignored us. I personally didn't really feel any discrimination, as such. I think they didn't try to make it easy for us, but Dean [David E.] Snodgrass was the dean and he was notorious about making it tough for everybody. And I think that everybody felt they were being discriminated against, no matter who they were. He just felt that if you couldn't take that kind of bad treatment, you wouldn't get along very well in the law, so he was preparing us for it.

Q: What did employers think of women law students at that time?

GUPTA: Women law students and women lawyers had a very difficult time getting any type of job involving the law. They were always shuffled back to the back room or the library or something, and it was just almost out of the question to be treated equally.

Q: Was that one reason why you decided to open your own practice?

GUPTA: Yes, I felt there was no other way to get involved than to open our own practice, and I liked being independent, anyway, and being our own bosses.

Q: Did your practice start out as a general practice?

GUPTA: Yes, we opened our office here in the Marina District, which is a neighborhood, almost like a small town type practice, and we took anything that came in the door, although it was practically all civil. And it's remained pretty much a civil practice, although now I've gotten where I do nothing but probate, because I don't have time to do other things, and I'm able to turn away other kinds of work.

Q: Why did you choose Hastings?

GUPTA: I chose Hastings partly because that's where my husband had gone before, and also because the classes were all held in the morning, and it was possible to work part of the time and go to school part of the time, rather than to work all day and go to night law school.

Q: Do you have any particular memories of influential teachers you had at Hastings, Mills, or even at high school?

GUPTA: I had a marvelous high school teacher of Latin that I've always been grateful for, for helping me have a good vocabulary. All of my professors at Mills were very influential, I think, because we had a very good ratio of student to faculty, a very small student body, and we had a chance to communicate well with our professors. At Hastings, Dean Snodgrass started his "over sixty-five club," where he drafted many of the top professors throughout the nation who were required to retire at sixty-five, and he brought them to Hastings. So we had some really superb professors at Hastings.

Q: Do you remember who some of them were?

GUPTA: There was [Arthur] Cathcart, [Lawrence] Vold on Sales, [Edward] Thurston on Torts — those are the ones on my mind specifically.

Q: What did you like and dislike about your law school?

GUPTA: I can't remember anything specific that I liked or disliked. It was a very rough grind. Having been out of college for ten years before going back, it took a little while to get used to studying again, but once I got in the groove, that wasn't too difficult. And my husband and I had our own built-in briefing trust — we'd type our briefs up in duplicate, and take turns each week doing the different courses, so it helped on the homework.

Q: During the ten years between college and law school, you met your husband during that period of time with the Democratic Party. Were you active in the party with politics at that time?

GUPTA: Only with the Young Democrats. Later I became more active, when I ran for the Legislature in 1958.

Q: Was that for the Assembly from your district?

GUPTA: Yes.

Q: Tell me something about that race and how it went.

GUPTA: At that time, women weren't used to being candidates and people weren't used to giving a lot of money to women candidates, so it was a bit of a pioneering effort. It was the last year of the cross filing in California, which meant that in the primary, irrespective of which party you were registered in, you could vote for whomever you wished. I won the Democratic nomination. Milton Marks, who later went on to the Senate, won the Republican and beat me in the finals. It was a very interesting experience, since as I say, people weren't used to having women candidates at that time, in 1958.

Q: What were the issues that were talked about in that campaign, if you remember?

GUPTA: One of the major issues that really brought the vote out was the right to work, which was an anti-union measure that brought organized labor out in great quantity, and you had to take a stand on that one. There was also a big issue about water, which is still an issue — Southern California wanting Northern California's water. Those were the two big issues.

Q: Was your husband supportive in this campaign?

GUPTA: He has always been very, very supportive. In fact, whenever I falter, he gives me a swift kick and says, "Go on and do it."

Q: Did you take the bar exam right after law school, and what was the bar exam like at that time — was it three days, essay, what kind of test?

GUPTA: It was all essays, and three days.

Q: Were there bar preparation courses then?

GUPTA: Yes, I took the Witkin.

Q: Did Witkin himself teach them?

GUPTA: Yes.

Q: And did you immediately start practicing after passing the bar exam?

GUPTA: Yes, where I was working I was assigned some legal duties and their legal counsel was Pillsbury, Madison & Sutro, and I worked with them in anti-trust matters, and also took a few independent clients. But mostly I worked at night here at the office, working on briefs and helping out on things that my husband was working on, until, in 1954, I quit my job and worked full-time in the law practice.

Q: What were the attitudes of your clients towards you, as opposed to your husband, perhaps, as a woman attorney?

GUPTA: I don't think there's ever been any problem, although I suppose if someone didn't want a woman attorney, they'd stay away in the first place, so, it's hard to say whether or not I was discriminated against. I had a great many men clients, always have had. Originally I did a fair amount of divorce work, and I seemed to represent more men than women in the divorce cases. I often thought it was because they felt they needed a woman to fight the other woman.

Q: What were the attitudes of judges when you first began appearing in court?

GUPTA: There were a few old-fashioned judges that seemed to not be too receptive to women in court. Now, of course, most of the judges got out of law school long after I did, so they're quite used to having women appearing before them.

Q: What do you see as your biggest successes, and perhaps failures, in your law practice over the years?

GUPTA: Well, I think I've had some success in pioneering on behalf of women in getting them accepted. For about twenty-five years I was a part-time lobbyist, legislative advocate for the California Federation of Business and Professional Women's Clubs. In that capacity I worked on a lot of legislation on equal pay for equal work, legislation that revised the inheritance tax laws to eliminate some of the discrimination that widows had, and I'm particularly proud of the work that I did in that regard. I think I paved

the way, being the first woman on quite a number of various boards and commissions, and opening doors and making it perhaps easier for other women to step into these without so much discrimination.

Q: Now, of course, equal pay for equal work is part of our law. What was the attitude when you first started it in the Legislature?

GUPTA: You'd be surprised how many loopholes there were in the law, even then. It was a real uphill fight. It was almost unbelievable that there was so much discrimination. In such things as factory work, they'd always bring up the issue of all the special legislation. For example, there was weight-lifting legislation that said women couldn't lift more than twenty-five pounds, and there wasn't any such restriction for men. So that was always a nice excuse, whether or not any woman actually lifted twenty-five pounds. I always pointed out that it seemed whenever a man had to pick up a typewriter or something like that, he always managed to get a dolly or something like that to haul it, that he didn't actually carry it himself. Also, the hours legislation — there was an eight-hour law that said women couldn't work more than eight hours, and no such restriction on the men. This was supposed to be primarily against factory workers, but was applied beyond, into the offices. Again, that was an excuse — that women couldn't get beyond the middle management stage because they'd always say, if we get into a jam we have to work at night, and the women can't work, so that was a good excuse not to promote them into middle management.

Q: Aside from being the lobbyist for the Business and Professional Women's Clubs, weren't you a president of that organization?

GUPTA: Yes, I was the president of the State of California Federation, and I was active on the national level in political action. I was vice chair and helped organize the political action committee for the National Federation.

Q: Can you describe what that group has done?

GUPTA: The California Federation was the first one to have a political action committee, and collected money to help women candidates for the State Legislature. Then on the national level, it did the same kind of thing, and formed PAC — a political action committee, qualified under the national regulations for PACs — and collected fairly substantial sums of money to give to women candidates for the U.S. Senate and Congress.

Q: How did you become the lobbyist for the state group?

GUPTA: Well, I was always interested in legislation, and I guess that was sort of a natural thing to get involved in, and I was appointed advocate shortly after I had joined and stayed in office for all those years.

Q: Do you think being a lawyer helped in that position?

GUPTA: Oh yes, no question that it was extremely helpful.

Q: Do you think being a lawyer helped in the other positions you held with other groups?

GUPTA: I think there's no question that the legal education opened doors for me that don't get opened so easily for other people. Whether or not you practice law, I think a legal education is an outstanding kind of education and background to have.

Q: I see from your résumé that you were also active in various conservation kinds of causes. Can you describe those?

GUPTA: After the 1958 election, Governor Pat Brown appointed me to the Water Pollution Control Board for the [San Francisco] Bay Area. There had never been a woman on that board before. So that was another door opener. I kind of gravitated from that into air pollution, and the Lung Association which worked on air pollution. I've served on the State Water Quality Control Board, and on the Lung Association's National Air Conservation Commission. So I got involved in both water and air pollution.

Q: Can you tell me how the practice of law in San Francisco has changed, and perhaps how the city has changed over the years, since you've started?

Q: I'm reminded of the old story about the old man who said he'd seen a lot of changes and he'd been against every one of them. I think law practice has changed considerably in that it's not as friendly as it used to be, and is much more mechanized. Of course the whole computer age has made a difference, and the Judicial Council and their darned required forms have made a difference. And there have been many, many changes in the law. I think the law in virtually every area has changed from the time that I studied in law school, so it's a constant question of taking courses to keep up with all the changes, particularly in the field in which you have specific interest. There are many, many more women, of course, practicing.

Now, many times you'll be in court and the entire cast of characters will be women — the judges, the clerks, the reporters, the counsel.

Q: That really has been a big change. When you first started practicing here in San Francisco, did you know most of the lawyers in town?

GUPTA: It seemed like it, and that's another one of the differences. In the probate area I see pretty much the same lawyers all the time. It used to be I knew virtually all the lawyers who were active in the practice, I knew all the women lawyers, I was president of Queen's Bench. There were only about two hundred members of Queen's Bench at that time, and that took in the entire Bay Area. I think there are some eight hundred or so now.

Q: What was Queen's Bench like, aside from the number of members? What kind of meetings did you have, what kind of issues did you explore?

GUPTA: We tended to stay away from the controversial issues. Most of the speakers that we had would talk on various aspects of the law that we were trying to get more information about, more education about. It was also a very social group, the idea being that we found a lot of support from our fellow practitioners, and we could always call them up and ask them questions, where we might be too timid to call up a man to ask the same question.

Q: Were you president of the Lawyers Club of San Francisco after or before Queen's Bench?

GUPTA: About fourteen years afterwards.

Q: And what led to your interest in that organization, what were its activities like, and how did it feel to be the first woman president?

GUPTA: It was kind of exciting to be the first woman president. I'd been on the Board of Governors for six or seven years, and there had only been one other woman on the Board of Governors at that time. Ed Towers invited me. By that time, women were being pretty much treated equally. There just weren't that many around who were ready to move in, or had the experience and exposure to be in a position to take leadership roles. They were pretty experimental in the field.

Q: Did your colleagues address the issue, currently very hot in the women's community, of private clubs and discrimination by private clubs against women and other minorities?

GUPTA: No, those weren't issues at all.

Q: When I look at your résumé and consider your really outstanding legal career, I think that if you had been a man and interested, you would have been a judge. Is that something that interested you, or something that was possible for you?

GUPTA: I really never wanted to be a judge. The one thing I don't think I'd like is to punch a time clock, which judges have to do, and account for the amount of work they have to do. It's more interesting to be independent. If I hadn't been independent, I couldn't have had all the experiences I've had at the Legislature, and on the various boards and commissions I've served on. I've had a lot of freedom to do these things because of being in independent, private practice. We sort of have an expression, that we practice just enough law to support our hobbies, and we're not trying to get rich, so we don't count the hours that you have to when you're working for somebody else.

Q: Ruth, did you have any children?

GUPTA: No.

Q: Was that a decision based partly on the practice?

GUPTA: It just worked out that way.

Q: That's something that I'm finding takes a great deal of time. I would like to get into your activities with the State Bar. Could you describe your activities with the State Bar of California?

GUPTA: I think my first committee assignment was on the Family Law Committee that I served on for three years. I had attended the Conference of Delegates, almost every year since about 1951 or '52, so I'd always been interested in the activities of the Bar and the Conference. And because of my legislative activities with Business and Professional Women, and because of my activities with the Conference of Delegates Executive Committee, I got to working fairly closely with the Board of Governors, appearing at most of their meetings on behalf of the Conference Executive Committee, and then at a time when the State Bar's legislative advocate resigned to take another job, I served as a part time legislative advocate for the State Bar. And it was after that that I decided to run for the Board of Governors, and was elected unopposed, fortunately.

Q: How were you appointed to the [Conference of Delegates] Executive Committee?

GUPTA: The Executive Committee is elected by the districts. I was the candidate from District Four, which is in San Francisco.

Q: Had you served on the Resolutions Committee before that?

GUPTA: No, I hadn't.

Q: Was that unusual at that time? I know now most of the people come from the Resolutions Committee to the Executive Committee.

GUPTA: Yes, I think it was unusual.

Q: What was it like to chair that conference? I was there, and was really proud of how you did. It was really exceptional. I'd been to a few conferences before then, and it was really very special to watch you in action.

GUPTA: Thank you. I couldn't have done it if I hadn't had my experience of women's organizations, and specifically Business and Professional Women, where I presided over some pretty tough situations, and learned my parliamentary law, and a sense of competence. I really enjoyed it. It was very challenging. I'd seen some top people preside at prior conferences and always admired them, and I guess without realizing it, I probably aspired to it for a long time.

Q: Was it particularly fun to have your husband be one of the delegation chairs and to have to control him as far as the proceedings?

GUPTA: I remember, I think I ruled him out of order twice. One time, he started to speak without giving his name, and I asked him to state his name, and he said, "The same as yours, Madam Chair."

Q: I recall that. Are there any other things you want to do in the legal profession at this time?

GUPTA: I've been attending the meetings of the International Bar Association; I'm on the House of Delegates of the American Bar [Association]. The American Bar is about where the California Bar was twenty or thirty years ago. There are very few women in positions of power in the American Bar, and they are just starting to get there.

Q: When you were on the State Bar Board of Governors, what were the issues that the Governors were addressing for those years?

GUPTA: They were mostly administrative problems of the usual crunch of not having enough money to do all the kinds of things that we wanted to do. Specialization was a big issue. I had opposed specialization. In our third year on the Board, Dale Hanst appointed me chair of the Committee of Professional Standards which dealt with specialization and I assured him that even though I lost out on the vote, that in reality I wanted to make it a good program as much as possible. That was quite a challenge. Also mandatory legal education was an issue, and there was legislation pending. I also opposed that and was successful in getting that headed off for the time being, convincing the author of the legislation that it didn't guarantee competence and that there were better ways to guarantee competence, which we all agreed was the objective.

Q: I know that many women in the state were hoping that you would be the first woman president of the State Bar. What led to your decision regarding running for the presidency?

GUPTA: Mainly, I didn't have the votes.

Q: And how did you determine that?

GUPTA: The person who was elected president had been lining up his votes well in advance and I had not. He apparently had them all convinced that he was prepared to do the job. The fact that I was virtually a sole practitioner, at least in a small office, meant that I might not have the same amount of time to devote as someone coming from a large office. The fact that the president would, in effect, have to take off a year to devote to the State Bar may have had something to do with it. Although in the following year Burke Critchfield was elected president, and he was a sole practitioner and he proved that it could be done.

Q: Maybe the time just wasn't ripe. Have you been active in any groups we haven't discussed yet? You have such an extensive résumé. I'd like you to look at it and describe some of the activities that we haven't discussed directly.

GUPTA: Oh, yes. I was on the Constitution Revision Commission, which was a very interesting assignment, appointed by the Legislature, to make proposals for revision of the State Constitution. That was quite a blue ribbon commission — we worked for almost ten years, proposing various changes which were taken to the voters.

When I was appointed by the secretary of state, March Fong Eu, to the State Board of Control, I was the only woman ever to serve on that. That was a three-person board, composed of the state controller, the state director of General Services, and a public member. I was appointed by the governor on that one, not March Fong Eu. And I was also removed by the governor. The appointment was at the pleasure of the governor, and it no longer pleased him when I voted for a per diem raise for state employees when they travel. The governor didn't like that, and removed me. After that, the Legislature then changed that term to be a term appointment, rather than serving at the pleasure of the governor. March Fong Eu appointed me to the Fair Political Practices Commission. I served on that for a while. I had to resign that when I became a member of the Board of Governors of the State Bar because that was a conflict of interest.

I was on the advisory board of the California Highway Patrol. When the issue came up regarding the hiring of women officers, women's organizations such as NOW [National Organization for Women] and others had filed a lawsuit to compel the Highway Patrol to hire women. The Patrol was very dead set against it. So the Legislature appointed a committee. It was composed of both men and women who worked for a year, developing a good deal of research. Judge Joan Dempsey Klein chaired that committee. There was a particular group who were picked at first, and we monitored how they managed in all the various tests that they had to go through in the training school and their performance on the job.

Then the Equal Rights Amendment became an issue, and I was lobbying for it as a professional. At that time we got California to ratify the Equal Rights Amendment to the U.S. Constitution, and the Legislature then appointed an advisory committee to go over various codes of the State of California to eliminate the references to discrimination on the basis of sex. In other words, eliminate the sexist language, take out the "he" and "him" and so forth — change all those words so they were non-sexist. Yes, I was on that committee. It was composed of legislators and lay people.

I was president of the San Francisco Council of District Merchants' Associations. Here in the Marina District there's a Merchants' Association as there is in each of the various some twelve or so districts in the city. The local merchants were having problems trying to get their point of view over at City Hall at the Board of Supervisors, often coming up against the

Chamber of Commerce in various issues that affected the small merchant. So I was instrumental in helping to organize the Council of all the various local merchants' associations throughout the city, and we got to be a fairly strong voice in City Hall representing small business. So I served on that and I still am a delegate to that, but I served as president for one year.

I was also president of the Northern California Service League, which was an organization that was organized by Justice [Raymond] Peters to help county jail inmates, and we did a lot of work trying to get educational opportunities and rehabilitative opportunities for the county jail inmates. We studied the conditions of the jail and were instrumental in getting a change in the person elected sheriff of the City and County of San Francisco because of the way the jail had been run at that time.

Mayor [Dianne] Feinstein appointed me to the Parking Authority of the City and County of San Francisco. I guess I was the only woman who had ever served on that also. That was an outgrowth of my work with the District Merchants' Associations.

I also served one year as secretary of the Alumni Association of Hastings, and in 1981 I was named Alumnus of the Year from the Alumni Association.

Q: I know that many of the lawyers in California look up to you as a role model. Who were your role models as a lawyer?

GUPTA: The woman that I worked for, that I mentioned, is a lawyer — Hazel Harvey. She had gone to night school while she worked. She was the purchasing agent and personnel director, and I worked for her for a number of years. She was a role model for me, although she was not a practicing lawyer. Many of the lawyers I had gotten acquainted with at Queen's Bench had been very helpful to me as mentors in many ways. I can't mention anyone particularly because there were any number of them who were very helpful.

Q: Can you think of any advice you'd like to give young women who are thinking of law as a possible profession?

GUPTA: I think it's a marvelous profession for women, because I think a woman's sensitivity makes her particularly capable of working with people when they are in a time of need and have problems. I think we have to be careful not to overemphasize the fact that we are women. We are lawyers,

whether we are male or female. And I think that most of the women who are practicing now are very professional. I am very proud of the way they conduct themselves. Fresh in my memory is the recent Conference of Delegates that took place in Los Angeles. I think the women who spoke out on the floor were just outstanding, the way they handled themselves. I was thinking back to thirty years ago, when I first started going to these conferences. Very few women dared to speak on the floor and when they did, they had none of the same professional attitude that the women do now. I think it is really gratifying to see what has happened.

Q: What direction would you like the State Bar to take?

GUPTA: First, to survive. I think the integrated Bar may very well be on its way out and I think it would be a terrible mistake, because the Bar could never accomplish the things that it does if it didn't have the financial support of all the lawyers. I think lawyers have a professional obligation to serve the general public. A great many lawyers who practice law take no part in activities at all in the profession and spend all their time just earning a living. I think it's unfortunate if the integrated bar goes down the drain because of what the Legislature's attitude is these days. A voluntary bar in no way could accomplish the things we've done. We'd end up with a plaintiffs' bar and a defense bar and a this bar and a that bar and we wouldn't have the cohesiveness that we were able to get through the State Bar, and in particular the Conference of Delegates, where the various local bar associations can get together. The small bars would be just left out and the whole thing would be dominated by the large county bars that are very active and well organized now. So I hope that the State Bar is able to survive this onslaught that the Legislature seems to be after the Bar, trying to put them down.

Q: With your experience as a lobbyist, do you have any advice or tactics to use in this?

GUPTA: I think lawyers have to get more political and better acquainted with members of the Legislature. I think they should take part in political campaigns so that when they pick up the phone to call a legislator, the legislator knows who they are and will feel somewhat obligated to them for possibly having some influence on a certain number of voters. It's not just the financial contributions that legislators need; they also need the bodies

and names of people who will be helpful. And if we were more active politically as individuals, not as an organized Bar, but as individuals, I think we would have more respect in the eyes of the legislators.

Q: Looking back at your career, is there anything you wish you'd done differently?

GUPTA: I probably wouldn't do anything differently than I did, because every move that you make seems to be brought on in part by your own volition, and part on where you happen to be at the time. Opportunities come up; you either take advantage of them or you don't. I would like to have been president of the State Bar, but the timing was not right. That's just one of those things. I know there will be a woman president very soon, because women are getting there and that's great. As far as different decisions I would have made, I can't think of any.

Q: Is there anything you'd like to add?

GUPTA: Just that I'm proud to have been a lawyer and to have been a part of what's happening in the almost forty years now. I look forward to continued improvement in the status of women because of the quality of the women who are coming up and taking an active leadership role. I'm very proud that we're going to have another woman chair of the Conference of Delegates next year. To me, that's a tribute to what's happened and it's very exciting news.

Q: Thank you again for taking your time. With all you have to do, we really appreciate the time you've taken this afternoon.

GUPTA: Thank you. It's been a real pleasure.

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# ORAL HISTORY

# SHARP WHITMORE

(1918–2001)

SHARP WHITMORE
(1918–2001)

*Oral History of*

# SHARP WHITMORE

(1918–2001)

## EDITOR'S NOTE

The oral history of J. Sharp Whitmore is one of four oral histories conducted by the former California State Bar Committee on History of Law in California in 1987. These were the final oral histories conducted by the committee, and they are published for the first time in the present volume of *California Legal History* (vol. 6, 2011). He was interviewed by committee member Raymond R. Roberts on January 9, 1987.

The oral history has been reedited for publication. Citations have been verified or provided, and the spelling of names has been corrected wherever possible. Explanatory notations in [square brackets] have been added by the editor. The sound recording and original transcription are available at The Bancroft Library, UC Berkeley. The oral history is published by permission of the State Bar of California.

Whitmore was a senior partner at Gibson, Dunn & Crutcher, a member of the State Bar Board of Governors, president of the Los Angeles County Bar Association, and County Bar delegate to the ABA Board of Governors. Two of his fellow partners at Gibson, Dunn agreed to prepare the brief reminiscence of Whitmore that appears below.

— SELMA MOIDEL SMITH

# SHARP WHITMORE

KENNETH W. ANDERSON AND WILLARD Z. CARR

Strikingly and elegantly handsome in appearance, with a mellifluous baritone voice. One of our colleagues nicknamed his voice the "golden fog." Never has a person looked and acted more in consonance with his name — Sharp. His influence in shaping the labor law environment in Southern California, particularly in the region's most important economic activity at the time — the aerospace industry — was enormous. In an often contentious field, he always had the respect of the "other side," a value he passed on to all of those who worked in the same area.

When Bill Carr came to Gibson, Dunn & Crutcher in the early 1950s, he joined an established Labor Department. Two of the stalwarts of the Department were J. Sharp Whitmore and William French Smith. Each had the distinction of having served as an officer in the U.S. Navy during the war and joining the firm in early 1946. One of the most appealing elements of Labor Law at that time was the involvement in real time issues affecting the dynamic growth of a postwar economy with all of its messy human aspects. Carr particularly remembers Sharp including the younger lawyers in the dynamics of the practice, meeting with clients, on the picket line, in negotiations and NLRB proceedings as well in court. We feel greatly indebted to Sharp for the substantive start he gave us in our practice.

Moreover, it was not all work and no play. Gibson, Dunn used to send a couple of associates each year to the annual meeting of the State Bar. In one earlier year, both Sharp and Bill Smith were sent. Each, of course, was given a modest personal expense account for the trip and meeting. At the end, Sharp found himself with a tremendous bar tab. The future U.S. attorney general, Bill Smith, had virtually no tab, having signed Sharp's name for nearly all libations at the meeting, including those consumed by partners who were also attending the convention.

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*Oral History of*

# SHARP WHITMORE

## (1918 – 2001)

Q: This is January 9, 1987. I am in the office of Sharp Whitmore of Gibson, Dunn & Crutcher to get his reminiscence and views on his involvement with the State Bar and law in California. Sharp, I'd like you to start with a little bit of your background of where you were born and when. if that's not too embarrassing.

WHITMORE: Well, I was born in Price. Utah. I came with my family to California in 1925 and after a few months in Berkeley moved to Piedmont. I went to grammar school in Oakland, California, high school in Piedmont, California, undergraduate school at Stanford University in Palo Alto and law school at the University of California, Berkeley, Boalt Hall.

Q: When did you go to Stanford?

WHITMORE: I graduated with the class of 1939.

Q: And did you immediately go to Boalt Hall?

WHITMORE: I immediately went to USC law school which I attended for one year.

Q: Why?

WHITMORE: Because I wasn't sure at that stage that I wanted to be a lawyer, and I had a job with the Shell Oil Company, and I knew relatively soon after entering law school that this was what I wanted to do, and the tuition at Boalt Hall was $17 a semester, so I quickly transferred to Boalt Hall and completed my legal education there.

Q: Were any members of your family involved in law?

WHITMORE: No members of my family were involved in law or ever have been, to my knowledge.

Q: So your firsthand adventure into law or with law was when you went to law school.

WHITMORE: Yes, I think I had met one lawyer. I knew no judges. I think I had met one lawyer before I went to law school.

Q: In '39 you started at USC and lasted there until the Spring of '40 — is that correct?

WHITMORE: Yes, and then in the Fall of '40 went to Berkeley and continued there until March of 1942. I would have continued until the end of May of 1942, but World War II began in December of 1941, and I was very lucky in having at Boalt Hall two others who had commissions at the time, were in the same boat as I, and who had orders to report for active duty in March of 1942. I also had three professors who were very understanding of our situation, who stayed over Christmas vacation in 1941 and gave us our classes for our last semester over Christmas vacation and up until the 6th or 7th of March of 1942, when each of the three of us took our final examinations and completed our legal education and got our degrees and were able to report for active duty at the time our orders prescribed.

Q: Do you remember any of your professors at Boalt?

WHITMORE: I certainly do. Max Radin, for one, was certainly one of my favorites. He was a very approachable professor. Professor [Henry Winthrop] Ballantine.

Q: Let's stay with Max a minute. Do you remember the occasion when Max Radin was nominated by Governor Olson to be on the Supreme Court?

WHITMORE: That occurred while I was at USC Law School.

Q: Oh, right. So it was past history by the time you went to Boalt.

WHITMORE: It was past, and because it was past, I didn't get an opportunity to get to know Roger Traynor then, because it was Roger Traynor, as you remember, who was nominated when Max Radin's name did not clear.

Q: And both of them were teaching at Boalt?

WHITMORE: They both were professors at Boalt the year before I went there, and of course, Roger Traynor was gone when I entered.

Q: What did Max teach?

WHITMORE: I took a course in Jurisprudence from him. He didn't teach any first-year courses, to my knowledge. He taught Jurisprudence, Roman Law, and I'm sure other courses — but Jurisprudence was the only course I took from him.

Q: You mentioned Ballantine?

WHITMORE: Professor Ballantine, in Corporations, yes.

Q: Before he wrote the book [*California Corporation Laws*, 1932] or after?

WHITMORE: After he wrote the book. He was a distinguished and recognized authority on corporation law, particularly California corporation law, when I took the corporation law course from him at Boalt Hall.

Q: Any other professors that you remember?

WHITMORE: "Captain Kidd" [Alexander Marsden Kidd] was the acting dean my last year. He was a Commercial Law, Bills and Notes professor. To a greater extent than anybody else at the law school, he was the Professor Kingsfield type — a most interesting and pleasant, but somewhat unapproachable, individual. Professor [William Warren] Ferrier was the Property professor. I remember Professor Ferrier well. I admired him a great deal, although he was a little more aloof than some of the others I've talked about. Barbara Armstrong.

Q: Before she wrote the book [*California Family Laws*, 1953]?

WHITMORE: After she worked on the Social Security Act, and I guess, before she wrote the book, but her field was family law at that time — at least that was her primary field. She was very approachable and I thought the world of her. She, I thought, was a fine professor.

Q: Did you actually graduate in 1942? Were you given a diploma then?

WHITMORE: By mail. I was at Harvard Business School, taking my Navy Supply Corps Training at the time my class graduated. But I had completed my finals in early March. And so, yes, I got my degree with my class.

Q: And what was your frame of mind so far as taking the bar exam in 1942?

WHITMORE: Well, I knew that I wouldn't be able to take the bar examination with my class. I was terribly occupied at Harvard with my Navy training, and then in June or July of 1942, I reported aboard my first ship, The USS Gridley, a destroyer. And once I was aboard that ship, we immediately went to the South Pacific, and I thought only intermittently about the bar examination and how nice it would have been, had I been able to take it. I did take the bar, finally, after completing my tour on the Gridley. I took my examination in the fall of 1944, about five weeks after getting back to the United States. I got thirty days' leave. I spent virtually every one of those days in the Boalt Hall library, because I was reporting to the Mare Island Navy Yard for duty next. And I took the examination — a free ride, really, because I had no idea that the war would be over in a year, or five years, or how soon, if at all, I'd be able to practice law. But I took the examination and passed it in 1944, some considerable time after I'd started law school.

Q: Do you remember when it was that you heard of the Legislature in California allowing law students whose study was interrupted, to be passed on motion?

WHITMORE: The Waters Enabling Act? Yes, I'd heard about that . . . . Certainly, I didn't hear about it until after I'd taken the bar examination. I was stationed on Midway Island for the Navy when I did hear about it. And I had heard by then, of course, that I had passed the examination, so it didn't make as great an impression on me as otherwise it might have, until I reported, after World War II, to Gibson, Dunn. I had worked two summers at Gibson, Dunn before World War II. When I reported aboard to begin my legal practice. I learned that Homer Crotty, who had been chairman of the Committee of Bar Examiners during a portion of World War II, felt so strongly about not hiring people who had not passed the bar examination, that to the best of my knowledge, the firm during that period, even as a result of the Enabling Act to which you referred, never

did hire anybody who didn't pass the bar examination. So I felt lucky, of course, that I had taken it.

Q: I know one of your colleagues from many, many years ago — [Charles] DeSantis — actually took his bar exam aboard ship during the war. The only case I know where somebody took it outside the jurisdiction of California.

WHITMORE: I didn't know that. Chuck was one of five of us who started with the firm after World War II. Chuck DeSantis had gone to Loyola Law School, Henry Lippitt from Harvard, Bill Smith — William French Smith — from Harvard, Julian von Kalinowski, from Virginia, and I started as soon as the war was over.

Q: Some time prior to that, and after you started law school, you got married, didn't you?

WHITMORE: I got married after I finished my first year at USC Law School and before I moved up to Berkeley to attend Boalt Hall. In August of 1940 I got married. My wife, then Frances Dorr, was at Stanford with me — two years behind me. She attended seven quarters, dropped out of school, and we were married. So I spent my last two years of law school married. And, incidentally, the situation was so different then than it was when my son, who went to Stanford Law School, married at the end of his first year of law school. Half of his class were married. When I was at Boalt Hall, Franny and I were one of two married couples in a class of 120, during my second year of law school. The other married couple was Dick and Charlotte Hayden. You know Dick Hayden — he was a superior court judge in Los Angeles County. But that second year of law school, Dick and I were the only married members of the class. No, I take that back. We had one woman in the class — Doris Brin Marasee Walker and she was married. So I guess there were three of us instead of two — not half the class, as I guess is the situation now.

Q: Why did you choose Boalt, other than economics, in preference of Stanford, or continuing at USC?

WHITMORE: Well. I didn't know that I was going to go to law school when I got out of school. My undergraduate grades were such that my admission to Stanford Law School was not something that was assured. I didn't apply.

I might have been admitted; I might not have been admitted. I recall talking to Sam Haskins at the firm, after I had finished my first year of law school. I had done rather well at USC Law School, and I was talking to Sam Haskins — he was a member of the Board of Regents for the University of California. He asked if I had any interest in going to Boalt Hall. And I, for a number of reasons, only one of which was financial — I was raised in the San Francisco Bay area and I thought very highly of Boalt — I indicated my interest and he arranged for me to make application, and I was admitted during the summer of 1940.

Q: You said that for two of the summers that you were in law school, you worked at Gibson, Dunn & Crutcher. How did that come about?

WHITMORE: I had met John Cobb Macfarland, a senior partner at Gibson, Dunn, while I was at Stanford. And he asked me on one occasion, if I was going to law school, to stop by and see how a large law firm operated, that he'd enjoy introducing me around.

Q: What was a large law firm at that time?

WHITMORE: There were three law firms — one with 20 lawyers, one with 21 lawyers, one with 22 lawyers, as I remember, in Los Angeles. One was O'Melveny and Myers, one was Gibson, Dunn & Crutcher. The other was Loeb and Loeb. A large law firm then was a firm of between 20 and 22 lawyers.

Q: How did that compare with some of the firms in San Francisco?

WHITMORE: I don't know that I had knowledge at that time of the size in San Francisco. I'd be surprised if Pillsbury, Madison & Sutro was not larger than those three law firms at that time, although I don't have any specific recollection of that. I recall what was a very humorous episode to me, when I interviewed at Gibson, Dunn in the summer of 1940, or perhaps it was the Christmas before that — it was while I was in school. In any event, at Mr. Macfarland's invitation, I came down to the Banks Huntley Building in Los Angeles, where the firm was then housed, and I got in the elevator and I went up ten floors, to where the senior partners were officed, asked Miss Alexander, who was the receptionist — she'd been with the firm since 1902, or thereabouts — if she'd announce me to Mr. Macfarland. She did, Mr. Macfarland came out, we talked for a few minutes. He took me around

and introduced me to Mr. Gibson, Mr. Haskins, Mr. Crotty and perhaps several others. We went back into Mr. Macfarland's office. I thanked him very much. I left, I got in the elevator, I went down ten floors, found myself on Spring Street, and realized I hadn't asked the question I came to ask. So I got back into the elevator and went back up ten floors, and asked Miss Alexander to announce me again to Mr. Macfarland. And I went in and I said, "Mr. Macfarland, I forgot to ask you: Have you got a job for me this summer?" He laughed, excused himself, went around and talked to the lawyers with whom I had spent a few minutes earlier, came back and in substance said, "Yes, when can you start?" That was my introduction to Gibson, Dunn & Crutcher. Oh, there's one additional aftermath. I thanked him, indicated that I would come to work the first of June or thereabouts, got in the elevator, went down ten floors, found myself on Spring Street — without a nickel, without a wallet — and my dad's car in a parking lot across the street. So, I got back in the elevator, went up ten floors, had Miss Alexander announce me to Mr. Macfarland, I borrowed a dollar — or maybe it was only fifty cents, I've forgotten — got in the elevator, went down, got in my father's car and drove home. That was my introduction to Gibson, Dunn.

Q: I trust that sometime or other you repaid the money?

WHITMORE: I have asked myself that question many times, and I can assure you, I assume I did, but I'm not entirely certain.

Q: In your summer work at that time, there were no such things, or at least no title of paralegals, were there?

WHITMORE: No.

Q: What type of work did you do?

WHITMORE: I was housed in the library of the firm, along with a number of other lawyers — Fred Sturdy, George Jagels, Van Nivens, Walter Ely and George Whitney — and we did legal research for other associates and for partners in the firm.

Q: You did that type of work during the two summers?

WHITMORE: Yes, I did.

Q: And then, sometime or other, the war was over. Let's briefly discuss where you were in the South Pacific.

WHITMORE: Well, I'd spent over a year — I've forgotten exactly how long — on the USS Gridley in the South Pacific. It was ordered back to San Diego sometime in the fall, I would guess, or maybe the early winter of 1943. I was relieved of duty on the Gridley and reassigned to Mare Island Navy Yard. I was in Mare Island Navy Yard until December of 1944, when I was sent to Midway Island to the submarine base, and I spent the rest of the war there in that capacity. When the war was over, I got as far as Pearl Harbor. Honolulu, and found a tremendous traffic jam, and it took me maybe six weeks to get transportation from Honolulu, Pearl Harbor, back to California. Very soon after arriving in California I retrieved my wife who, with my son, was living with my wife's mother in Washington, D.C. We returned to California, and I started at Gibson, Dunn in January of 1946 as a lawyer.

Q: And at that time you had a son.

WHITMORE: I had a son who was born in October of 1942, who is now practicing in Palo Alto, California, with the firm of Whitmore, Kay, Stevens. It's a firm of, roughly, twenty lawyers that specializes totally in public sector labor law work.

Q: Now, I'll jump the gun a little bit and have to ask you about your daughter.

WHITMORE: My daughter is now thirty-two years old. She has a bachelor's degree in Psychology, a master's degree in Education, teaching the deaf. She has completed her first semester at law school, at Stetson University in St. Petersburg, Florida. And the reason she is there is that her husband, a college physics professor, teaches in St. Petersburg.

Q: So there is very little chance of the three of you practicing together in one firm.

WHITMORE: Well, there is absolutely none because I have retired from practice. Gibson, Dunn has a total no-nepotism rule, and my son loves Palo Alto, and my guess is he's going to stay with the firm he founded up there, and stay in Palo Alto.

Q: Now let's go back for just a moment, and test your memory — and this is not a test in that sense of the word — but your familiarity with Gibson, Dunn & Crutcher leads me to ask you the reason or reasons why it became one of the largest law firms in Southern California when it did — I mean, prior to World War II.

WHITMORE: Well, it was a large law firm prior to World War II. Its substantial growth, of course, has been since World War II. The firm was formed in about 1903 as a result of a merger of two firms — Gibson, Bicknell & Trask [sic; Bicknell, Gibson & Trask], and the firm of Dunn & Crutcher — two firms that represented different interests of Mr. Huntington and his railroad and other interests. Mr. Huntington requested that the two firms merge and in 1903 they did. He owned national railroad interests as well as interests in the Pacific Electric Line and Inter-Urban Railway Line in and around Los Angeles, and I believe at one time the Los Angeles Railway. When I joined the firm, we had what we called the Railway Trial Department. There were probably eight or ten lawyers who did very little other than represent the streetcar system in personal injury litigation — defense litigation. So I think a good part of the growth of the firm can be attributed to the interests of Mr. Huntington, but I think we were just very fortunate in getting some excellent litigators, like Norman Sterry and Henry Prince, and excellent corporate lawyers like James A. Gibson and Homer Crotty and Sam Haskins, and a very fine probate lawyer. Elmo Conley — lawyers who were what today we call rainmakers. Because of their abilities, they did develop substantial practices as the result of recommendations of their clients to their clients' friends.

Q: I remember reading that Gibson, Dunn & Crutcher, or at least the partners in Gibson, Dunn & Crutcher, played a major role in the reorganization of Richfield Petroleum Company. Do you remember some of the stories you heard about oil companies in Southern California?

WHITMORE: Well, I do remember hearing about Richfield Oil receivership, which the firm handled. We represented Mr. McDuffy, who was the receiver. And I know that I remember hearing stories about the part played by Herbert Sturdy, another of our very able corporate lawyers, and Homer Crotty and Norman Sterry, and I'm sure, others in the firm. That was, however, in the early thirties. I first showed my head in Gibson, Dunn in 1940, so I was never involved in the Richfield receivership, but I'd heard a good bit about it from the firm and also from Mr. McDuffy, the receiver, who I met through his son, who was a classmate of mine in undergraduate school.

Q: Well, subsequently, Richfield became one of the clients of Gibson, Dunn & Crutcher.

WHITMORE: Yes, I'm sure it did, but not to the extent of our being primary outside counsel for them. My guess is we're still doing some work for Richfield, but it has a substantial-sized legal department, as it has for some years, as I'm sure you can guess.

Q: You mentioned a name that brings back a lot of memories to some of the trial people in Los Angeles — Norm Sterry. You mentioned that he was one of the outstanding trial lawyers in Los Angeles, but he was noted for things other than his ability inside a courtroom.

WHITMORE: Well, he was our big, old, gruff bear. He was one of the most conscientious case preparers I've ever run across. He kept ledgers, and everything he read and every note he made, he had in a bound ledger. Norman was a very difficult taskmaster when he assigned a research project to you.

Q: Would he allow you to digest a case, or did he just want the name of the case and would read it himself?

WHITMORE: He wanted you to digest the case and to summarize it, and he read the whole of every case ever cited to him in any memorandum that he received from any lawyer in the firm.

Q: And, at least immediately after World War II, he was probably the dean of trial lawyers in Los Angeles. Couldn't you characterize him like that?

WHITMORE: Oh, I would certainly characterize him that way. He and Irving Walker — there were two or three of them, and certainly Norman was one of them — were, I think, generally considered to be the deans of trial lawyers.

Q: I've heard stories that sometimes when Norm Sterry was involved in a lawsuit with co-counsel, they used to send notes to each other, rather than to try and socialize in the hallway or have lunch.

WHITMORE: Norman was, by nature, all business. There was relatively little socializing in Norman's nature. He also had a personality that made it difficult for him to commend or compliment young lawyers who did work for him. I remember I never did get a compliment from him in all of the years I was at Gibson, Dunn. But I remember, also, he knew my wife and her family prior to my marrying my wife. And we, over the course of my early years at Gibson, Dunn, always went to one Christmas party in

common. Again, Norman would see me, and would be very civil, very nice, say hello — probably wouldn't remember my name — but he would get my wife, take her over in a corner and tell her what a good job I was doing. But he wouldn't tell me that.

Q: Let me go back then, on another tack. Just before World War II, in the thirties, there were a lot of labor problems in Southern California. And the L.A. Railway was involved in some of those. There was at least one major strike of the railways. Do you remember when that was?

WHITMORE: Well, I wasn't at the firm at that time, and this is the lore of J. Stuart Neary, the first lawyer in the firm to perform labor work, and the senior member of the firm under whom I began the practice of labor law. I believe it was after Roosevelt became president, and before the Wagner Act was passed in 1935. In other words, during the one- or two-year period that the N.R.A. was in effect. There was a strike at the L.A. Railway. Stuart Neary, a marvelous lawyer and a very gregarious guy, born and educated in Head, South Dakota, was at the firm and through Mr. Haskins, who I believe was then president of the Los Angeles Railway, was asked to handle, as the lawyer, the labor matters for the L.A. Railway. There is a story — I certainly was not there to see it, and I cannot certify it to be true, though I believe it to be true — that after the strike had been underway for some time, without substantial prospects of early settlement, the railway decided it would begin operations again from the railway headquarters at 12th and S. Broadway or thereabouts, up to the City Hall and back. The conductor on that first run of a streetcar up Broadway was J. Stuart Neary, who then weighed perhaps 300 pounds, had a shock of gray hair, was a very impressive and significant guy, who looked the part, as was the case, of being an ex-football player. Stuart had wires strung around the underpinnings of the streetcar — he stood in the motorman's spot, opened the front door with several steps between the street and the level of the streetcar, and if somebody was about to cause any trouble, his right foot was available to eject that person, I'm told, from the streetcar. And he got the name, then, of Slugger Neary. He was a very likable person, and I'm sure there was probably nobody, in years following that, who was more admired and better liked by union people and union representatives and their counsel in Southern California than Stuart. Stuart played football at Creighton

University, where he went to law school. He had a most unusual way, again, the lore of J. Stuart Neary — and I'm reasonably certain it's true. He worked his way through Creighton Law School by being freshman football coach.

Q: I've heard it said that J. Stuart Neary actually wrote the Blue Eagle Pact, or whatever they called the guidelines for the N.R.A., so far as street railway transportation for the whole United States. Is that correct?

WHITMORE: That could be so. I can't assert that it's so. I don't recall ever hearing Stuart, himself, refer to that.

Q: Now, going back to the time then that you joined the firm, after the war, what is your impression, or memory, so far as labor law and labor law firms in Southern California, or in the nation, for that matter.

WHITMORE: Well, there were relatively few labor lawyers, and all of them had begun their practice in that field after the passage of the Wagner Act in 1935. There were one or two management labor lawyers at the O'Melveny firm. There was Stuart Neary, Dave Evans, and Fred Field at Gibson, Dunn, practicing in that area when I returned to the firm in January 1946. I have no present recollection of any other management labor law practitioner in the Los Angeles, or Southern California area. I do have a recollection of a number of labor lawyers representing labor organizations, however, at that time.

Q: Who were some of the outstanding firms in that area?

WHITMORE: Well, I guess the one I saw most of was John Stevenson, who was attorney for the Teamster's Union. There were several lawyers at the firm of Margolis, McTernan & Tyre, who represented labor organizations. I had forgotten one management labor lawyer, who had been regional director of the National Labor Relations Board in Los Angeles. His name was Leonard Janofsky and he was practicing in the labor field at the end of World War II. Now, the other management, the other union lawyers — I remember a lawyer named Lou Wolf, who represented the United Auto Workers Union and several others. I remember one in San Francisco, who I had occasion to deal with on a number of occasions, named Mathew Tobriner, who subsequently went on the California Court of Appeal and the California Supreme Court. But I limited myself to the period immediately after World War II now. I'm sure there are others I have not thought of, but those are all, at the moment, that come to my mind.

Q: Going back then to when you joined Gibson, Dunn & Crutcher, after the war — you said that there were a number of lawyers engaged in defense work for the railway. And that was, I presume, personal injury and property damage.

WHITMORE: Yes.

Q: Was the firm, at that time, departmentalized? Was there a tendency for lawyers to specialize?

WHITMORE: Yes. I think not to the extent that it is presently departmentalized, if that's the proper word, but at that time all of the lawyers that represented the streetcar company were on the eighth floor of the Banks Huntley Building. With the possible exception of Max Eddy Utt, all of the work done by the lawyers on the eighth floor was streetcar defense work. There were perhaps eight or ten of them — I don't remember. Max Utt did streetcar defense work, but in addition he did do some work with the City Council in connection with municipal ordinances and city government. Other than that, departmentalization was not terribly formal. There were corporate lawyers. There were probate lawyers. There were the three labor lawyers that I mentioned. We then had no tax lawyers at the firm until Bert Lewis came at the end of World War II. He was the first tax lawyer we had at the firm. And to the extent that their practice was separate, there was departmentalization, although every lawyer worked far more closely with every other lawyer than is possible in a firm the size of Gibson, Dunn today.

Q: In the trial department, those of you who represented the railway — did you handle both municipal and superior court cases?

WHITMORE: Well, those of us who were new — like I was at the end of World War II — handled municipal court cases. The answer to your question is yes. The firm handled both, although there were relatively few of us who handled municipal court cases, and it was perhaps six or eight months with the firm during which I tried municipal court cases before I was given a superior court case to try.

Q: Do you remember the jurisdictional limitation in municipal court at that time?

WHITMORE: My recollection was that it was $2,000.

Q: Do you remember if on any occasion you actually tried jury cases in municipal court?

WHITMORE: I tried jury cases against some of Los Angeles's fine plaintiff lawyers in the municipal court.

Q: Do you remember any of them?

WHITMORE: I remember trying one municipal court case to a jury against Lowell Dryden, who was then certainly one of Los Angeles's most significant plaintiff trial lawyers and others, but that's the one that comes to my mind right off.

Q: It's hard to realize or appreciate the fact that there were jury trials in a jurisdictional amount of less than $2,000.

WHITMORE: That's right, there were. And there were enough involving the streetcar company to keep three, perhaps four, lawyers quite busy.

Q: Do you remember any of your colleagues in your junior trial department when you first started?

WHITMORE: I remember Ernie Zack. Ernie came at, I think, just before the end of World War II, after having spent some time in the FBI. He came to work with Gibson, Dunn. My recollection is that he was there when I got there at the end of the war. Ernie and I shared an office and we did very little other than try municipal court cases — jury and nonjury — involving the streetcar company. John Binkley is another young lawyer, a fine trial lawyer, who tried streetcar cases with Ernie and me. John did that for several years with Gibson, Dunn, and then together with Bill Gray, now a senior federal district judge, and Morris Pfaelzer, now deceased — the three of them formed the firm of Gray, Binkley and Pfaelzer, Pete being the corporate or business lawyer and John Binkley being a labor lawyer and litigator and Bill Gray being primarily a litigator.

Q: Now, getting back then to the manner of conducting a trial in that era, were you and all law firms essentially on a five-day week then, or was it a little bit different than it is today?

WHITMORE: Well, during the two summers I spent with the firm prior to World War II and for a number of years after — I returned in 1946 — the normal schedule at Gibson, Dunn & Crutcher was the five weekdays plus

Saturday morning until 1:00 P.M. But my recollection is that all lawyers didn't work every Saturday. We worked most Saturdays, but periodically took off a Saturday morning.

Q: The courts weren't open on Saturday, so what was the primary purpose of being open or having an office open on Saturday?

WHITMORE: Case preparation.

Q: I presume, then, that a lot of depositions were handled on Saturday?

WHITMORE: I don't have the recollection that any great number of depositions were scheduled on Saturday. My recollection of that period, in the time I spent, was doing research for other lawyers, or preparing my own case for that next Monday morning if I knew about it on Saturday. Occasions did arise then, as far as municipal court cases are concerned, where a lawyer would be ill or for one reason or another a case was being called and the lawyer who had prepared the case was not available. I would be given a file at 8:00 in the morning by Philip Sterry, Norman's brother. Philip was in charge of the railway trial department. I'd be given a file at 8:00 and be told that the investigator would meet me in Division 1 with the witnesses. I would read the file, I would go up and spend what time there was waiting for my case to be called, talking to the investigator, reading written statements he'd taken and hopefully, spending some time talking to the witnesses who I would be calling. We don't operate that way now. We did operate that way then, but we had a lot of tools to help us. I remember being given, soon after I started trying municipal court cases, railway cases, a book that had citations for virtually every proposition that might arise in a streetcar case in the law of evidence or tort law that would be applicable to cases of that type. When I started trying superior court cases for the railway, I had available to me a second book, called a jury book, which gave me biographical and vital information on prospective jurors. So I had that information in front of me, to assist me, when selecting or challenging prospective jurors.

Q: How long did you stay in active trial work?

WHITMORE: The Taft-Hartley Act was passed in April of 1947. Bill Smith was approached by Stuart Neary at the same time that I was approached by Stuart Neary. Bill was doing corporate work; I was doing litigation. Stuart

had a very substantial overload of labor law work. Dave Evans had just left the firm to start his own.

Q: Incidentally, he continued to specialize in labor law after he formed his own firm.

WHITMORE: Yes, he did. Fred Field was doing less and less labor work and so Stuart needed help, and Bill Smith and I and John Binkley in about April of 1947, indicated to Stuart that we would be happy to help him with his temporary overload which never disappeared, incidentally, and entirely as a matter of choice, Bill and I stayed in the labor area.

Q: Tell me a little bit about Bill Smith.

WHITMORE: Well, Bill Smith joined the firm the same week as I did, in January of 1946. He had worked the summer of 1942 in the office as a clerk, prior to taking the bar examination in the fall of 1942. He had gone to Los Angeles High School where I understand he graduated first in his class. He then went to UCLA for his undergraduate training where, I understand, the same was true. He then went to Harvard Law School, graduating in the class of 1942, and he returned to Gibson, Dunn, after having spent that 1942 summer there, as he was released from active duty in the service. That's basically Bill's background.

Q: Tell me, then, about the transition, or rather, the development of what eventually became the labor law department.

WHITMORE: When Bill and I joined Stuart we, at that stage, thought we had a labor department. We three — plus John Binkley — we four — were it. And our workload, the amount of labor law work available to the firm continued to grow until now, I'm guessing, we have perhaps forty-five lawyers who practice.

Q: Essentially what did you do in the field of labor law? What were the nuts and bolts?

WHITMORE: Well, the bottom line, Ray, is that what we did in 1946 and for quite a number of years thereafter is really quite different from what labor lawyers at present are doing. Our time, in 1946, and for quite a few years after, was spent negotiating collective bargaining agreements, consulting with employers and preparing personnel policies and practices, trying cases — unfair labor practice cases or representation cases before the National

Labor Relations Board — handling litigation, whether injunction matters, contempt matters, or a variety of things, before state and federal courts, and handling arbitration cases under collective bargaining agreements for our clients. In addition, we counseled and worked with unorganized employers to assist them in connection with the personnel policies and practices. I think today the practice has changed a great deal. Considerably less time is spent in negotiating collective bargaining agreements. Basically, corporate personnel directors do most of this and they consult with lawyers by telephone or otherwise. Some collective bargaining agreements are still negotiated, however, by lawyers in the firm. The amount of unfair labor practice and representation case business has diminished substantially over what it was in the earlier days of the forties and the fifties and the sixties when a very substantial percentage of employers were unorganized or were in the process of being organized. Today, with class action, with Title VII of the Civil Rights Act, with our substantially expanded discovery procedures in the state, and under the federal rules, a considerably greater amount of time is spent by labor lawyers handling discrimination matters, handling class action lawsuits, preparing for complex, substantial, protracted, litigation. Far more time is spent doing that than was the case when I started practice. Other than Title VII of the Civil Rights Act, the recent development of the law with respect to termination at will or termination of employees — which results in an incredible amount of litigation — that was handled by arbitration or not handled at all. During the early days it was assumed an employer, absent a collective bargaining agreement providing otherwise, or an employment contract providing otherwise, had a right to terminate employees at will. And now so many terminations of organized or unorganized employers result in the courts. It's difficult for someone who has been away from it for a little while as I have to realize the extent of the practice in that area.

Q: Can you remember or pinpoint some of the difficult labor negotiations or strikes that were involved soon after World War II?

WHITMORE: When one does this, he tends to emphasize, because of his recollection and its limitations, his own activity. The most significant strike I recall was in the summer, fall and early winter of 1963, involving the employees of what was then known as North American Aviation, now Rockwell, Inc., at its plants in Southern California and Columbus, Ohio.

It was an 83-day strike. It involved virtually every aspect of the practice of labor law you can imagine — negotiation, litigation, substantial labor board activity, unfair labor practice cases, and even decertification petitions filed against the United Auto Workers at the company's plant in Columbus, Ohio, that involved me in Ohio for a substantial period of time. That was the largest in terms of thousands of people getting involved. The first very large case which I handled by myself — I remember a number of cases where substantial violence was involved. I remember developing a substantial distaste for representing employers with largely female working forces because my experience was strikes involving organized women were bitter, sometimes more violent than strikes involving a predominantly male work force.

Q: Were you involved in any of the Jergens matters?

WHITMORE: I was not. John Binkley and Stuart Neary, if my recollection was right, handled the bulk of Jergens matters. That was a client of Stuart's and not one that I have any recollection of being particularly close to.

Q: Any other cases or incidents or involvement that you had that you can recall at this time?

WHITMORE: Well, it's terribly hard to single any out. I remember scores of strikes — of my clients, of Bill Smith's clients, of Stuart's clients. I remember strikes at American Potash and Chemical Corporation, for example. I remember strike settlement negotiations. I remember an arbitration where I was a member of the arbitration board. The company, after an illegal or unauthorized strike, had terminated a number of employees who were largely responsible for the strike which was in violation of the agreement. And I remember spending many weeks in Trona, California, in connection with that strike.

Q: You don't go back there to vacation, do you?

WHITMORE: I have been there since I have become of counsel to my firm, but it surely is not what you would call a vacation, although it is certainly historically, geographically and geologically a very significant area. I thoroughly enjoyed the time I spent in Trona and I will enjoy my visits back there.

Q: The era beginning 1946, following World War II — is it fair to say that among the major law firms in Los Angeles, or California for that matter, that there were very, very few women lawyers?

WHITMORE: The first woman lawyer of whom I was aware was a woman named Helen Kemble who was a partner of Chuck Beardsley, who was then president of the State Bar. There had been a woman at Gibson, Dunn & Crutcher during World War II. I was not aware of any women lawyers at any other law firms other than Helen Kemble, with Chuck Beardsley and later with the firm of Beardsley, Hufstedler and Kemble. And the one who was at our firm during the war. I was not aware of any other women lawyers until well into the fifties.

Q: Did the acceptance, for instance, of women lawyers — was it a gradual process or does it seem precipitous so far as your observations?

WHITMORE: Well, it certainly was not precipitous. The lawyer who had been with our firm the longest, Marsha McLean Utley was hired because she was a truly outstanding person. She was editor-in-chief of the *UCLA Law Review* and clerked for Chief Justice Roger Traynor. I'm sure her work at Gibson, Dunn was very helpful in getting more women into the firm. She was accepted by her clients, she was a litigator, she has been a very, very successful practitioner. We, of course, now — I'll bet forty to forty-five percent of new lawyers we hire are women.

Q: But it's been a gradual process from Marsha's hire until today. And I presume that the reflection of this firm is a reflection of society as a whole at that time as far as hiring minorities of any kind.

WHITMORE: We like to think that we were involved in the forefront and hired women and minorities a little faster than most other firms. But yes, I would certainly say that what's happened since 1964 when Marsha was hired until today, our situation is reflective of what's happened in society and what's happened in the legal profession in Los Angeles and Southern California.

Q: In the ten or fifteen years that you were directly or involved in state court trial work and up until, say, 1964, do you remember any women trial lawyers?

WHITMORE: I remember the name of Gladys Towles Root, primarily or exclusively a criminal lawyer. I had no occasion to oppose her or to be involved in any professional dealings with her.[1]

[1] See, in this issue, Richard A. McFarlane, "The Lady in Purple: The Life and Legal Legacy of Gladys Towles Root."

Q: How about in the field of tort litigation. Do you remember of hearing of any woman lawyer in that era?

WHITMORE: I don't recall any at the moment. Can you think of some that might refresh my recollection?

Q: No, not at all. I had heard at the time that women were — even women lawyers — were reluctant to try jury trials because they felt there was a prejudice on the part of the jury against women lawyers because they were going into a man's field where they didn't belong.

WHITMORE: I do remember during that period after World War II a female superior court judge named Georgia Bullock, but I didn't ever appear before her. My recollection was that she spent her work largely in Adoption Court and matters involving juveniles, but since I had no dealings with her, I could be incorrect in that respect.

Q: Did you ever appear in front of May Lahey?

WHITMORE: Oh, that's another name I know. No, I never did appear before her. But I remember the name.

Q: I will gratuitously throw in that she's one of the finest judges that I have ever known.

WHITMORE: There was also a woman judge appointed sometime in the fifties named Ernestine Stahlhut who had formerly been an employee of the State Bar of California and I had known her in her State Bar capacity. I didn't ever appear before her, but I knew her during her period of time on the bench.

Q: Do you remember when you first were aware of the fact that a Black was hired by a major law firm?

WHITMORE: Well, let me digress just a moment, and say that I do remember quite well in the early fifties when the bylaws of the Los Angeles County Bar Association were changed.

Q: I want to come back to that in a minute. But I'm just talking about hiring practices now.

WHITMORE: I don't ever remember hearing of a black applicant for employment at our law firm or any law firm in Los Angeles until Sam Williams

was hired by Chuck Beardsley and Seth Hufstedler. And I can't tell you when that was, but my guess is that it was twenty-five years ago.

Q: Did you or do you remember any black law students at either USC or at Boalt Hall?

WHITMORE: When I was at Boalt Hall, there were no black law students. There had been one who would have entered with me in the class of 1939 had I gone directly to Boalt in 1939, but if my recollection is right, by the beginning of the second year of law school he was at Hastings. My recollection of Boalt Hall when I was there was that there were no black students. There was one Asian in my class and there were two women. At Stanford, for example, I don't remember any black students or in USC Law School the year I was there. No, there were just very few women applicants, and fewer blacks.

Q: I guess, in reflection of the times, is the fact that you're old or young enough to remember when it was quite a phenomenon to talk about a black football player, even at a state university.

WHITMORE: That's true. If my recollection is right, there were no black undergraduates at Stanford when I was an undergraduate. I recall some of the fine black athletes at UCLA who were there when I was an undergraduate at Stanford, among them, Kenny Washington, Jackie Robinson, Tom Bradley, that I recall.

Q: Woodrow Wilson Strode.

WHITMORE: Yes, Woody Strode, that's right. But I remember none at Stanford and very few at other schools. I'm sure there were fine black athletes at Berkeley at that time. I don't have the recollection of them as I do of the group at UCLA.

Q: Now, I want to go back and talk about the development of law firms with the bar. Was it a fact that most major law firms felt an obligation to encourage some of the juniors in the firm to participate extensively in state and local bar activities?

WHITMORE: Well, I can tell you it was the policy of Gibson, Dunn & Crutcher — I don't know about other firms — to encourage participation in state and local bar work. I recall in 1947 when the State Bar Convention was held in Santa Cruz. Homer Crotty, I think, was largely responsible for the firm determining to send two young lawyers from Gibson, Dunn

& Crutcher to that convention. The two lawyers were myself and William French Smith. I recall the convention very well, and I recall the interest that Bill and I rather immediately developed in the group then known as the Junior Barristers, or the Junior Bar of California — lawyers under 35 — now known as the Young Lawyers. I recall that the next year after that 1947 convention, of the four officers of the Junior Bar of California, Bill Smith and I were both vice presidents — we were two of them.

Q: At that time, and I presume that it's basically true today, the bar conventions and Conference of Delegates met alternatively in the northern or southern part of the state, and I presume that it was more pronounced at that time — the switching back and forth.

WHITMORE: Yes, it was, just as it was during that period after the war. The rule was followed without fail, which was the president of the State Bar was one year from the north, and the next year from the south. And it rotated, and that continued until the late sixties or early seventies.

Q: Now, when you went to the State Bar in 1947, you went as delegates?

WHITMORE: I just went as a member of the State Bar, not as a member of the House of Delegates to the convention. I recall that the Taft-Hartley Act was in the process of being considered, or just had been. I recall that President Truman vetoed it but it passed Congress over his veto, and Senator Robert Taft was one of the speakers of the Santa Cruz convention. I recall the picketing of Senator Taft outside the building at which he spoke. I recall the speech he gave. I have no recollection of attending the Conference of Delegates at that convention, although my guess is that I did. I was a delegate from the Los Angeles County Bar Association for many years starting soon after that, to the Conference of Delegates, but I have no recollection of the 1947 session of the Conference of Delegates.

Q: As I recall you and a fellow by the name of William French Smith were instrumental in changing the bylaws so far as the election of the officers of the Junior Bar was concerned.

WHITMORE: Well, I recall that we were instrumental in accomplishing a number of things. I'm not a bit sure I understand exactly what you have in mind.

Q: Let's talk about your involvement, formally, with the Young Lawyers. Were you ever an officeholder?

WHITMORE: Yes, I went through the chairs, starting, I believe, in about 1948, and I was chairman or president of the California Junior Bar in about, I would guess, 1950.

Q: At that time, was there an age limitation of the Junior Bar?

WHITMORE: Yes, it was quite a different organization than it is presently. The age limitation, and I guess it is still the case, was thirty-five years. You had to be thirty-five years or younger. One of the jobs of the president of the Junior Bar was going before the State Bar Board of Governors, requesting a budget for our activities. And for all of the activities of the Junior Bar in that year, I asked for and received a budget of $2500. That covered travel to meetings of the Council of the Junior Bar, to the Convention — the annual meeting of the State Bar — and for whatever other purposes or activities the Junior Bar was involved with. I recall that the members of the State Bar Board of Governors before whom I appeared were Chuck Beardsley, Herman Selvin, Joe Ball, a group of people whom I knew well and had great respect and regard for and who I saw much more of after that appearance than before.

Q: Was Homer Crotty on the Board at that time?

WHITMORE: Homer had been president of the State Bar shortly after World War II and was no longer on the Board of Governors.

Q: He certainly remained active in the State Bar activities until his demise.

WHITMORE: And activities of the American Bar Association, where he was a member of the Council of the Section of Legal Education and Admissions to the Bar, having been chairman of the Bar Examiners Committee in California as well as president of the State Bar, had a continuing interest in legal education, admissions matters. and related subjects. But, Homer was not the politician that most people assume the president of the State Bar would be. Homer was more interested in issues. As you know, he didn't smoke, drink, drive a car, swear. He never drove an automobile. And Homer's interests were in the profession and in particular issues, and he was a very persuasive individual and a very hard worker for causes that he felt strongly about.

Q: I presume that you were, of course, a member of the State Bar at the same time that you were active with the Young Lawyers or the Junior Barristers. When is the first time that you got involved in any particular committee work or other work with the State Bar as such?

WHITMORE: A year or two after I had completed my term as chairman of the Junior Bar, I was appointed to the Committee of Bar Examiners. If my recollection is correct, that was in 1952 or 1953.

Q: Before we get on to some more reminiscences and talk about the Board of Bar Examiners, I want to read you a little excerpt from a book called "Lawyers of Los Angeles," and this will be by way of background for some more questions that I want to ask you. It was talking about the institution of one of the first law schools in California. It says at page 270:

> At this time and for long years before and long years after, applicants for admission to practice in all the courts of the State had only to go before California's Supreme Court and be examined orally. The Justices of this court made semiannual visits to Los Angeles for the benefit of southern California applicants. Instead of seeking a law school, the young man who wanted to be a lawyer got a job in the best law office he could as clerk or stenographer and "read law" there preparatory to going before the Justices of the Supreme Court. Or, lawyers who came to California from states where admission requirements were even easier than California's, or perhaps nonexistent, their quick entrance into the legal field in California was, from the present day viewpoint, scandalous. Written examinations as a prerequisite to Bar admissions were not required by law until 1918. The "diploma privilege" of certain California law schools whose graduates were admitted to the Bar without examination was abolished by statute in 1917. Not until January 1, 1918, were California applicants required to submit proof of having studied law for a definite period, and not until 1919 was the Board of Bar Examiners created. The Examiners themselves were first appointed in 1920 by the Supreme Court. When the integrated State Bar was created in 1927, the present Committee of Bar Examiners was set up. Since then, admissions and requirements year by year had been tightened.

That's the end of the quotation. I take it from that that Homer Crotty must have been one of the foremost people, right from the beginning, in bar examinations. Is that correct?

WHITMORE: I would certainly assume so. He was a very bright, conscientious and hardworking individual. And that was one of the areas of his interest. He served a full term on the Committee of Bar Examiners in California during the late thirties and early forties, and was chairman of the Committee.

Q: He wrote extensively, didn't he, articles for the bar journals?

WHITMORE: I've read a number, and I'm sure you're correct in that respect, yes.

Q: There was an organization that grew up during this period called the Breakfast Club. Are you familiar with it?

WHITMORE: I was chairman of the Breakfast Club for a while.

Q: And what was its relationship to the selection of officers in the State Bar?

WHITMORE: The function of the Breakfast Club, when it was formed and initially chaired by Frank Belcher, was to make certain that at least one qualified person was nominated for each vacancy from Los Angeles on the Board of Governors of the State Bar.

Q: And in time their importance or their prestige was almost enough to make it tantamount that if nominated, they would be elected.

WHITMORE: I don't recall any opposition to the Breakfast Club candidate until sometime in the late 1960s. For example, when I ran for the Board of Governors, Gus Mack from Los Angeles and I were the two nominees that year. We were elected, each of us, without opposition, although I was a little distressed to find when I heard the vote results that in my case — although, being a lawyer I shouldn't have been too surprised — Jimmy Hoffa got four votes, and Caroline Kennedy, who had just been born, got one.

Q: I take it that for good reason you thought Jimmy Hoffa's votes were antagonistic to yours. In any event, the Breakfast Club was sort of an extralegal adjunct of the State Bar, at least for the purposes of seeing that candidates were nominated.

WHITMORE: Well, yes, and a number of candidates decided to run on their own. But the only function of the Breakfast Club was to make certain that there was, at least in the estimation of the members of the Breakfast Club, at least one qualified candidate nominated for each position in Los Angeles County.

Q: Was Homer Crotty a member of the Breakfast Club?

WHITMORE: Yes.

Q: Any other members of your firm or other people that played an active part that you remember?

WHITMORE: Well, I was in the Breakfast Club from the late forties on. I was chairman for several years. I would guess that would have been in the middle sixties or the early sixties. There were other lawyers from our firm other than Homer Crotty who were members and active in it. I remember Bill Smith, Bob Warren, and I'm sure there were others. I just at the moment cannot think of them.

Q: Coincidentally with your membership in the State Bar, you were active in the Los Angeles County Bar Association, were you not?

WHITMORE: Yes.

Q: Beginning in 1948, the Los Angeles County Bar Association was a volunteer bar association, is that correct?

WHITMORE: It still is.

Q: At that time, was there either formally or at least a de facto policy of exclusionary rules so far as membership is concerned.

WHITMORE: Black people, as I understand it, were not eligible for membership until the late forties or early fifties. I'm not sure of the year. I do remember those who, I believe, carried the ball in getting the bylaws amended to exclude that.

Q: The notes that I made indicate that the first vote to permit Negroes, as the word was used then, to the L.A. Bar, was in 1945 and at that time, the vote was 768 "no" and 604 "yes." And then there was a further plebiscite in 1947 and a third plebiscite in 1950. And by 1950, the vote was almost two to one "yes." Now the period from 1946 to 1950 was a period in which you were quite active in the L.A. Bar, were you not?

WHITMORE: Not as much in the Los Angeles Bar as I was in the State Bar, because of my work with the California Junior Bar, an entity within the State Bar of California.

Q: Do you remember any of the background, or incidents, or anything else about this feeling of exclusion.

WHITMORE: Well, I recall several people who were very active in getting this discriminatory exclusion provision changed — three in particular. I remember hearing Herman Selvin speak before the Association very eloquently and very persuasively.

Q: Have you ever heard Herman Selvin when he wasn't eloquent and persuasive?

WHITMORE: No, certainly not. But he felt very strongly about this situation and was very persuasive in his arguments to change. Grant Cooper was another Los Angeles lawyer active in the Association at that time and thereafter president of the County Bar who was very active. I have a lesser recollection of hearing Joe Ball speak, but I know he was actively involved to get it changed, also. The reason, and probably the only reason that I remember Joe's participation as being somewhat different from Herman and Grant's was that Joe was a lawyer in Long Beach and not in downtown Los Angeles where Herman and Grant and I and most other lawyers who were involved in that vote were involved.

Q: The number of people voting indicated that there was an increase in membership between 1956 and 1960, and I heard it said that there was a movement in which a lot of people refused to join the L.A. Bar in protest because of the black exclusionary rule. Were you aware of the fact that there was such a dissension?

WHITMORE: Vaguely, and I'm not a bit surprised by it. I'm sure there was a significant number who felt sufficiently strongly about it to manifest their displeasure by resigning from membership, or not joining.

Q: I want to throw in a personal note to see if you'll agree with it. I remember I refused to join the L.A. Bar Association for that reason, and you and a fellow by the name of William French Smith persuaded me that the only way to ever change the rule was to join and vote.

WHITMORE: Vote from within, that's right.

Q: At that time, were there women members of the L.A. Bar?

WHITMORE: There were, but certainly not in significant numbers, as is the case today.

Q: And certainly, I guess it would follow that to your memory there were no officers of the L.A. Bar as such who were women.

WHITMORE: Helen Kemble might have been chairman of the committee, but no, I don't remember any officers. When I was on the Board of Trustees of the County Bar Association in '57 or '58 or thereabouts, there were no women.

Q: The first time you were elected to the Board of Trustees of the L.A. Bar, do you remember who the president was?

WHITMORE: Grant Cooper was president one year, Steve Halsted and Hugh Darling, if my recollection is right, were those that I served under when I was a member in the fifties. Then I went back as an officer in about 1968. I served with different presidents then.

Q: Early on, it appeared to be the practice that people were elected to the L.A. Bar on the Board of Trustees and served a period of three years and from the senior class, a president was chosen. And I've heard it said that because of the tremendous talent that was available, a lot of people thought that it was just a shame that people had to go off the Board when they were first becoming extremely useful. And one of the first people that I think was reelected and primarily for the purpose of electing him president was Walter Ely — isn't that true?

WHITMORE: I have some recollection of that.

Q: So was Walter Ely before your time?

WHITMORE: Walter Ely was president before I was president and he went on the Board, if my recollection is right, at about the time I was first on it, or shortly after that.

Q: Now, how many years did you serve on the Board of Trustees on the L.A. Bar?

WHITMORE: Well, I served that term in '57, '58 or thereabouts. I assume that was three years. I then went on in 1968 as a junior vice president and

then served as the senior vice president and the president. So I guess I served two three-year periods, if my calculations are correct.

Q: Do you remember any of the other names other than those that you mentioned? Steve Halsted was on with you, wasn't he?

WHITMORE: Yes, I served with Steve on both the State Bar board and the L.A. County Bar board. When I returned to the Board of Trustees, Ira Price was president. Ed Shattuck had just been president. Glen Tremaine had just been president. Leonard Janofsky succeeded Ira Price. Seth Hufstedler succeeded Janofsky. I succeeded Seth. Stuart Kadison succeeded me.

Q: When did Sam Williams become active in the L.A. Bar?

WHITMORE: Well, I'm sure Chuck Beardsley and Seth Hufstedler persuaded him to become active upon his entry into the practice of law in Los Angeles. He was president of the County Bar — I can't tell you the year. Well, it was in the seventies, I'm sure, because after serving as president of the Los Angeles County Bar Association he served on the Board of Governors of the State Bar and as president of the State Bar. And that was some years ago — five or six years ago, at least.

Q: Do you recall any of the other names of people that served with you on the L.A. County Bar?

WHITMORE: Well, I recall the four of us who went on the board when I went on in '57 or '58 who were Loyd Wright, Jr., George Harnagel, Paul Hutchinson, and myself. At the end of our three-year term, Loyd Wright, Jr., was nominated to be the junior vice president. The next year, or maybe it was two years later, Loyd Wright became very ill and died. He was either replaced or would have been succeeded by Paul Hutchinson, who was in my class on the board.

Q: Well, tell me a little bit about Grant Cooper, because I think that he is one of the few people who specialized in criminal law who became quite active in State Bar work.

WHITMORE: Yes. He had been a prosecutor in the D.A.'s office and he went into practice, largely a criminal defense practice. He suffered under a great disability when he was president of the Los Angeles County Bar Association. He was, during most of that time, trying the Finch case. Dr. Finch, as you recall, was charged with murdering his wife, I think. In any

event, that case, if I recall correctly, was tried three times. Grant tried it the first two times, and his partner, Ned Nelson, tried it the third time. And I must say I admired Grant more than you can imagine, because trying a high publicity, lengthy, complex case like that is at best difficult, and Grant did it, and in addition presided over meetings of the Los Angeles County Bar Association Board of Trustees and served in a most commendatory way as president during the period of time when he was occupied morning, noon, night and weekends, with the Finch case.

Q: Not only that, but I think Grant Cooper does not have a large backup firm or other lawyers . . . .

WHITMORE: But he had one thing that a lot of lawyers with a lot of normal backup didn't have. He had a wife who was a lawyer. His wife, Phyllis, was a lawyer, and was very helpful to him, and he had a partner during this period, Ned Nelson, who I'm sure was helpful to him. But if my recollection is right, that was the extent of his law firm.

Q: By way of background, so that people can appreciate it, can you tell me about the work of the Board of Trustees of the L.A. Bar — how often do they meet and what occupies their time, at the time that you were active?

WHITMORE: During the fifties when I was on the County Bar board we concerned ourselves with matters as you would suspect — financial matters, personnel matters involving the staff of the Association. We spent a good bit of time on resolutions which we would propose, support or oppose before the Conference of Delegates of the State Bar. We concerned ourselves with the work of the committees of the Association. Among the other things that the L.A. County Board of Trustees did during the fifties was to take appropriate action with respect to recommendations of committees of the Association. That, of course, was before the Association had sections. At that time it did have active committees.

Q: Do you remember how many affiliate associations there were at that time?

WHITMORE: In the fifties, I don't have a recollection that formal affiliations existed. I do recall that the name of the Association was changed from the Los Angeles Bar Association to Los Angeles County Bar Association during the incumbency of Walter Ely as president of the Association. And if my recollection is right, the formal affiliation of the seventeen or

twenty associations presently associated with the L.A. County Bar Association came about after the name change.

Q: Well, there were at least geographical associations. You mentioned Joe Ball.

WHITMORE: Oh, the Long Beach Bar Association existed; the Pasadena Bar Association existed; the Beverly Hills Bar Association existed; I'm sure there were a number of them. I'm sure that participation as a result of affiliation of these other associations in Los Angeles County has become greater as time has passed. I don't have a distinct recollection of the nature and extent of the participation with the Board of Trustees of these associations in the fifties.

Q: Now there are affiliate associations other than geographic, are there not?

WHITMORE: Well, there's a woman's association [Women Lawyers Association of Los Angeles], and there are some ethnic associations that I understand are affiliates here.

Q: Now, do you remember, or do you have any recollection as to the percentage of lawyers in Los Angeles County that belonged to the L.A. Bar?

WHITMORE: I don't have a recollection as to the percentages of those in the county. I do recall that in 1970, when I was president, we got our 10,000th member of the Los Angeles County Bar Association. And my recollection, and it's certainly indistinct, was that there were at least twice that many lawyers practicing in Los Angeles County.

Q: So far as volunteer bar associations are concerned, by the time that you were a member of the board, the Los Angeles County Bar Association had a delegate to the American Bar Association. did they not — or do you remember?

WHITMORE: I think the answer is "yes." I know that I filled that position for six years, and I had several predecessors, among them Gus Mack, who was the delegate from the Los Angeles County Bar Association for six years. I'm sure there were others.

Q: So far as membership in the American Bar Association, of bar associations, it is only the very, very large volunteer bar associations that have delegates — is that not true?

WHITMORE: That's correct. Well, there are also delegates from state bars.

Q: Yes.

WHITMORE: Whether voluntary or integrated, and from city and county local bar associations, they only have a delegate in the House of Delegates of the ABA after they achieve a certain size of 2,500 members or something like that.

Q: Tell me something of the work that you did with the American Bar Association. What committees were you on, or what did you do as a delegate?

WHITMORE: Well, my first exposure to the American Bar Association was when I was elected chairman of the National Conference of Bar Examiners. Because of that office, I was a member of the House of Delegates of the American Bar Association for one year. That was in 1957 or thereabouts. I thereafter was on the Professional Grievance Committee of the Association and in the early seventies I became a member of the Council of the Section of Legal Education and Admissions to the Bar in about 1972, during which period I was also the delegate from the Los Angeles County Bar Association to the ABA House of Delegates. And I believe I held that delegate position from about 1968 to 1974.

Q: You missed the two conventions in London, then.

WHITMORE: I attended the one in 1957 in London. I missed the next one. Then I attended the last one in 1985. I did go over for that. In 1957 I recall being at one of the Inns of Court at dinner when the American lawyer at the head table was called upon for a response, and instead of speaking extemporaneously, he pulled a ten-to-fifteen page speech out of his coat pocket and it seemed, under the circumstances, at least to me, to be quite inappropriate. Well, to go on with my ABA activity. I was in the House of Delegates to the ABA from '68 to '74 as the delegate from the Los Angeles County Bar Association. Starting in 1974, I became the delegate from the Section of Legal Education and Admissions to the Bar. A most interesting position because that section is the entity in the United States that is responsible for the accreditation of law schools and the establishment of standards for the accreditation of law schools. And we had many fights in the House of Delegates, as you can imagine, over matters involving the standards for approval. In 1985 I was elected to the Board of Governors of the American Bar Association. a position I presently hold and it's a three-year term. I will be finished with that in August of 1988.

Q: Then, as a prelude to that particular work with the American Bar Association, you were active with the Committee of Bar Examiners in California, were you not?

WHITMORE: Yes. I was a member from, I believe from 1953 through 1958. I do recall the term of office on the committee was four years and mine was extended one year because I was elected chairman of the National Conference of Bar Examiners.

Q: Would you tell us, if you can, a little of the inside of the work that is done by the Committee of Bar Examiners — how they go about getting questions or graders.

WHITMORE: I can tell you how it was handled when I was on the Committee. And it's done in a far more sophisticated and, I believe, efficient way today than it was in the 1950s. The questions that are used in the bar examination are solicited from out-of-state professors in each subject. They are paid to prepare questions and an analysis of each question. These questions and the accompanying analyses were then considered by the seven-person Committee of Bar Examiners in a three- or four-day meeting.

Q: Was this done by staff?

WHITMORE: It was done by the Committee. And the Committee went over the questions and the analyses, and we always got maybe twice as many, or two-and-a-half times as many questions from professors as we needed for use in the examination. We would then compose the examination. If we found duplication in one question and another question submitted by another professor, we would change one of the questions to eliminate the duplication. We also, sometimes, expanded the question or restricted it if we felt that it was too narrow or too broad. That was done by the seven members of the Committee. And, I must say, with the advice and assistance of George Farley who was then secretary of the Committee of Bar Examiners, later a superior court judge in Los Angeles County. The examination was then given and after the examination was completed, the Committee — each member — would read about a hundred books to help determine if there were grading problems.

Q: You mean you would read every answer submitted in those hundred books, or a hundred answers?

WHITMORE: Well, let me start out and put it a little more clearly. The reader which the Committee had for each question, and I was on the Committee when there were sufficiently few applicants to make it possible to have only one reader for each question — the reader would read a hundred books, the staff would take the grades given by that reader in those hundred books, would chart the grades by number and then you'd be able to compare for different questions how each reader graded that applicant's paper. The Committee of Bar Examiners, then, would take those hundred applicants and their books. And my recollection is not clear that we read all of one hundred applicants' books for each of the questions. But I do recall spending many, many days reading in preparation for that meeting with the readers. We would sit down for three or four days and spend a couple of hours with each reader for each question, determining upon grading problems, ambiguities — any problems that existed in connection with the grading, or any variation from what appeared to us to be an appropriate norm for grading of one reader as against another. For example, if one reader graded everything and averaged out at about 60, and another averaged out at about 80, we went into that very, very carefully to make certain that there was a justifiable reason or necessity for it. After this meeting with the readers, the graders then went ahead with their work. The one hundred books were initially tentatively graded, in order that we could have our meeting regarding grading problems, ambiguities and the like, and when that three- or four-day meeting was over, then the readers or graders went off and engaged in their grading process. Then all applicants whose grades averaged between 65 and 70 percent, as I remember, had all of their books reread by a Board of Reappraisers to determine if, overall, they met the minimum requirements and should be determined to have passed or failed. When the reappraisal process was all completed, then for the first time, the code, the numbering system that was on the books was broken, and the identity of the people whose books were being read was established. And thereafter, of course, notices were sent out to the applicants as to who passed and who failed. That was the process we went though then. There was no practice or lawyering skills component to the examination as there is now. We had a degree of consistency from examination to examination, in order that it not be justifiably said that standards were being raised or lowered. It seemed a very simple way of conducting a

bar examination then, when you consider the nature of the problems and the extent of the studies that are conducted to make certain that it's appropriately done now.

Q: Were you active when the criticisms first started that the bar exam might be tilted in favor, well, not tilted in favor of, but tilted against, certain ethnic or cultural groups because they weren't as familiar with the language or idioms or things of that nature, as the middle-class American would be?

WHITMORE: To the best of my recollection that came considerably after my term on the Bar Examiners Committee. We had relatively few women or minorities taking it. I don't remember any substantial criticisms at all of the examination or our grading process, or anything in connection with the examination based upon race or ethnic background or sex.

Q: Were you subject to any criticism from any source concerning the fact that the Bar Examiners created a closed union shop and only allotted a certain percentage to pass each year?

WHITMORE: I read that in the paper: I heard it stated by people as far back as I can remember. I was so totally persuaded, however, as a result of my time on the Bar Examiners Committee that this was not the case, I answered questions about it in a very forceful way. I have no recollection that this was a prevalent feeling during the time I was on the Bar Examiners Committee. But I remember reading stories that in other states, as well as possibly in California, there were too many lawyers, and so the Bar Examiners Committee was tightening up in the grading process. I didn't pay much attention to it because I knew the extent to which we went to make sure that wasn't the case.

Q: I want to go back and talk to you for just a couple of minutes about another subject. And that is that certainly the bar association as such or the legal profession, or perhaps society in general has been criticized for their actions or exclusions in the forties and fifties, and certainly before that. Now, at the same time that the bar association was excluding Blacks and doing a lot of things that certainly are condemned now, I think that we forget that they were doing a lot of laudable and notable things that are no longer necessary. For instance, do you remember who took care of the representation of indigents in the federal courts? Do you remember how those were handled before there was the regular public defender?

WHITMORE: I know the Bar Association was always very active in doing what it could to encourage its members and others to perform that type of function, not only in the federal courts but elsewhere. Also, I recall the activity of the L.A. County Bar in connection with representation through the Legal Aid Society or otherwise of indigent people in civil cases. This has always, at least during my lifetime in the Bar, been one of the great concerns and activities, and I think one of the activities most constructively carried out, of the Los Angeles County Bar Association.

Q: I want to bring up the name of a colleague of yours in that regard — Maynard Toll. Do you remember some of the activities he had?

WHITMORE: Maynard Toll was a senior member of O'Melveny and Myers, and a very good friend of mine for many, many years and still is. He was always active in connection with the representation of the poor. If I remember correctly, he was chairman of the ABA's committee dealing with legal aid and indigent defendants' representation. He was president of the American Bar Foundation. Yes, Maynard was certainly one of the leaders, as I consider Joe Ball to have been, in connection with provision of legal services in both the criminal area and the civil area to indigents in our area.

Q: Another couple of names I'd like to mention just so that we can get things in the proper perspective is Lou Elkins and Stan Johnson. Can you tell me their roles?

WHITMORE: Well, Lou Elkins was the secretary, the paid head, of the Los Angeles County Bar Association for many years prior to my becoming a member of the Los Angeles County Bar Association, and Lou Elkins, upon his retirement, was succeeded by Stanley Johnson, who continued on as secretary of the Association, until about 1972 or '73 when, if my recollection is correct, he was replaced by Andrea Sheridan Ordin who had worked in the Attorney General's Office, who, again, is now in the Attorney General's Office, working in one of the first or second slots under Attorney General John Van de Kamp.

Q: The Los Angeles Bar Association, then, early on, was a completely organized bar association with a paid staff and was — correct me if I'm wrong — but I'm led to believe that they were one of the foremost volunteer bar associations in the country to be organized and to conduct the activities they did on that scale.

WHITMORE: I think that's right. I recall the first office of the L.A. County Bar Association of which I was familiar, in the Security Building at 4th or 5th and Spring Street in Los Angeles. Lou Elkins was there. There were, I guess, at most a half-dozen other employees, secretaries, and otherwise. When I was president of the County Bar, Stanley Johnson was secretary and we had moved over to a building on the south side of Pershing Square in Los Angeles, and we had a lunchroom for our members, and my estimate is that we had forty or thereabouts paid staff, handling lawyer reference service matters, arbitration matters, membership matters — all manner of things — for the Association. And my guess is, although I don't have the number, is that the number of paid staff of the Association is now several times what it was in 1970. But, yes, the Los Angeles County Bar Association, among local bar associations, has always, together with the Association of the Bar of the City of New York, and the Chicago Bar Association, been the innovator and the leader in the profession. I should include the San Francisco Bar Association in that, too. They have made many, many valuable contributions.

Q: You talked about the work that you did with the Committee of Bar Examiners and the various offices you had with the State Bar, and the local bar associations. Were there any other activities that you had with reference to the organized bar that we haven't talked about?

WHITMORE: One thing you might be interested in is the change in the work of the Board of Governors of the State Bar over the early sixties when I was a member of it and today. From 1962 to 1965 when I was on the State Bar board, the Board of Governors itself conducted the investigations and evaluated all prospective nominees to state and appellate court positions in California. Now, as you know, it's a separate statutory body which conducts the investigations and makes the evaluations. In addition, when I was on the board all discipline matters were finally argued before the Board of Governors and the determination was made directly by the Board of Governors. Now, as you know, there is a State Bar Court. There are thirty or forty or more lawyers who represent the State Bar in presenting matters, discipline matters. It's handled in quite a different way. The function of the Board of Governors has changed a great deal. The legislative matters before the board have become more significant and I guess occupy a good bit of more time of the State Bar than they did when I was on the board. There

really has been quite a change. The staff of the State Bar from '62 to '65 under Jack Hayes as the top staff person has increased in size and in the scope of the work they did by so many times that it's difficult for me to realize the extent of the change. I recall when I was first involved with the State Bar. Its offices in Los Angeles were in the Rowan Building, and relatively few square feet were devoted to their activities, and in San Francisco they were also in rented quarters. They then in San Francisco moved to what was then the State Bar Building on the corner of McAllister and Franklin Streets in San Francisco, which they still occupy, but a building three or four times that has been built next door to take care of their staff and activities in San Francisco, and in Los Angeles the same is true. They built a building on West Third Street which amply took care of their staff and their activities when I was on the board, and now a building next door to it which is three or four times the size of the original building has been added, and I understand that the State Bar is at this stage again wanting for space. One interesting story in connection with the acquisition of the building next door — the land next door in San Francisco on which the addition was built, and the land next door on West Third Street in Los Angeles where the addition was built. In San Francisco when I was on the board we realized we were running out of space and attempted to negotiate with George Davis, a prominent San Francisco lawyer who owned the space and we had difficulty, considerable difficulty, in our negotiations, and while I was on the board never did succeed in arriving at a price agreeable to Mr. Davis and to the State Bar.

In Los Angeles it was quite different. When Grant Cooper and several others — Herm Selvin, if my recollection is right, Frank Belcher, if my recollection is right, probably Joe Ball, although I have no specific recollection of that — realized that when the West Third Street State Bar office was built that the State Bar would be expanding and would need more space. So those gentlemen or some among them bought the property next door, and when the State Bar needed it they sold it at the price they bought it, with a very small, if any, addition to the purchase price. In fact, I'm told they bought the property initially so it would be available to the State Bar when they needed it. So the problem of acquisition of adequate space was quite different in the south than what it was in the north.

Q: I guess we've covered most of your activities. I know that you are too modest to volunteer it but certainly you have been recognized for some of

those activities, so will you tell me some of the times that you have been so recognized.

WHITMORE: Well, other than election to positions on the board of the state and local bar associations in which I was active and in the ABA, I must say the one thing that comes to my mind which was most satisfying to me was when I was selected as the recipient of the Shattuck-Price award being given by the Los Angeles County Bar Association each year. That was recognition that I was very proud of, and it was a very significant thing to me. [See photo, next page.]

Q: I remember at least one occasion in Sacramento when you were honored in a different type of activity.

WHITMORE: Yes, I have received an honorary degree from McGeorge Law School in Sacramento.

Q: That was in recognition of the work that you did with the Committee of Bar Examiners, wasn't it?

WHITMORE: Well, in connection with legal education and admission to the bar — work I had done in California and with the ABA.

Q: You mentioned at the beginning of our talk today that when you joined Gibson, Dunn & Crutcher there were, I think you said, twenty-two members.

WHITMORE: My recollection is that the three firms I mentioned each had between twenty and twenty-two lawyers.

Q: I think that it was the practice in those days that every member of the firm, in fact every lawyer in the firm, was named on the stationery.

WHITMORE: Either above the line or below the line. That's right. The line was important.

Q: What sort of a letterhead would be required today to list the names of every member of Gibson, Dunn & Crutcher?

WHITMORE: Well, as of today, January 9, 1987, I do not know how many lawyers there are at Gibson, Dunn & Crutcher. I have been of counsel at the firm for five years now and have not been on the executive committee of the firm or involved in hiring for that period of time, but I would guess we have about 600 lawyers or maybe slightly in excess of that number. A

letterhead obviously listing all lawyers would be impossible — that's the growth that's occurred in our firm and certainly in many of the other significant firms in California over the period of my time and prior.

Q: With 600 members, how does it compare with the larger firms in the United States?

WHITMORE: Well, I can't be sure of this but I believe I heard one of our active partners indicate that Gibson, Dunn & Crutcher is now the fifth largest firm in the country.

Q: And how many offices do you have? Well, let's go back, how many did you have in 1948?

WHITMORE: In 1948 we had one, on South Spring Street in Los Angeles. We had had during World War II a temporary office in the San Fernando Valley for use by several lawyers in working with defense contractors and subcontractors located there, but about the time of the end of the war that temporary office was closed. We opened our second office, which was the first permanent office away from Spring Street, in 1962 in Beverly Hills. Six of us went up to Beverly Hills to open that office. I can't tell you in what order we opened subsequent offices but our third office was in Orange County in Newport Beach. We now have offices in Saudi Arabia, London, Paris, Washington D.C., New York, Dallas, Denver, San Diego, San Francisco, San José, Seattle; we have 13 or 14 offices now.

Q: You mentioned to me previously that you had a list of the 1986 class of hirees (or those who were hired). How many people did the firm hire in 1986?

WHITMORE: Overall, all of our offices, it's about 80 for 1986.

Q: Have you any sort of an educated guess as to the total number of employees that the firm has?

WHITMORE: I guess it would approximate two non-lawyers for every lawyer, but, no, I don't have any exact figures.

Q: The growth in at least geometric proportions since the time that you joined the firm is mildly fantastic. To what do you attribute the fact that not only this firm but other firms have grown in such huge numbers?

WHITMORE: The nature of the practice of law has changed. Our clients in the 1940s, for example, were largely local — California companies,

companies doing business in California. That isn't the case now. Gibson, Dunn has opened offices in new areas when our existing clients had need for legal services in those areas. As our clients have become involved more in nationwide or worldwide activities the availability of lawyers to them from Gibson, Dunn & Crutcher had to be expanded, so we had lawyers

**Sharp Whitmore receives the 1982 Shattuck-Price Memorial Award of the Los Angeles County Bar Association, with (far right) U.S. Attorney General William French Smith, his former partner at Gibson, Dunn & Crutcher, and Whitmore's son, attorney Richard Sharp Whitmore, and daughter, Ann Whitmore — at a noon luncheon on May 21, 1982, at the Biltmore Hotel in Los Angeles.**

elsewhere in the United States and outside of the United States to take care of the expanded activities of our clients.

Q: The last thing that I'd like you to comment on is the fact that at least this firm, through William French Smith and others, has produced in recent years lawyers who have been on loan to the government or governmental activities. Can you comment on all that?

WHITMORE: Well, certainly there have been a number of others from Gibson, Dunn & Crutcher. We had a fine lawyer in our litigation department who is now a member of the Securities and Exchange Commission. Her name is Aulana Peters. We have had Frank Wheat, one of the senior members of our firm in the early seventies, serve a full term as a member of the Securities and Exchange Commission. Ted Olson, a partner in our Washington office, was director of the Office of Legal Counsel of the Department of Justice. Ken Starr, who served as counsel to the attorney general of the United States and then was appointed to the United States Court of Appeals for the District of Columbia, is presently serving in that capacity. We've had a number of people at the Washington level from the firm who have performed significant federal service, and certainly the same is true of our firm and others with respect to positions in state government such as activity in the corporation commissioners' offices and the like.

Q: How about Warren Christopher, did you know him?

WHITMORE: Oh I've known Chris since he first got out of Stanford Law School, and certainly few people have made a greater contribution to our federal government than Chris has. He has served as the deputy attorney general of the United States, and he also has served as the under secretary of state in the Department of State, and as I'm sure you remember, Ray, was our chief negotiator for the release of the hostages from Iran during the latter days of Jimmy Carter's administration.

Q: I guess then that you and I, among others in the legal profession, can still be proud of the fact that the legal profession donates or makes possible the fact that a number of lawyers can contribute and without regard to the compensation that they get.

WHITMORE: Well, I certainly think it's true that lawyers, probably more so than members of any other profession or activity, lend themselves,

certainly at financial cost to themselves, to further the constructive activities of the state and local governments. Yes, that's not only true of our firm and Warren Christopher's firm but certainly of many others. I remember, for example, Dana Latham from the firm of Latham & Watkins taking time away from his activity as one of the two senior members of that fine and large law firm to be commissioner of Internal Revenue in Washington, and Charlie Walker was involved in the Treasury Department in the significant policymaking position who left the firm for a significant period of time to go to Washington to perform that function, and I'm sure there are many other examples.

Q: Any other memories or anything else that comes to mind that you want to preserve for posterity?

WHITMORE: Certainly, one other member of the Los Angeles legal community who has made a very, very significant contribution to our country is Shirley Hufstedler, who is presently a partner in the firm of Hufstedler, Miller, Carlson & Beardsley. Shirley was a superior court judge, a judge in the United States Court of Appeals for the Ninth Circuit. She resigned from that life tenure position to serve as secretary of education, the first secretary of education, in the Jimmy Carter administration. She is now back practicing law in Los Angeles. There are few people, I'm sure, who could compare with Shirley in the contribution they have made and are still making. And I'm sure there are others; I just at the moment can't think of them.

Q: On behalf of the Committee on History of Law in California I want to thank you for taking the time to tell us about these experiences because I think that these insights will be a great means of looking back and analyzing what happened during this period in the progress of the law.

WHITMORE: I've rarely done anything that I enjoyed more than reminiscing as we've had a chance to do today.

* * *

# ORAL HISTORY

# GEORGE YONEHIRO

(1922–2001)

George Yonehiro
(1922–2001)

*Oral History of*

# GEORGE YONEHIRO

(1922–2001)

## EDITOR'S NOTE

The oral history of George Yonehiro is one of four oral histories conducted by the former California State Bar Committee on History of Law in California in 1987. These were the final oral histories conducted by the committee, and they are published for the first time in the present volume of *California Legal History* (vol. 6, 2011). Yonehiro was interviewed by committee member Raymond R. Roberts on January 21, 1987.

The oral history has been reedited for publication. The spelling of names has been corrected wherever possible, and explanatory notations in [square brackets] have been added by the editor. The sound recording and original transcription are available at The Bancroft Library, UC Berkeley. The oral history is published by permission of the State Bar of California.

As an introduction to Judge Yonehiro's life and career, the obituary published by *The Auburn Journal* at the time of his death in 2001 is reproduced below.[1]

— SELMA MOIDEL SMITH

[1] Gus Thomson, "Former Placer County Superior Court Judge passes away," *The Auburn Journal* (March 28, 2001), p. A5.

# GEORGE YONEHIRO

Former Placer County Superior Court Judge George Yonehiro is dead at age 78. Yonehiro, who spent 21 years on the municipal and justice court benches before serving as superior court judge from 1985 until his retirement in 1988, died Sunday in Auburn.

A native of Placer County's Gold Hill area, Yonehiro graduated from Roseville High School and what was then Sacramento Junior College.

After the bombing of Pearl Harbor in 1941, Yonehiro and his family joined other Placer County Japanese-Americans who were relocated to Tule Lake, California. During 1942-43, 119,803 men, women and children of Japanese descent were placed behind barbed wire.

In early 1943, the secretary of war announced a decision to form an all-Nisei combat team and Yonehiro enlisted. Yonehiro fought in Italy and France as an infantryman. He served with the all-Japanese 442nd Regimental Combat Team — one of the most decorated American units of the war.Yonehiro was awarded the Bronze Star medal but didn't find out about it until the mid-1980s when he requested a new copy of his discharge papers. By then a colonel in the California State Military Reserve, Yonehiro was presented the award by Gen. Donald Mattson, commander of the California Military Reserve. During the war, Yonehiro also received a Purple Heart medal.

Following the war, Yonehiro entered the John Marshall Law School in Chicago. He practiced law in Chicago for seven years.

Moving back to Placer County, Yonehiro was elected Colfax Justice Court judge in 1964, a position he held until 1980, when he headed both the Auburn and Colfax lower courts. In 1982, he was elected to the newly created municipal court by garnering 23,638 votes to his opponent's 8,674.

When Gov. George Deukmejian appointed then-attorney Jackson Willoughby to a Placer County Superior Court seat in 1984 over Yonehiro, the veteran jurist quickly announced that he would challenge the appointment in the June primary. Yonehiro won easily and was sworn in early the next year at St. Joseph's Parish Center with 300 people present.

Yonehiro is survived by his wife of 47 years, Miyoko; daughters Melissa Yonehiro Caldwell of Sacramento and Alison Dee Miller of Seattle; a son, Marcus Yonehiro [U.S. naval officer on active duty in the port] of Yokosuka, Japan; a sister, May Sagara of Granada Hills; and three grandchildren.

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*Oral History of*

# GEORGE YONEHIRO

## (1922 – 2001)

Q: It is January 21st, 1987, and I'm in the chambers of Judge George Yonehiro. He has consented to give us a few of his thoughts and reminiscences about the practice of law as it pertains to him. So, let me start off by asking when your earliest ancestor came to the United States or to California.

YONEHIRO: Initially, my dad was a newspaper reporter for an Osaka, Japan, newspaper. He got sent to the Hawaiian Islands to cover the Japanese immigrants there. He so loved the climate and geographic area of the islands, he resigned from the Osaka, Japan, newspaper and took on employment with a Hilo, Hawaii, newspaper.

Q: When was that?

YONEHIRO: This was 1912. He stayed in the Islands for seven years, doing newspaper reporting work. Also, during the course of seven years, he joined the United States Army. In that way, he was one of the few Asiatics who became automatically eligible for naturalization.

Q: When he joined the Army, was that the regular Army or the reserves?

YONEHIRO: The regular Army. He was stationed at Fort Shafter, just before the early part of 1918. He must have got in shortly before the declaration of World War I by the United States. I think that was the early part of 1918. America was involved in the World War for only a short time — a year or less — and during the '19, possibly '17 or '18, period he was with the regular U.S. Army — infantry.

Q: Stationed in Hawaii?

YONEHIRO: Yes, Fort Shafter. After he concluded his service with the U.S. Army — around 1919 — he came to the mainland. While he was in Hawaii, he held a close friendship with a person who had a gambling den. His buddy and he came over in 1919 to the mainland, and he urged him to join in gambling activities in the city of Sacramento. By that time my dad had gotten married. He felt that he couldn't raise a family in a gambling atmosphere, connected with a gambling enterprise, so he decided to become a farmer. He always felt that the rural atmosphere was most conducive to raising children. He was a very poor farmer, always a good newspaper man. He always maintained contacts with various newspapers. During the course of his career, he one time held paid correspondence with five newspapers and he did work for various newspapers until he was seventy years of age.

Q: Where did your mother come from?

YONEHIRO: My mother also came from Japan. During the period my father was in Hawaii he had visited Japan two times. On the second visit, just before he left for the American mainland, he married my mother. They were both from the Honshu Island. There are three major islands in Japan. The middle Island is Honshu. They are both from the Hiroshima area.

Q: And when were they married?

YONEHIRO: They were married in 1917.

Q: So they evidently met in Hawaii?

YONEHIRO: No, sir they did not meet in Hawaii. On one of my dad's visits back to Japan, he met my mother.

Q: I see. And where were they married?

YONEHIRO: In Japan, sir.

Q: Your mother, then, was never eligible for naturalization. Or was she, by virtue of her marriage?

YONEHIRO: No, sir, she was not. There was an Asian Exclusion Act which was not repealed until the early part of the 1950s. And then Asiatics became eligible for citizenship. At that time my mother, of course, made application and was subsequently naturalized.

Q: Could your father own any property for the purpose of farming when he moved to California?

YONEHIRO: Yes, he could, because he was a citizen. But the Asian Exclusion Act precluded Japanese nationals from owning property.

Q: Sometime during the marriage, you and your brother were born.

YONEHIRO: Yes, I have an older brother who was born in 1919 and a younger brother was born in 1925, and a sister was born in 1923. I was born in 1922.

Q: Were your parents living in the Sacramento area at the time you were born?

YONEHIRO: Yes, we were living in Gold Hill. I was enrolled in Placer County. During that period, hardly anybody was born in hospitals — they were mostly born at home, attended by midwives and physicians. I was born in the [inaudible], so actually the Gold Hill area was the closest post office. The address was Newcastle. I am registered as being born in Newcastle. My mother was attended by Dr. George Barnes. I suppose in lieu of fees he had the honor of me being named after him.

Q: You were then originally registered and baptized by the name of George. That is not an anglicized version of a Japanese name?

YONEHIRO: No. My younger brother was named Earl. That is on his birth certificate, as is my sister May, whose name appears as May on the birth certificate.

Q: How about your older brother?

YONEHIRO: The older brother, Horace, was actually named Hohei. Later, he adopted the name Horace before he went into graduate school.

Q: Gold Hill is the nearest post office to Newcastle?

YONEHIRO: Gold Hill at that time did not have a post office. Newcastle was the closest post office to Gold Hill, sir.

Q: Newcastle is directly south of Auburn — I guess about halfway between Auburn and Roseville.

YONEHIRO: Yes, about three or four miles west of Auburn.

Q: And your early schooling — you went to high school in Roseville, was it?

YONEHIRO: Yes, I graduated from Roseville High School in 1940 and attended then Sacramento Junior College. It is now City College. I graduated from Sac JC in 1942. I was relocated.

Q: We're getting ahead of the story now. I want to go a little bit slower. Sometime when you were in high school or college, did you take up flying?

YONEHIRO: Yes, when I was attending Sacramento Junior College I enrolled in the Civilian Pilot Training Program, which was a federally funded program. After World War II broke out, it was . . .

Q: You're talking about the war in Europe?

YONEHIRO: Yes. When World War II started. There was a department called the Aeronautics Department which was affiliated with Curtiss-Wright, an aeronautics engineering institute. The affiliation was such that a two-year course of studies in the aeronautical department qualified for two years of aeronautical engineering credit. Aeronautical engineering was not too complex in those days and usually the required course of studies entailed three years of application for an engineering degree in aeronautics.

Q: How did you find out about the bombing at Pearl Harbor?

YONEHIRO: By radio on Sunday afternoon, December 7, I believe.

Q: Where were you at the time?

YONEHIRO: At home, sir. We were outside, hoeing around the yard — cleaning the yard. And one of my brothers or sister came running out, stating what she or he had heard on the radio.

Q: And who was at home at that time, do you remember?

YONEHIRO: The whole family was home, sir.

Q: Including your brother who was in the Army?

YONEHIRO: No, he was on active duty. I'm sorry. It was just my younger brother, my sister, my father and I.

Q: And what was the first effect that Pearl Harbor had upon you or any member of your family?

YONEHIRO: My dad came from a long line of warriors — samurais. Also, his short military stint with the U.S. Army had given him that type of posture. So from the earliest childhood we were always counseled, trained and instructed to grow up and face life as a soldier — not in the sense of doing active duty as soldiers, but philosophically and morally and physically to always be a soldier. Whenever we cried as children, my dad would say, "A soldier would never cry," or, "What are you going to do when you get into the Army or when you grow up and become a soldier?"

Q: And what was his reaction then to the news of Pearl Harbor?

YONEHIRO: His reaction to the news of Pearl Harbor was actually, I felt, one of mixed emotion, concern for his older son, who was already in service and could become involved in warfare and concern for his possible immediate or future safety. I discerned that very strongly, sir. My father loved his children very closely.

Q: I want to jump ahead to another character that we're going to talk about later. Your future wife had occasion to visit Japan in the summer of 1941, didn't she?

YONEHIRO: She visited Japan after graduation from high school in 1940. In September 1940 she went to Japan and she came back to the United States in June of '41. So she just made it back on one of the few last boats coming back to the United States.

Q: Were you ever in Japan prior to World War II?

YONEHIRO: No. I have never been west of San Francisco, sir.

Q: Have any of your brothers or sisters been to Japan?

YONEHIRO: Yes, all of my brothers and sister have visited Japan a number of times.

Q: Were they there before the war?

YONEHIRO: No, sir, except my older brother, who was born in Japan.

Q: I see. He is Horace. And he is the older one who was on active duty on December 7?

YONEHIRO: Yes, sir.

Q: Let's talk a little about Horace later on. We're not going chronologically. Did he stay in the Army?

YONEHIRO: Yes, he stayed in the Army and he was discharged around December, 1945.

Q: And where did he serve in the Army?

YONEHIRO: A substantial amount of time was spent in the continental U.S. He went through the military intelligence school at Fort Snelling, Minnesota, and then he got assigned to the Pacific Theater as a military interpreter.

Q: Do you know what outfits he served with?

YONEHIRO: I believe I recall the 7th Cavalry.

Q: And the 7th Cavalry saw active duty, at least in the Philippines?

YONEHIRO: Yes.

Q: I know that you're far too modest to volunteer these things, so I'm going to suggest that you tell me if your brother was awarded any particular citations or medals for his service in the Army.

YONEHIRO: I don't think so. I really don't know. I haven't really discussed that too much with him, and he has never volunteered that.

Q: At the occasion of an award to you, it was said by one of the generals from California that your brother was awarded the Silver Star.

YONEHIRO: That was my younger brother, Earl.

Q: Oh, I've got the brother mixed up. I'm sorry.

YONEHIRO: My younger brother, Earl, and I were members of the 442d Regimental Combat Team, and he was awarded the Silver Star.

Q: Immediately after December 7, you said that the first effect upon you was that you were grounded. How were you told that?

YONEHIRO: I was advised that by a Signal Corps lieutenant who had taken over the then Sacramento Municipal Airport. The Signal Corps took

over the Municipal Airport and were in control of the airport, and I was advised by the lieutenant that I was grounded and also advised by the CAA authority man at the Sacramento Municipal Airport, that I was grounded.

Q: What other things affected you immediately after December 8?

YONEHIRO: A few weeks after December 8, we received public notice that our travels were restricted.

Q: That was a public notice in the papers?

YONEHIRO: A public notice in the papers that people of Japanese ancestry were restricted to about a fifty-mile travel radius, which did not restrict me from attending classes at Sacramento Junior College.

Q: But other than that, there were six members of your family, and five of them American citizens, but all of you were placed under that travel restriction?

YONEHIRO: Yes, sir.

Q: Did you notice any particular problems with relation to your education at Sacramento College.

YONEHIRO: No, sir.

Q: Was there any immediate reaction one way or another so far as the students in general were concerned towards Asiatic students?

YONEHIRO: No, sir.

Q: About how many students were there at Sacramento College, if you remember, who were of Japanese ancestry?

YONEHIRO: I would say about fifteen percent.

Q: Was there a tendency of those of Japanese ancestry to stay together for mutual comfort?

YONEHIRO: No, sir. I did not notice any prevalence for people of Japanese ancestry to congregate together for mutual comfort. You must remember, sir, that we were all of college age, late teens. And although I graduated from Roseville High School, by that time there were a lot of students from the Sacramento area I had made friends with. Younger people's emotions didn't run as rampant as adults'.

Q: Now we're covering the period of perhaps January and February of 1942 where your travel was restricted. Did anything else affect you as far as governmental actions were concerned at that time?

YONEHIRO: Well, those governmental actions that affected all Americans, such as rationing of tires, rationing of gasoline. Although because we were farmers, we had unlimited amounts of gasoline. But those who lived in the more urban areas were restricted, I believe. But I never realized the limitations because we were in agricultural pursuits.

Q: I notice on the wall of your chambers a framed copy of a newspaper poster. Can you read it for me?

YONEHIRO: "Headquarters Western Defense Command and Fourth Army, Presidio of San Francisco, California, May 7, 1942. Civilian Exclusion Order No. 47[:]

1. Pursuant to the provisions of Public Proclamations Nos. 1 and 2, this Headquarters dated March 2, 1942, and March 16, 1942, respectively, it is hereby ordered that from and after 12 o'clock noon P.W.T., of Thursday, May 14, 1942, all persons of Japanese ancestry, both alien and non-alien, be excluded from that portion of Military Area No. 1 described as follows" (and it gives a popular description of a portion of Placer County).

2. A responsible member of each family, and each individual living alone, in the above described area will report between the hours of 8:00 A.M. and 5:00 P.M., Friday, May 8, 1942, or during the same hours on Saturday, May 9, 1942, to the Civilian Control Station located at: Loomis Union Grammar School, Loomis, California.

3. Any person subject to this order who fails to comply with any of its provisions or with the provisions of published instructions pertaining hereto or who is found in the above area after 12 o'clock noon P.W.T., of Thursday, May 14, 1942, will be liable to the criminal penalties provided by Public Law No. 503, 77th Congress, approved March 21, 1942, entitled 'An Act to Provide a Penalty for Violation of Restrictions or Orders with Respect to Persons Entering, Remaining in, Leaving, or Committing any Act in Military Areas or Zones,' and alien Japanese will be subject to immediate apprehension and internment.

4. All persons within the bounds of the established Assembly Center pursuant to the instructions from this Headquarters are excepted from the

provisions of this order while those persons are in such Assembly Center. (Signed) J.L. DeWitt, Lieutenant General, U.S. Army Commanding."

Q: Thank you. Just as a note in passing, do you remember who was governor of the State of California at that time?

YONEHIRO: Yes, sir. Governor Warren.

Q: And the president was Franklin Roosevelt, of course. Did some member of your family attend that general assembly in the Loomis area?

YONEHIRO: Yes, my father. He received instructions. I was at school at the time this notice was posted. If I recall correctly, it was about six days before the actual exclusion date — the actual date we were subsequently ordered to depart from the area. So, I received a telephone message from my dad asking me to either come home that day or the next day, because of the posted notice.

Q: And what instructions was your father given, so far as leaving the area was concerned?

YONEHIRO: My father was given instructions in a printed form and also verbal instructions to prepare to be moved to the assembly center area, that the only properties that could be taken would be that that could be hand-carried.

Q: Was any provision made so far as the Army or the government was concerned for relief from taxes on your property, or someone to look after it in your absence?

YONEHIRO: No, sir.

Q: About how much time was your father given from the date of that notice to the time that he had to leave?

YONEHIRO: About five days. He advised me six days prior to our leaving. He attended this meeting, I think the next day — I was home by then — and he left about five days later.

Q: You were required, then, to finish up as much as you could with your school work?

YONEHIRO: Yes, sir.

Q: Was any provision made for you to continue your work at some other place, or continue it by correspondence?

YONEHIRO: No, sir.

Q: What did you and your father and rest of your family do in the next succeeding five or six days?

YONEHIRO: We prepared to move. We assembled as much of our movable household goods an we could. We moved them to our tank house. We had a three-story tank house. Bigger items, like pianos, like refrigerators and ranges, we just left in the house. We were all under the impression that we would be back in a few weeks or a few months. Livestock — we took the chickens and the turkeys over to a Caucasian friend — told him to take care of them, or eat them up, or whatever he wanted to do. The one horse we had left we moved to a pasture owned by another Caucasian. The horse was quite elderly, and I think my younger brother, who assisted my dad in moving the horse — I guess they had tied the horse behind the truck and towed the horse and made the horse run too fast. Anyway, they later reported that as soon as they got to the pasture, the horse keeled over and died of a heart attack.

Q: When you said that each person could take as much personal property as he could carry, was that in the form of a suitcase or a trunk?

YONEHIRO: Yes, a suitcase.

Q: And how many of your family were in this relocation plan?

YONEHIRO: The five of us — my father, my mother, my sister, my younger brother and myself.

Q: Then the only one not immediately affected by this was your older brother.

YONEHIRO: Who was on active duty in the Army.

Q: Then sometime in the middle of May, 1942, you were required to relocate. What happened? Where did you go?

YONEHIRO: We assembled at one of the fruit sheds in Loomis. A bus — Greyhound, or whatever the bus line then was — took us to what is now the Camp Beall area and there was an assembly center where we stayed for

about a month and a half before we were further transported by train to Tule Lake, California, in Modoc County.

Q: When you went to what is now Camp Beall, were you put in barracks, or tents?

YONEHIRO: Barracks, sir.

Q: And were you put in as a family unit, or did they separate you?

YONEHIRO: Family unit, sir.

Q: During that period of time, how were you served meals?

YONEHIRO: In mess halls.

Q: Cafeteria-style?

YONEHIRO: Yes, sir.

Q: And the family would go together?

YONEHIRO: Yes, sir.

Q: Were there any restrictions on your activities while you were at that first relocation center?

YONEHIRO: No, sir. There was a type of curfew — I can't recall the hours — but, actually, there was nothing to do after the sun went down.

Q: Were there any restrictions on the news that you received — newspapers or radio?

YONEHIRO: There were no newspapers admitted to the camp. Some of the people had hand-carried, as did our family — radio sets. The only outside news we got, was over these radio sets.

Q: Were you permitted to send any letters out or send any packages out from that camp?

YONEHIRO: Those letters were initially submitted for censorship and then sent on.

Q: And then, we're to April or May?

YONEHIRO: We went in the latter part of May, and I think, in the early part of July we were sent by train up to Modoc County to Tule Lake, California.

Q: Tell me what Tule Lake is like as far as the weather is concerned and the general geography.

YONEHIRO: Tule Lake is an old dried lakebed surrounded by barren hills out in the desert — more or less, sagebrush. Tule Lake Assembly Center consisted of some seventy-odd barracks, I believe.

Q: Were they constructed for the purpose of interning the Japanese, or were they used for some other purpose before that?

YONEHIRO: They were constructed for the purpose of interning the Japanese. Interestingly, there were remains of older, decayed structures — a few buildings that were remnants of detention centers for Italian and German nationals who had been detained there during World War I.

Q: To your knowledge, was there any mass internment of Italians or Germans during World War II?

YONEHIRO: No, sir.

Q: What was it like when you were at the war relocation area at Tule Lake?

YONEHIRO: Life was like in any assembled area where you had limitations. The camp proper were military, tar paper covered barracks.

Q: How many people were allocated to each barrack?

YONEHIRO: Each barrack was divided into about four apartments. And a family occupied each apartment unit, or a number of people occupied each apartment unit.

Q: In each apartment unit, was there a division for bedrooms and living areas?

YONEHIRO: No, sir.

Q: It was just one room?

YONEHIRO: Just one big room, and if you wished to do so, you could scrounge around — there was scrap lumber, or lumber that you could possibly purchase at the exchange. From pieces of lumber you could make your own partitions.

Q: Were you able to take money out of a bank account, if you had a bank account?

YONEHIRO: If you had a bank account, you could send for it, yes. You could send for it, withdraw money.

Q: Other than that, was there any source of income for any of the people at Tule Lake?

YONEHIRO: Yes. If you wished to work, there were three classifications of work. Professionals, were paid $19 a month; clerical and blue collar were paid $16 a month; unskilled labor was paid $12 a month.

Q: What type of labor did the professionals do?

YONEHIRO: Doctors, lawyers did the usual type of work that they would have done on the outside.

Q: I don't know if you remember or not, but was it possible for a citizen of Japan living in California to be a lawyer prior to World War II?

YONEHIRO: No, sir. I believe you had to be a citizen of the United States to take the oath at that time.

Q: Were there any entertainment facilities available at Tule Lake?

YONEHIRO: Those that you made for yourself. There was no such thing as a theater or other place of entertainment. It's what any group of people would facilitate for themselves.

Q: What language was commonly used at Tule Lake?

YONEHIRO: English for the younger people, and, of course, Japanese for the older people.

Q: Could you give an educated guess as to the percentage of people at Tule Lake who were American citizens?

YONEHIRO: I would say about two thirds.

Q: How long did you stay at Tule Lake?

YONEHIRO: I stayed there off and on for about seven or eight months.

Q: What was the occasion on which you could leave?

YONEHIRO: Work furlough, sir. There was a bunch of young fellows going to Idaho to work in the fields and I took that opportunity, and I think I was able to leave camp for approximately four months that way.

Q: And while you were in Idaho on this work furlough, were there any restrictions on your activity?

YONEHIRO: None other than that type of restriction that applied to any civilian of Japanese ancestry. Some limitation on travel. Idaho is still in the Western Defense Command Zone.

Q: Would you give me your impression of being confined and in camp?

YONEHIRO: My impression as to those of older Japanese — I could only surmise — but I had a lasting impression, very moving, of how younger, especially those of tender years, felt about confinement. Even at the assembly center where we were located, near what is now Camp Beall, after the first few days, after the first week or two, after the excitement and the novelty of meeting new people, seeing new things, experiencing new daily routines, the youngsters, the very young children started to whimper. All over camp you could hear little kids crying. They wanted to go home and they couldn't understand why they couldn't go home. They wanted to go home, I guess, to their familiar house, their toys, pets, or whatever they left behind, and they really couldn't understand. It's like when you take younger children out for an evening, and after they get tired of visiting, they want to go home. And you can give them relief on the outside by taking them home. But there, the mothers and fathers could do nothing but tell them, "You can't go home."

Q: Did your father or your brothers or sister take advantage of the opportunity for work furlough, or was it offered to them?

YONEHIRO: It was offered to them. In the meantime, my younger brother, who had received a scholarship to Antioch College in Ohio, got the opportunity to leave. After a few months, after scrutiny and clearance by the FBI, you were free to leave the relocation center and get out of the Western Defense Command Zone, which extended as far east as Ogden, Utah, if you were engaged in lawful activities — employment or school.

Q: And did your brother then attend Antioch College?

YONEHIRO: Yes, he did, sir.

Q: And how did he support himself while he was there?

YONEHIRO: He had a full scholarship from a firm of lawyers named Lowell Brothers, here in Auburn. They gave him full scholarship tuition and dorm fees and he also got a further grant from the school itself. Antioch was one of those progressive schools that believed in classroom attendance one semester, work experiences one semester — the kids got paid for work experience. He took pre-med and I think he worked in some hospitals every other semester.

Q: Where is he now?

YONEHIRO: He is in Minneapolis, Minnesota. He is one of the few physicians to have a PhD in surgery. He and twenty other physicians formed a medical center about twenty-five years ago. Now they have over 300 physicians in their medical group.

Q: I've got to go back then and ask you, how much education did your father have?

YONEHIRO: My father had what is in Japan called a central school, or mixed school, that is, high school — three years of central school. My mother had approximately the same.

Q: How about your other brother and sister and your father — did they leave the Tule Lake Relocation Center?

YONEHIRO: Eventually. My brother, like I said, went to school; my sister stayed with my folks. They were transferred to another relocation center in Amache, Colorado — in southeastern Colorado.

Q: Were you with them at that time?

YONEHIRO: No, sir. I had already left the Tule Lake center. I left in the mid part of '43, and I had gone to the Chicago area.

Q: Your mother and father and your sister May were relocated to Colorado at what time, do you remember?

YONEHIRO: In 1943 — the end of '43.

Q: And did they stay there till the end of the war?

YONEHIRO: Yes, they did.

Q: And, after the war?

YONEHIRO: May I correct that. My father left several times on these work furloughs — he went to work on a farm in western Nebraska several times while my sister and mother stayed at camp.

Q: And is it true that your mother and sister fell in love with Colorado?

YONEHIRO: Yes.

Q: How long did they stay there?

YONEHIRO: Forty years, sir. Almost forty years, until my father expired in 1982. Then about, six months later, my mother left Colorado to live with my sister in Southern California.

Q: You said that you left the relocation center permanently in the middle of 1943.

YONEHIRO: Yes.

Q: And where did you go?

YONEHIRO: I went to Chicago, sir.

Q: And for what reason? Why did you pick Chicago?

YONEHIRO: Because the Chicago area was one of the few places that offered employment. While we were at camp, recruiters would come in from major companies and offer jobs, and like I said before, the only way you could leave camp was to pursue other lawful activities. So, you had to have a job when you left.

Q: And what job did you have?

YONEHIRO: Initially, I signed up to work for a cold storage plant in Detroit, Michigan. I worked for them for about a month and a half, and the cold storage plant got too much for me. I went back to Chicago, because I had a number of friends there, and I went to work for the Simonize Company in Chicago.

Q: Were you ever involved in any military activities in World War II? Did you enlist?

YONEHIRO: Yes.

Q: And to what outfit were you assigned?

YONEHIRO: The 442d Regimental Combat Team.

Q: I guess that we can take judicial notice of the fact that it is the most highly decorated unit of any kind in World War II, isn't that correct?

YONEHIRO: Yes, sir. Thank you, sir.

Q: When you were with the Regimental Combat Team, were you stationed in the United States?

YONEHIRO: For training purposes. And then we were assigned overseas and I served in combat in France and Italy, sir.

Q: And, did you see your brother at that time?

YONEHIRO: Yes, my brother was in the same unit. And I saw him not too frequently, but every once in a while.

Q: Were the majority of the recruits in the Regimental Combat Team from Hawaii or from California?

YONEHIRO: I would say two thirds were from the mainland, California, one third from Hawaii. The original unit was a Hawaiian National Guard Unit. The original was called the 100th Battalion, which became the 1st Battalion of the 442d Regiment.

Q: And the regiment saw action in Italy and in France?

YONEHIRO: Yes, sir.

Q: Did you receive any awards or decorations for your military service?

YONEHIRO: Subsequently, I did, sir, a Bronze Star.

Q: You mean you found out about it subsequently?

YONEHIRO: Yes.

Q: At the time you didn't realize you had been awarded it?

YONEHIRO: That's right.

Q: When were you discharged from the Army?

YONEHIRO: February 1946, sir.

Q: And where?

YONEHIRO: In Chicago — Fort Sheridan, Chicago.

Q: And then, what? The next event in the life of George Yonehiro?

YONEHIRO: I stayed on in Chicago and eventually — like all veterans, I wasn't too proud to work, and I thought I'd buy myself a little business and went broke as a gas station operator in nine months. I felt that the study of law would certainly be better. I picked up some more pre-legal units at the then Roosevelt College — named for Eleanor Roosevelt, it subsequently became Roosevelt University — and from there, I went to John Marshall Law School. I graduated from John Marshall in 1954, got admitted in January 1955, because the Supreme Court did not meet in December of '54. But I passed the bar the first time, which I was quite proud of. And I practiced in Chicago until November or December of '61, and we moved out to Colorado.

Q: How did you support yourself when you were in law school?

YONEHIRO: I worked full-time for the Simonize Company and attended law school evenings, sir.

Q: And how many years did you attend law school?

YONEHIRO: Four years, sir.

Q: You took the bar in Illinois?

YONEHIRO: Yes, sir.

Q: And when you started practice, what type of practice did you have in Chicago?

YONEHIRO: Anything that would come. Like all new lawyers, general practice and then eventually, the area I was practicing in. I had two offices — a Loop office for prestige (in the Loop you could rent offices for $60 a month, then) and a southeastern side office for practicality. The southeastern area became subject to an urban renewal program. And I got deeply interested and became a specialist in that area of condemnation.

Q: Were your clients chiefly of Japanese ancestry?

YONEHIRO: No, sir. Mostly Caucasians. About twenty percent Blacks, very few Japanese.

Q: Sometime in this period, did you get married?

YONEHIRO: Yes, in 1954, on Valentine's Day — how romantic — Koko and I got married.

Q: And where was Koko from?

YONEHIRO: She was from the Los Angeles area. She was born in Burbank and grew up in the El Monte area. She attended El Monte High School.

Q: Was she relocated at the beginning of World War II?

YONEHIRO: Yes, she was.

Q: To where?

YONEHIRO: She was relocated initially to Calleri Assembly Center in Calleri, California. Then she got transferred to Gila Relocation Center in Gila, Arizona. And then, eventually, transferred to Crystal City, Texas, which was an internment camp. Her father happened to be at one time a president of the Japanese Association — a social group in El Monte — and for that reason he was interned along with what they considered dangerous aliens — Japanese nationals.

Q: And as a result of that marriage, you have children. What are their names and when were they born?

YONEHIRO: Melissa was born in 1958; Marcus was born in 1959. Melissa is presently working in the development department, KVIE, educational TV, Channel 6.

Q: Did you meet Koko in Chicago?

YONEHIRO: Yes, sir.

Q: And what was she doing there, at that time?

YONEHIRO: She had come out, I guess, seeking her fortune in Chicago, and I met her in Chicago.

Q: You told me that after a few years in Chicago you decided to try your luck at the practice of law in Colorado. Was that because your parents were there?

YONEHIRO: Yes, sir.

Q: And where did you move to in Colorado?

YONEHIRO: Glenwood Springs, Colorado — about 175 miles west of Denver.

Q: And did you practice law there?

YONEHIRO: Briefly, sir, for a short time.

Q: Did you have to take the Colorado Bar Examination?

YONEHIRO: No, sir. I was admitted to the Colorado Bar on a motion made by a resident attorney.

Q: Then you made a subsequent move from Colorado. To where?

YONEHIRO: To Placer County.

Q: And for what reason did you return to Placer County?

YONEHIRO: Basically, initially, because at that time I was deeply interested in representing an investment group in Chicago, and they asked me to look up potential land development possibilities in California and Nevada and five western states. And I thought there were high potentials for investment in this area, and because I was a native of this area.

Q: And what type of investment were they interested in?

YONEHIRO: In possible commercial development.

Q: When you moved out here you had the children?

YONEHIRO: Yes, sir.

Q: And where in particular did you move in Placer County?

YONEHIRO: Applegate, California, approximately ten miles east of Auburn.

Q: And what kind of office did you set up, or what did you do in Applegate?

YONEHIRO: For land investment purposes?

Q: No, offices.

YONEHIRO: Our office was at home. On instructions from Chicago, I would go weeks at a time and look up potential areas for development.

Q: And that would include all other areas in California?

YONEHIRO: Yes.

Q: Then did you decide to resume the practice of law?

YONEHIRO: Yes, I did. But I was not a member of the California Bar. I took employment initially with the County of Placer in their Assessor's Department. Then I went to work at Sacramento Municipal Utility District in their Land Department, when they were developing the Upper American River Project. While I was working at Sacramento Municipal Utility

District, the former judge of the justice court, Alta Judicial District, had decided to retire and I campaigned in 1964 for that position and won the election.

Q: At that time to be a justice court judge, was it necessary to be a member of the Bar?

YONEHIRO: No, sir. You took a qualifying examination.

Q: And did you take that examination?

YONEHIRO: Yes, before I ran for the office.

Q: And what year was this?

YONEHIRO: 1964.

Q: And do you remember how many people ran against you?

YONEHIRO: Yes, three others ran against me. One was the city attorney of Colfax, one was the former clerk of the court, and the other was the Democratic Central Committeeman.

Q: What was the general geographic area of that judicial district?

YONEHIRO: Extending a few miles north of Auburn, clear up to the Donner Summit.

Q: What were some of the localities or names of towns in that area?

YONEHIRO: Dutch Flat, Colfax, Norden, Silver Springs, Emigrant Gap.

Q: At least half of those were place names associated with early mining activities in the Mother Lode country.

YONEHIRO: Yes.

Q: I guess the other half were associated with the railroad?

YONEHIRO: Yes.

Q: About how many people were in that district at the time?

YONEHIRO: About 12,000 registered voters.

Q: And can you tell me your best guess as to those voters who were of Japanese heritage?

YONEHIRO: Just our family and one lady — a Japanese war bride.

Q: So, if any voting was done on the basis of race or heritage, you were only assured of three votes.

YONEHIRO: Yes.

Q: Were you forced into a runoff?

YONEHIRO: Yes, sir.

Q: And then eventually you were elected?

YONEHIRO: Yes, sir.

Q: This was in 1964?

YONEHIRO: Yes, sir.

Q: And where was the courthouse located at that time?

YONEHIRO: Colfax, sir.

Q: And what type of facilities were available?

YONEHIRO: The court was in the old City Hall building in the City Council chambers.

Q: Colfax, at that time, probably the only claim to fame was that it was a stop on the railroad, right?

YONEHIRO: Yes, sir.

Q: How busy were you as a justice court judge — was it a full-time occupation, or could you do other things?

YONEHIRO: I could do other things, but I decided that if I were going to become a judge, I would devote full time to it. Initially, the pay was less than what I was earning at Sacramento Municipal Utility District. If I recall, it was about $6,800 or $6,900, just a little short of $7,000, but I decided to devote full time to it, improve the type of job that others had regarded as just part-time supplement to their other activities or occupations. The following year, the supervisors awarded me with recognition by making my court the only full-time justice court judgeship in Placer County, and raised my salary to $900 a month.

Q: I know that when you first took over as a justice court judge, you had a tremendous idealism so far as judges were concerned in the practice of law,

but one time I think you told me that one of your initial impressions was disillusionment the way that justice was handed out prior to your election.

YONEHIRO: Yes, sir.

Q: Tell me about it.

YONEHIRO: One of my first impressions is of the former judge. He remains unnamed, and he has long been deceased. The former judge used to sit in the back end of the little courtroom and observe me, especially when I was in small claims matters. And after the conclusion of one of those small claims cases he came in the back room where I was drinking coffee, sat with me and he said, "George, you're doing those cases too fast. Take them under submission. What you do is tell them you'll decide later, go on home and see which one will bring you the chicken or the ice cream, or whatever they want to bring."

Q: I take it, you didn't follow his advice.

YONEHIRO: No, sir.

Q: Now, some time during this period when you were a judge of the justice court, you engaged in a few writing activities, didn't you?

YONEHIRO: Yes.

Q: Tell me about those. Tell me about the first occasion in which you followed in your father's footsteps. I guess prior to this you had done some writing.

YONEHIRO: Yes. I was always interested in creative writing and short stories. When I was going to Sacramento Junior College and also to Roosevelt College, and in between, I wrote and had published by *Bluebook Magazine*, *The Saturday Evening Post*, and *Collier's*, short articles. At that time, the prevailing rate — the high was 2 to 2½ cents a word; low was about ½ cents a word. So you got a few dollars, but the dollars went far in those days.

Q: Did you author the articles under the name of George Yonehiro?

YONEHIRO: No, sir. Patrick Shanagan.

Q: Did you use the same Irish alias for all of the articles you published in national magazines?

YONEHIRO: Yes, sir. Or some other of that sort. George Yonehiro would never sell. But Patrick Shanagan would sell, and there were a few others that I adopted from time to time.

Q: Did you continue any of this writing after you returned to California?

YONEHIRO: Yes, I did, when I started getting to factual, because nonfiction paid a little better, for even the shortest article. I believe it was *Newsweek*, or one of the national news periodicals, just a one-paragraph item would give you $14–$50, which is a lot better than pounding the typewriter at short stories and getting only a few bucks.

Q: From 1964 on, how long were you a judge of the justice court of that one judicial district?

YONEHIRO: Till 1980, and then the Colfax-Alta Judicial District was consolidated with the then Auburn Judicial District. In 1980, I became judge of the consolidated district.

Q: How many JP's were there in Placer County prior to the consolidation?

YONEHIRO: Seven, sir.

Q: Do you remember any of the JP's who served with you at that time?

YONEHIRO: Yes, sir, Howard Gibson.

Q: He subsequently became a superior court judge.

YONEHIRO: Yes, sir.

Q: Who else?

YONEHIRO: Wayne Wylie, who also became a superior court judge. Robert Fugazi, who has recently retired from the Tahoe Judicial District.

Q: But at the time of his retirement, was he the equivalent of the municipal court judge, by virtue of salary and activity?

YONEHIRO: Yes, sir. He was one of the few remaining circuit judges.

Q: And how about another JP?

YONEHIRO: There was Frances Raines in Forest Hill who never had formal — yes, she did — she had a year or so at McGeorge Law School.

Q: And how about the JP in — was it Loomis or Lincoln?

YONEHIRO: Bob Young?

Q: Wasn't Dick Couzens a JP?

YONEHIRO: Oh, yes. Richard Couzens was initially appointed to the Lincoln justice court and then because Judge Wayne Wylie got elevated to the superior court, there was a vacancy in the Auburn Judicial District. The supervisors decided to hold an election for that office. Richard Couzens won the election, was judge of both Lincoln and Auburn Judicial Districts. Richard was, in 1980, appointed to the superior court.

Q: Now, after the consolidation of the Colfax and Auburn Judicial Districts, I presume that, of necessity, you were a full-time judge.

YONEHIRO: Yes, sir.

Q: And where did you sit?

YONEHIRO: I sat in both Auburn and Colfax, mainly in Auburn.

Q: But you divided your time between judicial districts?

YONEHIRO: Yes. It was consolidated — one judicial district — but the facilities were apart. I was also appointed to be judge of the Lincoln Judicial District, until the Lincoln Judicial District was consolidated with Loomis.

Q: So, at least at one time, you were a judge of a substantial percentage of not only the geography but of the population of the county.

YONEHIRO: Yes, sir.

Q: I want to spend a minute or two for you to tell me about the occasion of building the new courthouse in Colfax.

YONEHIRO: Yes, sir. There was a person named Mr. Chase, Earl Chase — a blind man who owned three different adjacent parcels in Colfax. On each parcel he had an old house. Every time there was a vacancy in one of the houses, the city attorney would condemn the house so he couldn't re-let it. On one of the remaining occupied parcels there was an old well. Some kids one evening had removed the sheet metal that covered the old well. The well had long ago filled in to where there was only about two to three feet deep. But on a technicality, the city attorney filed a misdemeanor "dangerous abandoned well" charge against Earl Chase. Earl Chase came up to answer the complaint, and he said he was getting sick and tired of

this harassment: "I will give you the property, Judge." I told him I could not receive the property, but the county would love the donation, and would he give it to the county for courthouse purposes. He said, "yes, sir." So it was easy. I walked up to the then chairman of the board and asked him to come to the court and make a formal acceptance on behalf of the county and we did just that. We got a quick title search — everything was okey dokey except for current taxes, and that was the subject property for a new courthouse in Colfax.

Q: And who designed it?

YONEHIRO: I did, sir, together with a structural engineer friend of mine, Carl Schonig, who has long expired.

Q: So that courthouse in Colfax that is still in use today certainly is a memorial to George Yonehiro.

YONEHIRO: Thank you, sir.

Q: When did you pass the bar, or did you ever pass the bar in California?

YONEHIRO: Yes, in 1977, sir.

Q: And did you ever practice law in conjunction with, or at the same time that you were a justice court judge?

YONEHIRO: No, sir, I never did, sir. I am one of the few judges in California who had never practiced California law at all.

Q: Now, in 1980, you were a justice court judge of the Colfax-Auburn Judicial District. And, at that time, that judicial district was far and away the largest judicial district in the county.

YONEHIRO: Yes, sir.

Q: There was some belief that at that time the population of the judicial district exceeded 40,000 people, was that correct?

YONEHIRO: Yes, sir.

Q: And I am told that one of the former publishers living in Auburn filed a suit in the superior court to declare the district to have over 40,000 people in it, primarily for the purpose of making that judicial district a municipal court.

YONEHIRO: Yes, sir.

Q: When did that happen?

YONEHIRO: That happened in 1981 or 1982. I think it was early '81, by Mr. William Cassidy.

Q: And then, for one reason or another, the Board of Supervisors took some action, pending the determination of that lawsuit, so far as relocating the boundaries of your judicial district, is that right?

YONEHIRO: Yes, sir.

Q: And as a result of the Board of Supervisors' actions, a certain number of people were removed from your district?

YONEHIRO: Yes, sir.

Q: So, as a result of that lawsuit, and as a result of the action of the Board of Supervisors, there was a determination that there were not, at that time, 40,000 people in your judicial district.

YONEHIRO: Yes, sir.

Q: Now, at about the same time, the Board of Supervisors took legislation to Sacramento to create municipal courts throughout the county. Is that right?

YONEHIRO: Yes, sir. With the exception of the Tahoe Judicial District, other judicial districts — the proposal was to consolidate all those and make one municipal court district.

Q: So the result of that proposed legislation was that there was to be one municipal court in the entire county except for the fringe area around Tahoe, and there would be how many municipal court judges?

YONEHIRO: Three, sir.

Q: And those judges were to be elected, or appointed?

YONEHIRO: Elected, sir, because there was a brand new judicial district.

Q: When was the election to be held?

YONEHIRO: In 1982.

Q: Do you remember the election of 1982? Did you have any opponents?

YONEHIRO: Yes, I had one, Mr. Phillip Mohr, a lawyer who resided in Roseville and practiced in Wheatland.

Q: And that was for one of the districts?

YONEHIRO: Yes, sir.

Q: Were all of the seats at large? They weren't divided into geographical districts?

YONEHIRO: This was one judicial district, but there were three seats — Seats One, Two and Three.

Q: And which one dial you run for?

YONEHIRO: One, sir.

Q: And as far as seats, Two and Three — were they contested?

YONEHIRO: Yes.

Q: Now, the election, so far as Seat One was concerned, was that determined in the primary?

YONEHIRO: In the primary.

Q: And Seats Two and Three?

YONEHIRO: In November, sir.

Q: So at least in point of time when you were elected to Seat One, you then became the first municipal court judge in the County of Placer?

YONEHIRO: Yes, sir.

Q: Can you give me some sort of guess as to the number of Japanese voters in Placer County in 1982?

YONEHIRO: I would say less than one percent.

Q: Aside from any possibility of a marshal or constable, were there any other officeholders in Placer County of Japanese ancestry?

YONEHIRO: No, sir.

Q: So, in effect, you were the first person of Japanese heritage elected to a county-wide office?

YONEHIRO: Yes, sir.

Q: That was in 1982?

YONEHIRO: Yes, sir.

Q: And who were elected with you?

YONEHIRO: Judge John Cosgrove and Judge Richard Ryan.

Q: And at that time how many superior court judges were there in Placer County?

YONEHIRO: At that time there were four.

Q: In 1982, at the time that you were elected to the municipal court, who were the superior court judges?

YONEHIRO: Judges Howard Gibson, Wayne Wylie, Richard Couzens and Richard Sims.

Q: Soon after that, there was a vacancy created by Judge Sims's elevation. Was that the first vacancy?

YONEHIRO: Yes, sir.

Q: And who was appointed to his spot?

YONEHIRO: Judge Richard Gilbert.

Q: And after that, was there another vacancy?

YONEHIRO: Yes, Judge Wylie retired and Judge Jack Willoughby was appointed.

Q: Then, in 1984, there was a general election in Placer County?

YONEHIRO: Yes, sir.

Q: And in the general election, one of the spots to be voted upon was for the superior court?

YONEHIRO: Yes, sir.

Q: And did you run for that office?

YONEHIRO: Yes, sir.

Q: And were you elected?

YONEHIRO: Yes, sir.

Q: In the primary?

YONEHIRO: Yes, sir.

Q: And you have served as a superior court judge since that date?

YONEHIRO: Yes, sir.

Q: So that your experience as a judge in Placer County was that you were elected as a justice of the peace, you were elected as a municipal court judge and you were elected as a superior court judge?

YONEHIRO: Yes, sir.

Q: Sometime after your elevation to the superior court, I think you had occasion to try and recover some of your war records, including a discharge paper.

YONEHIRO: Yes, sir.

Q: When was that?

YONEHIRO: 1955, I believe.

Q: And what happened on the occasion of your relocating those records?

YONEHIRO: I found I had earned the Bronze Star.

Q: I know that you're not one to count, but I saw a picture of you on the occasion of receiving that award, and it seems to me that there were at least four rows of ribbons. And to that, you added the Bronze Star.

YONEHIRO: Yes, sir.

Q: So, after you came to California — after the war, of course — did you resume any military activity?

YONEHIRO: Yes, sir.

Q: What was that?

YONEHIRO: With the California State Military Reserve, sir.

Q: And what type of work did you do for them?

YONEHIRO: I was director of Logistics; I was judge advocate, and I am presently deputy commander under General Matson.

Q: What rank do you have?

YONEHIRO: Colonel.

Q: I presume that you joined the American Legion?

YONEHIRO: Yes.

Q: Any other organizations?

YONEHIRO: Veterans of Foreign Wars, Sons of Italy, the Navy League.

Q: Let's not skip over the Sons of Italy too fast. I take it you adopted some sort of Italian heritage for that purpose. Did you join the Sons of Italy under an assumed Italian name?

YONEHIRO: No, sir. Japanese and Italian names all end in a vowel, so I didn't have to change my name.

Q: You were convinced that they thought that you were of Italian blood! And what were some of the other organizations?

YONEHIRO: Veterans of Foreign Wars, the Navy League. I joined the Navy League primarily in interest and support of my son, Marcus, who graduated from Annapolis in 1982 and is still with the Navy Department. He has recently returned to Annapolis to teach.

Q: Now, as far is Marc in concerned — did he go to local schools?

YONEHIRO: Yes, he went to Colfax High School and then was appointed to Annapolis in 1978.

Q: So, as a former member of the Army, you decided, for his sake, to join the Navy League.

YONEHIRO: Yes.

Q: Did you go to his graduation?

YONEHIRO: Yes, sir.

Q: And he became an ensign in the United States Navy.

YONEHIRO: Yes, sir. And I was very proud, sir.

Q: You should be, indeed. What type of ship was he assigned to?

YONEHIRO: To a destroyer, sir.

Q: And what were some of the places he had served?

YONEHIRO: On one tour he went WESPAC — that is Western Pacific, Australia, Japan, and the Aleutian area. The second two duties or tours were in the Persian Gulf — he served two six-month sea tours in the Persian Gulf.

Q: And now he's doing what?

YONEHIRO: He's been assigned to Annapolis. He's teaching Navigation and Surface Warfare.

Q: Any other organizations?

YONEHIRO: Japanese-American Citizens League, National Guard Association of California.

Q: There was an early California case called *People v. Hall*, and in it, in 1852, the Supreme Court said that Chinese were in fact Indians and couldn't testify in court because there was a restriction against Indians testifying. And towards the end of the opinion, the chief justice made some remark that if he didn't do this that Asiatics would have a foothold and eventually they would want to become jurors and even, God forbid, sit on the bench! You've made his prophecy come true in that at least one Asiatic had the temerity to want to sit on the bench in California. About how many people of Japanese ancestry are there on the bench that you know of?

YONEHIRO: Presently?

Q: Yes.

YONEHIRO: I would say about eight or nine, sir, mostly in the Southern California area.

Q: Are there any others in the Northern California area?

YONEHIRO: The closest, I believe, would be Justice [Harry] Low in San Francisco.

Q: Who is of Chinese ancestry?

YONEHIRO: Yes.

Q: I guess that the most important contribution you could give to us is a viewpoint of the fact that you have reached such phenomenal success in spite of difficulties in World War II and relocation. Tell me some of your ideas about patriotism and service and the fact that you had such an unfortunate beginning with the government.

YONEHIRO: That's easy, sir. I grew up, like I have previously described, under a samurai or warrior father whose philosophy was not stoic as much as to endure and outlast the bastards, if I might use the term. And later, that same type of philosophy was tempered when I was associated for a

time with an older Jewish man who had the Hebrew philosophy, "Stay alive, George, just to be curious." And I believe that is one of the things that strengthened the Jewish people. Very few Jewish people commit suicide. Stay alive just to be curious. The shortcoming, or some of the adversities that others may seemingly think we have suffered I have never felt too deeply because of the philosophy my dad had impressed upon me to always look forward, never to look behind in time. Time will cure and time will strengthen you. What you may have lost today will be an advantage to you tomorrow type of a philosophical approach to life. All the time we were in evacuation or during the relocation period, my dad had always told us never to be bitter. Bitterness clouds the mind and doesn't accomplish anything.

Q: I never had the good fortune of meeting your father, but I know indirectly that there were few people who were prouder of his children than he was, and for good reason. All three boys served in the Army under very adverse circumstances.

YONEHIRO: If I might expand on that. I had a homicide case involving two black defendants. One of the defendants voiced his objection based on the premise that I or counsel might be prejudiced. I thought that everyone may be prejudiced towards his defense. I tried to teach him that he really, at his young age — early 20s, I believe he was — didn't know prejudice . His surname is Porter. For example, I said, "Mr. Porter, if someone contacted you by telephone or by mail, simply by use of your surname, they would not differentiate you from any other American. Anyone who wishes to contact Yonehiro, either by telephone or by mail knows immediately that I am of Japanese ancestry. The mere fact that I was of Japanese ancestry caused me to be incarcerated." I asked if the mere fact that his name was Porter caused him to be incarcerated. He said, "No." And I think after that short lecture or advice, he felt differently and he accepted the appointment of counsel and the court.

Q: Do you think most of the people your age carried a lasting resentment?

YONEHIRO: No, sir.

Q: Have you kept track of any of the people who were in relocation centers with you?

YONEHIRO: Yes, sir.

Q: And what has happened to some of them?

YONEHIRO: One of them, for example, is Hije Yago who became the first marshal in Placer County. He was initially an elected constable in the judicial district when it became a municipal court. He was in Tule Lake. And his reaction to the evacuation, to what has befallen the people of Japanese ancestry during World War II is not much different than others I have had contact with. There is no resentment. It is one of life's experiences, and it may be hard to relate to others but the Japanese had long had — not only Japanese, but Chinese — the Asiatic — have had a type of philosophy based on their geographic location, climatic conditions — subject to earthquakes and typhoons and flooding, famines and all that — but it is that type of philosophy based on, or closely related to, religious doctrines. Buddhism is philosophy, pure and simple — more philosophy than that religious philosophy that Christians embrace. By the way, I am a Catholic. Anyway, when you live close to nature — not because of the typhoons or earthquakes or floods — you live to be like one of God's little children or flowers. You learn to bend with the wind. You have to do that to survive.

Q: I can't think of a better expression to end this interview. I thank you on behalf of the State Bar, and I think it goes without saying that your reflections and autobiography as you related today indicate that you have indeed contributed a tremendous amount to the history of the law in California.

YONEHIRO: Thank you. I appreciate the opportunity.

* * *

# SPECIAL BOOK SECTION

PREVIEW OF FORTHCOMING BOOK CHAPTER

# FREEDOM OF EXPRESSION UNDER THE CALIFORNIA CONSTITUTION

JOSEPH R. GRODIN*

Most of us, when we want to refer to constitutional protection for expressive activity, refer to our "First Amendment rights." But when delegates to the first California constitutional convention gathered in Monterey in 1849 to draft a Declaration of Rights, the First Amendment was not a subject of discussion. Not only had the First Amendment never been interpreted by the U.S. Supreme Court, at that time the federal Bill of

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This article is intended to be the first in a series on rights and liberties under the California Constitution, focusing primarily on areas in which the state Constitution has been interpreted, or is subject to being interpreted, as providing greater protection than the federal Constitution. The author appreciates the helpful suggestions he received from readers of the draft, including Ann Brick and Karl Olson, and its excellent editing by his research assistant, Monica Smith.

Rights had no application to the states.[1] Instead, in drafting what became the first article of the Constitution, the delegates chose as models primarily the constitutions of New York and Iowa; and while most state constitutions had similar provisions relating to freedom of speech, it was the New York Constitution of 1846 that provided the text.[2] Article I, section 9 of California's first constitution read:

> Every citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press. In all criminal prosecutions on indictments for libels, the truth may be given in evidence to the jury; and if it shall appear to the jury that the matter charged as libellous is true, and was published with good motives and for justifiable ends, the party shall be acquitted; and the jury shall have the right to determine the law and the fact.

And section 10 read:

> The people shall have the right freely to assemble together, to consult for the common good, to instruct their representatives, and to petition the legislature for redress of grievances.

The language of sections 9 and 10 was incorporated without change into the Constitution of 1879, and has survived with only minor changes. In 1974, section 9 was renumbered as section 2, and in 1980 it became section 2(a), supplemented by a provision creating a newspersons' privilege that became section 2(b).[3] Section 2(a) now reads:

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[1] Barron v. Mayor & City Council of Baltimore, 32 U.S. 243 (1833).

[2] The language in the 1846 New York Constitution derived in turn from earlier constitutions in New York, and from earlier constitutions in other states. For discussion of the history and its significance to interpretation, *see* Christian G. Fritz, *More Than Shreds and Patches: California's First Bill of Rights*, 17 Hastings Const. L.Q. 13 (1989); Jennifer Friesen, *Should California's Constitutional Guarantees of Individual Rights Apply Against Private Actors?*, 17 Hastings Const. L.Q. 111 (1989); Margaret C. Crosby, *New Frontiers: Individual Rights Under the California Constitution*, 17 Hastings Const. L.Q. 81 (1989). *See also* the extensive discussion by the California Supreme Court in Gerawan Farming, Inc. v. Lyons, 24 Cal.4th 468 (2000).

[3] *See infra* Section VII.

> Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press.

Section 10 was renumbered as section 3 in 1974, then as section 3(a) in 2004. It was changed in 1974 to read:

> The people have the right to instruct their representatives, petition government for redress of grievances, and assemble freely to consult for the common good.

It was to be expected, notwithstanding the independent origins of the free speech and assembly provisions of the California Constitution, that their interpretation would be influenced over time by the First Amendment and its interpretation by the U.S. Supreme Court. This article's principal undertaking, however, is a description of the ways in which interpretation by California courts of the state constitutional provisions has given rise to a somewhat different jurisprudence, providing protections for expressive activity and association beyond the First Amendment. Toward the end of the article, I will discuss the justification for and methodology of such a distinctive state approach.

## I. EARLY CASES

The year was 1893; the place was a courtroom in San José. The case was *Price v. Price*, a hotly contested divorce proceeding, and the evidence (according to the lawyers) "would probably be of a filthy nature." The trial judge — anxious, he said, to protect decorum and public sensitivity — issued an order closing the courtroom to members of the public and directing that "no public report or publication of any character of the testimony in the case be made."

Charles Shortridge,[4] the editor and publisher of the *San Jose Mercury*, promptly violated the court's order by publishing the next day what purported to be the testimony of the witnesses. Appearing in response to an

[4] Charles was part of an illustrious family that came to California from Iowa and that included his sister, Clara Shortridge Foltz, the first woman lawyer in California, and brother, Samuel Shortridge, who later became U.S. senator from California. *See* Barbara Babcock, Woman Lawyer: The Trials of Clara Foltz (2011).

order to show cause why he should not be adjudged guilty of contempt of court, Shortridge said he meant no disrespect; he was simply exercising his constitutional right of free speech. Found guilty and ordered to pay a $100 fine, Shortridge sought relief through writ of habeas corpus in the California Supreme Court, thereby giving rise to the first appellate decision on free speech rights under the state Constitution.[5]

Deciding in favor of Shortridge, the Court understandably made no mention of the federal Constitution or the First Amendment. In 1833 the U.S. Supreme Court had decided in *Barron v. Baltimore* that the federal Bill of Rights had no application to the states;[6] and it was not until 1908, in *Twining v. New Jersey,* that the Court suggested it was "possible that some of the personal eight Amendments against National action may also be safeguarded against state action, because a denial of them would be a denial of due process of law."[7] At the time *Shortridge* was decided, there was no authority for the proposition that the First Amendment might be among the amendments thus incorporated. Indeed, that authority did not exist until years later, when the U.S. Supreme Court in *Gitlow v. New York*, in the process of upholding Gitlow's conviction, grudgingly conceded that "[f]or present purposes we may and do assume that freedom of speech and of the press . . . are among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment . . . ."[8]

And so it was that the *Shortridge* court spoke instead about state constitutions:

> The constitution of every state in the Union guarantees to every citizen the right to freely speak, write, and publish his sentiments on all subjects, and prohibits the passage of any law "to restrain or abridge the liberty of speech or of the press." What one may lawfully speak he may lawfully write and publish. The rights thus preserved by the constitution are dear to the heart of every American, and their exercise can be complained of by the courts in a

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5 *In re* Shortridge, 99 Cal. 526 (1893).

6 Barron v. Baltimore, 32 U.S. 243 (1833).

7 Twining v. New Jersey, 211 U.S. 78, 99 (1908).

8 Gitlow v. New York, 268 U.S. 652, 666 (1925).

> summary proceeding only when the publication or the speech interferes with the proper performance of judicial duty.[9]

The Court acknowledged but dismissed the English common law precedents which found the publication of even truthful accounts of pending cases to be contempt of court, saying,

> [P]recedents promulgated at a time when the ministers of the crown claimed and exercised the right to seize a newspaper and stifle the voice of its editor, when books were destroyed and speeches suppressed to subserve political purposes, are of little value in this age, and especially in this country.[10]

The Court instead relied on Cooley's *Constitutional Limitations* for the proposition that the constitutional liberty "implies the right to freely utter and publish whatever the citizens may please, and be protected against any responsibility for so doing . . . so long as it is not harmful in its character when tested by such standards as the law affords."[11] While a newspaper has "no right to assail litigants during the progress of a trial, intimidate witnesses, dictate verdicts or judgments, or spread before juries its opinion of the merits of cases which are on trial," the Supreme Court said, Shortridge's article did not exceed these limitations, and the trial court's order was void.[12]

While the Court's reasoning in *Shortridge* seemed to invoke a general constitutional right existing beyond the language of any particular constitution, the Court's next free speech opinion was more narrowly focused. The events which gave rise to that focus, however, were far from narrow. In 1895, San Francisco was embroiled in a sensational murder trial which attracted nationwide attention.[13] A medical student by the name of

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9 *Shortridge*, 99 Cal. at 533.

10 *Id.* at 535.

11 *Id.* (citing Thomas M. Cooley, A Treatise on the Constitutional Limitations Which Rest upon the Legislative Power of the States of the American Union (1868)).

12 *Id.*

13 The case was followed in the pages of the New York Times (*e.g.*, *Lunatic Tries To Kill Durrant: Rushes at Him as the Man Accused of Murder Entered the Court*, Aug. 5, 1895); Brooklyn Daily Eagle (*e.g.*, *Durrant and Miss Williams* (Apr. 23, 1895), *Damaging to the Pastor* (Apr. 25, 1895), *Police Stop the Play* (July 30, 1895), *Durrant Writes*

Theodore Durrant was accused of committing a pair of grisly murders in the Emmanuel Baptist Church in San Francisco. At his preliminary hearing damaging circumstantial evidence was produced, including somewhat dubious eyewitness testimony that placed Durrant in the vicinity of the church the night of the murders.

While the jurors were being selected for the trial, an entrepreneur by the name of William R. Dailey undertook to produce a play (*The Crime of a Century*) at the Alcazar Theater in San Francisco, based on the testimony at the preliminary hearing plus some imagination. Durrant's counsel, claiming that the production of the play during trial "would be an interference with the administration of justice, and deprive [Durrant] of a fair and impartial trial,"[14] asked Judge Murphy, the trial judge, to issue an order prohibiting the production. He did, but the production went on anyway, in defiance of the order. According to one account, "A great crowd attended the performance, which was hissed at intervals." In the middle of the third act, "[j]ust at the point when Debois, the character who is supposed to impersonate Durrant, was about to drag a woman to the belfry of a church, Sheriff Whelan and his deputies marched on the stage and arrrested the performers, eleven in all. The manager of the theater [Dailey] was also placed under arrest. . . . The whole company spent the night in jail."[15]

The next morning Dailey and the actors appeared in court. Judge Murphy found Dailey in contempt of his order, and sentenced him to three days in jail. The actors were released, based on their promise not to appear further in the production. Dailey sought relief through extraordinary writ in the California Supreme Court, invoking the free speech provision of the state Constitution, then article I, section 9.

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*a Book* (Nov. 6, 1895), and *Durrant Resentenced* (Apr. 11, 1897), *available at* http://afflictor.com/2011/06/12/old-print-articles-the-durrant-murder-case-brooklyn-daily-eagle-1895-99/; as well as in San Francisco's Examiner (*e.g.,* July 14, 1895) and Call (*e.g.,* July 30, 1895). The descriptions of the events are taken from these articles, as well as from the appellate court's opinion.

14 Dailey v. Super. Ct., 112 Cal. 94, 96 (1896). The concern was apparently well founded: newspaper accounts tell us that the first forty veniremen were disqualified for bias. The prosecutor joined in the request.

15 *Police Stop the Play*, Brooklyn Daily Eagle, July 30, 1895, *available at* http://afflictor.com/2011/06/12/old-print-articles-the-durrant-murder-case-brooklyn-daily-eagle-1895-99/.

The Court, in a 6–1 opinion by Justice Garroutte, held that the superior court's order was "an attempted infringement upon the rights guaranteed to every citizen by section 9":

> The wording of this section is terse and vigorous, and its meaning so plain that construction is not needed. The right of the citizen to freely speak, write, and publish his sentiments is unlimited, but he is responsible at the hands of the law for an abuse of that right. . . . It is patent that this right to speak, write, and publish, cannot be abused until it is exercised, and before it is exercised there can be no responsibility. The purpose of this provision of the constitution was the abolishment of censorship, and for courts to act as censors is directly violative of that purpose. This provision of the constitution as to freedom of speech varies somewhat from that of the Constitution of the United States, and also more or less from the provisions of many state constitutions treating of this question; but, if there is a material difference in the various provisions, it works no harm to this petitioner, for the provision here considered is the broader, and gives him greater liberty in the exercise of the right granted. . . . The [superior] court had ample power to protect itself in the administration of justice after the contempt was committed. As to the offender, it could punish him; as to the defendant on trial, he could be deprived of no rights by any act of this petitioner. If the publication deprived him of a fair and impartial trial at that time, a second trial would have been awarded him.[16]

Consequently, the trial court's order was annulled.[17] Durrant was convicted anyway, and hanged, despite evidence that the pastor of the church may have been the culprit.

While *Dailey* stands as an early confirmation of the independent status of state constitutional rights, the holding in that case, insofar as it seems to prohibit any injunction against speech, has since been modified.[18] And

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16 *Id.* at 97–100.

17 *Id.* at 100.

18 *See* Aguilar v. Avis Rent A Car Sys., 21 Cal.4th 121 (1999) (permissible to enjoin repetition of speech found to be unlawful, distinguishing *Dailey* on the ground that the speech in that case had not been determined to be unlawful before the injunction issued).

the opinion's implication, contrary to the broad language in *Shortridge*, that the free speech provision of the California Constitution protects *only* against prior restraints, leaving the government unlimited power to impose sanctions upon expression, has since been rejected — not, however, before it was allowed to cause considerable damage.

## II. THE RED SCARE CASES

In 1919 the California Legislature, responding to a national "Red Scare" which followed in the aftermath of World War I, enacted the Criminal Syndicalism Act.[19] The statute defined "criminal syndicalism" as "any doctrine or precept advocating, teaching, or aiding and abetting the commission of crime, sabotage . . . or unlawful acts of force and violence or unlawful methods of terrorism as a means of accomplishing a change in industrial ownership or control, or effecting any political change . . . ." Anyone who advocated, encouraged, or "justified" criminal syndicalism, or who assisted in the organization of a society to teach, aid or abet criminal syndicalism, was guilty of a crime.

A principal target of the Criminal Syndicalism Act was the Industrial Workers of the World (IWW), a radical labor organization widely accused of promoting "anarchy." In 1921 the California Supreme Court upheld the conviction of Nick Steelik, on the basis of evidence that he was a member of and organizer for the IWW, and that he "personally advocated revolution and preached some of the doctrines denounced as criminal in the act."[20] Rejecting Steelik's argument that the statute violated his "right of free speech guaranteed in the federal and state Constitutions," the Court declaimed,

> The right of free speech was guaranteed to prevent legislation which would by censorship, injunction, or other method prevent the free publication by any citizen of anything that he deemed it was necessary to say or publish. . . . The right of free speech does not include the right to advocate the destruction or overthrow of government or the criminal destruction of property. . . . It is expressly provided in our constitution that the publisher is liable for an abuse of this

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19 1919 Cal. Stat. 281 (repealed).

20 People v. Steelik, 187 Cal. 361 (1921); Stephen M. Kohn, American Political Prisoners: Prosecutions Under The Espionage And Sedition Acts 167 (1994).

> power and for any unlawful publication. This statute does not prevent the publication; it punishes the publisher . . . .[21]

By the time *Steelik* was decided, the U.S. Supreme Court had embarked, for the first time, upon the development of First Amendment jurisprudence, with its seminal decisions upholding convictions for subversive advocacy under the federal Espionage Act of 1917.[22] It is therefore interesting that the *Steelik* court made no reference to these cases — perhaps because at the time, and until the U.S. Supreme Court's 1925 decision in *Gitlow v. New York*,[23] there was no authority for the proposition that the First Amendment applied to the states at all. The *Gitlow* court, while establishing that states are limited by the First Amendment, nevertheless upheld New York's "criminal anarchy" statute, which was quite similar to the statute in California. And two years later, in *Whitney v. California*, the Court upheld California's Criminal Syndicalism Act against First Amendment challenge, over a strong dissent by Justices Brandeis and Holmes.[24] It did so, however, not on the reasoning of *Steelik,* but on the broader ground that the statute was within the "police power" of the state to protect against dangers to public peace and security.[25]

Nine years after *Steelik,* the California Supreme Court was confronted with another case involving subversive advocacy, this time under the state's "red flag law."[26] Adopted at about the same time as the Syndicalism Act, the law made it a felony to display a red flag in any public place "as a sign, symbol or emblem of opposition to organized government or as an

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21 *Id.* at 375. For good measure, the Court went on to say, not very convincingly, that Steelik was in any event "not in a position to raise the point, for he is not charged with or convicted of a violation . . . involving anything that he said or published . . . ." *Id.*

22 *See* Schenck v. United States, 249 U.S. 47 (1919) (opinion by Holmes, J.); Frohwerk v. United States, 249 U.S. 204 (1919) (opinion by Holmes, J.); Abrams v. United States, 250 U.S. 616 (1919) (Holmes and Brandeis, JJ., dissenting). In *Schenck,* Justice Holmes, who had previously expressed the view that freedom of expression was protected only against prior restraints, acknowledged that "[i]t well may be that the prohibition of laws abridging the freedom of speech is not confined to previous restraints, although to prevent them may have been the main purpose . . . ." 249 U.S. at 51–52.

23 Gitlow v. New York, 268 U.S. 652 (1925).

24 Whitney v. California, 274 U.S. 357 (1927).

25 *Id.* at 371–72.

26 Stromberg v. People of California, 283 U.S. 359 (1931); Cal. Penal Code § 403a (repealed 1933).

invitation or stimulus to anarchistic action or as an aid to propaganda that is of a seditious character." Yetta Stromberg, age nineteen, was one of the supervisors at a summer camp for children between the ages of ten and fifteen, in the foothills of the San Bernardino Mountains. A member of the Young Communist League, an international organization affiliated with the Communist Party, Stromberg supervised a daily ceremony directing the children to raise a red flag, apparently a reproduction of the flag of the Communist Party of the United States. As part of the ritual, the children saluted and recited a pledge of allegiance "to the workers' red flag, and to the cause for which it stands, one aim throughout our lives, freedom for the working class." Stromberg was convicted of violating the statute.

The Court of Appeal upheld her conviction, as against the claim that the statute violated both the First Amendment and article I, section 9 of the California Constitution,[27] on the ground that the definition of "sedition" under the statute included advocacy of violent overthrow of government, and there was evidence that Stromberg did engage in such advocacy.[28] The California Supreme Court declined to hear the case, but the U.S. Supreme Court granted *certiorari* and reversed.[29] While giving lip service to *Whitney* and *Gitlow*, it found the California statute, to use modern First Amendment language, unconstitutionally overbroad.[30] Twenty years later, in the context of another "red scare," the U.S. Supreme Court pronounced *Whitney* and *Gitlow* legally dead, and explicitly adopted the "clear and present danger" test long advocated by Holmes and Brandeis.[31]

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[27] This should not be taken as criticism of the lawyers, lest I be caught in my own critique. *See* Wirta v. Alameda-Contra Costa Transit Dist., 68 Cal.2d 51 (1967), in which I put forth and the Court accepted a First Amendment claim on behalf of Women for Peace, who wished to place an ad on AC Transit buses. I doubt that my briefs mentioned the California Constitution, nor did the Court's opinion, though it was written by Justice Mosk, normally a strong proponent of independent state analysis. *See also infra* notes 103–06 and accompanying text.

[28] People v. Mintz, 106 Cal.App. 725, 731 (1930). Bella Mintz was one of three codefendants. The Court of Appeal reversed the convictions of defendants other than Stromberg on the basis that there was no allegation or proof of an overt act. The Court of Appeal issued two opinions, one of them by a judge assigned pro tem and the other by the two permanent justices of the court.

[29] *Stromberg*, 282 U.S. 359.

[30] *Id.* at 369.

[31] Dennis v. United States, 341 U.S. 494 (1951).

## III. THE CALIFORNIA CONSTITUTION IN HIDING

For several decades after *Stromberg*, the free speech provision of the California Constitution seemed to go into hiding. This was not because there were no free speech cases that reached the California courts. Many did. But typically the courts would discuss the cases in terms of First Amendment law without mentioning the California Constitution at all. Or if they did mention it, they relegated it to a secondary position without independent analysis, finding the challenged governmental action to be valid or invalid on the basis of the First Amendment and then adding something like "and the result is the same under the California Constitution."

There are a number of possible explanations. During this period the U.S. Supreme Court was developing a substantial body of First Amendment jurisprudence, and lawyers invoking a constitutional claim against governmental action restrictive of speech turned naturally to those precedents. Even when lawyers did put forth a claim based on the state Constitution, it was easier for courts to rely on First Amendment analysis than to engage in the development of an independent state jurisprudence.[32]

All this was illogical, as Hans Linde of Oregon pointed out in an influential article,[33] arguing that a state could not be said to deprive a person of due process under the federal Constitution through action that was invalid under the state's own constitution.[34] It was, moreover, contrary to the principle of judicial restraint reflected in the doctrine that a court should not consider the constitutional validity of a statute if through reasonable interpretation the constitutional question could be avoided. And, reliance upon the federal Constitution to invalidate state action could prove to

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[32] As a judge I was probably on occasion guilty of that sin as well.

[33] Hans A. Linde, *First Things First: Rediscovering the States' Bills of Rights*, 9 U. Balt. L. Rev. 379, 383 (1980). The practice of tagging on to federal interpretation continues in a number of free speech areas. *See, e.g.,* Keenan v. Super. Ct., 27 Cal.4th 413, 435–36 (2002) (holding California's "Son of Sam" law unconstitutional under First Amendment precedent and concluding that it also violated article I, section 2, because "neither party suggests any reason why it should provide lesser protection under the circumstances of this case").

[34] The Ninth Circuit follows Linde's advice, holding that federal courts "should avoid adjudication of federal constitutional claims when alternative state grounds are available." Vernon v. City of L.A., 27 F.3d 1385, 1391–92 (9th Cir. 1994).

be embarrassing if the U.S. Supreme Court did not agree. But as Holmes taught us, the life of the law is not necessarily logic.

Perspectives on the relationship between the state and federal constitutions in areas other than free speech began to change in the 1950s, when the California Supreme Court, at a time when federal law did not require exclusion of illegally obtained evidence, decided in *People v. Cahan* that evidence obtained in violation of the state Constitution was inadmissible in a criminal proceeding.[35] The trend picked up in 1972, when the Court held California's death penalty statute unconstitutional in *People v. Anderson*.[36] In the same year, the state Constitution was amended to add an explicit right of privacy[37] as well as an explicit statement of state constitutional independence: "Rights guaranteed by this Constitution are not dependent on those guaranteed by the United States Constitution."[38] Finally, in 1979, the Court broke with federal precedent in the area of free speech.

## IV. EXPRESSIVE ACTIVITY ON PRIVATE PROPERTY: *PRUNEYARD* AND ITS PROGENY

"The Pruneyard"[39] is the name of a typical large shopping center in San José, with some twenty-one acres containing shops, restaurants, and a cinema connected by roads, walkways, and plazas, bordered on two sides by public sidewalks and streets. One Saturday afternoon in the late 1970s a group of high school students appeared at Pruneyard's central courtyard, set up a card table in the corner, and proceeded to solicit passersby for their signatures to a petition to be sent to the White House expressing their opposition to a United Nations resolution against "Zionism." The students were informed by Pruneyard security personnel that their activity violated Pruneyard regulations prohibiting public expressive activity unrelated

35 People v. Cahan, 44 Cal.2d 434 (1955); *see also* Cardenas v. Super. Ct., 56 Cal.2d 273 (1961) (holding that although the defendant's mistrial did not place him in jeopardy under the federal Constitution, "his jeopardy is real" under the Court's construction of the California Constitution).

36 People v. Anderson, 6 Cal.3d 628 (1972).

37 Cal. Const. art. I, § 1.

38 Cal. Const. art. I, § 24. The section goes on to state: "This declaration of rights may not be construed to impair or deny others retained by the people."

39 Robins v. Pruneyard Shopping Ctr., 23 Cal.3d 899 (1979).

to the commercial purposes of the shopping center. The students left, and sued.

The status of shopping centers in relation to the First Amendment had, prior to *Pruneyard*, a checkered history in the U.S. Supreme Court. Initially that Court, by extension of its holding in *Marsh v. Alabama* that a company-owned town could not exclude Jehovah's Witnesses who wished to distribute literature on its sidewalks,[40] held in *Amalgamated Food Employees v. Logan Valley Plaza* that a privately owned shopping center could not preclude striking workers from picketing a store within it.[41] Without directly addressing the "state action" requirement for applying the federal Bill of Rights, the Court stated:

> [B]ecause the shopping center serves as the community business block "and is freely accessible and open to the people in the area and those passing through," the State may not delegate the power, through the use of its trespass laws, wholly to exclude those members of the public wishing to exercise their First Amendment rights on the premises in a manner and for a purpose generally consonant with the use to which the property is actually put.[42]

A few years later, however, in *Lloyd Corp. v. Tanner,* involving anti-Vietnam War protestors, the Court held that *Logan Valley Plaza* did not apply to speech that was unrelated to the business of the shopping center.[43] Finally, in *Hudgens v. National Labor Relations Board* the Court, emphasizing that "the constitutional guarantee of free speech is a guarantee only against abridgment by government," rejected the distinction advanced in *Lloyd* on the ground that it was content based.[44] The Court expressly overruled *Logan Valley Plaza* and held that "the constitutional guarantee of free expression has no part to play in a case such as this."[45]

Meanwhile, before its decision in *Pruneyard* the California Supreme Court had on four occasions upheld a right to expression on private

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40 Marsh v. Alabama, 326 U.S. 501 (1946).

41 Amalgamated Food Emp. Union Local 590 v. Logan Valley Plaza, 391 U.S. 308 (1968) [hereinafter *Logan Valley Plaza*].

42 *Id.* at 319–20 (quoting *Marsh*, 326 U.S. at 508).

43 Lloyd Corp. v. Tanner, 407 U.S. 551, 563–64 (1972).

44 Hudgens v. NLRB, 424 U.S. 507, 513, 520 (1976).

45 *Id.* at 521.

property. In *Schwartz-Torrance Investment Corp. v. Bakery & Confectionery Workers' Union* the Court, presaging the U.S. Supreme Court's decision in *Logan Valley Plaza*, held on the basis of balancing the right of free expression against property rights, that a shopping center was not entitled to an injunction excluding a union from picketing a business within the center.[46] In *In re Hoffman*, the Court held that anti-Vietnam War protestors had a constitutional right to distribute leaflets within Union Station in Los Angeles, though it was owned by three railroads,[47] and that a municipal ordinance purporting to prohibit such activity was invalid.[48] In *In re Lane* the Court held that a union representative had a constitutional right to pass out handbills on a privately owned sidewalk leading from a parking lot to the Calico Market in Concord, a large "super-market-type" grocery store with whom the union had a dispute.[49] And in its initial decision in *Diamond v. Bland* (*Diamond I*) the Court relied on these precedents and the federal cases to hold that People's Lobby, an environmental organization, had a constitutional right to solicit signatures on initiative petitions inside a shopping mall, and ordered the trial court to enjoin the shopping mall owner from interfering with that right.[50]

Following the U.S. Supreme Court's decision in *Hudgens*, however, the mall owner in *Diamond v. Bland* sought and obtained a dissolution of the injunction on the ground that *Hudgens* had undermined the reasoning in *Diamond I* and had established a federally protected constitutional property right on the part of a shopping center or mall to exclude expressive activity if it wished.[51] And in a 4–3 decision (*Diamond II*), the California

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46 Schwartz-Torrance Inv. Corp. v. Bakery & Confectionery Workers' Union, Local No. 31, 61 Cal.2d 766 (1964).

47 *In re* Hoffman, 67 Cal.2d 845 (1967). The fact that Union Station was privately owned was not emphasized or separately analyzed in the Court's opinion, which focused instead upon whether the activity interfered with the operation of the facility.

48 *Id.* at 853–54. The ordinance made it unlawful for any person "to loaf or loiter in any waiting room, lobby, or other portion of any railway station . . . airport, or bus depot . . . or to remain in any such [place] longer than reasonably necessary to transact such business as such person may have to transact . . . ." The Court characterized the ordinance as "defin[ing] the law of trespass applicable to this situation."

49 *In re* Lane, 71 Cal.2d 872 (1969).

50 Diamond v. Bland (*Diamond I*), 3 Cal.3d 653 (1970).

51 Diamond v. Bland (*Diamond II*), 11 Cal.3d 331, 333 (1974).

Supreme Court agreed.[52] After *Hudgens* it was clear that the First Amendment did not protect the People's Lobby in gathering signatures, and it was also clear, said the majority, that they could not derive protection from the liberty of speech clauses of the California Constitution because the state Constitution could not be used to deprive the owners of their federally protected property interest.[53]

This, then, was the legal background to *Pruneyard*. If *Diamond II* was still good law, the students who sought to distribute handbills inside the Pruneyard shopping center would lose. But the composition of the California Court had changed by 1979, and in a 4–3 opinion by the recently appointed Justice Newman, joined by Chief Justice Bird and Justices Tobriner and Mosk — both of whom had dissented in *Diamond II* — the Court held that the *Diamond II* majority was wrong in refusing to take the California Constitution into account.[54] The Court said the U.S. Supreme Court's decision in *Hudgens* ought not be interpreted to preclude a state from defining property rights in such a way as to accommodate state-protected rights of expression; on the basis of the California Constitution, the students had a right to do what they were doing.[55]

In reaching this conclusion the Court relied upon evidence showing the growth in importance of suburban shopping centers as a place where large numbers of people gather, and hence their potential as a forum for communication;[56] upon the distinctive language of article I, section 2 ("Though the framers could have adopted the federal Bill of Rights they chose not to do so");[57] upon the right to petition in article I, section 3;[58] and upon the Court's prior opinion in *Diamond I*. While acknowledging

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52 *Id.* at 335.

53 *Id.* at 334–35.

54 Robins v. Pruneyard Shopping Ctr., 23 Cal.3d 899 (1979).

55 *Id.* at 905–06, 910.

56 *Id.* at 907.

57 *Id.* at 908. While the Court in *Pruneyard* did not identify the significance of differences in text between the state and federal constitutions, it had occasion to do so later, in *Gerawan Farming, Inc. v. Lyons*, observing that "article I's free speech clause, unlike the First Amendment's, specifies a 'right' to freedom of speech explicitly and not merely by implication . . . and does not merely safeguard some such right against encroachment." 24 Cal.4th 468, 491–92 (2000).

58 *Pruneyard*, 23 Cal.3d at 907. Article I, section 3 declares the right of people to "petition government for redress of grievances." In California, the Court observed, this

that the Court in *Diamond I* "relied partly on federal law," the Court said, "California precedents [i.e., *Schwartz-Torrance, Lane,* and *Hoffman*] were also cited [and] [t]he fact that those opinions cited federal law that subsequently took a divergent course does not diminish their usefulness as precedent. . . . The duty of this court is to help determine what 'liberty of speech' means in California. Federal principles are relevant but not conclusive so long as federal rights are protected."[59] Overruling *Diamond II*, the Court held that "sections 2 and 3 of article I of the California Constitution protect speech and petitioning, reasonably exercised, in shopping centers even when the centers are privately owned."[60]

The Court went on to elaborate on the "reasonably exercised" qualification: the right recognized by the opinion could be limited by "time, place, and manner rules," and quoting from Justice Mosk's dissent in *Diamond II,* it would not necessarily apply to "an individual homeowner or the proprietor of a modest retail establishment . . . A handful of additional orderly persons soliciting signatures and distributing handbills in connection therewith, under reasonable regulations adopted by defendant to assure that these activities do not interfere with normal business operations . . . would not markedly dilute defendant's property rights."[61]

*Pruneyard*'s initial holding — that the federal Constitution did not preclude states from requiring shopping center owners to accommodate reasonable rights of free expression — was quickly validated by the U.S. Supreme Court. Chief Justice Rehnquist's opinion in *Pruneyard Shopping Center v. Robins* confirmed that the high court's reasoning in *Lloyd* "does not *ex proprio vigore* limit the authority of the State to exercise its police power or its sovereign right to adopt in its own Constitution individual liberties more expansive than those conferred by the Federal Constitution," and that, given the allowance for limitations acknowledged by the California Court's opinion, there was no "taking" of property in violation of the Fifth Amendment or deprivation of property without due process of law.[62]

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right is "vital to a basic process in the state's constitutional scheme — direct initiation of change by the citizenry through initiative, referendum, and recall." *Id.* at 907–08.

59 *Id.* at 908–09 (citations omitted).

60 *Id.* at 910.

61 *Id.* at 910–11.

62 Pruneyard Shopping Center v. Robins, 447 U.S. 74, 81, 83–84 (1980).

Questions remained, however, as to the scope of the *Pruneyard* principle under California law, and answering those questions was complicated by the fact that the Court's opinion in *Pruneyard* is unclear as to the basis for its holding. Did the Court mean to say that because of the difference in language between the First Amendment ("Congress shall make no law") and the language of the California Constitution ("Every person may freely speak"), there is no "state action" requirement for application of article I, section 2? Or did it mean to say that there is a state action requirement, but it is more easily met than under federal law?[63] If, as the Court said in *Pruneyard*, that case would not necessarily apply to a homeowner or a modest retail establishment, was that because there would be no "state action," or for some other reason, perhaps because the public importance of allowing free communication on the premises was outweighed by the owner's interests in restricting access? Would the answers to these questions depend upon who was speaking to whom? Or would that inquiry be precluded by the First Amendment as content based? And finally, where the *Pruneyard* principle did apply, would the reasonableness of time, place, and manner restrictions be assessed by the same standards that would apply in a public forum, or, because private property interests are implicated, would different standards apply?

For over a decade the Court of Appeal grappled with these questions without guidance from the Supreme Court. Without directly confronting the "state action" issue, Court of Appeal opinions denied application of

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63 Before *Pruneyard*, the California Court read prior U.S. Supreme Court cases as finding "state action" in the shopping center's refusal to permit the exercise of "First Amendment rights in such areas as sidewalks, parks, and malls." Diamond v. Bland, 3 Cal.3d 653 at 666 n.4 (1970). Of course, the state acts when its judicial branch issues an injunction, and in other areas of the law, even the U.S. Supreme Court has found state action on the basis of judicial action to enforce common law rules. *E.g.,* Shelley v. Kraemer, 334 U.S. 1, 15 (1948) (state action found in judicial enforcement of restrictive covenant); New York Times Co. v. Sullivan, 376 U.S. 254, 265 (1964) (state action found in judicial enforcement of tort law); Cohen v. Cowles Media Co., 501 U.S. 663, 668 (1991) (state action found in enforcement of promissory estoppel doctrine). That Court has stopped short of finding state action in the enforcement of trespass laws generally. Bell v. Maryland, 378 U.S. 226 (1964); *but see id.* at 252–60 (Douglas, J., concurring). This remains a murky area under federal law, and a fertile area for the development of a more coherent jurisprudence under the state Constitution. *Cf.* Intel Corp. v. Hamidi, 30 Cal.4th 1342 (2003) (considering but not deciding the state action issue).

*Pruneyard* in cases involving access by abortion opponents to the property of medical clinics where abortions were being performed, on the ground that such property was not generally open to the public;[64] access to a bank, on the ground that it was the sort of "modest retail establishment" mentioned in *Pruneyard*;[65] and access by a signature-gatherer to patrons entering and exiting the Trader Joe's store in Santa Rosa, on the basis of a balancing test: Trader Joe's interests in preventing such activity were stronger than in the case of a shopping mall owner because it invites people to come and shop, not "to meet friends, to eat, to rest, or to be entertained"; and the public's interest in allowing free expression was not so strong because Trader Joe's, as a stand-alone facility, was "not a public meeting place and society has no special interest in using it as such."[66] Other cases involved time, place, and manner restrictions adopted by shopping center malls.[67]

The Supreme Court consistently denied review in these cases until, in 1999, it agreed to review a Court of Appeal decision involving the Golden Gateway Center, a large apartment complex in San Francisco, which sought the assistance of the courts in enforcing a rule prohibiting any solicitation or leafleting within the building except as specifically requested by a tenant.[68] The Tenants Association, formed by a group of tenants, had been accustomed to distributing newsletters to tenants by placing them at or under their apartment doors, and it continued to do that even after new management adopted the no-distribution rule. The Association maintained that it had both a contractual and a state constitutional right to continue what it had been doing. The trial court denied the injunction based on the Association's contract theory, but the Court of Appeal decided in favor of the Center on both grounds, concluding that the California free speech provisions, like the First Amendment, required state action for their application.[69] The Supreme

64 *E.g.*, Allred v. Harris, 14 Cal.App.4th 1386 (1993) and cases cited.

65 Bank of Stockton v. Church of Soldiers, 44 Cal.App.4th 1623, 1629–30 (1996).

66 Trader Joe's Co. v. Progressive Campaigns, 73 Cal.App.4th 425, 433 (1999).

67 *E.g.,* Savage v. Trammell Crow Co., 223 Cal.App.3d 1562 (1990) (prohibition against placing leaflets on parked cars to prevent litter and traffic problems is appropriate place restriction).

68 Golden Gateway Ctr. v. Golden Gateway Tenants Assn., 26 Cal.4th 1013 (2001).

69 Golden Gateway Ctr. v. Golden Gateway Tenants Assn., 87 Cal.Rptr.2d 22 (1999).

Court affirmed,[70] but did so through a set of opinions which left the issue, and for that matter *Pruneyard* itself, very much in doubt.

While the *Golden Gateway* case was pending for decision, the Supreme Court decided *Gerawan Farming, Inc. v. Lyons*.[71] *Gerawan* involved a completely different issue — whether a statutory requirement for contributions to an industry publicity fund violated constitutional principles against "compelled speech" — but in the course of emphasizing differences between the state and federal protections for free expression, the Court, in an opinion by Justice Mosk, expressed through dicta an expansive view of article I, section 2(a): "[A]rticle I's right to freedom of speech, unlike the First Amendment's, is unbounded in range. It runs against the world, including private parties as well as governmental actors."[72]

Three dissenting justices in *Golden Gateway*,[73] including one sitting by assignment, picked up on this language and concluded, based on the wording of article I, section 2 together with its application in *Pruneyard*, that the dictum in *Gerawan* was a correct statement of the law.[74] This did not mean, in their view, that there were no limits on the application of article I, section 2(a) but, rather, that in a particular context the Court "must balance the private and societal interests in the speech against any competing constitutional concerns"; on that balance, the Tenants Association deserved to prevail.[75] Moreover, in their view, the Center's ban on distribution could not be maintained as a time, place, and manner restriction because, even assuming it was content neutral, it was overly broad and failed to leave open ample alternative channels of communication.[76]

Three other justices[77] were of the view that state action is a necessary predicate for the application of article I, section 2(a), and disavowed the language of *Gerawan* as ill-considered dicta.[78] While the language of section

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70 *Golden Gateway Ctr.*, 26 Cal.4th 1013.

71 Gerawan Farming, Inc. v. Lyons, 24 Cal.4th 468 (2000).

72 *Id.* at 492.

73 Justices Werdegar, Kennard, and Klein (the latter by assignment from the Court of Appeal).

74 *Golden Gateway*, 26 Cal.4th at 1045.

75 *Id.* at 1049, 1053.

76 *Id.* at 1050–51.

77 Justices Brown, Baxter, and Chin.

78 *Golden Gateway,* 26 Cal.4th at 1029.

2(a) contains no explicit state action requirement, the history underlying New York's analogous provision, from which the California provision derived, reflects an understanding that it was designed to protect against governmental interference with speech, and the history of the California provision reveals no different intent.[79] *Pruneyard* should be viewed as a determination that for purposes of the California Constitution state action exists where the property in question is "freely and openly accessible to the public," and thus serves as the functional equivalent of a traditional public forum.[80] Since Golden Gateway limits access to residential tenants and their invitees, *Pruneyard* did not apply.[81]

Chief Justice George supplied the deciding vote, but on grounds which explicitly left the state action question unresolved. It was unnecessary, in his view, to determine the applicability of article I, section 2(a) because even if it did apply the landlord may "prohibit[] the tenants association from leaving unsolicited pamphlets on or under the hallway doors of fellow tenants, or in a pile for the taking in the hallway."[82] His opinion went on to say that if and when the Court was called upon to decide the state action question, "it will be helpful to consider the diverse circumstances in which the free speech clause might be implicated," indicating that he had in mind "circumstances in which a private person or entity may attempt to utilize its power or authority in one sphere to censor or undermine what might be viewed as another individual's 'core' free speech rights."[83] Further delineation of the scope of article I, section 2 could be left for another day.

Seven years later, the state action issue still unresolved, the California Supreme Court accepted an invitation from the federal Circuit Court of Appeals for the District of Columbia to clarify the applicability of *Pruneyard* to a situation in which a labor union, pursuant to a dispute with one of the tenants in Fashion Valley Mall, sought through picketing and handbills

79 *Id.* at 1025–28.

80 *Id.* at 1033.

81 *Id.* at 1031.

82 *Id.* at 1041 (George, C.J., concurring).

83 *Id.* at 1042. As examples, he pointed to a landlord who, using the threat of eviction, limits or requires the expression of political views by tenants through campaign posters, or a union or employer who seeks to prohibit bumper stickers on vehicles in parking lots, or prohibiting or requiring other political activity. *Id.*

to urge customers to boycott the tenant.[84] The mall owner argued that *Pruneyard* should not apply to calls for a boycott because such expression is inimical to the purposes for which the public space was created.[85] Three justices of the California Supreme Court agreed; indeed, they would have gone further and overruled *Pruneyard* altogether.[86] The majority, however, including Chief Justice George, reconfirmed *Pruneyard*, reconfirmed the independent and broader protection for expression in the California Constitution, and applied the same standards it would apply if the space were publicly owned: the distinction the mall owner sought to make was content based, and therefore subject to strict scrutiny, which it could not survive.[87] The fact that the union's activity might result in economic harm to the mall and its tenants did not rise to the level of a compelling interest.[88]

The Court's decision in *Fashion Valley Mall* provides scant basis for determining the applicability of *Pruneyard* outside the shopping mall context. The Court of Appeal, in cases both before and after the *Fashion Valley Mall* decision, has fairly consistently declined to extend *Pruneyard* to stand-alone retail stores, even when they are part of a larger shopping center, on the ground that they do not include courtyards, plazas, or other places designed to encourage patrons to spend time together or be entertained,[89] and the Supreme Court has declined to review the decisions in these cases. The Supreme Court has granted review in the most recent case, *Ralph's Grocery Co. v. United Food & Commercial Workers Union Local 8*,[90] but that case involves additional issues, making it unclear whether the Court will feel called upon to confront the scope of *Pruneyard*.[91]

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84 Fashion Valley Mall v. National Labor Relations Board, 42 Cal.4th 850 (2007).

85 *Id.* at 868.

86 *Id.* at 870–82 (Chin, Baxter, and Corrigan, JJ., dissenting).

87 *Id.* at 868–69.

88 *Id.* at 869.

89 *E.g.*, Van v. Target Corp., 155 Cal.App.4th 1375 (2007); Albertson's, Inc. v. Young, 107 Cal.App.4th 106 (2003).

90 Ralphs Grocery Co. v. United Food & Commercial Workers Union Local 8, 186 Cal.App.4th 1078 (2010).

91 In *Pruneyard* the Court made clear that even where the principle in that case applied, expressive activity could be limited by reasonable content-neutral time, place, and manner rules. In *Savage v. Trammel Crow Co.*, 223 Cal.App.3d 1562 (1990), the Court of Appeal upheld a prohibition of leafletting in a shopping center's parking lot, based on evidence that it posed traffic and litter problems, but struck down a prohibition

## V. EXPRESSIVE ACTIVITY ON PUBLIC PROPERTY: THE FORUM CONTROVERSY

For decades the U.S. Supreme Court has attempted to define the circumstances under which the government must yield its property to expressive activities. The results, in terms of coherence and clarity, leave a good deal to be desired. In 1983, in *Perry Education Ass'n v. Perry Local Educators' Ass'n*, the U.S. Supreme Court articulated a tripartite categorical approach: there is the "quintessential public forum," public property which has by tradition been open to expressive activity, such as streets and parks; the "designated public forum," public property which the state has voluntarily opened for such use; and the "nonpublic forum," all other public property.[92] In the quintessential public forum, speech content regulations are subject to strict scrutiny, and any time, place, and manner regulations must be reasonable, must be "narrowly tailored to serve a significant government interest," and leave open "ample alternative channels" for speech.[93] According to the Court in *Perry,* the designated public forum is subject to the same restrictions, except that the government is free to withdraw the designation.[94] In the nonpublic forum, speech may be prohibited or restricted so long as the regulation is reasonable and viewpoint neutral.[95] But then there is *Good News Club v. Milford Central School*, allowing for a "limited public forum" that is reserved "for certain groups or for the discussion of certain topics," provided there is no viewpoint discrimination and the restriction as to speakers and content is "reasonable in light of the purpose served by the forum."[96]

Or so it is said. In applying public forum analysis, however, the U.S. Supreme Court has encountered considerable difficulty, and has displayed considerable internal disagreement, over the criteria for determining

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on distribution of religious tracts as content based. The Supreme Court has not had occasion to consider the reasonableness of rules in the case of private property.

92 Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45–46 (1983).

93 *Id.* at 45.

94 *Id.* at 45–46.

95 *Id.* at 46.

96 Good News Club v. Milford Cent. Sch., 533 U.S. 98, 106–07 (2001) — perhaps suggesting, *contra Perry*, that the test for restrictions of speech in limited public forums is the same as in nonpublic forums.

whether government must make particular property available for expressive activity, what constitutes content neutrality, and what sorts of time, place, and manner restrictions are permissible. The Court's pattern of analysis has provoked a good deal of criticism from academics, and from some lower courts as well.[97] From time to time there have been signs of movement away from a categorical, and toward a more functional approach, deemphasizing "tradition" and "designation" in favor of an analysis that takes into account both governmental interests and the interests in free expression,[98] but the Court has adhered to its tripartite analysis.

There have been some hints of a less categorical, more functional approach by California courts, beginning with *In re Hoffman* in 1967.[99] There, the state Supreme Court, in an opinion by Chief Justice Traynor, held that Vietnam War protesters had the right to distribute leaflets in Union Station in Los Angeles, reasoning that

> a railway station is like a public street or park. Noise and commotion are characteristic of the normal operation of a railway station. The railroads seek neither privacy within nor exclusive possession of their station. They therefore cannot invoke the law of trespass against petitioners to protect those interests. . . . Nor was there any other interest that would justify prohibiting petitioners' activities.[100]

The test, the Court said, is "not whether petitioners' use of the station was a railway use, but whether it interfered with that use."[101] The opinion gives no separate weight to the fact that the station was owned by three railroads and not by the government, but the reasoning would appear to apply

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97 *E.g.*, Daniel A. Farber & John E. Nowak, *The Misleading Nature of Public Forum Analysis: Content and Context in First Amendment Adjudication*, 70 Va. L. Rev. 1219 (1984); Calvin Massey, *Public Fora, Neutral Governments, and the Prism of Property*, 50 Hastings L.J. 309 (1999).

98 In *Grayned v. City of Rockford*, the Court, while upholding an anti-noise ordinance as a reasonable time, place, and manner regulation, rejected the categorical approach, using broad language to describe the test as "whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time." 408 U.S. 104 (1972).

99 *In re* Hoffman, 67 Cal.2d 845 (1967).

100 *Id.* at 851.

101 *Id.*

*a fortiori* to a government-owned facility. The Court's opinion does not refer to the state Constitution, but the Supreme Court has since embraced *Hoffman* as part of California law.[102]

In the same year as *Hoffman* the Court decided *Wirta v. Alameda-Contra Costa Transit District*, involving the placement of advertising inside buses operated by a public transit district.[103] Commercial advertising was permitted, but the District refused to accept antiwar ads sponsored by an organization called Women for Peace, insisting that it would accept political advertising only at election time, and then only for or against a candidate or measure on the ballot. The Court held this policy unconstitutional, saying that while the Transit District did not have to allow ads inside buses, if it made that space available as a forum for commercial advertising it could not discriminate on the basis of content, and especially against political advertising, which was entitled to greater constitutional protection.[104] Again, the Court's opinion focused on the First Amendment, without mentioning the California Constitution. Seven years later, in *Lehman v. City of Shaker Heights,* the U.S. Supreme Court reached a contrary conclusion under the First Amendment.[105] In *Committee to Defend Reproductive Rights v. Myers*, involving discrimination in the availability of public funding for medical procedures, the state Court relied on *Wirta* as a statement of California law, stating that in *Lehman* the U.S. Supreme Court "declined to engage in the demanding scrutiny called for by the California precedents."[106]

Two Court of Appeal opinions gave further impetus to the *Hoffman* analysis, in the context of publicly owned property. In *Prisoners Union v. Department of Corrections* the court held that an organization seeking to distribute literature concerning prison conditions to persons visiting the prison was entitled to do so in the prison parking lot.[107] Relying in part on *Grayned,* the court held that the question was not whether the property could be considered a "public forum," but rather whether there was a "basic

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102 *See* Robins v. Pruneyard Shopping Ctr., 23 Cal.3d 899 (1979).

103 Wirta v. Alameda-Contra Costa Transit Dist., 68 Cal.2d 51 (1967).

104 *Id.* at 63.

105 Lehman v. City of Shaker Heights, 418 U.S. 298 (1974).

106 Comm. to Defend Reprod. Rights v. Myers, 29 Cal.3d 252, 264 (1981).

107 Prisoners Union v. Dep't of Corr., 135 Cal.App.3d 930 (1982). I confess to being the author of that opinion, a confession especially poignant because the opinion makes no reference to the California Constitution.

incompatibility" between the proposed communicative activity and the intended use of the government property.[108] *Prisoners Union* was followed two years later by the Court of Appeal in *U.C. Nuclear Weapons Labs Conversion Project v. Lawrence Livermore Laboratory*, holding that members of a group protesting nuclear weapons research at the University's laboratory had a right of access, under the California Constitution, to the laboratory's visitors center for the purposes of distributing and displaying its literature to the public.[109] Rejecting the federal categorical approach, the court suggested that the public forum question should be viewed as "a continuum, with public streets and parks at one end and government institutions like hospitals and prisons at the other," using a test of "basic incompatibility."[110]

In *San Leandro Teachers Ass'n v. San Leandro School District* the question reached the California Supreme Court.[111] A teachers' union which had been designated by teachers in the District as their bargaining representative sought to utilize internal school mailboxes to distribute communications to teachers, including endorsement of candidates in school board elections. The Court first analyzed the case under the federal Constitution, concluding that the mailboxes were a "nonpublic forum," so that viewpoint-neutral limitations on content, such as the district's no-politics rule, were permissible under the First Amendment.[112]

The Court then proceeded to consider the state Constitution, and the teachers' arguments that (1) as a matter of state constitutional law the proper test should be, not whether the mailboxes constituted a public forum, but rather a determination of the proper "balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees";[113] or (2) if the

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108 *Id.* at 935–36.

109 U.C. Nuclear Weapons Labs Conversion Project v. Lawrence Livermore Lab., 154 Cal.App.3d 1157 (1984).

110 *Id.* at 1164. Using the same test, it denied the group's request to be able to show films or slides in the auditorium of the visitors center.

111 San Leandro Teachers Ass'n v. Governing Bd. of the San Leandro Unified Sch. Dist., 46 Cal.4th 822 (2009).

112 *Id.* at 842.

113 *Id.* at 843 (citing L.A. Teachers Union v. L.A. City Bd. of Educ., 71 Cal.2d 551, 558 (1969) (off-duty teachers could not be prohibited from circulating in the faculty

Court uses forum analysis, it should use the functional analysis suggested in some prior opinions rather than the more rigid categorical analysis of the federal courts, and consider whether the use of the mailboxes as proposed would be "basically incompatible" with their principal purpose.[114]

As to the first argument the Court questioned whether the decision in *L.A. Teachers Union* relied upon the California Constitution as distinguished from the First Amendment, but in any event distinguished that holding on the ground that while the faculty lounge and lunchroom in that case were places in which unrestricted conversations between teachers took place generally, in the present case the school mailboxes were "dedicated to school business and, by statute, to union communications with employees."[115] The District, said the Court, "has a legitimate interest in restricting mailbox communications so as not to permit such mailboxes to become venues for the one-sided endorsement of political candidates by those with special access."[116]

The Court rejected also the second argument, observing that the "basic incompatibility" test reflected in *U.C. Nuclear Weapons Labs* had not been relied upon since that opinion.[117] It also distinguished that case on the ground that the "primary purpose of the visitors center was the dissemination of information about the laboratory and its work," and that the Court of Appeal in that case determined that "the government had no legitimate interest in monopolizing the dissemination of information about the laboratory on that site."[118] In the present case, the Court reasoned, the District is "not attempting to monopolize speech regarding political endorsements in mailboxes," but rather "to disallow use of mailboxes for one-sided political endorsements," as a "means of promoting an important

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lunchroom and lounge a petition for the improvement of education)) and Cal. Teachers Ass'n v. San Diego Unified. Sch. Dist., 45 Cal.App.4th 1383 (1996) (teachers could be prohibited from wearing buttons opposing a statewide school voucher initiative while the teachers were in the classroom, but not in non-instructional settings)).

114 *Id.* at 842.

115 *Id.* at 843–44.

116 *Id.* at 844.

117 *Id.* at 845. The Court also asserted, as had the Court of Appeal, that in *Grayned* the concept of "basic incompatibility" was used only after it had been decided that the government property in question constituted a public forum, in order to determine whether a given regulation constitutes a reasonable time, place, and manner restriction. *Id.*

118 *Id.*

government interest, i.e., maintaining the integrity of the electoral process by neutralizing any advantage that those with special access to government resources might possess."[119]

The Court's distinctions of prior Court of Appeal opinions, in place of their outright rejection, led to uncertainty as to the status of public forum analysis under the California Constitution. That uncertainty has remained. In *International Society of Krishna Consciousness v. City of Los Angeles* (*ISKCON*), an organization wishing to solicit immediate donation of funds in the Los Angeles Airport brought suit in federal court to challenge the constitutional validity of a city ordinance prohibiting such solicitation.[120] Against the background of a U.S. Supreme Court decision that airports are not public fora under the First Amendment,[121] the Ninth Circuit Court of Appeal asked the California Supreme Court to answer the question under the state Constitution. Accepting the certification, the California Court split three ways. One justice (Kennard) expressed the view that airports are public fora under the state Constitution, while three justices (Justice Chin, joined by Justices Corrigan and Baxter) expressed the contrary view.[122] The remaining three justices (Justice Moreno, joined by Justice Werdegar and Chief Justice George) found it unnecessary to reach that question, deciding instead that even if airports are public fora under the state Constitution, the ordinance was not content based,[123] and that it constituted a reasonable time, place, and manner regulation.[124] All seven justices agreed with this conclusion.

It seems clear that the California Supreme Court is not tethered to federal law when it comes to expression on public property. In *Bailey v. Loggins,* for example, it found, beyond federal precedent, that a prison newspaper

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119 *Id.*

120 Int'l Soc'y of Krishna Consciousness v. City of L.A. (*ISKCON*), 48 Cal.4th 446 (2010).

121 Int'l Soc'y of Krishna Consciousness v. Lee, 505 U.S. 672 (1992).

122 *ISKCON*, 48 Cal.4th at 460–66 (Kennard, Chin, Corrigan, and Baxter, JJ., concurring).

123 *Id.* at 457 (majority opinion). The California Court had previously decided that a law banning solicitation of funds is content neutral. L.A. Alliance for Survival v. City of L.A., 22 Cal.4th 352 (2000). It is possible that this view is or may turn out to be contrary to First Amendment law. If so, it would represent one of the few instances in which California courts have interpreted the state Constitution to be less protective of expression than the federal.

124 *Id.* at 404.

constituted a limited public forum subject to constitutional protection, so that prison authorities in deciding what could be printed must exercise their authority "even-handedly and with sensitivity to the values protected by the First Amendment and corresponding California constitutional and statutory provisions."[125] Yet, partly through studious avoidance on the part of the Supreme Court, it remains unclear to what extent California has a different constitutional approach to expression on public property, and the uncertainty has been amplified by changes in the composition of the Court.[126] The arguments in the opposing opinions of Justices Kennard and Chin in *ISKCON* turn in part upon differing interpretations of prior opinions, but more basically reflect differing views as to the proper balance between allowing the broadest feasible opportunity for free expression versus competing governmental interests — and to some extent between the desirability of a flexible approach as contrasted with the advantages of clear rules. Stay tuned.

## VI. COMMERCIAL SPEECH

Judging from *Gerawan*,[127] California may have broader protection for commercial speech than the First Amendment provides, at least when it comes to compelled speech. In a 4–3 opinion by Justice Mosk that comments extensively upon the separateness of California's free speech doctrine, the Court held that a marketing order issued by the state secretary of food and agriculture at the behest of a group of plum producers and handlers, requiring plum producers to contribute to the advertising of plums, "implicated" free speech rights under the state Constitution, despite a decision by the U.S. Supreme Court in *Glickman v. Wileman Brothers*.[128] *Glickman* upheld a similar

[125] Bailey v. Loggins, 32 Cal.3d 907, 922 (1982); *see also* Lopez v. Tulare Joint Union High Sch. Dist., 34 Cal.App.4th 1302, 1318–19 (1995) (recognizing that "the California Supreme Court has taken a different approach than the U.S. Supreme Court when analyzing the government's ability to regulate the content of its own sponsored publications," and on the basis of *Bailey* finding a school newspaper to constitute a limited public forum subject to constitutional protection).

[126] Since *ISKCON*, Chief Justice George and Justice Moreno have both left the Court, replaced by Chief Justice Cantil-Sakauye and Justice Liu.

[127] Gerawan Farming, Inc. v. Lyons, 24 Cal.4th 468, 509–17; *see also supra* notes 74–75 and accompanying text.

[128] *Gerawan*, 24 Cal.4th at 517 (citing People v. Teresinski, 30 Cal.3d 822, 836 (1982) and discussing Glickman v. Wileman Bros. & Elliott, Inc., 521 U.S. 457 (1997)).

order by the U.S. secretary of agriculture against First Amendment attack. Referring to the *Teresinski* factors in support of the divergence, Justice Mosk pointed to the fact that *Glickman* was a 5–4 opinion, that it had been subject to extensive scholarly criticism, and that both textual and historical differences supported a different result.[129] As to historical differences, Justice Mosk observed that in the California of 1849 "the prevailing political, legal and social culture was that of Jacksonian democracy," animated by a spirit of individualism which "presupposed and produced . . . unrestrained speech about economic matters generally, including . . . commercial affairs."[130] And, he explained, the right to free speech is "put at risk both by prohibiting a speaker from funding speech that he otherwise would fund and also by compelling him to fund speech that he otherwise would not fund."[131] The dissenters, led by Chief Justice George, insisted there was no justification for interpreting article I, section 2(a) so as to afford a greater right "to obtain 'free rider' status with respect to such generic advertising."[132]

The majority opinion in *Gerawan* stops short of declaring the marketing order unconstitutional, however, instead remanding to the Court of Appeal to determine, inter alia, "what protection, precisely, article I afford[s] commercial speech, at what level, of what kind and . . . subject to what test";[133] and the subsequent history of the case, as well as the subsequent history of the *Glickman* opinion, leaves the relationship between state and federal law in this area decidedly muddy.

## VII. ARTICLE I, SECTION 2: NEWSPERSON IMMUNITY

In *Branzburg v. Hayes* the U.S. Supreme Court declined to recognize a First Amendment right on the part of media reporters to resist subpoenas that require disclosure of confidential sources.[134] Justice Powell, who joined the plurality opinion to that effect, wrote a separate concurring opinion

129 *Id.* at 501–12.
130 *Id.* at 495.
131 *Id.* at 491.
132 *Id.* at 518 (George, C.J., dissenting).
133 *Id.* at 517 (majority opinion).
134 Branzburg v. Hayes, 408 U.S. 665 (1972).

suggesting that a balancing test be used in particular cases.[135] Whether or not the net result is that there exists a limited First Amendment privilege for reporters is a question over which lower courts have divided.[136]

In 1980, in the wake of *Branzburg*, California voters approved a state constitutional amendment proposed by the Assembly which renumbered the existing article I, section 2 to section 2(a) and added a subsection (b), which has the effect of protecting a newsperson from being adjudged in contempt for refusing to disclose either (1) unpublished information or (2) the source of information, whether published or unpublished.[137]

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135 *Id*. at 709–10 (Powell, J., concurring).

136 The California Supreme Court, in *Mitchell v. Superior Court*, concurred in the observation by some other courts that Justice Powell's position was the "minimum common denominator" of *Branzburg*, so that the decision does not preclude a qualified privilege, but stops short of deciding whether *Branzburg* requires such a privilege. 37 Cal.3d 268, 277–79 (1984).

137 Subsection 2(b) reads:

> (b) A publisher, editor, reporter, or other person connected with or employed upon a newspaper, magazine, or other periodical publication, or by a press association or wire service, or any person who has been so connected or employed, shall not be adjudged in contempt by a judicial, legislative, or administrative body, or any other body having the power to issue subpoenas, for refusing to disclose the source of any information procured while so connected or employed for publication in a newspaper, magazine or other periodical publication, or for refusing to disclose any unpublished information obtained or prepared in gathering, receiving or processing of information for communication to the public.
>
> Nor shall a radio or television news reporter or other person connected with or employed by a radio or television station, or any person who has been so connected or employed, be so adjudged in contempt for refusing to disclose the source of any information procured while so connected or employed for news or news commentary purposes on radio or television, or for refusing to disclose any unpublished information obtained or prepared in gathering, receiving or processing of information for communication to the public.
>
> As used in this subdivision, "unpublished information" includes information not disseminated to the public by the person from whom disclosure is sought, whether or not related information has been disseminated and includes, but is not limited to, all notes, outtakes, photographs, tapes or other data of whatever sort not itself disseminated to the public through a medium of communication, whether or not published information based upon or related to such material has been disseminated.

Cal. Const. art. I § 2(b).

In various cases the California Supreme Court has held (1) that the broad definition of "unpublished information" does not require a showing by the newsperson that the information was obtained in confidence;[138] (2) that a newsperson's protection under the shield law "must yield to a criminal defendant's constitutional right to a fair trial when the newsperson's refusal to disclose information would unduly infringe on that right";[139] (3) that there is no similar requirement for accommodation in a civil action;[140] (4) that the prosecution in a criminal proceeding cannot insist upon such balancing based upon the people's right to due process under article I, section 19 of the California Constitution, since the "absoluteness of the immunity embodied in the shield law only yields to a conflicting federal constitutional . . . right";[141] and (5) that since the shield law by its terms provides only an immunity from contempt, and not a privilege, extraordinary writ relief is available only after a judgment for contempt has been entered, and a trial court may impose sanctions other than contempt, including monetary sanctions provided by section 1992 of the California Civil Procedure Code.[142]

## VIII. ARTICLE I, SECTION 3: THE RIGHT TO ASSEMBLE AND PETITION

Article I, section 10 of the 1849 Constitution provided that "[t]he people shall have the right to freely assemble together, to consult for the common good, to instruct their representatives, and to petition the legislature for redress of grievances." In 1974, pursuant to recommendations by the Constitution Revision Commission, the section was renumbered as article I,

138 Delaney v. Super. Ct., 50 Cal.3d 785, 798 (1990).

139 *Id.* at 793.

140 New York Times Co. v. Super. Ct., 51 Cal.3d 453, 462 (1990).

141 Miller v. Super. Ct., 21 Cal.4th 883, 901 (1999).

142 *New York Times*, 51 Cal.3d at 458–61. Observing that the monetary sanctions under section 1992 are limited (up to $500 forfeiture plus actual damages) and are obtainable only in an independent action, and are "not effective as a practical matter" so that "contempt is generally the only effective remedy against a nonparty witness," the Court rejected the newsperson's argument that the operation of section 1992 would frustrate the purposes of the shield law. *Id.* at 461, 464; Cal. Civ. Proc. Code § 1992 (2011).

section 3 and amended to its present form: "The people have the right to instruct their representatives, petition government for redress of grievances, and assemble freely to consult for the common good." The Commission report explained that the section was being broadened to clarify that the right of petition extends beyond the Legislature to include other branches of the government.[143]

The earliest application of this provision came at the turn of the century, in connection with an 1899 primary election law that prohibited the election of delegates to a convention of any political party not representing three percent of the votes cast at the previous election.[144] Characterizing the law as a discrimination against minority parties, the Supreme Court relied upon the original provision, along with other provisions of the state Constitution, to hold the law unconstitutional.[145] For the next three quarters of a century California courts treated the provision as if it merely replicated the First Amendment's analogous protection for assembly and petition,[146] sometimes citing the state language but relying primarily on U.S. Supreme Court decisions for the analysis.

The California Supreme Court's opinion in *Pruneyard*, however, relied in part upon the state constitutional rights of assembly and petition to support its holding that the state Constitution protects rights of expression on nongovernmental property beyond any protection provided by the federal Constitution. And in *City of Long Beach v. Bozek* the Court, in an opinion by Justice Mosk, cited this provision in holding that the right to petition includes an absolute privilege to file a lawsuit against a government entity without fear of a malicious prosecution lawsuit.[147] The opinion makes reference to both federal and state constitutional provisions, giving rise to grant of *certiorari* by the U.S. Supreme Court. That Court vacated the opinion and sent the case back for clarification as to whether it was decided on federal or state grounds. On remand, the California Supreme Court

143 Joseph R. Grodin, Calvin Massey & Richard Cunningham, The California State Constitution 42 (Oxford Univ. Press 2011) (1993).

144 Britton v. Bd. of Election Comm'rs, 129 Cal. 337 (1900).

145 *Id.*

146 "Congress shall make no law . . . abridging . . . the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. Const. amend. I.

147 City of Long Beach v. Bozek, 31 Cal.3d 527 (1982).

confirmed that the opinion was supported independently by the state Constitution, and reiterated its prior opinion.[148]

The California Supreme Court has not addressed this provision since *Bozek*, and the cases in the Court of Appeal that have cited to *Bozek* have involved actions for malicious prosecution. The potential exists for application of this provision in other contexts, but neither courts nor litigants appear to be giving it much attention.

## IX. ARTICLE I, SECTION 3(B): PUBLIC RIGHT OF ACCESS TO INFORMATION

The argument has often been made that the rights protected by the First Amendment should include a public right of access to government places and papers, as a means of enhancing the values of self-governance, which it is one of the functions of the First Amendment to preserve. The U.S. Supreme Court recognized a limited right of access under the First Amendment to court proceedings,[149] but has otherwise proved unwilling to expand that right, for example to prisons.[150]

Many states, however, including California, have imposed upon government an obligation to allow broad public access to meetings and papers through statutes. In 2004 California voters went further, approving a legislatively proposed constitutional amendment, Proposition 59 on that year's ballot, which establishes a state constitutional right of access "to information concerning the conduct of the people's business," including "the meetings of public bodies and the writings of public officials and agencies."[151]

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148 City of Long Beach v. Bozek, 33 Cal.3d 727 (1983).

149 Richmond Newspapers v. Virginia, 448 U.S. 555 (1980) (right to attend criminal trials held to be implicit in the First Amendment); Globe Newspaper Co. v. Super. Ct., 457 U.S. 596 (1982) (closure requires compelling government interest and narrow tailoring); *cf.* Seattle Times Co. v. Rhinehart, 467 U.S. 20 (1984) (press has no right of access to documents subject to protective order in civil proceeding).

150 The Court has held that the press has no First Amendment right to visit inmates (Pell v. Procunier, 417 U.S. 817 (1974); Saxbe v. Wash. Post Co., 417 U.S. 843 (1974)) or to inspect jail conditions (Houchins v. KQED, 438 U.S. 1 (1978)).

151 Cal. Const. art. I, § 3(b) provides:

> (1) The people have the right of access to information concerning the conduct of the people's business, and, therefore, the meetings of public bodies and the writings of public officials and agencies shall be open to public scrutiny.

It is unclear to what extent Proposition 59 changed previous law. The ballot argument in support of the proposition asserts that existing disclosure laws "have been eroded by special interest legislation, by courts putting the burden on the public to justify disclosure, and by government officials who want to avoid scrutiny and keep secrets."[152] The Legislative Analyst's summary which accompanied the measure states that "[a]s a result, a government entity would have to demonstrate to a somewhat greater extent than under current law why information requested by the public

(2) A statute, court rule, or other authority, including those in effect on the effective date of this subdivision, shall be broadly construed if it furthers the people's right of access, and narrowly construed if it limits the right of access. A statute, court rule, or other authority adopted after the effective date of this subdivision that limits the right of access shall be adopted with findings demonstrating the interest protected by the limitation and the need for protecting that interest.

(3) Nothing in this subdivision supersedes or modifies the right of privacy guaranteed by Section 1 or affects the construction of any statute, court rule, or other authority to the extent that it protects that right to privacy, including any statutory procedures governing discovery or disclosure of information concerning the official performance or professional qualifications of a peace officer.

(4) Nothing in this subdivision supersedes or modifies any provision of this Constitution, including the guarantees that a person may not be deprived of life, liberty, or property without due process of law, or denied equal protection of the laws, as provided in Section 7.

(5) This subdivision does not repeal or nullify, expressly or by implication, any constitutional or statutory exception to the right of access to public records or meetings of public bodies that is in effect on the effective date of this subdivision, including, but not limited to, any statute protecting the confidentiality of law enforcement and prosecution records.

(6) Nothing in this subdivision repeals, nullifies, supersedes, or modifies protections for the confidentiality of proceedings and records of the Legislature, the Members of the Legislature, and its employees, committees, and caucuses provided by Section 7 of Article IV, state law, or legislative rules adopted in furtherance of those provisions; nor does it affect the scope of permitted discovery in judicial or administrative proceedings regarding deliberations of the Legislature, the Members of the Legislature, and its employees, committees, and caucuses.

[152] November 2004 Official Voter Information Guide, Proposition 59 Arguments and Rebuttals, *available at* http://vote2004.sos.ca.gov/propositions/prop59-arguments.htm.

should be kept private. Over time, this change could result in additional government documents being available to the public."[153] Thus far, the few appellate court opinions that have considered Proposition 59 have not provided much enlightenment.[154]

## X. SOME THOUGHTS ON METHODOLOGY

While there is a growing recognition on the part of judges and lawyers, and for that matter the public generally, that state constitutions have an important role in the protection of what we call "constitutional rights," questions remain as to the methodology for interpreting the relevant constitutional provisions — in particular the role to be played, if any, by U.S. Supreme Court decisions under the federal Constitution.[155] Despite the fact that state and federal constitutional protection for civil rights and liberties have different historical roots — often, but not always, reflected in differences in language — it has often proved tempting for a state court to rely heavily on federal precedent, especially when there is a dearth of state authority.

In recent years California courts, in the context of free speech, have been relatively resistant to that temptation. From time to time an opinion will cite the comment in a 1938 opinion, *Gabrielli v. Knickerbocker*, to the effect that "cogent reasons" must exist for departing from the U.S. Supreme Court's interpretation of a "similar provision" in the federal Constitution;[156] but *Gabrielli* provided no explanation for such a rule,

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153 November 2004 Official Voter Information Guide, Proposition 59 Analysis by the Legislative Analyst, *available at* http://vote2004.sos.ca.gov/propositions/prop59-analysis.htm.

154 *See* Mercury Interactive Corp. v. Klein, 158 Cal.App.4th 60 (2007) (declining to construe article I, section 3 as establishing a right of access to sealed court documents beyond existing law).

155 Disagreement over the proper role of U.S. Supreme Court opinions in state constitutional interpretation has provoked a plethora of scholarly and judicial opinion, and I do not undertake to provide a general evaluation here. For an excellent source, see Robert F. Williams, The Law of American State Constitutions (2009).

156 *E.g.,* Edelstein v. City and Cnty. of S.F., 29 Cal.4th 164, 168 (2002) (citing People v. Monge, 16 Cal.4th 826, 844 (1997), which in turn cites Gabrielli v. Knickerbocker, 12 Cal.2d 85, 89 (1938)). *See also* Raven v. Deukmejian, 52 Cal.3d 336, 353 (1990) (listing cases).

other than to cite to several decisions from other states which in turn contained no explanation. Moreover, *Gabrielli* illustrates one of the dangers in such a rule. The case involved an attack under both federal and state constitutions against a flag salute requirement in public schools. The Court, pointing to several cases in which the U.S. Supreme Court had summarily affirmed state court decisions upholding such requirements, declared that the issue under the federal Constitution "is no longer open."[157] Five years later the high court announced its 8–1 decision in *West Virginia Board of Education v. Barnette* holding a compulsory flag salute to violate several provisions of the federal Constitution, thus leaving the state Constitution with lesser protection for liberty.[158]

In 1982, in *People v. Teresinski*, the California Supreme Court, reiterating the dogma that decisions of the U.S. Supreme Court are entitled to "respectful consideration . . . and ought to be followed unless persuasive reasons are presented for taking a different course,"[159] set out a list of factors, considered in prior cases, relevant to that determination. These include whether there are differences in "language or history"; whether the most recent opinion of the high court represents a limitation on rights established by earlier precedent "in a manner inconsistent with the spirit of the earlier opinion"; the "vigor" of any dissenting opinion or "incisive academic criticism"; and whether adherence to the federal precedent would overturn established California doctrine affording greater rights.[160] *Teresinski* was an illegal search case, and in free speech cases what have become known as the "Teresinksi factors" are seldom mentioned.[161]

Certainly the *Teresinski* factors are broad and vague enough to allow for considerable flexibility in deciding state constitutional issues, but the question remains, and is seldom asked, why federal precedents should be entitled to any deference at all, beyond respectful consideration of the reasoning which they contain. Perhaps an argument can be constructed on the basis of uniformity: people, especially those who are not lawyers, may

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157 *Gabrielli*, 12 Cal.2d at 89.

158 W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

159 People v. Teresinski, 30 Cal.3d 822, 836 (1982).

160 *Id.* at 836–37.

161 An exception is *Gerawan Farming, Inc. v. Lyons*. *See supra* notes 130–37 and accompanying text.

find it difficult to understand why "constitutional rights" should vary from one state to another. Our commitment to the idea that as a nation we are joined by common concepts of rights that are in some meaningful sense "fundamental" is arguably weakened by such diversity. In some contexts there may be some value in uniformity per se, as a means, for example, of avoiding confusion on the part of those whose activities take them across state lines,[162] though that problem arises equally in situations where there are differences in state statutory or common law. Finally, it may be simpler and less controversial, when there are clear federal precedents pointing to unconstitutionality, for a state court to rely on those precedents rather than break new state constitutional ground. But whether these arguable advantages outweigh the disadvantages of deference — including the constrictions on the development of state constitutional jurisprudence and the risk of changes in federal law, not to mention the awkwardness which results when the high court disagrees — is highly questionable.

It has been pointed out that the history of California's free speech provision offers little guidance as to how it should be interpreted, but this is true of the First Amendment as well. When the U.S. Supreme Court embarked upon the development of First Amendment jurisprudence in the middle of the twentieth century it had little to rely upon other than its own reasoning and assessment concerning the place of free expression in a free society, the weight to be given other societal values, and the relative roles of the courts and legislatures. With respect to issues such as those raised in *Pruneyard* there is the added dimension of private property rights. The judicial task is a demanding one, but it is no more demanding for state courts than for federal.

The California Supreme Court has frequently observed, for example in *Los Angeles Alliance for Survival,* that the fact that the state provision is worded more expansively and has been interpreted as being more protective than the First Amendment does not mean it is broader in all its

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162 *See, e.g.,* Int'l Soc'y of Krishna Consciousness v. City of L.A., 48 Cal.4th 446, 464 (2010) (Chin, J., concurring) ("The public, litigators, and government attorneys advising their clients need a clear, consistent 'public forum' doctrine in cases arising on public property, not seemingly random fluctuations between state and federal constitutional law.").

applications.[163] But whether or not it should be so interpreted ought to depend upon independent analysis rather than upon some presumption in favor of the federal rule, as Chief Justice George's opinion in that case demonstrates. The issue was whether a regulation of solicitation should be viewed as content based or content neutral under the free speech provisions of the state Constitution. After setting out the history of California's free speech provisions and acknowledging their support for a higher level of protection in many contexts, the opinion carefully examines both the history of solicitation regulations in California and the theoretical foundations of the content-based doctrine concluding, contrary to a Court of Appeal opinion which is criticized and disapproved, that such regulations should not be viewed as content based.[164] The fact that the U.S. Supreme Court happened to reach the same conclusion was secondary, and not a principal focus of the Chief Justice's opinion. As the Court put it in a different context:

> [S]uch independent construction does not represent an unprincipled exercise of power, but a means of fulfilling our solemn and independent constitutional *obligation* to interpret the safeguards guaranteed by the California Constitution in a manner consistent with the governing principles of California law. . . . [J]ust as the United States Supreme Court bears the ultimate judicial responsibility for determining matters of federal law, this court bears the ultimate responsibility for resolving questions of state law, including the proper interpretation of provisions of the state

163 L.A. Alliance for Survival v. City of L.A., 22 Cal.4th 352, 367 (2000). There are numerous instances in which the Court has upheld limitations on speech under both constitutions. *E.g.*, Aguilar v. Avis Rent A Car Sys., 21 Cal.4th 121 (1999) (upholding an injunction against repetition of harassing statements found to violate the California Fair Employment and Housing Act, distinguishing the early prior restraint case of Dailey v. Super. Ct., 112 Cal. 94, 96 (1896) on the ground that it did not involve speech already determined to be unlawful); *cf.* Brown v. Kelly Broad. Co., 48 Cal.3d 711 (1989) (relying on distinctive wording of article I, section 2 as a reason for *not* extending the federal rule requiring malice in defamation actions on the part of public figures to private persons: "The federal Constitution, by contrast, contains no express provision imposing responsibility for abuse of the right of free speech. This difference refutes defendants' policy argument that our state Constitution weighs in favor of a standard of fault higher than that required under the federal Constitution.").

164 *L.A. Alliance for Survival*, 22 Cal.4th 352.

> Constitution. In fulfilling this difficult and grave responsibility, we cannot properly relegate our task to the judicial guardians of the federal Constitution, but instead must recognize our personal obligation to exercise independent legal judgment in ascertaining the meaning and application of state constitutional provisions.[165]

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[165] Comm. to Defend Reprod. Rights v. Myers, 29 Cal.3d 252, 261–62 (1981) (quoting People v. Chavez, 26 Cal.3d 334, 352 (1980)). The Court has not been entirely consistent in following these principles of independent construction. For example, in *Edelstein v. City and County of San Francisco*, the Court partially overruled a prior decision that held a ban on write-in voting in municipal elections to violate article I, section 2 as well as the First Amendment. 29 Cal.4th 164 (2002). The *Edelstein* court based its decision on a subsequent U.S. Supreme Court decision upholding, against a federal constitutional challenge, an even broader ban. *Id.* at 168 (citing Burdick v. Takushi, 504 U.S. 428 (1992)). The Court acknowledged that the explanation for the divergence between the prior California case and the subsequent federal case was that the prior state decision "placed a higher value than the *Burdick* court on . . . the 'expressive function' of voting," but instead of saying that this represented a legitimate difference which justified a different state rule, or that the majority simply disagreed with the value assessment in the prior decision and on that basis declined to follow it, the majority explained its decision by saying there were no "cogent reasons" for departing from the federal rule. *Id. Compare* Robins v. Pruneyard Shopping Ctr., 23 Cal.3d 899, 908 (1979) ("The fact that those [state] opinions cited federal law that subsequently took a divergent course does not diminish their usefulness as precedent.").

# ARTICLES

# "DEVILISHLY UNCOMFORTABLE":

## In the Matter of Sic — *The California Supreme Court Strikes a Balance Between Race, Drugs and Government in 1880s California*

BY MIKELIS BEITIKS*

On the evening of October 22, 1885, some 300 residents of Stockton showed up at the town's city hall for an "Anti-Chinese Meeting." The turnout was so large that officials had to relocate the meeting to the nearby Turn-Verein Hall to accommodate the crowd.[1] To read newspaper accounts of this event is to feel as though one is watching the raucous, conflict-establishing closing scene of a play's first act — a thunderous and irreversible event that will surely lead to something interesting after the intermission.[2]

Exhibiting a dynamic that had been playing and replaying in West Coast towns for several decades, Stockton's white residents were pacing, clenching their jaws and cracking their fingers over difficult economic times, and

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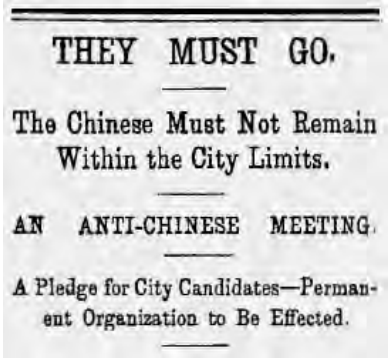
* [Editor's note: This article was the winning entry in the California Supreme Court Historical Society's 2011 Student Writing Competition, written while the author was a third-year student at UC Hastings College of the Law. He is now a member of the California Bar.] The author would like to thank Professors Brian Gray, Reuel Schiller, and Darien Shanske for their support, inspiration and suggestions for this paper.

1 "The Anti-Chinese Boom," *The Stockton Daily Evening Mail*, October 23, 1885. (The Turn-Verein Hall was Stockton's German ethnic hall).

2 "They Must Go," *The Stockton Daily Independent*, October 23, 1885. See also, "The Anti-Chinese Boom," *The Stockton Daily Evening Mail*, October 23, 1885.

then coming to a consensus that Chinese immigrants were to blame for their hardship.[3] Stockton's anti-Chinese meeting was reportedly called to "urge the necessity of excluding the Chinese from the city,"[4] but a headline describing the meeting in the *Stockton Mail* the next day captures the gathering's purpose more bluntly: "Law or no Law, John Chinaman Must Go."[5]



THEY MUST GO.

The Chinese Must Not Remain Within the City Limits.

AN ANTI-CHINESE MEETING.

A Pledge for City Candidates—Permanent Organization to Be Effected.

In an era of partisan politics, Stockton's anti-Chinese meeting was a collaborative event. Future governor of California, former U.S. congressman and Stockton resident James Budd was the featured speaker. Budd declared that if "healthy public sentiment" prevailed, every Democrat, Republican, Workingman, Socialist and Sandlotter "would put his shoulder to the wheel, and help to throw the Chinese to the other side of the Mormon slough." He assured those present that there was "no question" that the town could use the law to target the Chinese, and then went further, proclaiming that it was in fact "the duty" of local government to make life "so devilishly uncomfortable," for the Chinese as to make them "glad to leave." Budd informed the crowd that Stockton's City Attorney, Frank Smith, was already drafting ordinances to this effect — sanitary laws targeting the Chinese, similar to ones that had been recently adopted in San Francisco. His speech was followed with great applause.[6]

Stockton's chief of police then stood and spoke in "glowing language of the filth and corruption that met his gaze" in Chinatown, giving details

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[3] Elmer Clarence Sandmeyer, *The Anti-Chinese Movement in California* (Chicago University of Illinois Press, 1991), 97. It is noteworthy that this 1885 action by Stockton was one of a series of many momentous anti-Chinese actions that were happening even within that very month in California. Sandmeyer lists over thirty California communities that were taking drastic action against their Chinese during this period of 1885, in a series of actions motivated by dissatisfaction with the implementation of preceding anti-Chinese legislation, and spurred by a murderous anti-Chinese riot in Wyoming.

[4] "They Must Go," *The Stockton Daily Independent*, October 23, 1885.

[5] "The Anti-Chinese Boom," *The Stockton Daily Evening Mail*, October 23, 1885.

[6] Id. The Mormon Slough was Stockton's southern border in 1885.

of conditions that could be targeted by sanitary laws. His account was received with "laughter and good-natured applause."[7]

With the substance and the color of the meeting's thrust sufficiently established, resolutions were drafted to support only anti-Chinese candidates in the upcoming election and to create a permanent anti-Chinese committee to ensure follow-through. As the resolutions were enthusiastically adopted by those in attendance, there was but one "No" vote cast in the hall — "a single voice, the voice of a woman."[8]

Mrs. Farrington, a landlord to some of Stockton's Chinese residents, rose amidst bustle and gavel-raps for order to attempt to speak in defense of the town's Chinese. She reminded the group that some of Stockton's Chinese residents had lived in town for three decades — longer than almost any of the whites in attendance — and that the Chinese were undeniably prompt and dutiful in paying their bills and their taxes. She attempted to continue her plea, but before she should say any more, the meeting's chairman aggressively cut her off, calling Farrington and people of her type a "curse to the city."[9]

The chairman's dismissal of Farrington was "drowned in uproarious applause." He rounded out his scorning by saying that Stockton would be better off if it could be rid of the Farrington-types of the town right along with the Chinese, and then shouted a motion to adjourn over her objection, abruptly closing the meeting.[10]

And just like that, with the downswing of the chairman's gavel, the curtain drops on the first act of the play, the lights go up in the house, and the crew begins to move furiously, re-setting the stage.

In the second act, less than a week after this dramatic meeting, the Stockton City Council would pass local sanitary ordinances "aimed at the Mongolians." These ordinances set penalties for various aspects of open cooking fires, gambling, operating laundry facilities in town, and opium smoking — penalizing practices unique to the town's Chinese residents.[11]

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7 "They Must Go," *The Stockton Daily Independent*, October 23, 1885.

8 "The Anti-Chinese Boom," *The Stockton Daily Evening Mail*, October 23, 1885.

9 Id.

10 Id.

11 "John Chinaman Must Go," *The Stockton Daily Evening Mail*, October 27, 1885.

Within six months of the passage of these laws, an arrest of two Chinese residents of Stockton would be made under the opium-smoking ordinance. This arrest would lead the city to appear before the California Supreme Court and see the opium law struck down as in violation of the California Constitution of 1879.

The case is *In the Matter of Sic*, and the contextual history of the decision speaks volumes about California's anti-Chinese legislation in the late nineteenth century, America's earliest drug laws, and the wrinkles between federal, state, and local government law that needed ironing out as California settled onto its new constitutional foundation after 1879.[12]

## ANTI-CHINESE LEGISLATION IN CALIFORNIA

> *"Diverse motives entered into the opposition of Californians to the Chinese. Fundamental to all of them was the antagonism of race, reinforced by economic competition. . . . In true frontier fashion, Californians attempted to solve the problems arising from the Chinese by local measures. . . ."*
>
> — Elmer Clarence Sandmeyer, *The Anti-Chinese Movement in California*[13]

More or less from the moment they settled in California, Chinese immigrants were subjected to various local, state and federal laws explicitly aimed at unsettling them.[14]

These laws took countless forms. Laws levied heavier taxes on Chinese miners; prohibited Chinese from fishing; made requirements of laundry businesses that Chinese proprietors couldn't meet; prohibited traditional Chinese hairstyling; prevented companies and municipalities from hiring Chinese workers; hindered Chinese burial practices; outlawed the conditions in which the Chinese slept; banned the type of gambling practiced by Chinese men; denied the Chinese the right to vote; prohibited Chinese children from attending white schools; explicitly forbade Chinese

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12 *In the Matter of Sic*, 73 Cal. 142 (1887).

13 Sandmeyer, 109–10.

14 Hyung-chan Kim, *A Legal History of Asian-Americans, 1790–1990* (Westport: Greenwood Press, 1994), 47.

immigration; made the use of ceremonial firecrackers and gongs illegal; prohibited Chinese from marrying whites; and the list goes on.[15]

The California Constitutional Convention of 1879 was perhaps the legal pinnacle of the anti-Chinese movement in California. While the 1879 Convention was undoubtedly needed to redraft the original 1849 Constitution (which had been "hastily drawn up by men whose experience in California was measured only by months"[16]), one scholar has gone so far as to say that the Convention was "called almost exclusively to deal with the Chinese problem."[17] The number of Chinese immigrants in California more than doubled between 1860 and 1879. This influx seemed nowhere near diminishing, and the white citizens of the state were desperate to stop the deluge.[18]

In turn, it seems as though the primary debate at the Convention concerned the question of how to make the Constitution as anti-Chinese as possible without running afoul of the federal government. [19]

Ultimately, the 1879 Constitution was written with an entire article devoted to anti-Chinese governance that included provisions compelling the Legislature to legislate against the Chinese, provide means for their removal from the state, prevent their immigration into the state, and prohibit their employment by government agencies.[20]

Anti-Chinese legislation of the era was fervently supported by white labor interests (who saw the Chinese immigrants as competition) and loudly trumpeted by opportunistic politicians.[21] Occasionally, the legislative acts that resulted from the anti-Chinese movement were almost comically blunt in revealing their legally questionable motivations. For example, the 1862 California Supreme Court case of *Lin Sing v. Washburn* has at issue a

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15 For general discussions of the various laws passed against Chinese during this era including these, see: Sandmeyer; Kim; John Hayakawa Torok, "Reconstruction and Racial Nativism: Chinese Immigrants and the Debates on the Thirteenth, Fourteenth, and Fifteenth Amendments and Civil Rights Laws," *Asian Law Journal* 3 (1996): 55; and Daina C. Chiu "The Cultural Defense: Beyond Exclusion, Assimilation, and Guilty Liberalism," *California Law Review* 82 (1994): 1053.

16 Sandmeyer, 66.

17 Kim, 56.

18 Sandmeyer, 17.

19 Sandmeyer, 68–73.

20 Sandmeyer, 71–72.

21 Sandmeyer, 41.

state legislative act that was *officially* titled "An Act to Protect Free White Labor Against Competition with Chinese Coolie Labor, and Discourage the Immigration of the Chinese into the State of California."[22] In declaring this act unconstitutionally discriminatory, the Court wrote: "The act applies exclusively to the Chinese, and there is no doubt that the object of the legislature in passing it is correctly expressed in the title."[23]

Legislative bodies were no doubt ruthless toward the Chinese in California, but the courts, such as the *Lin Sing* court, were generally more forgiving.[24] Most state and local legislation against the Chinese was found invalid upon reaching the judiciary.[25]

In many legal opinions coming out of the anti-Chinese movement, one can see thinly veiled frustrations of the judiciary in dealing with out-of-control legislative bodies. Those crowning achievements of the anti-Chinese movement — the anti-Chinese provisions of the 1879 California Constitution — were struck down less than a year after they were enacted in the federal case *In re Ah Chong*.[26] The *Ah Chong* opinion contains several long paragraphs detailing the faultiness of the anti-Chinese constitutional provisions before cutting directly to the bone of the matter in a brief penultimate paragraph that drips disappointed frustration:

> These various provisions are referred to as instances illustrative of the crudities, not to say absurdities, into which constitutional conventions and legislative bodies are liable to be betrayed by their anxiety and efforts to accomplish, by indirection and

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22 *Lin Sing v. Washburn*, 20 Cal. 534 (1862).

23 Id., 566.

24 I would be remiss not to qualify this sentence by saying, "barring at least one glaring exception." In 1854, the California Supreme Court released a white man accused of murdering a Chinese man because the testimony against him was provided exclusively by other Chinese men, who were determined to be unfit to give testimony against white people. The case is *People v. Hall*, 2 Cal. 399, and the language in the decision is a grade-A example of the distant and uncritical "logic" applied to the racial classifications of the time. Kim calls the *Hall* decision "not only discriminatory but irrational" (Kim, 48), and Torok notes that this decision "reinforced popular anti-Chinese sentiment and sanctioned the violence perpetrated with impunity by whites against Chinese immigrants" (Torok, 65).

25 Sandmeyer, 56.

26 *In re Ah Chong,* 2 F. 733 (1880).

> circumlocution, an unconstitutional purpose which they cannot effect by direct means.[27]

California's anti-Chinese legislative efforts didn't stand up particularly well even in presumably more friendly state courts, but in federal court, with cases like *Ah Chong,* the anti-Chinese movement takes real judicial browbeatings.[28]

The various federal court deaths of California's misadventures in legislating against its Chinese residents include the 1886 U.S. Supreme Court case *Yick Wo v. Hopkins,* a canonical work of American constitutional law that struck down a San Francisco ordinance regulating the types of buildings in which laundries could be operated because the ordinance was being applied discriminatorily in violation of the Fourteenth Amendment.[29] What should also be remembered about *Yick Wo,* though, is that it overturned the opinion of the California Supreme Court, which had upheld the same San Francisco laundry ordinance as within San Francisco's regulatory capacity under its police power.[30]

JOHN CHINAMAN MUST GO

Heavy Ordnance Aimed at the Mongolians.

City Laws Passed by the Council Last Night—Wash-Houses to be Forbidden Except in Specified Places.

Four ordinances, whose object is to drive the Chinese from the city, were submitted to the City Council last night. Three of them were passed and given to the Mayor to receive his signature. The fourth, referring to laundries, was referred to the Ordinance Committee, to be adjusted so that it would not prohibit laundries on a certain half of a lot upon which is now situated a white laundry belonging to [illegible] in which Councilman Eshbach is interested. Adjoining that laundry is a Chinese wash-house, and on the opposite side of the same block is another Chinese wash-house.

It was in the midst of this back-and-forth between legislatures and courts and between California and the federal government that City Attorney Frank Smith drafted Stockton's 1885 anti-Chinese ordinances. Aware of the thin line he had to walk to avoid litigation, *The Stockton Daily Independent* would praise Smith's wile in crafting the ordinances, noting, "They apply equally

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27 Id., 739–40.

28 For two quick state examples, see *The People v. Downer et al.*, 7 Cal. 169 (1857), in which a passenger tax on Chinese passengers was ruled "invalid and void," or *Tape v. Hurley,* 66 Cal. 473 (1885), which compelled the admission of Chinese students to San Francisco public schools.

29 *Yick Wo v. Hopkins,* 118 U.S. 356 (1886). See Sandmeyer, 76, for a general discussion of *Yick Wo*.

30 *In the Matter of Yick Wo*, 68 Cal. 294 (1885).

to white persons violating their provisions, but most of the offenses named are committed chiefly by Chinese."[31] *The Stockton Daily Evening Mail* would report that care was taken to delay the passage of the laundry ordinance (which aimed to prohibit the operation of any laundry business in town, thereby driving the Chinese operators out), so as to re-word it in such a way as not to affect a white laundry operation.[32]

However, despite this praise, Smith's laundry ordinance would gasp its last breath in a courtroom.

The case challenging Smith's laundry ordinance, *In re Tie Loy*, also called *The Stockton Laundry Case*, was heard in a federal district court.[33] It is possible that no court opinion in the field is as packed with vitriol at the audacity of an anti-Chinese ordinance than the *Stockton Laundry* opinion. The author of the opinion, former California Supreme Court Chief Justice Lorenzo Sawyer, unwaveringly discharges Tie Loy and does away with the Stockton law. Sawyer's dismantling of Smith's laundry ordinance is less like a careful surgeon scalpeling away at the cancerous elements of a body than it is like an indignant man with a sledgehammer swinging away at drywall. Some choice quotes from the opinion:

> This ordinance does not regulate — it extinguishes. It absolutely destroys, at its chosen location, an established ordinary business, harmless in itself, and indispensable to the comfort of civilized communities, and which cannot be so conveniently, advantageously, or profitably carried on elsewhere. . . .[34]
>
> Of course, no one can in fact doubt the purpose of this ordinance. It means, "The Chinese must go;" and, in order that they shall go, it is made to encroach upon one of the most sacred rights of citizens of the state of California — of the Caucasian race as well as upon the rights of the Mongolian. It should be remembered that the same clause in our Constitution which protects the rights of every native citizen of the United States, born of Caucasian parents, equally protects the rights of the Chinese inhabitant who is lawfully in the country. When this

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31 "Passage of Important Ordinances Against the Chinese," *The Stockton Daily Independent*, October 27, 1885.

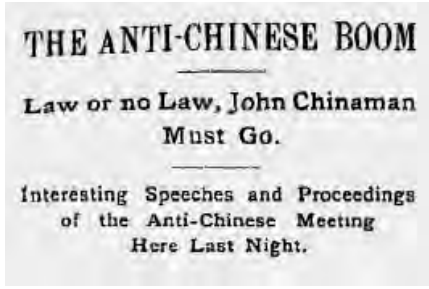
32 "John Chinaman Must Go," *The Stockton Daily Evening Mail*, October 27, 1885.

33 *In re Tie Loy*, 26 F. 611 (1886).

34 Id., 612.

barrier is broken down as to the Chinese, it is equally swept away as to every American citizen; and in this instance the ordinance reaches American citizens as well as Chinese residents. . . .[35]

It does not appear to me to be difficult to determine that this sweeping, exclusive, destructive, prohibitory ordinance, making it an offense to pursue one of the most ordinary and necessary occupations, without regard to the manner of its pursuit, or the character of the appliances with which it is carried on, is not within the police power of the state. . . .[36]


THE ANTI-CHINESE BOOM

Law or no Law, John Chinaman Must Go.

Interesting Speeches and Proceedings of the Anti-Chinese Meeting Here Last Night.

It would appear from the *Stockton Laundry* opinion that the very same seemingly equal application and sneakily hidden intentions that won Smith praise for the laundry ordinance in the Stockton press also spelled its future downfall.

Smith, of course, was not some sort of isolated legal mad scientist, or some rogue city attorney recklessly crafting local government policy in the backwaters of California. The problems with Stockton's anti-Chinese ordinances are indicative of a coast-wide phenomenon of the era, in which laws were crafted against the practices of the Chinese in a political climate of "Law or no Law — John Chinaman must Go," [37] and little thought was given to the head-slapping complications inherent therein.

The opium ordinance at issue in *Sic*, anti-Chinese legislation that it was, sat squarely in this minefield of local government law that the State of California was trying to traverse safely in the 1880s, avoiding explosions of federal invalidation with one foot and explosions of mass anti-Chinese violence with the other.[38]

In dealing with opium, Stockton also stretched into another hot-button field of law, that of drug policy.

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35 Id., 612–13.

36 Id., 615.

37 "The Anti-Chinese Boom," *The Stockton Daily Evening Mail*, October 23, 1885.

38 Sandmeyer, 98. Sandmeyer takes a perspective that emphasizes great respect for the "strenuous efforts" that channeled anti-Chinese sentiment into legislation rather than letting it erupt into violence more often.

## OPIUM: AMERICA'S FIRST PROHIBITED DRUG

> "*There can be no reasonable argument made against the enactment and enforcement of a rigid municipal law against a habit so insidious and deadly, so debasing and utterly destructive of all that goes to constitute manhood, as the habit of smoking opium. It is a practice than which no other evil against which municipal laws are enacted, can be worse in its effects on society.*"
>
> —*The Stockton Daily Evening Herald*, Editorial, August 21, 1878[39]

On November 15, 1875, the City of San Francisco passed an ordinance prohibiting the operation of opium dens within city limits.[40] This law is considered America's first anti-drug legislation.[41] Ostensibly, the ordinance was passed to protect the welfare and morals of San Francisco's white men and women.[42] However, it primarily targeted Chinese opium den operators, and was undoubtedly anti-Chinese legislation, first and foremost.[43]

Following San Francisco's lead, similar anti-Chinese/anti-opium local ordinances and state laws proliferated up and down the West Coast, and into any state that had a significant Chinese population.[44] The California State Legislature enacted an opium ban in 1881, making various opium-associated actions misdemeanors under the section of its penal code reserved for crimes against religion, conscience, and good morals.[45]

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39 "The Opium Ordinance," *The Stockton Daily Evening Herald*, August 21, 1878.

40 "The Opium Dens," *The San Francisco Chronicle*, November 16, 1875.

41 See, for example, Stephen A. Maisto, Mark Galizio, Gerard Joseph Connors, *Drug Use and Abuse*, *Sixth Edition* (Belmont: Wadsworth, 2010), 33.

42 "The Opium Dens," *The San Francisco Chronicle*, November 16, 1875.

43 See Kathleen Auerhahn, "The Split Labor Market and the Origins of Antidrug Legislation in the United States," *Law and Social Inquiry* 24 (Spring 1999): 411, 417. For an in-depth look at the creation of opium laws and their close ties to the anti-Chinese movement, see Diana L. Ahmad, *The Opium Debate and Chinese Exclusion Laws in the Nineteenth-Century American West* (Reno: University of Nevada Press, 2007).

44 Richard J. Bonnie and Charles H. Whitebread II, *The Marihuana Conviction: A History of Marihuana Prohibition in the United States* (Charlottesville: University Press of Virginia, 1975), 14.

45 "An Act to Amend an Act Entitled 'An Act to Establish a Penal Code,' Approved February 14, 1872, by Adding a New Section Thereto, to Be Known as Section

Just as all anti-Chinese legislation of the era sought to do, opium ordinances targeted the lifestyle of the West Coast's Chinese in an effort to make them "devilishly uncomfortable." However, where the majority of anti-Chinese ordinances were either laws like the laundry ordinance in *Yick Wo* (targeting the way that specifically the Chinese made their living), or were like the cubic-feet-of-air ordinances for sleeping conditions (targeting the way that specifically the Chinese maintained themselves or their homes), legislation against opium was complicated by targeting something that white people were also actively participating in.

As a prime example of the unintended consequences of anti-Chinese opium laws, when, in 1878, Stockton itself passed an ultimately ineffective opium ordinance pre-dating the one at issue in *Sic*, *The Stockton Daily Evening Herald* called the ensuing arrests of some whites in opium dens to be "gross injustice" and felt it necessary to warn its readers to stay away from the dens for fear that the law would also apply to them.[46]

In addition to unintentionally snaring certain whites, anti-opium legislation also faced the complication of delving into an issue of substance control that resembled alcohol prohibition, which brought it closer to being a debatable issue than most anti-Chinese legislation was.

The potential hypocrisy of forbidding opium smoking while still allowing the seemingly equal evil of alcohol consumption did not go without discussion in opium debates.[47] For a time preceding opium ordinances, opium usage was considered no worse than alcohol in California, but rather simply different. In San Francisco in 1870, a *San Francisco Chronicle* article about smuggling considers the use of opium by the Chinese as a simple cultural quirk — just an item of commerce that the Chinese dealt in and white people didn't. The article shows remarkable empathy for the similarities between opium use for the Chinese and analogous practices of other American groups: "To a Chinaman, opium is as much a necessity as whisky to a

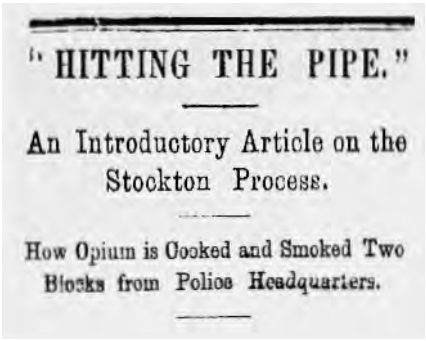
307, Relating to the Sale and Use of Opium," March 4, 1881, *The Statutes of California and Amendments to the Codes, 1881, 24th Session of the Legislature* (Sacramento: State Office, 1881), 34.

46 "Gross Injustice," *The Stockton Daily Evening Herald*, September 4, 1880.

47 See, for example, "Rum and Opium," *The Stockton Daily Evening Herald*, May 24, 1880.

Californian, lager to a German, or poi to a Kanaka."[48] The same year that this article was printed, the *Chronicle* also reported that a white man was charged with selling a Chinese man "bogus opium" — the City was not only tolerating the Chinese opium practice before 1875, it was protecting it.[49]

In part, this is because the use of opium in non-smoking forms was actually rather common among white people of the era, so use of the substance itself was not unfamiliar. It has been shown that the most common users of opium at the time were white women.[50] However, most whites who used the drug were "opium eaters" and not "opium smokers."[51] Opium smoking remained foreign, and fascinating to white Americans unfamiliar with the drug as it grew in popularity. Newspaper accounts exploring the practice of smoking and opium addiction were frequently published,[52] and an entire book devoted to the matter was written in 1881 by a doctor.[53] These early accounts of the effects of opium smoking were, almost without fail, lurid and phantasmagoric.[54]



"HITTING THE PIPE."

An Introductory Article on the Stockton Process.

How Opium is Cooked and Smoked Two Blocks from Police Headquarters.

48 "Opium Smuggling," *The San Francisco Chronicle*, February 19, 1870.

49 "Police Court Record," *The San Francisco Chronicle*, January 11, 1870.

50 Edward M Brecher and the Editors of Consumer Reports, *Licit and Illicit Drugs* (Mt. Vernon: Consumers Union, 1972), 17.

51 Id., 5.

52 See, for example, "Hitting the Pipe," *The Stockton Daily Independent*, May 29, 1883, or "Opium — A Fiend talks to a Reporter About It," *The Stockton Daily Independent*, August 28, 1883.

53 H.H. Kane, M.D., *Opium Smoking in America and China: A Study of its Prevalence, and Effects, Immediate and Remote, on the Individual and the Nation* (New York: G.P. Putnams's Sons, 1882). As an interesting aside on Kane's book in the context of this article, Kane writes on the fourth page of his book that he is "indebted for a great deal of information" on opium smoking to one Dr. G.A. Shurtleff, who was superintendent of the State Insane Asylum at Stockton.

54 For an example, Kane pulls no poetic punches in describing the drug's trappings:

> Upon the morals of the individual the effects are well marked. The continued smoking of this drug plunges the victim into a state of lethargy that knows no higher sentiment, hope, ambition, or longing than the gratification of this diseased appetite. It blunts all the finer sensibilities, and cases the individual

Opium smoking was a strange new drug habit that captured the imagination. When the wild descriptions of the seemingly mystical powers of the drug were coupled with the apocalyptic racial propaganda that came to be attached to the people it was most associated with, the laws that resulted from the regulation of opium smoking were destined for interesting interaction with the systematic and compartmentalized legal science mentality that permeated American jurisprudence in the 1880s.[55]

The judicial reactions that arose from these early opium laws are indicative of both the legal complications and the racial motivations behind the drug legislation. For example, in an 1886 federal case out of Oregon denying a writ of habeas corpus for a Chinese resident who allegedly distributed opium in violation of a state law, *Ex parte Yung Jon,* federal judge Matthew Deady delivers the opinion of the court and does not parse his words about the origins of the legislation he is reviewing:

> [T]he use of opium, otherwise than as this act allows, as a medicine, has but little, if any, place in the experience or habits of the people of this country, save among a few aliens. Smoking opium is not our vice, and therefore it may be that this legislation proceeds more from a desire to vex and annoy the "Heathen Chinee" in this respect, than to protect the people from the evil habit. But the motives of legislators cannot be the subject of judicial investigation for the purpose of affecting the validity of their acts.[56]

As frank as Deady is in his opinion on what he perceives as the limits of judicial review on the will of a possibly racist majority, a complementarily

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in a suit of vicious armor, that is as little likely to be pierced by the light of true morality as a rhinoceros hide by a willow twig. To him, Heaven is equivalent to plenty of the drug, Hell, to abstinence from it.

Once fastened upon the victim, the craving knows no amelioration; it is a steady growth with each succeeding indulgence, gaining strength as the huge snow-ball gains in circumference and weight by its onward movement. No wonder that laws have failed to blot it out. A man may wish to be free from it, as may a dove in the talons of an eagle, or a lamb in the embrace of a tiger, and with as little good result. The awakening comes too late. (Id., 128)

55 For a background on the Legal Science Movement see William P. LaPiana, *Logic and Experience: The Origin of Modern Legal Education* (New York: Oxford University Press, 1994).

56 *Ex parte Yung Jon*, 28 F. 308 (August 14, 1886), 312.

frank federal case coming out of California and decided the very same month as *Yung Jon* reaches the opposite conclusion. The judge in the case *In re Ah Jow* is former California Supreme Court Chief Justice Lorenzo Sawyer again, and he discharges a Chinese prisoner charged with violating a Modesto ordinance penalizing any person visiting a place where opium is sold or given away by ruling, rather simply:

> The ordinance applies to all citizens, as well as aliens, and deprives them of rights and privileges secured by the constitution and laws of the United States. If directed only against Chinese, then it would be void under the fourteenth amendment as discriminating against them.[57]

Sawyer cites *Yick Wo* in his decision, a case that had been decided by the Supreme Court of the United States less than four months prior.[58]

Springing from the same questionable sources as other anti-Chinese legislation, opium ordinances faced difficulties in enforcement, as it was unclear what exactly the people were trying to prohibit besides the practices of the Chinese, generally. As mentioned before, the opium ordinance at issue in *Sic*, Stockton Municipal Ordinance 192, was not Stockton's first attempt to regulate the drug.[59] Indeed, concerns with police hesitance in enforcing Stockton's 1878 opium law led to an inclusion of explicit penalties for law enforcement officials who did not give full effort to their enforcement of Ordinance 192.[60]

As a further complication, Section 3 of Ordinance 192 seemed to not just prohibit opium dens (as was the normal practice for anti-opium laws), but went further and prohibited the gathering of two people anywhere to

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57 *In re Ah Jow*, 29 F. 181 (1886), 182.

58 *Yick Wo v. Hopkins,* 118 U.S. 356 (1886).

59 See "Police as Judges," *The Stockton Daily Evening Herald*, January 27, 1880.

60 The relevant section of Ordinance 192: "It shall be the duty of the Chief of Police and of regular and special police officer of the city of Stockton to see that the provisions of this ordinance are strictly enforced, and any of such officers who shall knowingly and willfully neglect or refuse to diligently prosecute any person violating any of its provision, or who shall neglect or refuse to diligently investigate any alleged violation which may come to his knowledge, shall be punished by a fine of not less than one hundred nor more than five hundred dollars, or by imprisonment not exceeding three months, and shall be subject to removal from office." A draft of the ordinance was printed in full in *The Stockton Daily Evening Mail* on October 27, 1885.

smoke opium.[61] Since opium-smoking practices of the time necessitated at least two people, Ordinance 192 essentially banned opium smoking outright, even if one were to partake in the privacy of his own home.[62]

While *Sic* is ultimately decided on a state constitutional issue, some of the most jurisprudentially interesting language in the majority opinion comes in the discussion of the appropriateness of an outright ban like this, and the government's place in regulating personal intake of a substance this invasively. Writes majority opinion author Justice Jackson Temple:

> To prohibit vice is not ordinarily considered within the police power of the state. A crime is a trespass upon some right, public or private. The object of the police power is to protect rights from the assaults of others, not to banish sin from the world or to make men moral. It is true no one becomes vicious or degraded without indirectly injuring others, but these consequences are not direct or immediate. *In jure non remota sed proxima spectatur. . . .* Possibly this resulting injury to others and to society may justify the legislature in declaring these vices to be crimes. We are not required to pass upon that question, and we do not. It is enough to say that such legislation is very rare in this country. There seems to be an instinctive and universal feeling that this is a dangerous province to enter upon, and that through such laws individual liberty might be very much abridged.[63]

Justice Van Patterson's concurring opinion, while agreeing that the law is invalid, really slams this question home, focusing almost exclusively on invalidating Ordinance 192 for its overextension into a realm of "certain great principles that cannot be invaded" by legislation.[64] Namely, the right of every man to "eat, drink, and smoke what he pleases in his own house."[65]

Opium laws on the West Coast were America's first drug laws. They were carried into law books with fervent anti-Chinese sentiment, but when they arrived at the courts they posed individual liberty questions much

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61 From Section 3 of Ordinance 192. Quoted in *Sic* at 144.

62 See, for example, "Hitting the Pipe," *The Stockton Daily Independent*, May 29, 1883, or Kane *supra* note 53 at 70.

63 *In the Matter of Sic*, 73 Cal. 142 (1887), 145–46.

64 Id., 150.

65 Id.

different from the typical "Can we discriminate against these Chinese or not?" question that most anti-Chinese legislation presented.[66]

In *Sic*, the California Supreme Court had the unique privilege of being able to avoid both the discrimination and individual liberty questions presented by opium laws, but it seems very likely that these deep auxiliary questions of *why* we make laws must have led the Court to examine *how* we make laws much more closely than it typically would have.

## *SIC*, DILLON, AND THE RESTRICTION OF LOCAL GOVERNMENT

> "*The decisions on this question are so very conflicting that they present no obstacle to our considering it as a new one. . . .*"
>
> —Justice Jackson Temple, *In re Sic*

Article XI, section 11 of the original 1879 California Constitution states, "Any county, city or township may make and enforce within its limits all such local, police, sanitary and other regulations as are not in conflict with the general laws."[67]

This is the provision of the 1879 Constitution at issue in *Sic*. The California Penal Code (part of "the general laws") contained Section 307, which prohibited certain opium transactions and opium dens. Stockton, for its local part, had Municipal Ordinance 192, essentially prohibiting opium smoking altogether. The question before the Court was whether under section 11 of article XI, Ordinance 192 conflicted with Section 307. If the two laws did conflict, Stockton's law would be invalidated.

Defending the validity of Ordinance 192 for Stockton was its drafter, Stockton City Attorney Frank Smith. Smith had been reelected to his office in no small part because of his role in drafting the anti-Chinese ordinances that included Ordinance 192, and because of the belief that he was the most qualified lawyer in town to defend Stockton's local governance

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66 For an excellent example of a court discussing the evolution of government at issue in the early opium cases, see *Territory v. Ah Lim*, 1 Wash. 156, (1890), 165–66.

67 For a discussion of this particular section of the 1879 Constitution in much more depth than I go into here (including a criticism of how the *Sic* Court read the commas in the section), see John C. Peppin, "Home Rule in California III: Section 11 of Article XI of the California Constitution," *California Law Review* 32 (1944): 341.

against state attacks like the one presented in *Sic*.[68] In a speech campaigning for his reelection after his 1885 anti-Chinese ordinances were adopted, Smith said, "[Y]ou will understand readily why a city attorney should not be forward in expressing opinions that might be misconstrued as evidence of prejudice against the Chinese, but if you want to know how I stand, I am strongly in favor of using every lawful means to get the Chinese out of Stockton's limits. . . . The city has and will continue to have my best efforts towards that end."[69]

Going into his defense of Ordinance 192, Smith had already seen one of his 1885 anti-Chinese ordinances struck down in federal court in the *Stockton Laundry* case.[70]

Attacking the validity of Ordinance 192 was Lyman I. Mowry, a San Francisco lawyer who had appeared many times before the California Supreme Court representing Chinese clients.[71] Mowry was the go-to lawyer for the Six Companies Chinese Association (one of the groups that funded Chinese challenges to anti-Chinese laws) during this era, and, as could be expected, this work made him infamous in the San Francisco press. In a newspaper article describing the theft of bread from the front porch of Mowry's San Francisco home, the opening paragraph reads "Lyman I. Mowry, the attorney who has assisted many Chinese to take bread from the mouths of white men and women, has recently suffered from the enforcement of the lex talionis. White men have

ATTORNEY LYMAN I. MOWRY, CHARGED WITH ONCE HAVING BEEN A HIGHWAYMAN.

68 "The City Attorney," *The Stockton Daily Independent*, October 29, 1885. Incidentally, Smith successfully defended several other ordinances he drafted from state preemption, including an anti-prostitution ordinance decided a month after *Sic* in which his opposing counsel was none other than anti-Chinese crowd rouser and future governor James Budd. See *Ex Parte Johnson*, 73 Cal. 228 (1887).

69 "They Are Sound," *The Stockton Daily Independent*, October 29, 1885.

70 *In re Tie Loy*, 26 F. 611 (1886).

71 A sampling of cases in which Mowry stood as counsel for Chinese clients: *People v. Wong Ah Ngow*, 54 Cal. 151 (1880); *Ah Jack v. Tide Land Reclamation Co.*, 61 Cal. 56 (1882); *Ex parte Young Ah Gow*, 73 Cal. 438 (1887); *People v. Lum Yit*, 83 Cal. 130 (1890); *People v. Chun Heong*, 86 Cal. 329 (1890).

been stealing his bread."[72] Other newspaper accounts paint him as a chain-smoker and an alcoholic,[73] raise questions as to whether he is a member of a Chinese secret society,[74] and tout his mastery of the feminine art of cooking.[75] His courtroom demeanor was described as overconfident and aloof.[76]

Mowry's petitioner's brief to the Court for Sic is handwritten in flat and fast cursive, complete with sloppy corrective marginalia, and cites to barely a half-dozen out-of-state cases the Court could refer to for support of state preemption.[77] Smith's respondent's brief for Stockton is neatly typed, underlined in places for emphasis, and cites to somewhere in the neighborhood of fifty cases for the Court to examine supporting Stockton's right to pass and enforce ordinances like 192.[78] As it would turn out, fortunately for Mowry, the case did not come down to presentation or precedent.

As Justice Temple's epigraph to this section shows, the Court looked at the authority preceding it, and decided that the conflict of opinions on the matter made no particular authority persuasive. The Court then decided to resolve the question raised by the interaction between Section 307 and Ordinance 192 as a matter of first impression. With the case law out of the picture, the Court was left to decide what exactly "conflict with the general laws" meant — how far Stockton could go with regulating opium intake in the town before their effort became necessarily a challenge to the authority of the state. Answering this question meant deciding between two contemporary competing schools of thought on the role of municipalities in governance. The two schools of thought are those of Michigan Judge Thomas Cooley and Iowa Judge John Dillon.

Cooley's was the perspective advocated by Smith and Stockton, and was a position of strong local governance.[79] His *Treatise on Constitutional*

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72 "Lyman I. Mowry's Bread," *The San Francisco Call*, August 23, 1892.

73 "Tobacco Smoke Annoyed Her," *San Francisco Chronicle,* September 13, 1899.

74 "Says Mowry is a Highbinder," *San Francisco Call*, August 21, 1896.

75 "Man in the Kitchen," *San Francisco Chronicle*, June 3, 1894.

76 "Fong Ching Shee," *San Francisco Chronicle*, January 6, 1888.

77 Petitioner's Brief. The court documents are available at the California State Archives by requesting the file either for *In the Matter of Sic*, 73 Cal. 142, or WPA #13791. By way of trivia, the original petition for the writ of habeas corpus for Sic is signed by a man named Lee Po and is signed in Chinese characters.

78 Id., Respondent's Brief.

79 Id.

*Limitations* declared that "the American system is one of complete decentralization, the primary and vital idea of which is, that local affairs shall be managed by local authorities, and general affairs only by the central authority."[80] Cooley believed in the virtues of "local constitutionalism."[81] Rudimentarily summarized, Cooley's philosophy was that deference should be given to local governments whenever appropriate, as their grassroots structure and participatory nature made them better suited to discern a public purpose in legislation than state governments were.[82] So absolutely did he believe in the importance of a decentralized system that he once wrote in an opinion, "[L]ocal government is a matter of absolute right; and the state cannot take it away."[83]

Dillon's basic philosophy, on the other hand, can be rudimentarily summarized with the idea that local governments should not be given any more authority than they absolutely must be given — those powers expressly delegated to municipalities in state constitutions. Dillon simply didn't trust local government to make smart decisions. In a notably disdainful section of his *Treatise on Municipal Corporations* he wrote, "[T]he value of our municipal corporations has been impaired by evils that are either inherent in them or that have generally accompanied administration," and then went on to insinuate that locally elected officials lack "intelligence, business experience, capacity, and moral character," and that as a result, the "administration of the affairs of our municipal corporations is too often unwise and extravagant."[84]

Essentially, Dillon believed that local governments were filled with corrupt and unthinking fools. So low was his opinion of local government and high his preference for limiting their power that he enumerated only three circumstances where local governments could act:

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80 Thomas M. Cooley, *A Treatise on the Constitutional Limitations Which Rest Upon The Legislative Power of the States of the American Union* (Boston: Little, Brown, and Company, 1868), 189.

81 David J. Barron, "The Promise of Cooley's City: Traces of Local Constitutionalism," *University of Pennsylvania Law Review* 147 (1999): 487, 492.

82 Id., 521.

83 *People v. Hurlbut*, 24 Mich. 44 (1871), 108.

84 John F. Dillon, *The Law of Municipal Corporations, Third Edition* (New York: James Cockfort & Co., 1881), § 11, 19–20.

> It is a general and undisputed proposition of law that *a municipal corporation possesses and can exercise the following powers and no others*: First, those granted in *express words*; second, *those necessarily or fairly implied* in, or *incident* to, the powers expressly granted; third, those *essential* to the declared objects and purposes of the corporation — not simply convenient, but indispensable. Any fair, reasonable doubt concerning the existence of power is resolved by the courts against the corporation, and the power is denied.[85]

Naturally, Dillon's perspective was the perspective advocated by *Mowry* and *Sic*.

Both Cooley and Dillon are fruit from the same tree, growing as they did out of a singular root problem of widespread government malfeasance accompanying and following the industrial revolution. In some sense, their differing perspectives are simply two sides of the same coin.[86] The coin toss in *Sic* would land with Dillon's side facing up.

After discarding the case law in *Sic,* the Court scrambles over to Dillon, and points out that Stockton had no express authority to regulate opium under the state constitution.[87] It then settles the conflict issue by theorizing that legislating on the same matter and thus creating a situation where a citizen could be tried twice for the same offense, or where being tried for a local offense could preclude being tried under a state offense, is the type of conflict that article XI, section 11 is trying to prevent. Its authority for this is a loose analogy to the relationship between the federal government and the states.[88]

To be blunt, the Court's opinion is shaky. In part, this shakiness is precisely because they threw away the case law, which favored Stockton and would likely have dictated a different result. In considering the *Sic* ruling for a similar overlapping ordinance a few years after the decision, the Idaho Supreme Court would write:

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85 Id., § 89, 115–16.

86 For an article that delves more deeply into the differences between and fates of Cooley and Dillon, See Edwin A. Gere, "Dillon's Rule and The Cooley Doctrine," *The Journal of Urban History* 8 (1982): 271.

87 *In the Matter of Sic*, 73 Cal. 142 (1887), 148. While the opinion is not devoid of case law, there is only one case citation in the entire majority opinion, and that is to an Alabama case, not a California case.

88 Id., 148–49.

> In [*Sic*] the court says: "The decisions on this question are so very conflicting that they present no obstacle to our considering it as a new one," etc., and proceeds to consider it as a new one, and hold such ordinances void. After carefully considering the authorities on both sides of this question, I find that the clear weight of authority and reason is against the rule adopted by the supreme court of California. . . .[89]

As this 1894 Idaho decision shows, The *Sic* decision was not particularly influential even soon after it was decided (although it was applied semi-regularly in California for some time[90]). As of 2011, *Sic* has not been cited in a court opinion from any state for over forty years.[91] Part of the reason for this is exactly what the Idaho court says. It is no longer, and it probably never was, "good law."

However, if one can take a page from the *Sic* court and put the law aside for a moment, the virtue of the decision becomes more apparent.

In 1887, the California Supreme Court was in the center of a maelstrom of anti-Chinese political and legislative activity, assaulted on one side by out-of-control local uprisings and on the other side by heavy-handed federal slapdowns. Before the Court stood a Stockton ordinance clearly stemming from anti-Chinese sentiment. The same type of unhesitating anti-Chinese sentiment that had given rise to endless ill-advised legislation in California — legislation that was routinely embarrassingly crushed in the federal courts. In touching on opium, this same Stockton ordinance also infringed on potential individual liberties in a manner that was likely not fully considered in its drafting, and certainly in a manner that the Court had never previously considered.

To put the law aside and run to Dillon was a highly sensible decision for the *Sic* Court to make. In some ways, the story behind Stockton's 1885 anti-Chinese ordinances and opium ban could serve as a textbook example of why Dillon would have developed the philosophy that he did — a mob-like small-town meeting that resulted in overbearing and shortsighted policy.

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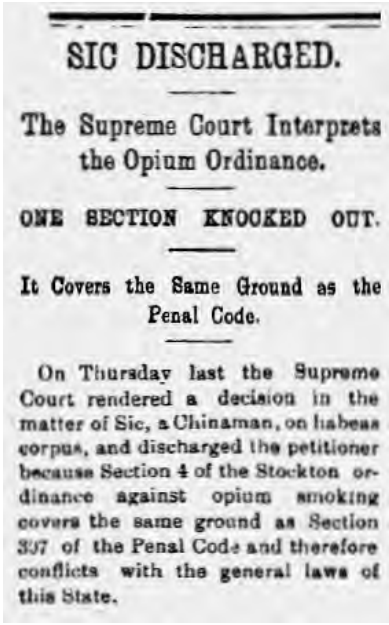
89 *State v. Preston*, 4 Idaho 215 (1894), 219.

90 A few examples: *Ex parte Christensen*, 85 Cal. 208 (1890); *Ex parte Taylor*, 87 Cal. 91 (1890); *Ex parte Hong Shen*, 98 Cal. 681 (1893); *Ex parte Mansfield*, 106 Cal. 400 (1895); *Ex parte Stephen*, 114 Cal. 278 (1896).

91 Most recent citation: *Bishop v. San Jose*, 1 Cal. 3d 56 (1969), 69.



SIC DISCHARGED.

The Supreme Court Interprets the Opium Ordinance.

ONE SECTION KNOCKED OUT.

It Covers the Same Ground as the Penal Code.

On Thursday last the Supreme Court rendered a decision in the matter of Sic, a Chinaman, on habeas corpus, and discharged the petitioner because Section 4 of the Stockton ordinance against opium smoking covers the same ground as Section 397 of the Penal Code and therefore conflicts with the general laws of this State.

Viewed in its historical context, as opposed to its legal context, the *Sic* decision makes perfect sense. It limits local power at a time when local power was proving to be disastrous and sends a message of "Please calm down and think about this a little more," in the least offensive way it can.

The *Stockton Daily Independent*, which consistently published anti-Chinese articles during this era, reacted rather benignly to the *Sic* decision, publishing a simple, matter-of-fact account of the decision remarkably free of any criticism of the Court.[92] Within a week of the decision, the paper would publish an article about *Sic* being applied to release a white Santa Cruz man who had been arrested under a local ordinance regulating bar and theater licenses. The headline for this Santa Cruz article is "SIC SEMPER: Makes a Santa Cruz Ordinance Sicker."[93] The tone of the article is not one of anti-state-power, "Look at what else this horrible decision is doing!" but rather a shoulder-shrugging tone of "Well, it looks like this silly ruling applies to everyone, and everything. Those are the breaks."

As the State of California struggled with the anti-Chinese movement and a related new field of drug regulation, the California Supreme Court struck a much-needed balance to settle down the whole system with its decision in *Sic*. It may not have settled the matter in a way that was particularly comfortable for local government, but it certainly took some fire out from under the movement for the "devilishly uncomfortable."

* * *

92 "Sic Discharged," *The Stockton Daily Independent*, June 17, 1887.

93 "Sic Semper," *The Stockton Daily Independent*, July 20, 1887.

# NINE TREASURES:

## *California Legal History Research in the Bancroft Library, University of California, Berkeley*

BY WILLIAM BENEMANN*

The streets were filled with billows of acrid smoke and dust, and every time a dynamite charge was detonated the earth would tremble and the horses would shy and pull at their reins. For three horrifying days dozens of separate fires raged, consuming block after block of homes and businesses. Over 3,000 people were killed, nearly one hundred times that number were left homeless, and the entire northeast quadrant of San Francisco was reduced to blackened charcoal. Every major library in The City was damaged or utterly destroyed — except for one.

In April 1906, housed safely in a fireproof building at the corner of Valencia and Army Streets and therefore outside the burned zone, sat the newest acquisition of the University of California: the Bancroft Library. The library was the life's work of Hubert Howe Bancroft, who had arrived in San Francisco in 1852 as an eager young man of twenty with a shipment of books to sell. Four years later he opened his own bookstore, eventually assembling a specialized collection of books, manuscripts and pictorial items documenting the entire West Coast from Alaska to Panama, and from the Rockies to

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**The Bancroft Library at 1538 Valencia Street, San Francisco, circa 1890–1900.**

*Courtesy of The Bancroft Library, University of California, Berkeley (call no. BANC PIC 1905.11574–FR).*

the Pacific. At the core of his library was an unparalleled collection of Californiana, telling the story of the State from the very earliest period of its recorded history. Drawing on this superb collection, and augmenting it where needed by firsthand research, Hubert Howe Bancroft and his assistants over time produced a comprehensive thirty-nine volume history of the West.

On November 25, 1905, Bancroft sold his entire library to the University of California for a quarter of a million dollars, $100,000 of which Bancroft would donate himself. Having narrowly escaped complete destruction in the 1906 Earthquake and Fire, the collection was finally moved out of San Francisco in early May and onto shelves and into cabinets on the third floor of California Hall on the Berkeley campus. The treasures were transported in prosaic moving vans by the Bekins Van Company.

Today the collection is housed in a newly-renovated, state of the art facility at the center of the Berkeley campus, and for over a century now the

HUBERT HOWE BANCROFT

Bancroft Library has carried on Hubert Howe Bancroft's compulsive drive to document the history and culture of the Pacific Coast. Because of this academic obsession, anyone engaged in California legal history research will find a cornucopia of both core documents and unusual ephemera, rare manuscripts and online digital files, vintage photographs and raspy tape recordings, the quirkily odd and the astonishingly unexpected. This article

will focus on nine diverse (and somewhat random) items that demonstrate the variety of riches that await the researcher in the Bancroft Library reading room. It will attempt to place those items in their historical context, to demonstrate why they are significant to the legal history of California, and to suggest similar material for further research in the Bancroft's collections.

## 1. IGNACIO EZQUER. *MEMORIAS DE COSAS PASADAS EN CALIFORNIA: SAN LUIS OBISPO, CALIFORNIA, APRIL 29, 1878.*[1]

Realizing that a large portion of early California history was being lost as the elder *Californios* passed away, Hubert Howe Bancroft and his assistants traveled by carriage, stagecoach and horseback throughout the state conducting approximately 125 oral history interviews with Mexican and Anglo pioneers. The transcriptions of these interviews became known collectively as the Bancroft Dictations (or as the *Testimonios* or *Recuerdos*). While most of the dictations are in English, a few — such as that of Ignacio Ezquer — are in Spanish, and they provide eyewitness accounts of events in early California from the perspective of participants whose contributions would otherwise have been marginalized or entirely lost. They include first person narratives of some of the earliest governmental and legal landmarks in California history.

Ignacio Ezquer emigrated from Mexico in 1833 at the age of fifteen and settled in Alta California, eventually serving as Justice of the Peace in both Monterey and San Luis Obispo. In 1878 he was interviewed by Thomas Savage, one of Bancroft's research assistants. Savage wrote in an introductory statement, "The accompanying pages were taken down by me from [Ezquer's] lips in his own house in San Luis Obispo." Though hastily written as the old man spoke, with some deletions and insertions in the text, the narrative is still quite legible. (Scanned images of most of the Bancroft Dictations may be found on the University of California's website, called Calisphere.)

In his *recuerdo* the elderly Ezquer describes the secularization of the San Juan Capistrano Mission. He narrates in some detail the February 1845 revolt against the Mexican governor, Brigadier General Manuel

[1] Call no.: BANC MSS C-D 77.

Micheltorena, who had been appointed by Mexico City to oversee Alta California, but who was resoundingly unpopular because of the depredations of the army of criminals and misfits he brought with him to enforce his authority. Many *Californios* and *extranjeros* took up arms against Micheltorena, forced his abdication, and selected Pio Pico in his place.

Ezquer describes the arrival in 1846 of John C. Frémont, who was supposedly on "una comisión científica," but who instead rallied American settlers to rise up against Mexican rule in California. Ezquer speaks of his own relations with General Bennett C. Riley, the last military governor of California, who arrived in Monterey in April 1849 just as all governmental authority in the region began to splinter and collapse. Riley issued a proclamation calling for a convention whose delegates would write the first constitution for the State of California. Ezquer talks briefly about the events surrounding the Constitutional Convention, speaking from the point of view of a *Californio* whose government and culture were being supplanted by the new arrivals.

ALSO OF INTEREST: William R. Wheaton, *Statement of Facts on Early California History, 1878* (BANC MSS C-D 171); Joseph Webb Winans, *Statement of Recollections on the Days of 1849-52 in California, 1878* (BANC MSS C-D 178); Hiram C. Clark, *Statement of Historical Facts on California from 1851-1865, 1878* (BANC MSS C-D 59); John Currey, *Incidents in California: Statement by Judge John Currey for Bancroft Library, 1878* (BANC MSS C-D 63).

## 2. RICHARD B. MASON. *LAWS FOR THE BETTER GOVERNMENT OF CALIFORNIA = LEYES PARA EL MEJOR GOBIERNO DE CALIFORNIA.*[2]

Richard B. Mason arrived in California on May 31, 1847 to take up the position of Military Governor and Commander-in-Chief of the United States land forces. He found a territory in a state of flux and confusion, with an unstructured government loosely applying a vague system of legal control — part Mexican civil law, part English common law, part ad hoc reliance on

[2] Call no.: xF865.M375. Published as: Richard B. Mason, *Laws for the better government of California, the preservation of order, and the protection of the rights of the inhabitants, during the military occupation of the country by the forces of the United States* (San Francisco: S. Brannan, 1848).

whatever the particular situation seemed to require at the moment. No one was quite sure who or what constituted governmental authority. In the words of Military Secretary of State Henry W. Halleck, "In the absence of positive law, we must be governed by custom and general usage in this country, and in the absence of both law and precedent, the laws and usages of other States and Territories, in like cases, should be referred to, to guide our decisions."[3]

When Commodore John D. Sloat issued his proclamation *To the Inhabitants of California* the previous year, declaring that the territory of California was now officially under the control of the United States government, he had called for a temporary continuation of the status quo. "With full confidence in the honour and integrity of the inhabitants of the country, I invite the judges, alcaldes and other civil officials, to retain their offices, and to execute their functions as heretofore that the public tranquility may not be disturbed, at least until the Government of the territory can be more definitely arranged."[4] Nearly a year after that ringing proclamation, little progress had been made in establishing a more Yankee-style government, and public tranquility was rapidly waning.

Stepping into the breach, Governor Mason took the extraordinary measure of drawing up his own code: *Laws for the Better Government of California: "The Preservation of Order, and the Protection of Rights of the Inhabitants," During the Military Occupation of the Country by the Forces of the United States.* In his code Mason explicitly allowed for the continuation of Mexican or Spanish laws in California, but only "so far as they are in conformity to, and do not conflict with these laws." In other words, the Mason Code was in reality intended to supersede the mélange of laws and to provide a single, coherent and explicit legal code for the inhabitants of California.

The code is redolent with provisions that evoke vivid pictures of this period of California history. Take, for example, Article I, Section 4, which prescribes that "any person convicted of stealing any horse, mare, colt, filly, mule, ass, neat cattle, sheep, hog or goat, shall be sentenced to receive not less than twenty, nor more than fifty stripes, well laid on his bare back, and be imprisoned not more than six months."

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[3] Quoted in Myra K. Saunders, "California Legal History: The Legal System Under the United States Military Government, 1846-1849," *Law Library Journal* 88 (1996), 497.

[4] Quoted in Woodrow James Hansen, *The Search for Authority in California* (Oakland, Calif.: Biobooks, 1960), 72.

In recognition of the bilingual culture then prevalent in California, Mason asked William Edward Hartnell to translate the new code into Spanish. Hartnell was an Englishman who had learned the language while working for a British company in Chile. Arriving in California in 1822, Hartnell quickly integrated himself into *Californio* society, converting to Catholicism, marrying the sixteen year-old daughter of Don José de la Guerra y Noriega, and changing his own name to Don Guillermo Arnel. In a letter to Joseph Folsom mentioning that he has arranged for a Spanish translation of his code, Mason refers to Don Guillermo as "Mr. Hartnell, the government interpreter."[5] Hartnell/Arnel also provided the translation for the first California Constitution.

General Richard Barnes Mason, *photographed by the U.S. Army Signal Corps*

The Mason Code is perhaps the only codification of laws whose printer is more famous than its compiler. The code was printed by Samuel Brannan, the Mormon pioneer who first brought the news to San Francisco of the gold discoveries at Sutter's Mill, thereby launching the California Gold Rush. Brannan was the publisher of the *California Star*, the first newspaper in San Francisco, but Governor Mason later complained that he was unable to procure a complete print run of his code from Brannan "owing to the stopping of the presses upon the discovery of the gold mines, etc."[6]

With the arrival on August 6th of news of the signing of the Treaty of Guadalupe Hidalgo, and the ceding of Alta California to the United States, Governor Mason assumed that his interim code was no longer needed, and the code was never promulgated. It is unclear how many copies of the Mason Code were published. Given Mason's statement that he "did not succeed in getting [the code] printed" because of the gold discoveries, perhaps only proof copies were ever produced. The only other known copy of this code was acquired by the Huntington Library in 1923. The copy in the Bancroft Library is the sole known copy that includes both the English and the Spanish translation.

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[5] Quoted in Lindley Bynum, "Laws for the Better Government of California, 1848," *Pacific Historical Review* 2:3 (September 1933), 285.

[6] *Ibid.*

## 3. *DISEÑO DEL RANCHO SANTA ANA Y QUIEN SABE, CALIFORNIA.*[7]

Under the 1848 Treaty of Guadalupe Hidalgo, the United States acquired for a bargain payment of $15 million an expanse of territory totaling 525,000 square miles, including all of present-day California, Nevada and Utah, and much of what is now Colorado, Arizona and New Mexico. With the land came a perplexing problem: what should be done about the vast Spanish and Mexican land grants that already claimed prime real estate in the new territory? The treaty that was negotiated at the end of the Mexican-American War included a provision (Article X) that guaranteed recognition of those land grants, but the U.S. Senate deleted the article before ratifying the treaty. While it was customary to recognize existing property ownership arrangements when a new territory was acquired, many Americans believed that the Mexican land grants comprised the best — and perhaps the *only* productive — land in the new acquisition. The remainder was believed to be too mountainous or too arid to be of any real value, or was capable of supporting "only the weird life of the Apache, the cactus and the serpent."[8]

In the nation's capital a compromise was arranged that followed a middle ground between outright expropriation and maintenance of the status quo. The new senator from California, William M. Gwin, submitted a bill to Congress calling for the creation of a commission of three members to judge the validity of all Spanish and Mexican land grant claims. Under the Act of March 3, 1851, all claimants in the new territory were required to submit proof of ownership within two years. All lands not submitted to the commission within the two-year period would automatically be deemed in the public domain. On the West Coast the act was greeted with stiff opposition. In two cases argued twenty-three years apart before the California Supreme Court, *Minturn v. Brower* (1864) 24 Cal. 644, and *Phelan v. Poyoreno* (1887) 74 Cal. 448, the Court ruled that land grant holders could *not* be compelled to submit their claims to the Board of Commissioners, and that the United States Congress did *not* have the power to impair or destroy perfect titles for failure to submit them for examination and judgment.

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[7] Call no.: Land Case Map B-1301.

[8] William W. Morrow, *Spanish and Mexican Private Land Grants* (San Francisco, Los Angeles: Bancroft-Whitney Co., 1923), 9.

The issue landed in the U.S. Supreme Court, where in *Botiller v. Dominguez* (1889) 130 US 238, the Court ruled that the powers of the Commission were not only valid, but were a necessity given the circumstances. In *Botiller* the Court held that "the United States were bound to respect the rights of private property in the ceded territory, but that it had the right to require reasonable means for determining the validity of all titles within the ceded territory, to require all persons having claims to land to present them for recognition, and to decree that all claims which are not thus presented, shall be considered abandoned."[9]

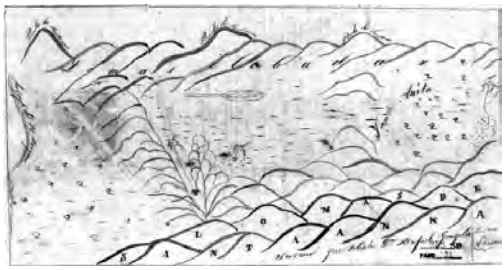
The U.S. Supreme Court recognized that the procedures under which the land had been originally granted left the claims necessarily vague, contradictory and ripe for fraud. The grants were free gifts of the Spanish crown or the Mexican government, usually with no money exchanged, and with little effort made to furnish the petitioner with unambiguous proof of title. Lands were rarely surveyed, or were surveyed using a method that could not yield an accurate, replicable result. By tradition, two men on horseback would take a lariat that was fifty *varas* in length (about 137.5 feet). One man would begin at a stated landmark — the old oak tree at the edge of the dry creek, the big red rock at the top of the third hill — and drive in a stake. The second horseman would ride until the lariat was drawn tight, and drive in another stake. The procedure would then be repeated. If the lariat was drawn through wet grass, it might be stretched and lengthened, or on a hot day, dried and contracted. As a result, no two surveys of the same area ever matched, and descriptions of the land were frequently so vague that it was not clear what should be measured in the first place.

When conflicting claims were submitted to the Board of Commissioners, the resulting disputes were heard in the U.S. District Courts of California (Northern and Southern Districts), and the decision might be appealed to the U.S. Circuit Court (9th Circuit). Litigation often dragged on for years, and generated many folders of petitions and sworn testimony. The litigation documents of the land grant cases were placed on permanent deposit in the Bancroft Library in 1961. Researchers may consult the collection titled *Documents Pertaining to the Adjudication of Private Land*

[9] Quoted in Morrow, *Spanish and Mexican Private Land Grants*, 14.

*Claims in California* to view this material. A finding aid is available via the Online Archive of California.

Among the documents are over 1,400 manuscript maps, or *diseños*, submitted as a visual representation of the property in dispute. Very few show high artistic merit (even trained surveyors seem to have made only a token attempt at aesthetic appeal), though some include careful hand-coloring and lettering. A typical example is the *diseño* for the Rancho Santa Ana y Quien Sabe in Southern California. The *diseño* is small — approximately 20 cm x 28 cm — and includes wave-like mountains sketched in with an almost child-like hand. Hills, streams and neighboring ranchos are indicated. The locations of natural springs (*ojos de agua*) are indicated with stylized representations of watering holes. These manuscript maps may also be viewed on the Calisphere web site, with a search on the term "diseno."



**Diseño del Rancho Santa Ana y Quien Sabe, circa 1840s.**

*Courtesy of The Bancroft Library, University of California, Berkeley (call no. Land Case Map B-1300).*

## 4. SAN FRANCISCO COMMITTEE OF VIGILANCE OF 1851. *SAN FRANCISCO COMMITTEE OF VIGILANCE OF 1851 PAPERS, 1851–1852.*[10]

Despite the new government's best efforts to provide for domestic tranquility, in the rough and tumble city of San Francisco violent crime was rampant — and it went largely unpunished. Robberies, arson and murders were committed on a regular basis with impunity. Finally, in June 1851 a group of San Franciscans formed a Committee of Vigilance to impose swift justice and restore order where the corrupt police and the inept courts had failed. On the evening of June 10th a man named John Jenkins

[10] Call no.: BANC MSS C-A 77.

allegedly committed a robbery. Before dawn on June 11th he was hanged. Far from slinking in the shadows after the lynching, the vigilantes — 183 of them in all — proudly published their names in the daily newspapers and announced their firm intention to continue to administer justice as needed.

For the next three months the executive committee met almost every day. In an effort to counter any suggestion that they represented mob rule, the Committee of Vigilance was punctilious about following highly formalized procedures, and they went to great lengths to preserve an accurate record of their activities. Minutes of meetings, reports of subcommittees, testimony and confessions were recorded and annotated with care, most of the proceedings handwritten on long sheets of heavy blue stationery.

The testimony was transcribed quickly as the witnesses were interrogated, and what the narratives lack in stylistic flow they more than make up for in raw immediacy. Take for instance part of the confession of James Stuart, a native of Brighton, England and one of the leaders of the so-called "Sydney Ducks," former residents of British penal colonies in Australia whose criminal activities were the prime target of the Committee of Vigilance. Stuart testified on July 8, 1851 at 10:30 in the evening:

> We then came to San Francisco — Edwards told us there was a vessel here with considerable money on board — Jim Burns alias Jimmey from town came down with us — Jimmey robbed a Spaniard of about 30 oz when we were coming down from Sac City — we divided the money between us — the same night we went on board the vessel and robbed her — I — John Edwards — Jim Brown George Smith, went on board — the vessel was the James Caskie — we had hard fighting the Capt became desperate — we left him nearly dead — in the fight the Capts wife came out with a sword I took it from her — I acted as Capt of our boys — we were all masked I left them in charge of Capt while I searched the Cabin — Capts wife gave me what money there was on board. . . . Capts wife begged of me not to take the Capts life I told her I did not want to do that if he would only be quiet — I then looked into the Cabin and saw a splendid Gold Chronometer Watch — she begged of me not to take it as her Mother gave it to her — I told her on those conditions I would not take it — the rest of my

"Vigilance Committee Hanging — Jas. Stuart, San Francisco, July 11, 1851."

*Courtesy of The Bancroft Library, University of California, Berkeley (call no. BANC PIC 1963.002:0304–B).*

> Company kicked up a row with me for not taking the watch — I told them they had made me master and I would act as such.[11]

Despite his full confession — or perhaps as a result of it — James Stuart was hanged on the wharf at the foot of Market Street.

An idea of the conditions that led to the formation of the Committee of Vigilance may be gleaned from a letter written on July 8, 1851, by a man named Charles Marsh, who had appeared as a witness in one of the earlier proceedings. "Having been called on last night," Marsh reported, "and threatened by two of the City Police on account of my information concerning Goff, I wish to appear before Your Committee again and make a further Statement, and to claim your protection from the ruffianly intimidation to which I was last night subjected."[12]

In 1919 the University of California Press published *Papers of the San Francisco Committee of Vigilance of 1851*, edited by Mary Floyd Williams. Williams provided complete transcriptions of nearly all the manuscripts

11 *San Francisco Committee of Vigilance of 1851 Papers,* Box 2, folder no. 193.

12 *Ibid*., folder no. 190.

included in the collection, and consulted newspapers and other documentation of the period to enhance the reader's understanding of the proceedings. Her introduction and her annotations are particularly helpful in placing the documents in context, and in identifying partial names and obscure references. The index to the volume is extremely helpful if the researcher has a list of proper names to begin with; it is less helpful in tracking the prevalence of any particular crime.

While Mary Floyd Williams's transcriptions are a good place to start, the research process should not end there. The transcriptions are an excellent way to narrow down one's search and zero in on testimony of interest, but the blue sheets of paper should also be consulted. In some folders there are two versions of the testimony — one rough and colloquial, the other more polished. It appears that the first is an on-the-spot transcription complete with blots and insertions, and the second is a "fair copy" with some editorial smoothing. For the example given above of the confession of James Stuart, Williams chose to publish the more literary version. While the changes in the two transcriptions are minor (Stuart's "Sac City" becomes "Sacramento City"; his "her Mother gave it to her" becomes "it was a gift from her Mother"), the polished version loses some of the piquant flavor of contemporary speech.

Moreover, Williams performed silent blue-penciling of material she found inappropriate. "A few necessary expurgations have been made without further comment," she sniffs in her introduction. One wonders what was considered a necessary expurgation in 1919.

ALSO OF INTEREST: San Francisco Committee of Vigilance of 1856, *San Francisco Committee of Vigilance of 1856 Papers* (BANC MSS C-A 78).

## 5. UNITED STATES CIRCUIT COURT (9TH CIRCUIT). *U.S. CIRCUIT COURT (9TH CIRCUIT) RULE BOOK, 1855–1911.*[13]

The supplied title for this item is only partially accurate, given its date span. There was no Ninth Circuit in 1855. When this ledger was started, Congress had just established California as a separate, unnumbered circuit comprising

[13] Call no.: BANC MSS C-A 144.

two districts, the Northern and the Southern, having both original and appellate jurisdiction. In 1863 the Tenth Circuit was formed, which included California and Oregon, and then in 1866 the circuits were renumbered, with California, Oregon and Nevada composing the new Ninth Circuit.

Once a bound ledger, but now a stack of disbound sheets tied together in manila paper by a length of string, this so-called "rule book" provides a spotty but curious view of the court now known as the Ninth Circuit as it functioned during the first few decades of its operation. Most of the entries in the volume are notations of subpoenas issued or demurrers filed, but in among the routine instructions to the Clerk are manuscript copies of correspondence transcribed into the official volume. One of the more intriguing letters concerns litigation over a very small piece of property that would eventually loom large in the history of jurisprudence in California: Alcatraz Island.

The story of the island's ownership is tangled. According to official documents, on June 8, 1846, Mexican Governor Pio Pico granted the property to Julian Workman, a naturalized Mexican citizen. Workman was given Alcatraz (previously considered public property) on the condition that he erect "as soon as possible" a much-needed lighthouse to guide ships into San Francisco Bay. Workman did not build the lighthouse, but instead conveyed title to his son-in-law, Francis P. Temple, also a naturalized Mexican citizen. The following year Temple sold the island to John C. Frémont, who had been recently appointed as military commandant and civil governor of the territory. Frémont later explained that he had given "a bond for the purchase money in my official capacity as governor of California."[14] The unauthorized purchase of Alcatraz was merely one of many charges brought against Frémont when he was court-martialed for refusing to give up his governorship to Brigadier General Stephen Kearny. He was found guilty of mutiny, disobedience of a superior officer, and conduct to the prejudice of good order and military discipline, but Frémont eventually had his sentence commuted by President James K. Polk, and later resigned his commission.

The complicated legal history of Alcatraz, however, did not stop there.

In 1850 President Millard Fillmore included the island on a list of properties in California which were to be reserved from public sale (indicating

[14] Quoted in Erwin N. Thompson, *The Rock: A History of Alcatraz Island, 1847–1972* (Denver: Denver Service Center, National Park Service, [1979]), 7.


**Picture postcard, "Alcatraz Island — San Francisco Bay," 1900.**

*Courtesy of The Bancroft Library, University of California, Berkeley (call no. BANC PIC 1999.011:019).*

that, as far as the president was concerned, Alcatraz at that point belonged to the United States government). Fillmore was perhaps relying on intelligence supplied by Major John Lind Smith, a surveyor sent to the Pacific Coast the previous year to reconnoiter the defense needs of the territory. Smith reported that all valid Mexican land grants included a provision that the grant could be rescinded if the property was later needed for public use. In the nimble and sometimes dubious juggling of Mexican and U.S. law in the new territory, here was a case where Mexican law apparently provided the President with exactly the justification he desired. In addition, the fact that Workman failed to complete the primary condition for his grant — the construction of a lighthouse — would seem to invalidate whatever rights he may once have held. But Frémont continued to insist that his purchase from Workman's son-in-law was indeed valid, and he subsequently paid Temple $5,000 of his own money. "The island consequently reverted to me," Frémont insisted, "and has ever since been held by me to be my property."[15]

[15] *Ibid.*

Meanwhile, the United States Army began the arduous and costly process of constructing defenses on Alcatraz. Frémont in retaliation hired the San Francisco law firm of Palmer, Cook and Co. to bring an action of ejectment against the Army engineers, an action filed in the District Court, Fourth Judicial District. The engineer in charge of the Alcatraz construction work, who bore the marvelous name of Major Zealous B. Tower, notified his superiors that he was being personally sued by Frémont for trespassing on the island. The Secretary of War advised Tower to turn to the U.S. District Attorney in San Francisco for assistance with the litigation.

Here the *Ninth Circuit Rule Book* records a small, perhaps previously unknown, episode in the protracted Alcatraz drama. Col. Samuel W. Inge, the U.S. District Attorney in San Francisco, contacted his counterpart in Los Angeles, the also magnificently-named Pacificus Ord. (Ord was the elder brother of Major General Edward Otho Cresap Ord, for whom Fort Ord would be named.) On July 23, 1855, Ord responded with his best counsel on the matter. Ord suspected that the Alcatraz grant was one of the flurry of questionable land transactions that flowed from Governor Pico's pen as it became increasingly clear that California was slipping from Mexican control. Ord advised Inge to return to the very beginning of this hopelessly entangled chain in order to establish a clear title for the U.S. government:

> From all the information I can gather about this and other suspected fraudulent grants made by Pio Pico, I believe that there is now but one Witness who can and will testify to the truth of these frauds, and that is C[ayetano] Arenas — son of Luis Arenas — living at the mission of San Buenaventura, Santa Barbara Co, who it is said acted as a Clerk for Pico, and wrote these antedated grants. Caution and tact are necessary to get this evidence. Father and Son are poor, and they are, like nearly all the Californians, averse to testifying against their Countrymen & friends, & in favor of the US. This Witness knows the value of his evidence to the U States, and I believe he would be, to say the least, a very slow one for the U States, unless he could be previously assured that he could in some way be the gainer, by appearing as a Witness for the Government, in this, and other very important heavy land claims.[16]

[16] Pacificus Ord to Samuel W. Inge, July 23, 1855, transcribed in *U.S. Circuit Court (9th Circuit) Rule Book, 1855–1911,* 26.

It is perhaps a matter for speculation whether Ord's suggestion that Cayetano Arenas be assured of being "the gainer" as a result of his testimony on the Alcatraz grant should be viewed as one U.S. District Attorney encouraging another to bribe a witness.

ALSO OF INTEREST: California Court of Sessions (Solano County), *Solano County Court of Sessions Minutes, 1850-1853* (BANC MSS 98/171 c); United States District Court (California: Northern District), *United States District Court, Northern District, California Sales Books, June 2, 1851–November 4, 1887* (BANC MSS C-A 133); California Justice Court (Santa Barbara). *Justice Court of Santa Barbara Docket, 1850-1855* (BANC MSS C-F 151); California Justice Court (Colfax). *California Justice Court (Colfax) Records, 1873-1930* (BANC MSS C-A 357).

## 6. CALIFORNIA STATE PRISON AT SAN QUENTIN. *DESCRIPTION OF PRISONERS RECEIVED AT THE CALIFORNIA STATE PRISON AT SAN QUENTIN, 1909–1912.*[17]

California's current prison system began with a single ship. On October 8, 1849, the San Francisco Town Council approved the purchase of the brig *Euphemia* to use as a prison hulk, and the ship was docked at the wharf near what is now the corner of Battery and Sacramento Streets. In 1851, James M. Estell and Mariano Guadalupe Vallejo converted a bark named the *Waban* into a second prison ship, and leased the labor of prisoners from the State of California for a period of ten years. The ship was docked at Angel Island for one year, until prison inspectors ordered Estell and Vallejo to locate a permanent land-based prison site. The two men purchased twenty acres on Point San Quentin, and the institution we know today had its first incarnation.

The Bancroft Library's collections includes San Quentin prisoner registers from as early as 1851, but among the most fascinating records are four boxes of disbound pages covering the period 1909–1912. These records represent most of the tenure of Warden John Hoyle, who was appointed in 1907, and served until 1913. Warden Hoyle was an adherent of the Progressive

[17] Call no.: BANC PIC 2008.060–ffALB.

Movement, the social revolution that swept through California in the early decades of the twentieth century, reaching its apex with the 1910 election of Governor Hiram Johnson. Hoyle was successful in improving the living and working conditions at San Quentin, doing away with striped prison uniforms and instituting a program of vocational education to ready inmates to become productive citizens upon their release. Despite supervising conditions that might be considered by most modern observers as decidedly grim, Warden Hoyle at the time was widely criticized for "coddling" his prisoners with his progressive reforms. Female inmates (it was alleged) were released for springtime walks to pick wildflowers on Mount Tamalpais.

The registers for the years 1909–1912 contain detailed information about each prisoner admitted, including most notably an evocative mug shot. The entry includes name, prison serial number, date of admission to San Quentin, the type of crime for which the individual was incarcerated, the county in which the crime was committed, and the number of years of the sentence. Biographical details include age, state or country of birth, and occupation. Physical descriptions include height, weight, eye and hair color, complexion type, shoe size and hat size. A free-text field titled "Marks, scars, moles" frequently gives a quite colorful and detailed description of the prisoner's tattoos. Take, for instance, Harvey Wilson, who was booked on June 11, 1909. Wilson's tattoos include an arrow piercing flesh on his left arm, "H.H." and the outline of a star, bracelets inked on both wrists, a dagger piercing flesh on his right arm, the word "Pugh," a star and moon on his left foot, and "Anna" on his right foot. Wilson had evidently had a rough life before reaching San Quentin: the entry notes that his broken nose leaned to the right and the middle finger of his left hand had been chopped off at the third joint. (In the following decade the prison physician at San Quentin would use plastic surgery to correct "flat noses, cauliflower ears and other criminal stigmata."[18])

The youngest prisoners in the ledgers were sixteen (two of them); the oldest was seventy-five. Most prisoners were white, and the race or

[18] Quoted in Benjamin Justice, "'A College of Morals': Educational Reform at San Quentin Prison, 1880–1920," *History of Education Quarterly* 40:3 (Autumn 2000), 297. See also Ethan Blue, "The Strange Career of Leo Stanley: Remaking Manhood and Medicine at San Quentin State Penitentiary, 1913–1951," *Pacific Historical Review* 78:2 (May 2009), 210–41.

nationality of non-whites was specifically noted: Negro, Indian, Chinese, Japanese, etc. In among the men are included photographs of perhaps two dozen women. While female prisoners were segregated into a separate Women's Building at San Quentin, they appear in chronological order among the men in the registration ledgers' mug shots, oddly incongruous in their huge Victorian hats.

Only one famous person was admitted to San Quentin Prison during this three-year period: San Francisco's infamous "Boss" Abe Ruef. In the ledger his crime is listed as "Offering a Bribe," with a sentence of fourteen years. Perhaps nowhere else may one learn that Ruef was five feet, six and half inches tall, weighed 160 pounds, and wore size 6½ shoes. His occupation is listed as "Lawyer."

ALSO OF INTEREST: California State Prison at San Quentin, *Descriptive Registers of Prisoners, 1851–1940* (BANC MSS 79/18 c); August Vollmer, *Prisoner Portraits, 1895–1900* (BANC PIC 1957.022–PIC); San Francisco (Calif.) Police Dept., *San Francisco Police Dept. Records of Folsom Prison Convicts, 1924–1930* (BANC MSS 2007.244); Maynard P. Canon, *Folsom Prison Notebook, 1881–ca. 1949* (BANC MSS 2004/204 c); San Francisco (Calif.) Police Dept., *Wanted Posters Received, 1921–1925* (BANC MSS 91/146 c).

## 7. MARY E. GALLAGHER. *AN INTERVIEW WITH MARY GALLAGHER ON THE I.W.W. [AND] TOM MOONEY: ORAL HISTORY TRANSCRIPT.*[19]

The Bancroft Library's collection is strong in labor history, especially the history of the radical labor movements in California during the early twentieth century. Of particular interest is material concerning the California Criminal Syndicalism Cases, including the extensive Thomas J. Mooney Papers (82 cartons, 84 volumes and 37 scrapbooks, plus miscellaneous subcollections), which document the central figure in the syndicalism trials.

On April 30, 1919, the Legislature passed the California Criminal Syndicalism Act which declared guilty of a felony anyone who "organizes

[19] Call no.: BANC MSS C-D 4011.

or assists in organizing, or is or knowingly becomes a member of, any organization, society, group or assemblage or persons organized or assembled to advocate, teach or aid and abet criminal syndicalism." Aimed primarily at the Industrial Workers of the World (I.W.W.), the measure was a panicked response to a wave of labor actions that ranged from factory slow-downs to fatal bombings, and political organizing that included both opposition to U.S. involvement in World War I and support for the Bolshevik Revolution in Russia. From 1919 to 1924 there were 94 criminal syndicalism trials in California, involving 264 defendants.

Among the more interesting of the many resources available concerning the trials is an interview with Mary Eleanora Gallagher recorded in 1955 as part of the Regional Cultural History Project. Mary Gallagher had been working for the I.W.W. in Chicago, and closely following newspaper reports of the California trials, when she was surprised to read that she herself had been named in one of the proceedings. W.E. Townsend, a former member of the Chicago chapter of the I.W.W., had been called as a prosecution witness. In Gallagher's estimation Townsend was "a stool-pigeon" — a government agent who had infiltrated the organization in order to collect incriminating evidence. Townsend claimed on the witness stand that Gallagher had instructed him in methods of industrial sabotage. When alerted to the allegation, the I.W.W. sent Gallagher to California to refute Townsend's testimony.

During his time in Chicago, Townsend had shared many details of his personal life, and as a result of his indiscretion, Mary Gallagher was able not only to contradict his allegation that he had received instruction in violent labor tactics from her, but also to provide damaging details about his own past in an attempt to impeach his testimony. In her oral history Gallagher explains:

> [F]or six different trials I tried to get this testimony in, that he had deserted from the Army and Navy nine different times and had also been in the insane asylum in Elizabethtown outside Washington, D.C. [*Gallagher here confused St. Elizabeth's Hospital in Washington, D.C. with Elizabethtown, an earlier name for Quincy, California.*] I could never get that onto the record because his attorney would object. That never went into the record until I had made about six attempts at different trials.[20]

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20 Mary E. Gallagher, *An Interview with Mary Gallagher: Oral History Transcript*, 57.

Not until Townsend was called to testify in a case held in Quincy, California, was Gallagher's damaging information admitted. Townsend's response was simply to agree to the accuracy of her statements. "He got up on the stand," Gallagher recalled, "and said, 'Why yes, I was as crazy as a coot. She's right.' And still they used him. It was most astonishing."[21]

Gallagher's oral history provides the type of personal anecdotes about the syndicalism trials that frequently are lost in the winnowing of historical detail. She recalls that during the various trials in California she was entitled to witness fees and transportation, hotel and meal reimbursements. "We had to turn in a bill and have it certified by the judge at the end of each trial so that we could collect our expense money. . . . The judge in each case always went over our expense accounts very carefully to see that we were not eating two-dollar meals when we should have been eating fifty-cent meals."[22]

ALSO OF INTEREST: Mary E. Gallagher, *Photographs Relating to American Socialism and Labor* (BANC PIC 1955.005 – PIC); Joe Murphy, *Industrial Workers of the World: Interview* (Phonotape 1557 C); Harold Haynes, *The Life History of Harold (Red) Haynes: Interview* (Phonotape 1388 C); Patrick Cush, *Patrick Cush Interviews and Songs* (Phonotape 3069 C:1-5); Cottrell Laurence Dellums, *International President of the Brotherhood of Sleeping Car Porters and Civil Rights Leader: Oral History Transcript* (BANC CD-236:1-7); Helen Valeska Bary, *Labor Administration and Social Security: a Woman's Life: Oral History Transcript* (BANC CD 612:1-12).

## 8 JOHN ALFRED SUTRO. *A LIFE IN THE LAW: ORAL HISTORY TRANSCRIPT.*[23]

Most histories of law firms are written to commemorate a particular milestone in the firm's history, or to acknowledge a significant partner upon his or her retirement or death. These publications tend to be puff pieces, intended to celebrate the law firm's many notable accomplishments. Among the extensive collection of oral histories available through the Bancroft Library is a group focusing on law firms in California. While these interviews were recorded with the full cooperation of the attorneys

21 Gallagher, *An Interview*, 58.

22 *Ibid*., 58-59.

23 Call no. BANC MSS 87/243 c.

involved — and at times at their own behest — and while they are certainly not in the category of rigorous exposés, the oral histories do explore the behind-the-scenes dramas of some high-profile California cases, discussed in a forum in which a neutral interviewer can ask probing questions and challenge questionable statements. In many cases they capture vignettes about the practice of law in California that would otherwise have been irretrievably lost.

John A. Sutro, Sr.

The venerable firm of Pillsbury, Madison & Sutro was founded in 1905, but its roots stretch back to 1874, when Evans S. Pillsbury opened a law practice in San Francisco. By the 1890s, Frank D. Madison and Alfred Sutro had been hired as associates in the firm, setting the stage for one of the oldest and most prestigious law firms in California.

In 1985, John A. Sutro, Sr., son of one of the founders, was interviewed for a series of oral histories focusing on PM&S. The senior Sutro was asked about beginning as an office boy in his father's firm, and he related a story that is almost Dickensian in its archaic detail of how a law office in California once functioned:

> That was back in, let's see, 1916 or '17. I think it was after the Panama-Pacific International Exposition, which was in 1915. . . .
>
> One interesting thing, I don't know if I told you about this, but Mr. E.S. Pillsbury was very conscious of security and the lawyers keeping their relations with their clients confidential. The library of the firm, on the top floor of the 200 Bush, had a fireplace in it. Mr. Pillsbury required the office boys to go to every office before they went home in the evening, empty the wastebaskets and take the trash in and burn it up in the fireplace.[24]

After graduating from Harvard Law School in 1929, Sutro joined his father's firm. In his stories about his early years in practice he reveals

[24] John A. Sutro, Sr., *A Life in the Law: An Interview*, conducted by Sarah Sharp (Regional Oral History Office, UC Berkeley, 1985–1986), 11.

colorful anecdotes about the law profession in California during the Depression and World War II. In one case that he handled, the California Artichoke Growers had hired the distinguished Philadelphia advertising firm of N. W. Ayer & Son to help promote the consumption of California artichokes nationwide. The campaign was effective, but the growers in the Monterey region felt that Ayer had favored growers in the San Francisco region over their own, so they blocked payment of the company's bill. Ayer hired Sutro to represent the advertising firm. It was necessary to serve each grower individually in order to give notice of the litigation, but all the growers simply ignored the summons and complaint. As a result, Sutro was able to get a default judgment in the United States District Court. Enforcing the judgment, however, proved to be another matter.

> There was no practical way to collect the judgment by going to the individual growers. It would have been an impossible job, just to collect a few thousands of dollars. It occurred to me that most of the artichoke growers being Italian probably had a bank account at the Bank of America, which had been founded as you know by Mr. A. P. Giannini as the Bank of Italy.
>
> I got a writ of execution and served it on the Bank of America to tie up the accounts of the artichoke grower defendants. In those days, if you served the principal office of a bank you attached or executed upon accounts at all the branch offices. That isn't true any longer today. So I served the headquarters office with a writ of execution. It turned out that I tied up several millions of dollars and the judgment was only for a few thousand. I was called upon by scores of artichoke growers who were really mad. I also got a call from the Bank of America, whose headquarters at that time was on the corner of Powell and Market Street. Would I please come out, because we had all the artichoke growers' accounts tied up?
>
> So I went out there and they gave me a cashiers check for the amount of the judgment with interest and costs.[25]

The Pillsbury, Madison & Sutro Oral History Series includes eleven separate interviews with attorneys from that firm.

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25 Sutro, *A Life in the Law*, 23-24.

ALSO OF INTEREST: Herman Phleger, *Sixty Years in Law, Public Service and International Affairs: Oral History Transcript* (BANC MSS 80/67 c); Edgar Sinton, *Jewish and Community Service in San Francisco, and Family Tradition: Oral History Transcript* (BANC MSS 79/28 c); Leon Thomas David, *California Lawyer and Judge: Oral History Transcript* (BANC MSS 90/118 c); Sharp Whitmore, *California Lawyer: Oral History Transcript* (BANC MSS 90/117 c). Ruth Church Gupta, *Oral History Transcript* (BANC MSS 87/251 c). George Yonehiro, *California Lawyer and Judge: Oral History [transcript]* (BANC MSS 90/119 c).[26]

## 9. ROSALIE RITZ. *ROSALIE RITZ COURTROOM DRAWINGS, 1968–1982.*[27]

When cameras were routinely barred from the courtroom, artists such as Rosalie Ritz provided the only visual record of some of the country's most important trials. Ritz began her career as a court artist in the 1950s working for the Associated Press, the *Washington Post* and CBS. She covered Senate and House Congressional hearings, including those of the House Un-American Activities Committee.

By the mid-1960s she had relocated to California, where she sketched a majority of the most significant California trials of that very turbulent era. A list of the defendants whose trials she illustrated is a Who's Who of the most important political and social figures of the time: Eldridge Cleaver, Juan Corona, Angela Davis, Bill and Emily Harris, the Hell's Angels, David Hilliard, Sara Jane Moore, Patricia Hearst, Daniel Ellsberg, the San Quentin Six, Sirhan Sirhan, the Soledad Brothers, Dan White, Wendy Yoshimura and Huey Newton.

ROSALIE RITZ

In 1966 Bobby Seale and Huey Newton formed the Black Panther Party for Self Defense. In much the same way that the San Francisco Committee of Vigilance had been formed over

[26] Editor's Note: The last four oral histories are published in the present volume of *California Legal History* (vol. 6, 2011).

[27] Call no.: BANC PIC 1991.012–B.

a century earlier to counter perceived corruption in the criminal justice system, the Black Panthers were founded to counteract perceived racism in the Oakland Police Department — and like their Vigilance predecessors, the Panthers' high ideals soon led to excesses. One of their most controversial activities was to institute armed citizens' patrols to intervene in encounters between the police department and African Americans. When on the evening of October 28, 1967, Oakland Police officers John Frey and Herbert Heanes attempted to disarm Newton during an encounter on the street, the incident led to gunfire. All three men were wounded, Frey fatally. In his initial trial Newton was convicted of voluntary manslaughter, but his conviction was overturned by the California Court of Appeal. Two subsequent proceedings ended in mistrials.

Rosalie Ritz was present for all three of Huey Newton's trials for the murder of Officer Frey, and her courtroom sketches present the most complete rendering of the proceedings — 151 drawings in ink and colored pencil. One of the most striking images from the first trial shows two separate sketches of Newton on the witness stand, appearing cool and composed, while Judge Monroe Friedman sits scowling, framed by the red and white stripes of an American flag. Another drawing gives a detailed portrait of each member of the jury. Ritz sometimes added captions to the verso of her work describing the event being depicted. A few suggest the compressed poetry of a haiku: "Emergency Room nurse testified Newton wasn't bad off with bullet hole in stomach."[28]

The Rosalie Ritz drawings have been recently digitized; a finding aid is available via the Online Archive of California.

ALSO OF INTEREST: Walt Stewart, *Walt Stewart Collection of Courtroom Drawings, ca. 1970–ca. 1990* (BANC PIC 2004.133).

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The collections of the Bancroft Library span the entire breadth of California history, and contain documentation in all imaginable formats. An intensive program of digitization is making large portions of the collection available online for remote research, and many users will find they can already pull

[28] Rosalie Ritz. *Rosalie Ritz Courtroom Drawings, 1968–1982* [digital file], image cubanc_39_1_00303530a.

up unexpected riches on their own laptop. Yet nothing can quite match the experience of sitting in the elegant Bancroft Library reading room, inhaling the musty scent and touching the rough sheets of blue paper on which, transcribed in faded, spidery penmanship, a poor soul in 1851 San Francisco pleads for his life before an unsympathetic panel that listens patiently, rope in hand.

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# THE HISTORY OF LOS ANGELES

## *As Seen from the City Attorney's Office*

BY LEON THOMAS DAVID

## EDITOR'S NOTE

The publication of Leon Thomas David's oral history in this volume of *California Legal History* provides the opportunity to present his "History of Los Angeles as seen from the City Attorney's Office," which he completed in 1950. It is one of several works occasioned by his service as an assistant city attorney, a position he held from 1934 until his appointment to the bench in 1950, except for his period of active duty during World War II.

In addition to the legal, academic, and military careers discussed in his oral history, Judge David enjoyed a fourth public career as a pioneering legal historian. In this role, he gave special attention to the legal history of California. His service in the City Attorney's Office led to studies that combined the historical and substantive aspects of that office. For example, one of his earliest and best known works is a series of articles published in 1933–34 that discuss the development of municipal tort liability in California.[1] Many of his works in the field of legal history predate the creation

[1] Leon Thomas David, "Municipal Liability in Tort in California," published in five parts in *Southern California Law Review* 6 and 7 (1933–34); revised and expanded edition published as *Municipal Liability for Tortious Acts and Omissions with Particular Reference to the Laws of the State of California* (Los Angeles: Sterling Press, 1936). A procedural work arising from his city attorney service was *The Administration of Public Tort Liability*

in 1956 of the American Society for Legal History, of which he became an active member. At the time he first recorded his recollections in 1977, he was also the chair of the State Bar Committee on History of Law in California. His final published work is the article titled, "California Cities and the Constitution of 1879," which appeared in 1980.[2]

Judge David's history of the Los Angeles City Attorney's Office is today both a "history" and a documentary source on the viewpoints and attitudes of a prominent lawyer in mid-twentieth century Los Angeles. It was serialized in the *Los Angeles Bar Bulletin* from April to December, 1950.[3] Chapter I, covering the Spanish-Mexican period, reappeared in Judge David's doctoral dissertation of 1957 (a three-volume work of 1470 pages on the role of lawyers in government from William the Conqueror to America of the 1950s).[4]

The complete ten-chapter history of the City Attorney's Office has been reedited for publication here, but without alteration of the content. Comments in [brackets] have been added by the editor. Citations of cases and sources have been checked and expanded. The spelling of names, particularly in Spanish, has been corrected wherever possible. The photographs that accompany the article have been newly obtained for this publication.

— SELMA MOIDEL SMITH

*in Los Angeles, 1934–1938*, coauthored with John F. Feldmeier, published by the Committee on Public Administration of the Social Science Research Council in 1939.

[2] Leon Thomas David, "California Cities and the Constitution of 1879: General Laws and Municipal Affairs," *Hastings Constitutional Law Quarterly* 7 (Spring 1980): 643.

[3] A verbatim reprint, without indication of publisher, date, or copyright, was distributed by Judge David to selected law libraries in California. The copy in the UCLA Law Library bears a handwritten note indicating that it was received from Judge David on October 4, 1951.

[4] Leon Thomas David, *The Role of the Lawyer in Public Administration*. Dissertation, University of Southern California, 1957; Chapter IX(M)4, "Spanish-Mexican City Government: Los Angeles," pp. 261–71.

# THE HISTORY OF LOS ANGELES

## *As Seen from the City Attorney's Office*

LEON THOMAS DAVID*

The fabric of history is an endless web of cause and effect, but one may choose some bright thread and follow it through the pattern, and note the cyclic recurrences of the pattern itself in the fabric.

The transition of our Spanish-Mexican city to an American metropolis, still in population and interests the second largest Mexican city in the Hemisphere, has involved cyclic recurrences of major problems: organization, housing, land, water, transportation, immigration and integration of the newcomer.

That Los Angeles is the third city of the United States testifies that the community has solved such problems, and in many a major battle, the solution has been due in large measure to the work of the city attorney and his staff.

The office itself dates at least to 1822. In the roster of the thirty-one men who held the office since 1850, and of their deputies and assistants, we

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* The original author footnote reads: "Judge, Municipal Court, Los Angeles 1950. A.B., J.D., Stanford University; M.S. in Pub. Adm., U. of So. Calif.; Deputy City Attorney, Palo Alto, 1926–1931; Director, League of California Municipalities, 1931–1932; Faculty, U.S.C. Law School, 1931–1934; Lecturer, School of Government, 1934–1940; Assistant City Attorney, Los Angeles, since 1934; Colonel, F.A., U.S. Army, 1942–1946. Admitted California Bar, 1926."

recognize old friends whose legal careers are well known to the bench and bar. There are others whose tradition should not remain unknown, whose labors antedated the American occupation and conquest. Here we can but note briefly some data, which at a later time may be worthy of more detail, concerning a number of able and interesting men.

In this centennial year [of the State of California], we lawyers who consider these items may feel impelled to consider further, by reading from numerous works readily available. Some of these are indicated in the notes on the sources of the writer's information. Pictures of these leaders of the bar in times past and present are found in a number of works, and in the Los Angeles Public Library.

## CHAPTER I
## A CONTRACT FOR SETTLEMENT

In the development of California jurisprudence, and the growth of a large and learned bar in the State of California, men's quest for gold did not give rise to the major legal problems which taxed the abilities of lawyer and the patience of litigants for many a year. Land — land and water — these more than gold, were to instigate many a bitter battle in politics and at law.

Philip II of Spain, contemporary of Queen Elizabeth, was known as "the prudent."[1] Master of almost all of the New World, he established the *Leyes de los Reynos de las Indias* for the establishment and government of colonies. Therein it was provided that a pueblo or town might be established by a contract for settlement,[2] in which ten married men agreed to establish it with their families, within a time therein specified. Dwellings were to be provided for each family, a church established, and a prescribed list of livestock was to be maintained by each settler on the common lands allotted for the settlement. If the conditions had been met, within the time specified, the reward was the official establishment of the town or pueblo and a grant to the settlers in common of four square (Spanish) leagues of

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[1] Though the loss of his Armada in 1588 was to start the decline of Spanish power, which culminated in Mexican independence in 1821, [this is not] pertinent to our story.

[2] *Recopilación de leyes de los Reynos de las Indias, Ordenanzas del Rei Don Felipe II,* Libro IV, título V, leyes VI, X; "Ayuntamiento," in Joaquín Escriche, *Diccionario Razonado de Legislación y Jurisprudencia* (rev. ed., Paris: Librería de Rosa, Bouret y Cia., 1854), 336–38.

land, laid out in a square if topography permitted without infringing upon any other pueblo or Indian town. The pueblo gained political status.

It would be under the eye of the prefect, representing the crown, but with its *alcalde* or mayor, and its *regidores* or councilmen formed into the *ayuntamiento* or council, it would have considerable self-government, and the council would assign and administer the pueblo lands. The waters, minerals and forests likewise were to be so administered.

The *alcalde*, as mayor, exercised the general functions of a justice of the peace, a feature retained in later municipal law in the American regime taking over Spanish-Mexican cities (see 1 Cal. Reports, original ed., appendix).

In October, 1781, Lord Cornwallis surrendered, and English dominion of the Atlantic colonies ceased. Only a month before, on September 4, 1781, twelve unpromising colonists began building rush huts for themselves and families at an Indian village called Yang-Na, to hold the Pacific Coast for Spain. They had come from Sonora and Sinaloa to fulfill their contract of settlement under Philip II's *ordenanzas*, which settlement was blessed as the Pueblo de Nuestra Señora la Reina de los Ángeles de Porciúncula, in ceremonies conducted by the San Gabriel Mission. "Porciúncula," the name given to the present Los Angeles River by Portola, was derived from the Franciscan festival day on which Portola, in 1769, had paused at the spot.

The launching of this settlement, under the laws of the Indies, had involved some legal difficulty. The requirements of the *ordenanzas* of Philip II were not well adapted to this new land. For instance, Law VI required settlers, among other things, to have blooded Castilian livestock, obviously difficult on such a faraway frontier.

A decree was drawn up by Don Filipe de Neve, governor, close to the problem, for the government of Alta California, of which the 14th Title treated of settlements and pueblos on a more realistic basis.[3] Promulgated at Monterey, this decree was referred to the King of Spain, who approved the decree on October 24, 1781. De Neve already had given instructions for the establishment of the new settlement, which was well under way before the royal approval was given.

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[3] A translation appears in John W. Dwinelle, *The Colonial History of the City of San Francisco: being a synthetic argument in the District Court of the United States for the Northern District of California, for four square leagues of land claimed by that city* (San Francisco: Towne & Bacon, 1863), Addenda IV.

Galindo Navarro, as the *procurador* or attorney general of the Four Interior Provinces gave a legal opinion to Don Pedro Fages, governor of Alta California, that he might legally lay out the pueblo lands of four square leagues for each pueblo, and that other grants should not be made to the disparagement of such lands,[4] in reliance on the *ordenanzas*.

So, from 1781 to 1786, the inhabitants worked, while Vicente Félix, the royal commissioner, watched. By 1783, a chapel, a guard house or jail, and a town house were built. In 1786, the nine remaining settlers complied with their bargain; a survey of the pueblo lands was made, each of the settlers was allotted a house lot, four fields for cultivation, and a branding iron.

The town *ayuntamiento* was established, with its *alcalde* (mayor, who acted as justice of the peace or recorder), and its *regidores* (councilmen).

Under the Spanish Constitution, the Spanish Cortés, on May 23, 1812, provided for the election of the Common Council, pursuant to the Spanish Constitution,[5] in each pueblo. A decree of the Cortés, of June 22, 1813, established the number of *alcaldes*, *regidores*, and other officers in each pueblo or city, according to population. In 1822, it appears that the Los Angeles Council was expanded by the addition of a *síndico-procurador*. After Los Angeles was made a city and capital of Alta California in 1835, the proceedings of the City Council or *ayutamiento* indicate it was entitled to two *alcaldes*, four *regidores* and one *síndico-procurador*.

The *síndico-procurador* was the city attorney. He had a combination job. Under the Spanish and the Mexican law, he was defined as the person "who in the common council is charged with promoting the interest of the pueblos, defending their rights, and complaining (remedying by suit) public injuries when they occur,"[6] and he was also *fisc* or treasurer. The most substantial of those tangible rights and interests of the pueblo were the lands, waters and minerals of the town, and the revenues derived from the lands; plus excises on liquors. Besides its four square leagues, the pueblo of Los Angeles had other lands allotted to it for administration and grant.

The earliest volumes in the Los Angeles City Archives, treasured by City Clerk Walter C. Peterson, are largely composed of petitions concerning land. The settler petitions for an allotment, or urges that the allotment

4 Ibid., Addenda VI.

5 Ibid., Addenda X.

6 Escriche, *Diccionario,* "Ayuntamiento"; Dwinelle, *op. cit*., par. 12.

of another has lapsed, or that there are encroachments by others. Lanes are opened, and some are closed. There are numerous matters relating to the *zanjas* or water ditches from the river.

The petition, carefully written on special paper, bearing the documentary excise tax stamp or seal, was presented to the *ayuntamiento*. Upon many a petition, there is endorsed the report of a Council committee to which it was referred; and then, a few lines record the action of the Council on the report, signed by the *ayuntamiento* members, and the *síndico* frequently signs as such. Where lands are allotted, one may find he was on the allotment committee that viewed the land; and after 1834, he drafted the documents given the allottees to evidence their possessory right.

For several decades after 1850, the California Supreme Court, the federal courts and the U.S. Supreme Court were filled with litigation over California grants. The pueblo grants of San Francisco fill the early reports.[7] Those of Los Angeles do not. The local authorities had done their work relatively well. The transition to American rule was expedited in Southern California and eased by the fact that a considerable number of Americans had settled in the region and had become naturalized Mexican citizens, receiving grants of land, from 1832 to 1850.[8] In the years following 1850, there were a number of judges in the district who were familiar with the pueblo land system. The bulk of the immigrants did not at that time come to Southern California. The mines were in the north.

The *síndico* made many reports to the *ayuntamiento* concerning the city finances, and they are found in the present city archives for a considerable number of fiscal years.[9] The city funds were derived from rentals involving city lands and licensing.[10] For handling this revenue, the *síndico* was allowed a commission.

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[7] *Hart v. Burnett* (1860), 15 Cal. 530, involved the question of whether or not San Francisco had any pueblo rights. Los Angeles pueblo land cases primarily concern water rights: *Feliz v. City of Los Angeles* (1881), 58 Cal. 73; *Vernon Irrigation Co. v. City of Los Angeles* (1895), 106 Cal. 237.

[8] In 1836 alone, there were petitions presented to the *ayuntamiento* for naturalization of Moses Carson (brother of Kit Carson), Dr. John Marsh, William Chard, Nathaniel Pryor, James Johnson, Samuel Carpenter, and William Wolfskill (who later began orange culture here): I Archives, City Clerk, 245, 281; II, 150, which are examples.

[9] An example is the report for 1834: I Archives, City Clerk, pp. 669–73.

[10] The lands were divided into several classes. There were *solares* or single house lots; the *suertes* or fields, assigned by *suerte* or luck in drawing lots; *ejidos*, vacant

On November 19, 1836, Narciso Botello, *síndico*, prayed for an allowance of commissions at the rate of ten percent. The *ayuntamiento* committee recommended three percent. The committee of the council kept watch over the financial affairs by periodic checkups, as on March 15, 1838, when an account of the [1837] *síndico*, Ignacio M. Alvarado, was audited and found correct.[11]

But the city was always having financial troubles. The *ayuntamiento* was always in the middle between the demands of rival claimants of the governorship, as that involving Alvarado and Carrillo.

Sometimes the *síndico* was hard pressed to collect his salary. This was true in 1837 when Alcalde Ybarra reported that he had had to receive eight colts, some hides and several bushels of corn in lieu of fines. The *síndico* claimed the colts on account of his past-due salary. The *alcalde* counterclaimed for money advanced to pay the secretary of the *ayuntamiento* and for board of the colts. The Council determined that the *sincido* should pay out the colts on claims against the city. Then it was discovered that the colts had eaten the corn and two had run away.

Not all those elected to the office of *síndico* desired it, in spite of the penalties imposed for not accepting public office. Thus in December, 1838, Vicente Sánchez refused the office, which occasioned some concern to the *ayuntamiento*.[12]

There was in that year a war going on between rival claimants for the governorship, Don Carlos Carrillo and Juan Bautista Alvarado. Vicente de la Osa, a forceful member of the *ayuntamiento,* had been captured along with fellow councilmen and Alcalde Louis Arañas by Alvarado's forces, and imprisoned in General Vallejo's *castillo* at Sonoma. Osa and Regidor José Palomares eventually made their way back, and Osa became *síndico.* The *síndico* returned and claimed his accrued allowances, but there were no funds.

Vicente de la Osa (1838)

commons; *dehasas* or pasturage; and *propios*, or proprietary lands leased out, whose revenue was a principal municipal finance item.

11 I Archives, City Clerk, p. 53.

12 Ibid., pp. 581–686.

Faced with the practicalities of the situation, a petition had been presented to the Council by citizens, requesting the Council to withdraw support from Carrillo. The *síndico*, Osa, ruled that the petition was not legal, as it was not presented on the official stamped paper. This did not daunt the citizens, who the following day presented one fully legal in form. So the "recall" succeeded, as the *ayuntamiento* recognized Alvarado.

The military occupation of the city of Los Angeles by United States forces from 1846 to 1850 involved numerous legal problems for the *síndico*. The city records today contain copies of military regulations sent from General Winfield Scott's headquarters in Mexico, authenticated by William Tecumseh Sherman, lieutenant of artillery, as adjutant general, providing rules for military government.

The citizens of the state at an election in November, 1849, ratified a constitution promoted by the United States Army commander in California. In 1850, an act was passed in the Legislature for the incorporation of Los Angeles, and a general act also passed providing for government of cities. The 1850 charter was nothing more than legislative recognition of the existing city government, and defined its boundaries, very important to the city.

Under the treaty of Guadalupe Hidalgo, its citizens became American citizens, and their collective property in the form of the pueblo lands was protected by the treaty obligation.

The machinery of city government at the time was carried over from its Mexican organization. There was little need to do otherwise, for the powers of the Council and the scope of the municipal administration were little changed. However, it is interesting to note that the *ayuntamiento* had exercised jurisdiction over a considerable area outside the pueblo boundaries. Pending the creation of county government, it was the county government.

## CHAPTER II
## BENJAMIN IGNATIUS HAYES

Early in 1850, a number of lawyers arrived in Los Angeles. These included Benjamin Hayes, J. Lancaster Brent, William G. Dryden and Lewis Granger, all of whom became city attorneys and had notable legal careers.

Benjamin I. Hayes was a college graduate, born in Baltimore in 1815, who came overland from Missouri, arriving February 3, 1850. He met and

formed a partnership with Jonathan R. Scott, for many years thereafter a leader at the bar. Hayes arrived with total assets of three mules, which he proceeded to sell. On April 1, less than two months after his arrival, he was a candidate for the office of city attorney, at the municipal elections to fill city offices for the first time under the new constitution, and he was elected. Fast work for a newcomer!

Benjamin Ignatius Hayes (1850–1851)

Hayes took the oath of office as city attorney on July 3, 1850, and the salary set was $500 per annum.[13] Apparently the City Council did not make too frequent demands upon him. In August 1850 Benito Wilson, who was already the elected county clerk, was elected to the City Council. Hayes ruled there was no incompatibility in office. (Hayes himself, at the same moment, was county attorney.[14]) Antonio Coronel served at this time as assessor.

When Coronel was about to make his first *ad valorem* assessments, he wished to know what lands to assess. Many "city" lands, claimed by it were outside the four square leagues to which its first American charter had trimmed it. So he was told to confer with the city attorney. No report was made for eight months.[15] The absence of adequate surveys made the task difficult.

The city passed its first general licensing ordinance, which imposed fees on a gross receipts basis. When the city wished to auction off some of its lots, the treasury being low, Hayes pointed out that the auctioneer would have to pay the tax.[16]

On May 1, 1851, the salary of the city attorney was cut to $300 per year, the Council reserving the right to allow extra compensation for special services. On May 7, W.G. Dryden was elected city attorney. Hayes, as partner of his fellow Missourian, Jonathan Scott, may have been no longer interested in the city job. At least, in February, 1851, Lewis Granger (later

13 I Records, City Clerk, pp. 9–10.
14 Ibid., p. 73.
15 Ibid., p. 77.
16 Ibid., p. 116.

a city attorney) billed the council for $10 for services in a suit, and was told to settle his claim with the city attorney.[17]

In 1852, Hayes was elected the first district judge. On January 1, 1864, the district was enlarged by adding San Luis Obispo and Santa Barbara counties, and Don Pablo de la Guerra of Santa Barbara became his successor.

Hayes, as judge, found murders a major judicial concern, there being about one a day in Los Angeles at that time. He was very sensitive to the need of counsel for the accused, and his diaries show him praying in the church for one he had sentenced to hang.

In 1850, as prosecuting attorney, he tried the Lugos, sons of a prominent citizen, for the alleged murder of two men who had misdirected Lugo's party, pursuing Indian cattle thieves, into an ambush. The Lugos were defended by another newcomer, J. Lancaster Brent, who secured their acquittal. At the preliminary hearing, outlaws packed the courtroom, and their leader, Irving, an ex-cavalryman renegade, threatened to "get" the Lugos if they were admitted to bail. The marshal was hard put to maintain order, and later, an assassin shot at Hayes, putting a bullet through his hat.

As judge, in January 1855 he sentenced two men to hang. These were Alvitre and Brown. Through the efforts of his counsel, Cameron E. Thom (who later was city attorney), Brown secured a stay of execution from the Supreme Court. A similar stay was requested for Alvitre. It was granted, but before it was known of or received, Alvitre was executed. The rope broke, and the job had to be done over. A crowd then formed, designed to lynch Brown. Stephen C. Foster, Yale graduate, superintendent of schools and mayor, resigned as mayor to take part in the lynching. Brown was seized from the sheriff, and asked if he had any last word. He stated he wanted "none of the greasers" — Mexicans were numerous in the crowd — to pull on the rope. So he had an all-American hanging.[18] Perhaps Brown's request was induced by the Alvitre disaster.

Hayes protested in 1854 when the sheriff offered $500 for delivery of two murderers, alive or dead, and they were delivered dead, as this seemed productive of more violence.

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[17] Ibid., p. 137.

[18] Harris Newmark, *Sixty Years in Southern California, 1853–1913, containing the reminiscences of Harris Newmark, edited by Maurice H. and Marco R. Newmark* (editions of 1916, 1926, 1930, 1970, 1984), pp. 139–40.

In his diary, Hayes noted that he attended a ball, given by two gentlemen "lately admitted to the bar," at the Gila House at San Diego. One was Mr. Nichols, a preacher, and the other a Dr. E. Knight. These two had been brought before his court for admission. He had some doubts as to their study of the law, not removed a whit when the investigating committee moved their admission. On the motion it was stated that "one had studied the law of God, the other being a physician was reading the laws of nature. Their studies in the statutes and common law etc."

In 1857, he recorded with evident condemnation that the U.S. district judge had spent a portion of last election day at the polls, challenging voters and giving opinions on election laws, and that the county judge was inspector of elections. In 1858, the Los Angeles vote for the district judgeship he held was 363 votes, San Gabriel 170, San Pedro 38, and San Bernardino 135.

When Hayes resigned as county attorney in 1851, he was succeeded by Lewis Granger, who became city attorney in 1855.

Hayes was an eager collector of the early history of the area, and in 1876, published a county history with two other early pioneers, J.J. Warner and J.P. Widney.[19]

Hayes's sister married Benjamin S. Eaton, who was the first district attorney in the county, and another sister taught in the first public school in the city.

Ignácio Sepúlveda, himself a judge of Los Angeles County, stated of Hayes: "He made an upright judge. As a lawyer he was learned. As a man, he was unassuming, gentle and good."

## CHAPTER III
## THE GOLDEN ANTE-BELLUM DAYS: 1850-1860

In the golden decade of 1850–1860, breathing space between two wars, the sleepy pueblo still waited for the prince's kiss to wake it to its destiny. The rancheros herded their cattle, reaped their grain. In the autumn sun, bare-legged Indians danced their bacchanalia in vats of purple grapes,

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[19] J.J. Warner, Benjamin Ignatius Hayes, and J.P. Widney, *An Historical Sketch of Los Angeles County, California from the Spanish occupancy, by the Founding of the Mission San Gabriel Archangel, September 8, 1771, to July 4, 1876* (Los Angeles: Louis Lewin & Co., 1876; reprint, 1936).

that the new minerocracy of San Francisco might drink to their ascendant fortunes.

Once a week, in the evening, the Americanized City Council would meet. Half or more of its members bore the old familiar Mexican names, and they strove valiantly to understand English; while the others tried to understand Spanish, and occasionally postponed consideration of important documents, until each had a translation he could understand. Progress there was, for Lieutenant E.O.C. Ord was hired to make a map of the city lands. This progress was limited by the failure of the Council to provide permanent stakes to mark the survey; and the hangers-on at the Plaza scarcely paid attention to Ord as he waved to his slow-moving chainmen along the irregular *Calle Principal*, not yet translated to Main Street.

By 1850, the arrival of wagon trains was an old story to the somnolent peons of the Plaza. Occasionally, they were stirred into a flash of interest, when the unusual occurred. On one day, they witnessed an entire family arriving, and little boys made haste to tell the other two American families in the town that the gringo lawyer, Lewis Granger, had brought his wife and children.[20]

Or it might have been the arrival on another day of lawyer Joseph Lancaster Brent, whose wagons disgorged a library of well-worn law books, bound in calf, with other countless volumes on a variety of subjects. This man spoke Spanish like a native. The *Mexicanos* who had unloaded his goods thought he was *muy simpático*. Soon he was known as Don José.

One wonders what Stephen C. Foster, mayor, and a Yale graduate, said to lawyer James H. Lander when Lander arrived in 1852 to start his practice with Joseph R. Scott.[21]

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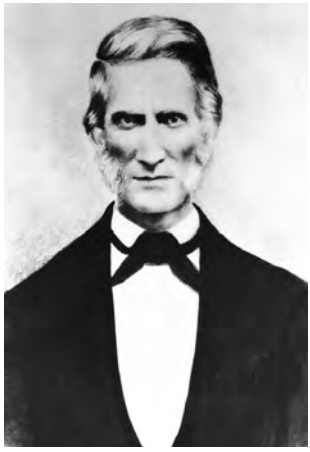
[20] Thus it was natural that Granger should have become a member of the first school board, formed in 1853. His fellow-lawyer, J. Lancaster Brent, was made superintendent. Stephen C. Foster, mayor, was the third member of the board, and succeeded Brent as superintendent in 1854. Miss Louisa Hayes, sister of Judge Benjamin Hayes, was the first teacher. Granger was elected to the City Council in 1854, and as city attorney in 1855.

[21] James H. Lander was born in New York City in 1829, and was a graduate of Harvard College. In Los Angeles, the year of his arrival, he married Margarita Johnson, who not only was the daughter of Don Santiago Johnson, prominent citizen, but also was the niece of Mayor Manuel Requena. Soon he was a court commissioner, and

One day in 1850 the placid onlookers at the Plaza chattered about another unusual newcomer. He was not a young man like the others. His muttonchop whiskers already were gray, and bobbled up and down as he erupted words with incredible rapidity, inquiring with delightful profanity the way to the hotel, the Bella Union. From his arrival, until his death in 1869, Los Angeles was always to be conscious of the genial impetuousness of electrically-charged William G. Dryden. Twice he would become allied by marriage with substantial families of the town.[22] His appointment as secretary of the City Council (city clerk) was almost simultaneous with his first days of law practice in the pueblo.[23]



WILLIAM G. DRYDEN (1851–1852)

*Courtesy California Historical Society — USC Digital Archive*

Within a few months he was elected city attorney and also continued to serve as the secretary of the Council.[24]

In 1853 he knew, as men following him half a century later knew, that irrigation was the alchemy required to make the bunch of grapes on the City seal symbolic of the promised land. The dream of 1853 became the reality of 1857 when Dryden was granted a franchise for a water system. Its small tank, standing in the Plaza, the wooden pipes leading to the premises of a few consumers, would seem ridiculous today. But they were monuments of change, prophetic of the city that was to be.

Dryden practiced law assiduously for a time, then was elected police judge, county judge, and district judge in turn. A judge was a great man in

partner of Joseph R. Scott. He was the first notable "office lawyer" in Los Angeles, and specialized in land titles. He died June 10, 1873. Lander was city attorney in 1858–59.

22 Dryden, though older than most of the single men arriving in town, soon married. Señorita Dolores Nieto was his first wife, and on her death, he again married into the old aristocracy of the town, espousing Señorita Anita Dominguez.

23 Dryden began as secretary of the City Council on November 6, 1850, when Vicente del Campo resigned (l Archives, City Clerk, p. 97).

24 Dryden was elected city attorney on May 7, 1851, but continued to serve as city clerk. As city attorney he received a salary of $200 a year, plus allowances for extra services as determined by the Council (I Archives, City Clerk, p. 163).

this small town. Judge Hayes had the majesty of Jove upon the bench, somewhat humanized by frequent afternoon adjournments due to overdoses of non-Olympian nectar. With equal indulgence, the public made legend of the peppery profane fireworks engendered in tight moments in Judge Dryden's court. When opposing counsel drew pistols on each other, during a heated argument before the court, Dryden yelled, "Court's recessed. Fire way and both of you be damned," as he dropped behind the protecting dais.

As city attorney his labors were not arduous. Some consideration was given to a Thanksgiving proclamation. A number of citizens proposed to form a volunteer police force.[25] This action was proposed on January 8, 1851, and resulted in the formation of a volunteer force under Dr. A.W. Hope.[26]

When rumors reached the Council that the town was to be invaded by a band of armed Indians, the question arose whether the city could borrow money to provide for its defense. An ordinance was passed providing that householders should bring out and set their garbage at their doors.[27]

The City Council drew an ordinance in September, 1851, relating to sale of liquor to Indians, there having been many gatherings of drunken Indians on the city streets. An astute councilman asked whether or not this ordinance could be enforced as the Legislature had passed an act dealing with the subject matter. Upholding the rights of the city to municipal home rule, Dryden held that the city had ample power.

On October 7, 1851, lawyer J. Lancaster Brent was elected as councilman to fill the vacancy left by the resignation of David Alexander. Of this lawyer, more is to be written.

The ordinances drafted by City Attorney Dryden and the Council Minutes which he kept are careful and precise, albeit that when Manuel Requefia acted as substitute secretary in Dryden's absence the minutes always were shorter.

Dryden, the second city attorney of Los Angeles, still is one of the legal immortals of Southern California. One of his contemporaries called him "audacious." Another said that despite all of his nervous eccentricities, he was genial.

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25 I Archives City Clerk, p. 126.

26 Ibid., p. 179.

27 Ibid., p. 136.

## CHAPTER IV
# THE WAR CLOUDS GATHER WHILE CALIFORNIA LAWYERS LITIGATE LAND TITLES: 1850-1860

On July 4, 1848, President Polk proclaimed the Treaty of Guadalupe Hidalgo with the Republic of Mexico. Article VIII made inviolate the individual property rights of Mexicans in California under the new flag. Nevertheless, to new settlers flocking into California, the ownership of the land they occupied was frequently immaterial. When land had been abundant, and Mexican governors generous, the marking of rancho boundaries had been most informal. At San Francisco, an army officer, purporting to act as a *de facto alcalde*, granted away the lands of the pueblo of San Francisco.

As to these *alcalde* grants, the battle raged through fifteen volumes of *California Reports*, debating whether San Francisco had ever been a pueblo, whether it had ever had any pueblo lands, whether an *alcalde* could grant them away, and whether the army officer grantor in question had ever been an *alcalde*. Successive courts reached contrary conclusions. Speculators wagered as to which decision would remain unreversed long enough for *stare decisis* to freeze it into law.

Cameron E. Thom (1856–1858)

Bound by solemn treaty to guarantee the preexisting titles, John C. Frémont and William M. Gwin, the first senators from California, brought action from Congress. Pursuant to statutory authorization, a Land Commission was appointed and came to California. In five years' time, the commission confirmed 604 titles and rejected 190, and all but 19 of its decisions were appealed to the United States district courts.

Captain Henry Halleck, the mainspring of the California Constitutional Convention and military secretary of state, resigned from the Army, and the firm of Halleck, Billings, Peach & Park leaped into prominence in the land litigation. The name of Judah P. Benjamin was heard frequently in San Francisco, where most of the sessions of the Land Commission were held. Cameron E. Thom arrived in Los Angeles in 1852,

representing the government as land commissioner. He established himself at the Bella Union Hotel (until the rains of 1855 caused the flat roof to cave in), and found time to be elected city attorney.

Isaac Hartman also arrived in 1852, and was special assistant attorney general, representing the government in land case appeals through 1861. In 1854–55, he also served as city attorney of the town of Los Angeles. Samuel F. Reynolds arrived to practice law, but after serving as city attorney from 1859 to 1862, moved on to San Francisco, where he became district judge. Charles E. Carr held the office in 1853–54, and then served as state assemblyman.

Outside of the short session of the Land Commission in Los Angeles in 1852, the legal frenzy over titles found in San Francisco did not materialize in Los Angeles. The *rancheros* quietly sought to have their titles confirmed, and lawyers kept busy, particularly J. Lancaster Brent. In May, 1851, W.C. Jones petitioned the City Council for an appointment to present the city land claims. But it was Brent who secured the contract, $3,000 to be paid him for representation before the Land Commission, $3,000 more for appeal to the district court, and another $3,000 if the litigation went to the Supreme Court. Brent, who also had served as city councilman and city attorney, secured confirmation of the city's right to the four square leagues of pueblo lands.

The new state Supreme Court saw little of Los Angeles lawyers. Murder trials were frequent, in the city of the angels, but capital sentences were speedily executed and minor offenses did not count. Few litigants appealed civil judgments. Whether Los Angeles was a blissful arcady or whether the distance, time and expense involved were major deterrents, the fact is that only thirteen cases in the first eight volumes of *California Reports* originated in Los Angeles.[28]

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[28] *Keller v. Ybarru* (1853), 3 Cal. 147, breach of contract to supply grapes; *Domingues v. Domingues* (1854), 4 Cal. 186, action to set aside conveyance, Scott & Granger, and H.P. Hepburn, counsel; *Isaac Hartman v. Isaac Williams* (1854), 4 Cal. 254, breach of oral contract, Scott & Granger, counsel; *De Johnson v. Sepulveda* (1855), 5 Cal. 150, ejectment, Scott, Granger & Brent, of counsel; *Martinez v. Gallardo* (1855), 5 Cal. 155, appellate procedure, Norton and Hartman, Scott and Granger, counsel; *Keller v. De Franklin* (1855), 5 Cal. 433, probate appeal, J.R. Scott, counsel; *Stearns v. Aguirre* (1856), 6 Cal. 176, prom. note, J.L. Brent and J.R. Scott, counsel; *People v. Carpenter* (1857), 7 Cal. 402, bail bond forfeiture; *People v. Olivera* (1857), 7 Cal. 704, perjury; *Dominguez v.*

It is also entirely possible that the local judges and their decisions enjoyed high popular repute.

During this period, Los Angeles was Democratic in its national politics. There were rumblings and distant echoes of great political controversy raging between North and South. California's admission to the Union had been part of Henry Clay's Compromise of 1850. California's Supreme Court had decided that although California was a free state where slavery was prohibited by the Constitution, slaves brought into the state by their masters were to be delivered up to him as his property, when he sought to repossess them.

Had California not been so remote from the remainder of the United States this decision might well have become the rallying point of the abolitionists.[29]

The issue of "North" versus "South" was localized in California. The southern part of the state in 1859 still strongly represented the Mexican-Californian influence. The immigrants outweighed all others in the north. The Tehachapi Mountains were a formidable barrier between the sections. Gold was the quest of the northerner. The southern Californian predominantly remained a rancher and agriculturist.

Beginning in 1855, members of the Legislature led a movement for division of the State of California into three states. In 1859, a bill passed both houses of the Legislature and was signed by the governor, providing for the division of California.[30]

At the general election of 1859, the proposition carried, and was forwarded to Congress. The area south of San Luis Obispo was to constitute the new State of Colorado.

Congress took no action to recognize the division. The Congress had maintained equilibrium between the northern and the southern states by the Compromise of 1850. The Kansas-Nebraska question was generating threats of disunion. To divide California would have added fuel to the mounting flame.

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*Dominguez* (1857), 7 Cal. 424, to set aside sale of realty, Sloan & Hartman, and J.L. Brent counsel: *McFarland v. Pico* (1857), 8 Cal. 626, presentment and demand on commercial paper, J.R. Scott, counsel.

29 *In re Perkins* (1852), 2 Cal. 724.

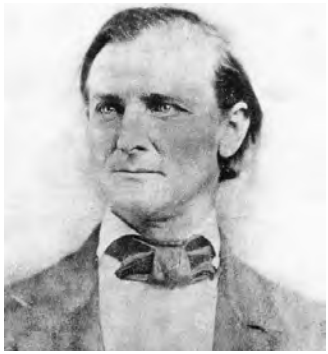
30 Cal. Stats. 1859, Chap. 288, p. 310.

CHAPTER V

# DISUNION AND WAR: 1861

When J. Lancaster Brent arrived in Los Angeles in 1850, he soon became the unofficial political leader of the town. He addressed the Mexican population in fluent Spanish, and it was said he could nominate any candidate at will. A councilman in 1851, he became city attorney in 1852 and served until 1853. In 1855–56, he succeeded Charles E. Carr as state assemblyman.

In 1851, he joined the Rangers, which were to Los Angeles almost what the Vigilantes were to San Francisco. In 1853, he was the first superintendent of schools. He was regarded a scholar, having both a personal library and a law library. He acquired the famous Indian library accumulated by Hugo Reid. His friendship with Judge Benjamin Hayes ended over the trial of William B. Lee for murder, in which Brent was defense counsel. Lee was convicted in spite of a motion for change of venue on the ground he could not have a fair trial in Los Angeles County.



**Joseph Lancaster Brent (1852–1853)**

*Courtesy Special Collections Room, Glendale Public Library, Glendale, California*

Brent appealed the case. The Supreme Court reversed the conviction, the decision stating that the failure to grant the motion for change of venue was error, in that "over one hundred citizens united in employing counsel to prosecute the defendant. Without any opposing affidavits tending to show a fair trial could be had, we think that a sufficient case was made to entitle the person to a change of venue. . . . It would be a judicial murder to affirm a judgment thus rendered, when the reason of the people of a whole county was so clouded with passion and prejudice as to prevent mercy, and deny justice."[31] Judge Hayes took this as a personal affront, not lessened by a movement which was started for his impeachment.

In the golden years of 1850 to 1860, California was still Indian country. The statutes of 1859 list various Indian wars still recurrent, and the

[31] *People v. Lee* (1855), 5 Cal. 353.

Legislature was seeking to be reimbursed by the federal government for state expenditures in repression of Indian outbreaks. Indians congregated in Los Angeles streets, some seeking the source of contraband liquor, and others clearly showing they had found it. In Los Angeles, and about the state, there were many people soon to become famous in the war between the states.

After pursuing Indians into Oregon, Captain U.S. Grant whiled away his time at Eureka, fishing and drinking. Forced to resign from the Army in 1854, Grant made his way to San Francisco. Penniless, Colonel Simon Bolivar Buckner at the Presidio loaned him money with which to return to Illinois. Jefferson Davis, secretary of war, established Fort Tejon in the pass of the Tehachapi, to control the Indians. General Frémont, whose forces had taken Los Angeles from the Mexicans, had turned to mining in California, and was living in Paris following his term as United States senator. Halleck, the army engineer who had engineered the statehood of California, had resigned from the Army and was practicing law in San Francisco. At Wilmington, Captain Winfield Scott Hancock was in charge of Drum Barracks, which was the army supply installation that served the string of frontier forts throughout the Southwest. Judah P. Benjamin was considering returning to Louisiana, and entry into the race for United States senator.

A colonel of rare military attainments, Albert Sidney Johnston commanded the Department of the Pacific, and on the site of Pasadena built a new homeplace called Fair Oaks to commemorate his wife's home in Virginia.

Could any of these men foresee what the future so shortly was to hold for them? Jefferson Davis, the president of the Confederacy; Judah P. Benjamin, his secretary of state; Frémont fumbling the command of Union forces in Missouri; General U.S. Grant demanding and receiving the unconditional surrender of General S.B. Buckner at Fort Donelson; H.W. Halleck recalled to the Army to be Lincoln's chief of staff throughout the Civil War, known far-and-wide as "Old Brains." Soon, Winfield Scott Hancock would be flinging his division against Marye's Heights at Fredericksburg; soon he would turn back Pickett's charge at Gettysburg. E.O.C. Ord, who made the Los Angeles city survey, would become a famous general of the Army and a right-hand man to Grant.

Shortly, Johnston would be opposing Halleck in the Confederate campaign in the West, and Jefferson Davis would be saying, "If Johnston is not a soldier, we have no soldiers." Soon, Albert Sidney Johnston would be lying

dead on the battlefield of Shiloh (1862), and Confederates everywhere would say, "The South could better have spared an army." Soon, Johnston's son would also lose his life, in the explosion of a vessel in San Pedro Harbor named after Hancock's wife, and the California plantation of Fair Oaks, so beautifully begun, would mournfully close.

In the election of 1860, Los Angeles voted predominantly for Breckenridge, and there were strong sympathies for the South. When Albert Sidney Johnston resigned his command, and started for the Confederacy, some hundred left Los Angeles to volunteer with him. Others tried to intercept the movement. Among those who reached the Bonnie Blue Flag were Joseph Lancaster Brent and Cameron E. Thom.

As a brigadier general of the Confederate States, Brent is said to be the last Confederate officer to have finally surrendered his sword. He never returned to Los Angeles. Cameron E. Thom, late captain, C.S.A., was to reach Los Angeles penniless at the conclusion of the war. Within twenty years, he was to be mayor of Los Angeles, and he was to live for fifty years more to see Los Angeles fulfill its destiny, and to fulfill his own as a servant of the people, commenced when he once served as city attorney.

## CHAPTER VI
## GONE WITH THE WIND: 1865-1870

The emaciated Confederacy, drained of the life-blood of its army at Gettysburg, starved by the scorched earth policy of Sherman and Grant, faltered, stopped, then fell, never to rise again. Only the women were left to mourn. But more than the Confederacy was dead. Southern agricultural feudalism had "gone with the wind," and the ex-slave and carpetbagger succeeded to the ruin.

The agricultural, stock-raising feudalism of Southern California had been on the wane since 1850. The paid guest had succeeded the free hospitality of the *rancho* before 1860. It was not war that brought it to an end in 1860–65. It was drought, three years of it in succession. Fifty thousand cattle at a time would storm a meager water hole, and fifty thousand rotting carcasses resulted, month after month. The land-poor ranchers tried to hold their land. They borrowed, and borrowed, and were unable to repay. Mortgage foreclosures, or financial stringency, broke up the vast estates.

James H. Lander, Myer J. Newmark, and A.B. Chapman, leading members of the bar, saw this happen. In 1863, the corner of Fourth and Spring Streets sold at a tax sale for less than two dollars. City lands went for a song. In a few more years, Westlake Park would be established on city lands that did not produce the minimum twenty-five cents a lot. The war brought other problems to Los Angeles. The attorneys of the city always had sponsored the school system. City Attorneys Hayes, Brent and Lander all had served on the school board. Now, there was a fight over the allegiance of the teachers, North and South. Half of the pupils in the school were withdrawn, and gained knowledge, if at all, from private schools or private tutors. Sentiment was so divided that it was thought expedient to forego the traditional Fourth of July celebrations.

We already have noted something of the career of James H. Lander, Harvard graduate, office lawyer *par excellence*. Myer J. Newmark came to Los Angeles with Joseph Newmark, merchant. He read the law with E.J.C. Kewen, and was admitted to the bar. He formed a partnership with Howard and Butterworth in 1862, the year he was elected city attorney. But law was not to be his career. He went to New York, and later returned to San Francisco and Los Angeles, known throughout the country as a leading merchant, businessman, and civic leader of the West.

Myer J. Newmark (1862)

While in Los Angeles, Newmark lived at the corner of Seventh and Spring Streets. He sold his residence at this location to I.N. Van Nuys in 1879 for $6,500.

Alfred B. Chapman was city attorney from 1862 to 1865, and lived here throughout his legal career. He died on January 16, 1915, and many members of the bar still remember him. His great-grandfather was president of North Carolina University, at which he studied for a time. He was graduated from West Point in 1854, and served at Benicia Arsenal and Fort Tejon. General Robert H. Chapman was his brother. A.B. Chapman resigned from the Army, married the daughter of Jonathan R. Scott, and went to study law in Scott's office. Scott's office was the law school for many lawyers commencing practice

in Los Angeles. Hayes, Landers and Granger had been in partnership with Scott during their early careers, as well as Chapman. Chapman served as district attorney for two terms, commencing in 1868, and for twenty years practiced with Andrew Glassell. He settled at Santa Anita, and became one of the first to grow and market citrus fruit on a large scale.

The gold that was to gild the Southland from the Tehachapi to Mexico was found by A.B. Chapman. At Newhall and in Los Angeles, oil, black gold, had been found.

The next episode of legal-civic importance to Los Angeles was to be "The Fight for the Railroads."

ALFRED B. CHAPMAN (1862–1865)

## CHAPTER VII
## THE FIGHT FOR THE RAILROADS

In the years 1870 to 1880 the City of Los Angeles, with a population of approximately 10,000 souls, had no claim to prominence. The development of oil and of citrus groves was rudimentary. The only commodity of which there was any surplus for export was wine. Weekly steamers left San Pedro for San Francisco. A telegraph line to San Francisco had just been completed. Stock raising had been dealt a death blow by drought. The city had been forced to issue scrip in discharge of its municipal indebtedness.

In spite of all this, there were those who believed Los Angeles had a future. That future depended on the development of roads and railroads to the outer world.

The opening chapter of such development was the construction of a railroad line, the Los Angeles & San Pedro Railroad, from its Los Angeles terminal at Alameda and Commercial Streets to San Pedro. The voters of the city and of the county authorized the issuance of bonds in aid of the venture, and took stock in return. Contrary to predictions, the line did not go bankrupt. The fare for a passenger going to San Pedro was $2.50, and freight rates were somewhat in proportion. With this venture started, the Los Angeles & Independence Railroad was organized. It was planned that

it should go from Santa Monica to Inyo County and thence to Salt Lake. The road reached Los Angeles.

The year 1869 marked the driving of the last spike on the transcontinental railroad, the Union Pacific. The Texas & Pacific Railroad was surveying a route into San Diego. The Atlantic & Pacific Railroad was considering a link from Santa Barbara to San Francisco. None of the plans included Los Angeles.

The problems connected with the locations of the railroads were to engage the attention of a number of men who served the city as city attorney. These were Andrew J. King (1866–68), Colonel Charles H. Larrabee (1868–69), Frank H. Howard (1870–72), A.W. Hutton (1872–76), and Colonel John F. Godfrey (1876–80).

In addition to these men one of the prominent figures in the controversies was H.K.S. O'Melveny. On the minutes of the City Council his signature as president stands out large and bold. As revealed by the city records, it was he who earnestly contended that Los Angeles should not temporize with branch-line connections, but should demand to be included on the transcontinental lines.

So far as the railroads were concerned, there was every indication that Butterfield's transcontinental stages, leaving Los Angeles three times a week, would continue to be the main link with the outside world. But the city fathers and citizens generally had other ideas. Emissaries of the famous Big Four — Crocker, Stanford, Huntington and Hopkins — consulted with the local governmental bodies. These sessions were stormy. Crocker, after one session with the City Council, walked out, stating that so far as he was concerned, grass could grow in the streets of Los Angeles.

To build a railway line into Los Angeles, the Southern Pacific Railroad demanded a contribution amounting to approximately five percent of the assessed valuation of the county, a right of way, a sixty-acre depot site, and the stock in the Los Angeles & San Pedro Railroad as well. At first blush it is no wonder that Crocker was received in rather a rude manner. To any demurrer to the proposal, the railroad pointed to the existing plan, which called for a direct line across the Mojave Desert into San Bernardino and thence north, and to the mountain ranges through which long and costly tunnels would have to be constructed to link Los Angeles and San Francisco.

Charles H. Larrabee
(1868–1869)

Opinion was divided but finally the voters accepted the proposition and agreed to turn over the railroad stock, while the city provided a depot site. Colonel Charles H. Larrabee, who had purchased much realty in the town, took the stump in support of the acceptance of the railroad's proposition. Chinamen began to toil on the tunnels in the San Fernando mountains. A branch line to Anaheim was constructed. Los Angeles would not continue to be an insignificant pueblo.

By 1878 the Southern Pacific absorbed the Los Angeles & Independence Railroad. By 1875 the Santa Fe arrived in the city and in 1905 through-service to Salt Lake began over the Los Angeles, San Pedro & Salt Lake Railroad, which was later purchased by the Union Pacific, in 1921.

In this era of expansion, the city attorneys were called upon increasingly by the City Council to assist in the collection of delinquent taxes, to help secure legislation in Sacramento, to assert the water rights of the city in the Los Angeles River. It must also be said that their advice was sought to stave off the city's creditors, who, in view of tax delinquencies so prevalent, frequently were considerably delayed in receiving their due.

On February 17, 1870, a claim was made for a reward for highway robbers captured by Colonel Chipley. At another time the Los Angeles & San Pedro Railroad had run an extension from Commercial to Aliso Streets and it was necessary to order the company to remove it for want of authority. The growth of the city and confusion concerning its records required that the city attorney search out the records in the U.S. Land Office. Suits over water rights were frequent. Ordinances were so numerous that William McPherson was hired to codify the same for $400 in gold coin.

Andrew Jackson King (1866–1868)

Andrew J. King, city attorney, had a varied career. He served as undersheriff of the county and likewise became district judge, succeeding Judge Dryden on Dryden's death.

As undersheriff, King, in 1866, fell into an altercation with Carlisle over the outcome of a murder trial. The next day King's brothers, Frank and Huston, saw Carlisle at the Bella Union Hotel and a gun fight ensued. Carlisle shot and killed Frank King, and in turn was riddled with bullets

by Huston King, who likewise fell from Carlisle's shots. Huston King was tried for Carlisle's murder but was acquitted. In the fight, another early city attorney, J.H. Lander (1858–59) of Los Angeles was accidentally wounded. During Civil War days, King was arrested by the U.S. marshal, who apparently had some doubt as to his Union loyalties. King had been a member of the state legislature in 1859 and 1860. He published the *Los Angeles News*, which was the first daily south of San Francisco, from 1865 to 1872.

Frank Howard was the son and partner of General Volney Howard and the brother of Charles Howard, who was killed in a fight in 1869 by Dan Nichols, son of ex-mayor Nichols. Frank Howard's father had been United States senator from Mississippi, a representative in the California Constitutional Convention, and a judge of the superior court. When his father came to Los Angeles, Frank Howard was a doctor practicing in Mexico. He came to Los Angeles, studied law and formed the well-known partnership of Smith, Howard and Smith.

**John F. Godfrey (1876–1880)**

*From the Collections of the Bangor Public Library*

A.W. Hutton is still remembered by many Los Angeles lawyers. A native of Alabama, he and three brothers saw service with the Confederacy. He came to California in 1869 and entered the office of Glassell and Chapman. For forty-six years he had offices in the Temple Street Block situated on the site of the present City Hall. In 1874, as city attorney, he personally drafted the first special charter of the city. In 1887 he was appointed to the superior bench. Later he served as U.S. district attorney. In 1901 he was a member of the Board of Freeholders to prepare a new charter for the city.

Colonel John F. Godfrey served during the Civil War. In 1876 he became city attorney, and was marshal in the big centennial parade on July 4, 1876. In 1884, one Hunt killed his neighbor, Gillis, at El Monte. Godfrey returned from a visit to the widow of Gillis and children, to find a

crowd gathered to lynch Hunt. Godfrey addressed the crowd, stating that charity for the widow and orphans should be considered before justice for the killer. So saying, he passed his commodious hat. With this, the crowd dispersed.

None of these gentlemen, eminent in law and public affairs, was able to stop the local tong war and massacre of Chinese, which had international repercussions. Of that we will write later.

## CHAPTER VIII
## THE INTERNATIONAL SCENE: THE CHINESE MASSACRE AND THE FIGHT FOR THE HARBOR

Los Angeles made the international limelight in sensational fashion in 1871. One October day, twenty-two or more Chinamen were seized, beaten and hung near Los Angeles and Commercial Streets by an infuriated mob of over a thousand persons which surrounded Nigger Alley, bashed in roofs, and engaged in a frenzied orgy of lawlessness.

It had started with a tong war between Chinese, excited over abduction of a woman, and flared high when wrathful San Francisco Chinese arrived as reinforcements.

City policeman Jesús Bilderrain, with a group of citizens, sought to break up the tong war disorders and tried to arrest armed tong members. Bilderrain and his brother were shot, and Robert Thompson, who assisted them, was shot and killed.[32]

A mob quickly formed as the news spread. Sheriff Burns sought to form a posse to handle the riot and demanded that it disperse, but no one responded.

Andrew J. King, undersheriff and later city attorney, in rushing to arm himself, shot off the tip of his finger. Henry T. Hazard — another who served as city attorney — stood on a barrel to harangue the crowd. Friends rescued him also from the enthusiastic lynchers. Judge R.M. Widney, and Cameron Thom — another who later was city attorney and mayor — tried

[32] An account of the episode is given in *Wing Chung v. Los Angeles* (1874), 47 Cal. 531, 532–33.

to quell the riot and did succeed in rescuing some of the Orientals. Thom mounted a barrel and harangued the crowd, and so did Sheriff Burns. Harris Newmark, eyewitness, tells how the barrel collapsed under Burns, ending his speech ludicrously.[33]

The verdict of the coroner's jury was ludicrous, also, finding the victims met death by strangulation at the hands of parties unknown.

But there were meetings all over the nation, protesting the indignity. The Chinese ambassador made serious matter of the episode and indemnity was paid by the United States government.

City Attorney Frank H. Howard, O'Melveny, and Hazard then had to defend suits brought against the city under the unique statute making cities responsible for damage done by mobs and riots.[34] The claim of the Chinese for injury to their property was defeated on the ground they failed to notify the mayor of the impending riot and that their conduct had precipitated it.[35]

### *New Era*

The attention of the citizenry was diverted to other matters. The bandit, Vásquez, operating between Bakersfield and here, was captured, taken on a change of venue to San José, tried and executed. In a shaft, sunk by pick and shovel, E.L. Doheny found oil — a new era had commenced.

Electric lighting came to Los Angeles in December, 1882. The telephone was contemporaneous. In 1885 the first cable railway began operations, and the Santa Fe reached the city. Thereupon began a rate war. Roundtrip tickets from the Midwest went down to fifteen dollars, then a dollar, and tourists began to pour into Los Angeles in a stream which has not stopped yet.

Legal notables passed by. Erskine Ross, nephew of City Attorney C.E. Thom, was elected in 1879 to the state Supreme Court, and in the late eighties, Ross and Stephen J. Field sat here in the United States Circuit Court,

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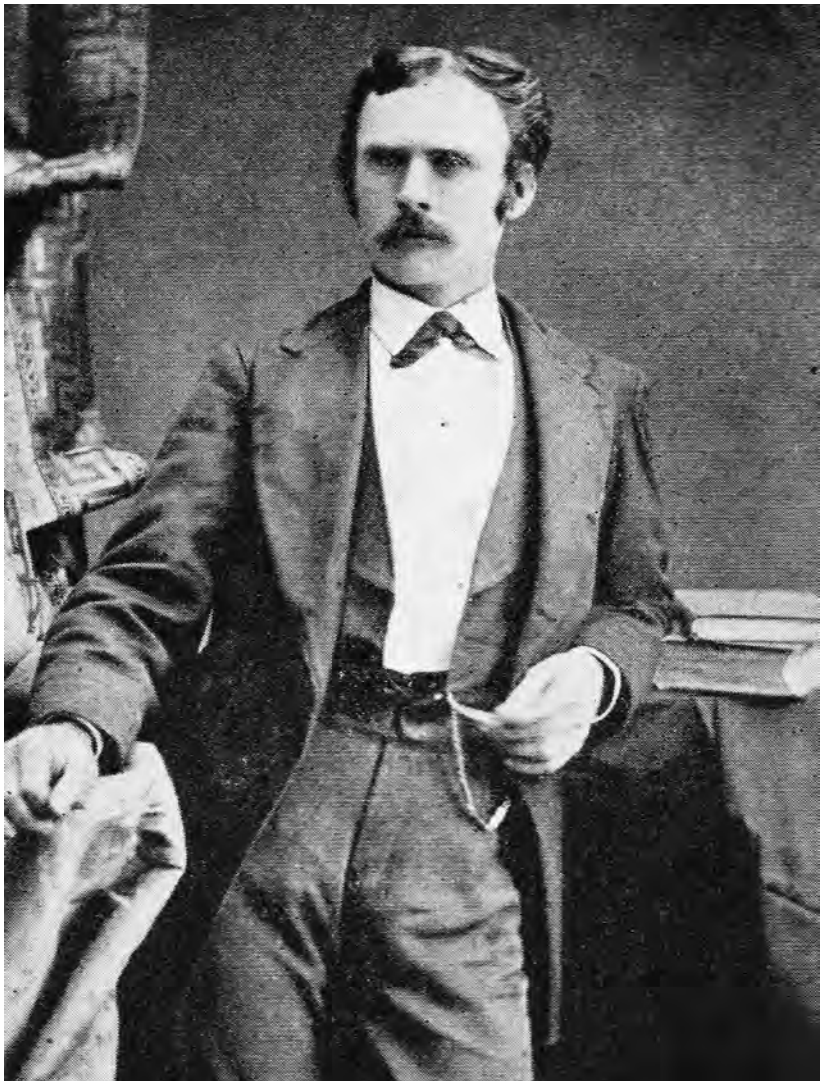
33 Newmark, *op. cit.*, pp. 434–35.

34 Cal. Stats. 1867–68, p. 418.

35 *Wing Chung* v. *Los Angeles* (1874), 47 Cal. 531, 535. Thereafter, the mobs and riot statute was to lay dormant for three generations until invoked in reference to another riot over foreigners *(Agudo* v. *Monterey County* (1939), 13 Cal.2d 285.



HENRY T. HAZARD
(1880–1882)

holding sessions over the Farmers and Merchants Bank at Main and Commercial Streets.

The boom was on. In 1888, the project for a separate state received momentary attention. It was determined to be a necessity, but "the time is not ripe."

In 1889, the first Tournament of Roses was staged.

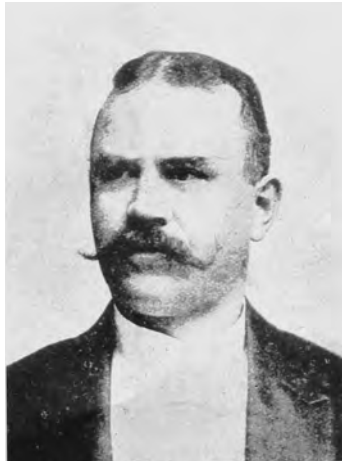
Such material developments called for civic expansion. There were dreamers who saw Los Angeles as the capital of the Western Sea with argosies coming and going from the four corners of the earth.

The long fight for federal appropriations and Congressional approval for the development of a municipal harbor to be located at San Pedro involved civic organizations, lawyers and local officials for a generation. Charles H. McFarland, William E. Dunn, Walter F. Haas, William B. Matthews and Leslie R. Hewitt, as city attorneys from 1888 to 1910, profoundly influenced the course of this municipal development.

Henry T. Hazard, ex-city attorney and mayor (1889–92), actively began the free harbor campaign. Hazard was a member of the firm of Hazard and Gage. Gage, later became governor of California. They had an office in the Downey Block on Temple Street. Hazard succeeded John Bryson as mayor in 1888, being elected at a special election held under the new Charter.

Hazard was a member of the first Park Commission, appointed in 1888. During his second term as mayor in 1892, Doheny discovered oil in Los Angeles. Vigorous Council action was necessary to prevent the spread of oil drilling to the Westlake Park region. In 1894 Hazard was a member of the Fiesta Committee. In 1899, upon the successful conclusion of the fight for the Los Angeles harbor, Hazard made the presentation speech at a ceremony in which a plaque was awarded the *Los Angeles Times* for its support of the fight. Hazard died in 1921.

Billy Dunn was known to many lawyers. He was the Dunn of Gibson, Dunn & Crutcher. He studied law at the University of Michigan. As assistant city attorney and city attorney, he won his first fame in the suits over the purchase by the city of the Los Angeles Water Company. In 1898 he became the city's special counsel for water litigation; he became counsel later for the Huntington and other utility interests.



William Ellsworth Dunn (1894–1898)

Walter F. Haas, who later resided at Alhambra, became a member of Haas & Dunnigan, and was regarded as an authority on water law, derived in good measure from his municipal experience in helping set up the Los Angeles City system.

Walter F. Haas
(1898–1900)

William B. Mathews as city attorney (1900–06), and later special counsel for the city in water and power matters, is regarded affectionately as one of the fathers of Los Angeles's highly successful utility system, and served as well on the Library Board.

From 1850 until 1870, goods and passengers were lightered ashore to San Pedro and Wilmington. Terminal Island was a thin wraith of sand called Rattlesnake Island. The inshore channel, where there was one, had a maximum depth of 17 feet. In 1881 a jetty was completed to prevent the small channel from filling up, and reclamation of Terminal Island commenced. Following these improvements Wilmington was regarded as the main harbor.

Congress, in 1890, caused a board to be appointed to examine this locality and to report on the best location for a deep water harbor. It reported in favor of San Pedro, but in 1892 another board was constituted. Santa Monica Bay was the competitor and rival railroads fanned the fires concerning the ultimate selection. The second board reported for San Pedro, but the report gathered dust in the halls of Congress. In 1896, a third board reported but a bill was introduced in Congress to build a $2,900,000 seawall at Santa Monica.

William B. Mathews
(1900–1906)

The contest was long and bitter. C.P. Huntington and his associates were the adversaries. Huntington had established Port Los Angeles, northwest of Santa Monica, and built the long wharf — six thousand six

hundred feet long. He also controlled the entire ocean frontage. The threat of such a monopoly did much to crystallize sentiment against such a development. Stephen M. White, U.S. senator, led the fight in the Senate. The victory for San Pedro was the beginning of the decline of the railroad political machine in California, reaching a climax in 1911, the real beginning of the development of our municipal harbor department for all the people.

Even after the Harbor victory was won, two years more were consumed in forcing the secretary of war to call for bids for the first ocean breakwater, completed in 1907. Thirty years later, the federal government, at the instance of the Navy, sought to condemn the major part of Terminal Island ocean frontage for naval uses, alleging ownership by the United States. This was after the Congress, through the War Department, had spent millions to develop the commercial harbor. After two years of preparation for trial and negotiations in which it was clear that such an action would damage the city, some $22,000,000 on account of loss of its investment and the cost of necessary relocations, the suit was dismissed.[36]

This was a prelude to *United States v. California*, whose repercussions have not yet died down in Congress.

## CHAPTER IX
## LOS ANGELES COMES OF AGE AND LAW PRACTICE BECOMES METROPOLITAN: OUR MODERN LEGAL TITANS

John W. Shenk is serving his twenty-sixth year as an associate justice of the Supreme Court of California. This is the longest period of service of any of the justices, the next longest being that of Chief Justice William H. Beatty. John Wesley Shenk was born in Vermont, received his schooling in Omaha, Nebraska, and at Ohio Wesleyan University. He left college in his junior year to serve with Company A, 4th Ohio Volunteer Infantry, and saw service in Porto Rico [as it was then known]. The Spanish-American War concluded, he was graduated from the law school at the University of Michigan in 1903, and then came to Los Angeles.[37]

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[36] U.S. Dist. Court, *U.S. v. 338.6 Acres of Land* #1102B Civil.

[37] For further details of the life of this eminent jurist, consult: *Boyle Workman's The City that Grew / as told to Caroline Walker Workman* (Los Angeles: The Southland

LESLIE R. HEWITT
(1906–1910)

In 1906, he became a deputy city attorney under W.B. Mathews. In 1909, he was promoted to assistant city attorney by City Attorney Leslie R. Hewitt, taking the place of Lewis R. Works, who became a judge of the superior court and later a justice of the District Court of Appeal. In 1910, when Leslie Hewitt resigned as city attorney to become special counsel for the Board of Harbor Commissioners, John W. Shenk became city attorney and held the post until 1913, when he was appointed judge of the superior court.

When Shenk entered the City Attorney's Office in 1906, there were three deputies; when he left, there were sixteen. On his staff, and still active on the bench or at the bar were Edward R. Young, assistant city attorney, followed in 1912 by George E. Cryer, who later served three terms as the mayor of Los Angeles. Emmet H. Wilson was his chief deputy, soon to become a judge of the superior court, and now a justice of the District Court of Appeal. Among the other deputies were Howard Robertson; S.B. Robinson, who remained in the legal division of the City Attorney's Office for the Department of Water and Power for many years; Jess E. Stephens, who was later city attorney (1921–29) now judge of the superior court; and Charles E. Haas, now judge of the superior court.

It was during this period that Los Angeles came of age, and the framework of Its municipal institutions took form in the fashion we now know them. Certainly, it was a period rich in legal experience, for perhaps in no other incumbency were so many fundamental legal problems first encountered and decided by the courts.

Wilmington and San Pedro were annexed. Necessary contiguity was furnished by the famous "shoestring strip." Time was short and opposition great, and Justice Shenk recalls a midnight trip amidst irate farmers and sharp-toothed watchdogs as he hurriedly listed polling places and secured

Publishing Co., 1936), p. 243; Rockwell D. Hunt, ed., *California and Californians*, vol. V (Chicago, New York: The Lewis Publishing Co., 1926), pp. 339–40.

His son, John W. Shenk II, is now in practice in Los Angeles with Edward R. Young, with whom Mr. Justice Shenk himself had planned to practice.

names of election officers for the required ordinance, calling the annexation election.[38]

Los Angeles was attempting to develop the harbor, and to secure a water supply. The city was expanding, and there was need of new public buildings, parks, and all the other adjuncts of a metropolis.

For years, the basic water supply of the city had been the waters and underground waters appurtenant to the Los Angeles River. By virtue of the pueblo rights of the old Spanish city, Los Angeles claimed these in the entire San Fernando Valley. Shenk's major assignment in 1906–09 was the adjudication of these rights, the city vindicating its claims.[39] At this time the valley area was undeveloped. Land could be purchased in the vicinity of the present city of Burbank for $35 an acre. In 1907, a bond Issue of $23,000,000 was voted for the Owens Valley project, and the major attention of the city was thenceforth turned to the Sierra Nevadas in procuring of adequate water.

While this was a live issue, there was a perplexing "dead" one. The Los Angeles City School District wanted a school site on property used as a cemetery.[40] Unfortunately, the lots had been deeded in fee to many who no doubt had long since been interred in their supposedly final resting place. Shenk persuaded Judge Nathaniel P. Conroy[41] that he had made "due and diligent search" for the owners and could not find them, and hence was entitled to an order for publication of summons.

In 1909, the city was deeply engaged in litigation concerning the validity of tide and submerged land grants in the harbor area. To reach the so-called Miner concession, owned by the Huntington interests, whose title was challenged by the city, the Pacific Electric Railway was laying a spur which had to cross First Street in San Pedro. This required a franchise, said Los Angeles. The company speedily replied. Over the Labor Day holiday and weekend it installed the track over the street, relying on the holiday to disperse the judges and thus prevent the granting of an injunction.

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38 Litigation followed, terminating favorably in *People v. City of Los Angeles* (1908), 154 Cal. 220.

39 As in *Los Angeles v. Los Angeles Farming and Milling Company* (1908), 152 Cal. 645; *City of Los Angeles v. Hunter* (1909), 156 Cal. 603.

40 The Old Masonic Cemetery, owned by Los Angeles Lodge No. 42, F.&A.M. [Free and Accepted Masons]. The bodies were removed and reinterred, and the site used for an addition to the high school on Ft. Moore hill.

41 Afterward, a justice of the California Supreme Court.

But City Attorney Shenk paid the railway back in its own coin. On his advice, the Board of Public Works on the following weekend took horses and equipment to the harbor, removed the railroad's empty cars from the Miner concession, and took possession of the property for the city. The legal burden having passed to the Huntington interests, there was an abandonment of the claims made in their behalf. Thus the city took over the site of our present Outer Harbor development.

On October 1, 1910, the *Times* Building was dynamited, and City Attorney Shenk was called from bed by David M. Carroll, deputy city clerk and minute clerk of the City Council, asking if a reward could be offered legally for the arrest and conviction of those responsible. The advice was that the city did not have such authority. Later, the Charter was amended to authorize the posting of rewards, but the Charter was repealed. The question arose again, and it was held that the present city government did not have the power to offer rewards for the apprehension of those committing felonies.[42]

JOHN W. SHENK
(1910–1913)

To develop the city's electrical system and harbor, the electors voted unprecedented bond issues. Sale of bonds depended upon securing an adjudication that the bonds were valid. Mr. Justice Shenk relates that James G. Scarborough of Scarborough and Bowen came to the rescue with a client who then litigated the validity of these bond issues, the Supreme Court having refused to pass upon the question in a mandate proceeding brought for the purpose.[43]

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42 Despite Shenk's advice, the Council offered the rewards, and in later litigation before amendment of the 1889 charter, it was held the city did not have the power.

In connection with the famous Hickman murder case, the Council again offered a reward. There was a change of administration and it was not paid, and in *City of Los Angeles v. Gurdane* (1932), 59 F.2d 161, it was held that there was no power under the present Charter to offer such a reward.

43 *Los Angeles v. Lelande* (1909), 157 Cal. 30; but later holding the issues valid, after legislative validation: *Clark v. Los Angeles* (1911), 160 Cal. 30 and 317.

Then, as now, the city urgently needed to secure and maintain an adequate sewer system. A main line sewer was under construction in 1909, to carry effluent to Hyperion and into the Pacific Ocean. In the midst of the operation, the contractor defaulted. The City sued for a forfeiture of $125,000 on his bond. The bondsmen offered to settle for $75,000, which exceeded the expectations of the City Council. After the motion to accept had been carried, a member of the Council congratulated City Attorney Shenk, and asked if the City Attorney's Office was not in need of something. Shenk replied that the office was in need of an adequate library. The Council then authorized the city attorney to procure a good library for the city attorney's staff, and this was the beginning of the present working library of that office.

Then there was the Griffith Park case. The Rancho Los Feliz was granted to Verdugo in 1843 and patented to him by the United States in 1871. It was acquired by Griffith J. Griffith, who deeded a large part of the rancho to the city for park purposes in 1898. There was considerable controversy when the grant was offered, on the ground that Griffith was attempting to lighten his tax load by unloading the property on the city. While negotiations were pending, the first Monday in March passed. The city cancelled city taxes, but forgot that there were county taxes liened against the property. In 1905, J.H. Smith bought a portion of the rancho, comprising 800 acres in the center of the tract, at the county tax sale for $80 or less. Offer after offer was made to Smith, all of which were refused. In the meantime, the city brought a quiet title action against the tax deed, on the ground the boundaries described did not meet. While an offer of $5,000 was pending, the Supreme Court held the tax deed invalid, and the property was saved to the city.[44]

Much more could be written, and undoubtedly more will be written, about this remarkable city attorney and the remarkable era in which he served the city as such. As a world port, Los Angeles owes much to City Attorney John Wesley Shenk, in whose administration steps were undertaken to perfect the harbor land titles, thus making harbor development

[44] *Smith v. City of Los Angeles* (1910), 158 Cal. 702. Chief Justice Beatty, who dissented, later remarked to City Attorney Shenk that "it was a good thing for you that one member of the court is from Los Angeles. If It had not been for Mr. Justice Shaw you would have lost that Griffith Park case." This was Mr. Justice Lucien Shaw, only member on the Court from Southern California from 1903 to 1918.

possible.[45] Public utility law still reflects the impact of his lawyership.[46] Through his business ability and persuasiveness, citizens underwrote the city so that it might acquire the present central library site, originally for a city hall (then the Normal School site).[47] Water development by Los Angeles was accelerated by the Shenk Act, the Water District Law of 1913;[48] and Shenk's career as city attorney closed with the annexation of the San Fernando Valley to Los Angeles.

No wonder, after such experiences, that Mr. Justice Shenk of the California Supreme Court as a jurist today is considered one of the foremost American authorities on municipal corporation law.

## CHAPTER X
## THE LAST FORTY YEARS: 1910-1950

When John Wesley Shenk was appointed to the Los Angeles Superior Court in 1913, his successor as city attorney was Albert Lee Stephens, the first graduate of the law department of the University of Southern California to hold that office. Born in Indiana in 1874, City Attorney Stephens was already known in civic circles, since from 1911 to 1913 he had served on the Civil Service Commission, which

ALBERT LEE STEPHENS (1913–1919)

45 Numerous suits were started or pending or carried to completion during the time Mr. Shenk was city attorney, including: *San Pedro R.R. Company v. Hamilton* (1911), 161 Cal. 610; *People v. Banning Co.* (1913), 166 Cal. 630; *People v. California Fish Co.* (1913), 166 Cal. 576; *People v. Banning Co.* (1914), 167 Cal. 642; *Patton v. Los Angeles* (1915), 169 Cal. 521; *People v. Southern Pac. R.R. Co.* (1915), 169 Cal. 537: *People v. Banning Co.* (1915), 169 Cal. 542; *Spring Street Co. v. Los Angeles* (1915), 170 Cal. 24.

46 As in *Pomona v. Sunset Tel. & Tel. Co.* (1911), 224 US 330.

47 The city did not have $600,000 required for the purchase. Joseph F. Sartori raised the money in a local syndicate, with approval of Senator Rosebeery who organized a corporation and took title. The city purchased the land on installments. How the library was built on the property is another story.

48 Cal. Stats. 1913, p. 1049.

was then pioneering in municipal personnel matters. His career from city attorney to superior court judge, to judge of the United States District Court, to justice of the U.S. Circuit Court of Appeals for the Ninth Circuit, is well known,[49] and will deserve an individual biography at a later time. Appointed to the bench in 1919, Albert Lee Stephens was succeeded as city attorney by Charles Burnell, who had served in the City Attorney's Office since 1913, and for a brief period in 1918 had been counsel for the Los Angeles Flood Control District.[50]

JESS E. STEPHENS
(1921–1929)

As City Attorney Burnell made his way to the superior court bench, he was followed by another illustrious member of the Stephens family, Jess E. Stephens.[51] During his administration of eight years, the expansion of the city involved millions of dollars expended for public improvements; thousands of special assessment matters were handled by the office; the utility departments grew apace; the city built and occupied the new City Hall. William H. Neal, legislative representative *par excellence* and now assistant city attorney, came on the scene.

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[49] Consult Willoughby Rodman, *History of the Bench and Bar of Southern California* (Los Angeles: W.J. Porter, 1909), p. 234; Rockwell D. Hunt, ed., *California and Californians*, vol. IV (Chicago, New York: The Lewis Publishing Co., 1926), p. 322. As will hereinafter appear, his brother, Jess Stephens, became city attorney and superior court judge, and his son, Clarke Stephens, is now judge of the municipal court, Los Angeles.

[50] Judge Burnell was born in Elko, Nevada, 1874; was graduated with the pioneer class at Stanford University in 1895. He practiced with Seward Simons, Kemper Campbell, and Frank Doherty, before entering the City Attorney's Office. He became judge of the superior court, an office which he held at the time of his death last year [1949].

[51] His biography is given in William A. Spalding, *History of Los Angeles City and County, California, Biographical*, vol. 2 (Los Angeles: J. R. Finnell & Sons Publishing Co., 1931), p. 315, to which any reader unfamiliar with Judge Jess E. Stephens is referred. [A note inserted by the editor of the *Los Angeles Bar Bulletin* reads, "Due to the official relationship now existing between the author and Judge Stephens, many complimentary characterizations of his administration as city attorney have been omitted, lest such comment be misconstrued."]

EDWIN P. WERNER
(1929–1933)

Public improvement matters still were in the fore during the administration of E. "Pete" Werner as city attorney.[52]

Werner was succeeded as city attorney by Ray L. Chesebro in 1933. At this moment, Ray L. Chesebro has served the City of Los Angeles as its city attorney for a longer period than any other incumbent during the city's one hundred seventy years of existence.

Born at Mazeppa, Minnesota, on August 28, 1880, Judge Chesebro was bereft of his parents at an early age, and at eighteen was earning his living as a telegrapher on the Minneapolis & St. Louis Railway. For a year and a half, he worked in a wholesale commission house in St. Paul, Minnesota. Along the way, he learned shorthand and typing. This paved the way for his next advancement, in which he served H.M. Pearce, general freight agent of the Northern Pacific Railway, as private secretary. This railroad secretarial experience brought him to Los Angeles in 1904 as a stenographer in the offices of the Santa Fe Railroad.

In 1907, while John W. Shenk was working on the annexation of San Pedro and Wilmington by means of the "shoestring strip," Ray L. Chesebro, then living in San Pedro, became secretary of the Consolidation Commission. He stepped from this to another public service, when he became secretary of the Los Angeles County Highway Commission, then engaged in securing highways adequate for the new-fangled motor buggies which were making their appearance in the city.

He then decided to make the law his profession. With the same determination and intensity of purpose which had won him an enviable reputation as secretary of the commissions, he laid out a rigorous routine for himself which bore fruit in his admission to the bar in 1909.

[52] E.P. Werner was born at Eau Claire, Wisconsin, in 1893; is a graduate of the University of Southern California. He served in the 91st Division in World War I, and from 1921 to 1929 was chief counsel, State Inheritance Tax Department. In 1929, he was elected city attorney, and was defeated for reelection by Ray L. Chesebro in 1933.

In 1911 he was appointed judge of the police court, and thereafter was twice reelected. His experience in dealing with public prosecutions and penal ordinances has an important bearing on his excellent administration of the prosecuting division of the City Attorney's Office.

When he left the police court bench, Chesebro had decided that the highest aim of any lawyer was the successful private practice of the law. In 1933, when he was "drafted" by citizens to be a candidate for the office, he probably considered it only a protest at the then state of affairs. When he was elected, no one was more surprised than he; and he certainly did not foresee that he would be in office longer than any other city attorney before him.

He steadily has maintained his basic premise: the private practice of the law is the goal to be desired. As one and another of his staff during these sixteen years has found some opportunity out of public service, he cheerfully has urged him to take it, and wished him God-speed; and has set about to readjust his staff as best he can. Now there are dozens of persons in the general practice who prize their days in his office, and who assist it in its smooth administration of public business from their vantage points in the community.[53]

Though the City Attorney's Office in Los Angeles is one of the largest law offices in the United States, it apparently lacks the administrative

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[53] Some of those who have left the city attorney's office in recent years for private practice are: Marvin Chesebro, son of the city attorney; W. Joseph MacFarland, assistant city attorney, who headed the Prosecuting Division; Robert Moore; Alfred C. Bowman, now on duty with the Army; former military governor of Trieste, Edward L. Shattuck, candidate for office of attorney general; Ellsworth Meyer, judge of the superior court, and grand master F.&A.M. [Free and Accepted Masons] of California; Don Kitzmiller; Jerrell Babb; Clyde P. Harrell; Frank Ferguson and Robert Patton, of the Fox Studio legal staff; Walter Bruington; Carl H. Wheat, public utilities counsel of Washington, D.C.; Al Forster; Milton Springer of the Southern California Gas Company staff; Grant Cooper, later of the district attorney's staff and now in criminal law practice; W. Turney Fox, former assistant city attorney in the Water and Power Division, now superior court judge.

Some splendid lawyers died while serving in the office, including Thatcher Kemp; Frederick von Shrader, gentleman, scholar, and accomplished trial lawyer; Newton J. Kendall, colorful assistant who headed the Prosecuting Division; James M. Stevens, who headed the Water and Power Division; and Cecil Borden, well-known trial lawyer.

S.B. Robinson, Robert L. Todd, Moresby White, and Fairfax Cosby are among those who retired from the office.

framework which public administrators these days might consider typical, if not essential. Ray Chesebro has maintained that each lawyer in his office, particularly in the civil departments, has full responsibility for the cases or matters assigned him. He gets help but not detailed supervision. If the individual lawyer is not equal to such a responsibility, he therefore is not adapted to the office. Yet very few men have failed to meet the requirement. Judge Chesebro is a swift and accurate judge of men's capabilities, and when he and his assistants concur on the choice of personnel, it has been almost always a highly satisfactory choice. He personally directs the work of the office on a lawyer-to-lawyer basis.

Ray L. Chesebro
(1933–1953)

As a city attorney, Ray L. Chesebro maintains that civil service would stultify the usefulness of the office to the people. It is certain that the approval of the voters given his administration has permitted him to maintain a judicial independence from political factions. At times, he has been able to personally give impetus to public matters, as would be expected from counsel in big corporate enterprises, and he has refused to assent to a view that the chief law officer of the country's third largest city should remain silent unless spoken to, when public matters needed attention.[54]

Offered an official car, he refused it and drives his own. When the city prosecutor's office was consolidated, he found that courtesy special investigator's badges had been issued by that office, far and wide, and were being misused. So badges of any kind were abolished in the city attorney's department.

[54] Some examples which come to mind are the improvement of the rapid transit system with new equipment; the inauguration of weekly passes thereon; his insistence that the city must make provision for new sewage disposal works; and his early insistence that the city prosecutor's office be consolidated with the city attorney's. Most dramatic, perhaps, was the seizure of the offices of the civil service department, by which corruption therein was disclosed and, on account of which, the department was reorganized and is one of the best in the country.

At the outbreak of World War II, twenty-three of his men were called into service. Despite all of the demands made upon the office and still further depletions by the armed forces, he carried on the office under a heavy load and reduced personnel throughout the war period. Yet in that period he found time to endear himself to city attorneys all over the United States in the National Institute of Municipal Law Officers, and was elected to its presidency.

It is not possible in the compass of this article to explore the achievements of the City Attorney's Office in these latter years, which deserves a special chapter of its own; nor to name all of those assistants, deputies and secretaries, typists, investigators, clerks and accountants, who compose the firm of "Ray L. Chesebro, City Attorney," and to whom he never ceases to pay generous tribute.

Ray L. Chesebro, the incumbent city attorney, who has served the people the longest of any in that capacity, fittingly epitomizes the honor, the dignity, the high degree of selfless public service, the impartial administration, personal integrity, and professional excellence that have characterized this office throughout the one hundred seventy years of our city, Los Angeles.

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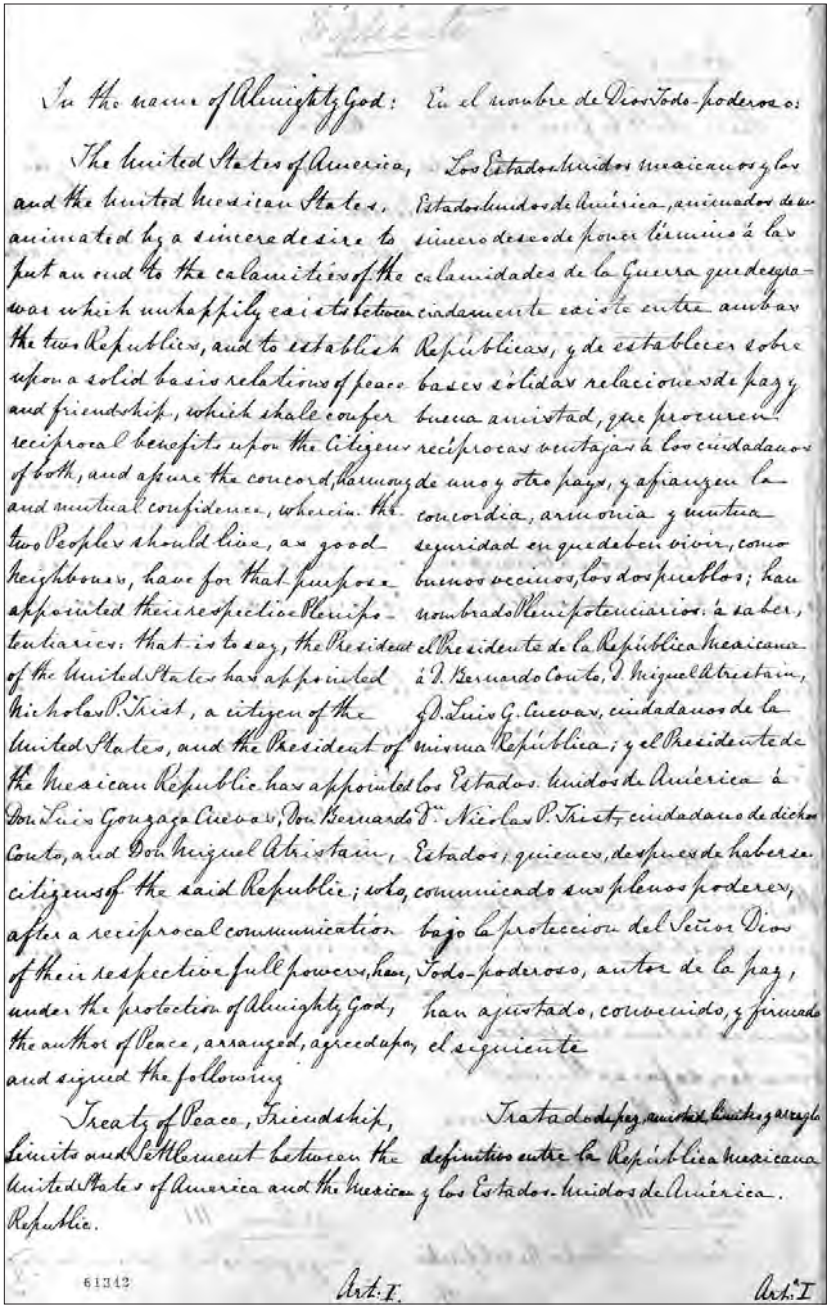
# TRANSLATING CALIFORNIA:

## *Official Spanish Usage in California's Constitutional Conventions and State Legislature, 1848–1894*

BY ROSINA A. LOZANO*

Pablo de la Guerra was not an ideal candidate for a conquered man. Educated, landed, and holding great prestige in his community, de la Guerra was a *Californio* who witnessed the transfer of his native land from Mexico to the United States during the Mexican American War. His previous advantages afforded him continued respect in post-1848 California. The Treaty of Guadalupe Hidalgo guaranteed United States citizenship for Mexican citizens living in the newly secured territories. While de la Guerra maintained some of his previous wealth and status, he shared conflicted views about his new "Yankee," English-speaking identity and the feeling that came from writing in English rather than in his native Spanish. De la

* Rosina A. Lozano recently completed her PhD in History at the University of Southern California. I would like to acknowledge several individuals who made this article possible. Thank you to William Deverell for recommending that I publish this article and to George Sánchez, Félix Gutiérrez, and Mary Dudziak for providing advice, encouragement, and notes on all my work. An early version of this article was presented at the Western History Dissertation Workshop held at Yale University in May 2009. I wish to thank Richard White, Steve Aron, Louis Warren, Adam Aranson, Ryan André Brasseaux, Jay Gitlin, and especially John Mack Faragher for their detailed comments and suggestions on my work.



In the name of Almighty God: — En el nombre de Dios Todo-poderoso:

The United States of America, and the United Mexican States, animated by a sincere desire to put an end to the calamities of the war which unhappily exists between the two Republics, and to establish upon a solid basis relations of peace and friendship, which shall confer reciprocal benefits upon the citizens of both, and assure the concord, harmony and mutual confidence, wherein the two Peoples should live, as good neighbours, have for that purpose appointed their respective Plenipotentiaries: that is to say, the President of the United States has appointed Nicholas P. Trist, a citizen of the United States, and the President of the Mexican Republic has appointed Don Luis Gonzaga Cuevas, Don Bernardo Couto, and Don Miguel Atristain, citizens of the said Republic; who, after a reciprocal communication of their respective full powers, have, under the protection of Almighty God, the author of Peace, arranged, agreed upon and signed the following

Los Estados Unidos mexicanos y los Estados Unidos de América, animados de un sincero deseo de poner términos á las calamidades de la Guerra que desgraciadamente existe entre ambas Repúblicas, y de establecer sobre bases sólidas relaciones de paz y buena amistad, que proporcionen recíprocas ventajas á los ciudadanos de uno y otro pais, y afianzen la concordia, armonía y mutua seguridad en que deben vivir, como buenos vecinos, los dos pueblos; han nombrado Plenipotenciarios: á saber, el Presidente de la República mexicana á D. Bernardo Couto, D. Miguel Atristain, D. Luis G. Cuevas, ciudadanos de la misma República; y el Presidente de los Estados Unidos de América á Dn. Nicolas P. Trist, ciudadano de dichos Estados; quienes, despues de haberse comunicado sus plenos poderes, bajo la proteccion del Señor Dios Todo-poderoso, autor de la paz, han ajustado, convenido, y firmado el siguiente

Treaty of Peace, Friendship, Limits and Settlement between the United States of America and the Mexican Republic.

Tratado de paz, amistad, límites y arreglo definitivo entre la República mexicana y los Estados Unidos de América.

61342

Art. I.

Art. I

**The Treaty of Guadalupe Hidalgo with parallel English and Spanish text, 1848.**

*The Library of Congress*

Guerra's description of Anglos in a December 14, 1851, letter suggested just how strange he thought his new countrymen to be:

> The English (in which I have to write to you) the idiom of birds, I do not know it with such a perfection, as I have neither beak nor wings, things both I believe inherent to every Yankee, and notwithstanding that I am one of them, yet its deficiency in me I think is because I am an unwilling one.[1]

This letter not only points out how de la Guerra was forced to write in English to his lawyer, Archibald Peachy, but also suggests that he would never be comfortable in his new role as a Yankee due to his imperfect English. This language deficiency would forever label him as an "unwilling" or conquered American. De la Guerra's feelings of being an outsider in the new system would be underscored as the state moved away from supporting the mother tongue of the *Californios* and in the process began seeing them as foreigners in the land of their birth.

Despite his reluctance to be a Yankee, de la Guerra became a fixture in the American period's political system. He demonstrated a certain acceptance of the new government and was selected to represent his home region of Santa Barbara in the state senate. His English skills must have improved tremendously while in this role: Just two years into the statehood period, he had already begun writing in the language of the conquerors. This gain was impressive considering he needed a translator at the 1849 California Constitutional Convention.[2] Perhaps due to his own language struggles and the needs of his constituents, de la Guerra was the most adamant supporter in the state senate for proper and timely translations for Spanish speakers. As his brother, Antonio de la Guerra later reminded him, without translations entire regions could not follow the law,

> *Aquí hemos visto varias leyes de esa legislatura pero a nada hemos hecho caso por no venir de oficio y estar en Yngles . . . no hai quien*

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[1] Pablo de la Guerra to Archibald Cary Peachy, 14 December 1851, box 9 fol 413, Guerra Family Collection, The Huntington Library, San Marino, California (hereafter cited as GFC).

[2] California, *Report of the Debates in the Convention of California on the Formation of the State Constitution, in September and October, 1849* (Washington: Printed by J. T. Towers, 1850), 305.

> *traduzca tal cual . . . creo seremos los del sur los últimos en darles cumplimiento* / Here we have seen various laws of this legislative session, but we have paid them no attention since they are in English and not official . . . there is no one here to translate . . . I believe that we of the South will be the last ones to comply . . . .[3]

By providing representation for those who could not appeal to the Legislature in English, de la Guerra attempted to get the young state to support and respect native Spanish speakers. Without translations, this population would have to struggle to get their own translations or live in ignorance of the new laws that might benefit them and of those they were required to uphold as residents of the state. The translator was a position of major importance for *Californios* and de la Guerra was integral to the selection process. One of the most respected early translators was his brother-in-law.

William E.P. Hartnell, or Don Guillermo Arnel, married Pablo de la Guerra's sister, Maria Teresa de la Guerra, in 1825 after converting to Catholicism.[4] He was part of a larger group of Anglo immigrants who entered California prior to 1846 and who benefitted in the early statehood period from already understanding two languages and different legal, social, and political systems. This group of Anglos served to bridge the divide between the two cultures. Many of them such as Hartnell had married into *Californio* families and had strong ties with and the trust of native Spanish speakers. When the prospect of statehood came to California, Hartnell had the central role in facilitating communication between the new Anglo settlers and the *Californio* ranch leaders.

As *Californios* and Anglos worked together to get the new state to function, they tried to bridge a linguistic divide. This article traces the politics of the Spanish language in the early years of California statehood. It focuses on Spanish's official status in the state government. Another place where Spanish was at times required was in the courts. The use of language in court cases, however, was more on a case-by-case or county-by-county

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[3] Antonio de la Guerra to Pablo de la Guerra, 9 March 1850, box 8 fol 351, GFC (Spanish spelling and diacritics per the original).

[4] Louise Pubols, *The Father of All: The De La Guerra Family, Power, and Patriarchy in Mexican California*, Western Histories 1 (Berkeley: Published for the Huntington-USC Institute on California and the West by University of California Press and The Huntington Library, San Marino, Calif., 2009), 118–19.

basis. This article examines larger legislative trends instead of individual cases. The overall language policies in laws passed in the first fifty years of statehood shows that the use of Spanish in the government was largely a practical policy. If *Californios* were expected to follow the laws of the new state, they must be provided the opportunity to learn what legislation was passed and how it affected them. Studying state language law finds that the official sanction of the Spanish language dropped precipitously in the years after statehood. The loss of *Californio* representation in the state's government was largely tied to the shift in language policy. The changes in language outlook are apparent in the different approaches taken in the two state constitutional conventions completed in 1849 and 1879 that bookend the period of official Spanish usage.

## LANGUAGE USAGE AT THE FIRST CALIFORNIA STATE CONSTITUTIONAL CONVENTION

The California State Constitutional Convention was held in the old Mexican capital of Monterey from September through October 1849. The delegates shifted during the debates, but forty-eight Californians signed the final Constitution. When the convention met, a demographic upheaval had already occurred in the territory; the vast majority of Northern California was populated by new arrivals. There remained however a significant Spanish-speaking minority. The early openness towards Spanish language usage can largely be explained by looking at the power *Californios* continued to have — particularly in Southern California — in the first years of statehood. There were eight native Spanish-speaking representatives at the first state constitutional convention.[5] With the exception of Mariano Guadalupe Vallejo, all of these delegates were from regions south of San Francisco and the mines. In addition to Vallejo, the other native Spanish-speaking delegates included: J.M. Covarrubias (San Luis Obispo), Pablo Noriega de la Guerra (Santa Barbara), Miguel de Pedrorena (San Diego), José Antonio Carrillo (Los Angeles), Jacinto Rodríguez (Monterey),

[5] Roger D. McGrath, "A Violent Birth: Disorder, Crime, and Law Enforcement, 1849–1880," in *Taming the Elephant: Politics, Government, and Law in Pioneer California*, ed. John F. Burns and Richard J. Orsi (Berkeley: University of California Press, 2003), 7.

**Daguerreotype of (left to right): Pablo de la Guerra, Salvador Vallejo, and Andrés Pico**

*Courtesy The Bancroft Library, UC Berkeley*

Antonio M. Pico (San José), and Manuel Domínguez (Los Angeles). With the exception of Pedrorena who was a native of Spain, the other seven were native-born Californians.[6] The southern residence of native Spanish-speaking delegates was contrary to the new demographics of the state. The center of the state's population had moved to Northern California during the Gold Rush, and San Francisco and Sacramento had eight signers each compared to five from Los Angeles and two from San Diego. The number of representatives from Southern California increased due to appeals made by individuals from Los Angeles like José Antonio Carrillo. With only 8,000 residents settled in Los Angeles, compared to the estimated 35,000 in San Francisco, the North had the ability to forcefully advocate for its interests throughout the convention.[7]

In 1849, the land cases had not yet stripped away the wealth, land, or prestige of most *Californio* families. The concerns and needs of native Spanish speakers were different from the Anglo miners and businessmen who entered the state. *Californios*' presence and outspokenness on certain topics at the convention helped to remind the other delegates of those distinctions. These included discussions related to voting rights for Indians, representation, and state boundaries. The native Spanish speakers had some Anglo allies. Twelve of the forty Anglo signers of the new state Constitution lived in California prior to the Mexican American War. This long residency suggests that they chose to remain in a Mexican state and probably understood Spanish as well as the social, economic, and political practices of the region. Seven of those twelve had lived in California for ten or more years and were highly respected businessmen and landowners in the *Californio* community. Abel Stearns, John Sutter, Hugo Reid, and Pierre Sainsevain each had pre-American period land grants. These individuals would be familiar with the main issues and discussions of Spanish speakers. They brought shared concerns over landholdings and representation into the debate over the new Constitution. Both Stearns and Reid as

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[6] It is not clear whether John Sutter, a native German speaker, used the Spanish interpreter as he confessed his poor ability to speak the English language during the proceedings. California, *Report of the Debates,* 478–79, 187.

[7] Ibid., 16, 407, 478–79, 14; Sidney Redner, "San Francisco Population History," Sidney Redner. 6 November 2003, Boston University Physics. 15 January 2009 <http://physics.bu.edu/~redner/projects/population/cities/sf.html>.

well as other Anglo San Luis Obispo and San Diego representatives voted against creating a state constitution and instead advocated for a territorial status where longstanding residents of California could continue to control local affairs.[8]

The eight native Spanish speakers at the convention had varying levels of English knowledge and ability. For that reason, the translator was a key position and one of the first selected. William E.P. Hartnell was officially appointed on September 4 and served as the intermediary between the Spanish and English speakers. After Hartnell's selection, Vallejo immediately requested that a clerk be assigned to assist the translator. He recognized the difficulties of the job and knew that one individual would be unable to ensure accurate and timely translations without aid. Vallejo's request was supported by the delegation, and H.W. Henrie was elected to the office of clerk to the interpreter and translator.[9] These two translators — neither of them native Spanish speakers — would have the unenviable task of trying to keep up with the English language debates occurring while translating the ideas, opinions, and arguments of the Spanish speakers. They would also be privy to what the Spanish language speakers were saying if they were discussing issues off the floor.

The report of the constitutional debates shows that there was no simultaneous translation during the convention, but rather a summing up of views by the translator at the end of the discussion and prior to the vote. In fact, Spanish-speaking views in the debates appeared few and far between. There was no record taken of the Spanish dialogue occurring during the constitutional convention. It is unknown whether the Spanish language speakers silently observed and waited for translations or if they debated the issues on their own and sent an emissary to discuss important concerns. Considering that Carrillo, de la Guerra, and Vallejo were the most likely to rise to speak on topics that concerned *Californios*, it is possible that these men were given a vote of confidence by other Spanish speakers to voice their opinions. These individuals spoke rarely (de la Guerra spoke the most, around fifteen times during the entire proceedings) and each talked about needing a translator, "Mr. Carillo [sic] felt a diffidence in

8 California, *Report of the Debates*, 22.

9 Ibid., 18–19.

addressing the assembly, from his ignorance of the English language. He claimed its indulgence, therefore, as he was compelled to speak through an interpreter."[10] Vallejo was the only one who discussed what could be described as his frustration with his inability to understand the discussion; "He regretted that his limited knowledge of the English language prevented him from replying to all the arguments adduced by those gentlemen who did not speak in his own tongue."[11] Vallejo let the convention know that he had an opinion that was going unspoken due to his language limitations.

*Californios* rarely took to the floor during the proceedings due to lack of comprehension. The *Report of the Debates* contains only two instances where José María Covarrubias spoke. Both instances occurred when he disagreed with something that another *Californio* had said. When Covarrubias heard the testimony of his fellow Spanish speakers in his native language, he immediately responded to the conversation at hand. In one instance, Vallejo was asked about some documents detailing the borders of California. After hearing his opinion, Covarrubias spoke up and corrected Vallejo's statement. Vallejo then responded and clarified his point.[12] In a second more heated exchange, Carrillo shared his ideas about a vote and again Covarrubias interjected his interpretation. Aside from a motion he presented, these were the only two cases when Covarrubias's name appeared outside of vote summaries.[13] His interjections were forceful and confident when he understood the issues at hand. If Covarrubias had grasped more of the proceedings, his involvement in discussions would have been much greater. Covarrubias's comments provide evidence that *Californios* were impeded from participating in the debates due to their English language deficiency.

While native Spanish speakers rarely participated in the discussion, there was a demonstration of respect toward the *Californio* delegates by the rest of the convention, especially in light of the discussions in favor of

[10] The recorder of the constitutional convention, J. Ross Browne, had difficulty staying consistent with the names he used. Carillo was used as well as Carrillo. Pablo de la Guerra was sometimes referred to as Noriego (his father was José de la Guerra y Noriega). Ibid., 14, 26, 63.

[11] Ibid., 303. For Pablo de la Guerra's use of an interpreter, see page 305.

[12] Ibid., 450–51.

[13] Ibid., 450–51, 456–57, 290–91, 153.

Anglo-Saxons throughout the proceedings. The "Spanish" gentlemen were viewed as white men deserving of the vote.[14] English speakers made requests throughout the convention to halt discussions prior to a vote in order to allow adequate translation time for Spanish speakers.[15] Sometimes the response to this request was that a translation had already been thought of and created prior to the meeting.[16] The delegates thought beyond their needs as well. All Californians could read the proceedings only if they had accurate translations, and the delegates therefore decided to publish the debates of the constitutional convention in both English and Spanish.[17] In addition, the Constitution itself would have a Spanish version that was engrossed and certified by the translator and placed in parallel columns of English and Spanish translations.[18] Recognizing that the Spanish-speaking delegates were representing significant populations within California, the English-speaking delegates at the convention made numerous attempts to get articles translated, debates understood, and generous wages for the interpreter.[19] The voting date for Californians to approve the Constitution was also extended by the length of time it would take to get accurate translations to meet the needs of Spanish-speaking residents.[20]

One Anglo repeatedly defended the rights of Spanish speakers during the convention. Kimball H. Dimmick appeared to be a very conscientious follower of procedure and fair representation and spoke up when he believed the convention was veering off course, especially on issues of fair *Californio* representation.[21] He made a point of recognizing *Californios* as American, "As to the line of distinction attempted to be drawn between native Californians and Americans, he knew no such distinction himself; his

14 Ibid., 71–72.

15 Ibid., 25, 31, 153, 219, 331.

16 Ibid., 31.

17 Ibid., 163–64.

18 Ibid., 398.

19 The interpreter had one of the largest salaries of any of the support staff at the convention. Hartnell was paid $28, equal only to the secretary. There was a request to raise his pay from $21 demonstrating his importance in the view of the convention and the commitment of the delegates to appear fair to Spanish-speaking delegates. Ibid., 95, 106–07.

20 Ibid., 390.

21 Ibid., 157–59, 274. Dimmick would later be a respected Los Angeles District Attorney and judge.

constituents knew none. They all claimed to be Americans."[22] This stance differed from the views of most delegates as the term "American" became synonymous with individuals born in what was called "the older states of the Union," despite the fact that the vast majority of Mexican citizens remaining in the United States opted to become citizens of the new ruling nation.[23] Dimmick forcefully argued *Californios* should not be placed in the minority and should be considered full members of the majority. He accepted and advocated for a new vision of an American that was broader than just those born in American states. Dimmick also showed his support for *Californios* as the convention was deciding on procedure. He rejected the idea to use the Constitution of Iowa as a model,

> It would have to be translated into Spanish, and a sufficient number of copies made for those who only spoke that language. If, on the other hand, the committee reported, article by article, a plan of a Constitution, it could be translated, copied, and laid upon the tables of the members at the opening of each day's session.[24]

Here Dimmick made his suggestion for how the convention should operate daily and he based his opinion on the needs of the entire convention to function properly, which included the Spanish speakers.

Native Spanish speakers were in the minority at the convention and in the state, but their language rights were supported as the decision to distribute government documents in Spanish met with little debate. On September 27, Pablo de la Guerra proposed a constitutional provision that all laws, decrees, publications, and provisions requiring public distribution in the new state be translated and printed in Spanish.[25] Myron Norton immediately responded that he believed a section was previously adopted to ensure that publications were in Spanish. His statement suggests this was an obvious provision in need of no further discussion. The sole dissenter to de la Guerra's proposal was Charles T. Botts who felt there was no need to require Spanish translations in the Constitution, as the new state government would take care of the task for as long as it was required. He

22 Ibid., 23.
23 Ibid., 23.
24 Ibid., 25.
25 Ibid., 273.

believed that the state would be burdened with "an immense and permanent expense upon the people — an expense for which there will be no necessity in a few years."[26] Botts viewed California as quickly becoming a monolingual English-speaking state.

De la Guerra responded to Botts by denouncing the early translation practices of the American occupational period where little effort was made to create or send translations to the southern regions of the state. He explained the reality of the language situation in Santa Barbara where he himself had to translate some government publications despite his lack of mastery of the language. He passionately argued that

> all laws ought to be published in a language which the people understand, so that every native Californian shall not be at the expense of procuring his own interpreter; and moreover, you will bear in mind that the laws which will hereafter be published, will be very different from those which they obeyed formerly. They cannot obey laws unless they understand them.[27]

De la Guerra was reminding the delegates that this American rule was new not only in language alone, but also in style of governing. He suggested the possibility that interpretations might not be necessary after twenty years, once native Spanish speakers got the opportunity to learn English, at which point the Constitution could be changed.[28] His statement suggested a resignation that English was the predominant language and that the state's future was not a bilingual one.

Some delegates sought to specify a time limit in the proposal after hearing de la Guerra's estimate for how long Spanish translations might be required. Henry A. Tefft shifted the conversation by supporting a possible bilingual future for the state. He explained that Louisiana continued publishing laws in French and Spanish over fifty years after statehood. The knowledge that another state published their governmental documents in languages other than English led to the delegates' unanimous passing of the resolution.[29] Article XI, section 21 of the constitution supported

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26 Ibid.
27 Ibid.
28 Ibid.
29 Ibid.

Spanish translations with no time limit. The provision implied an acceptance that California's linguistic future might remain a bilingual one.[30] This decision to conduct state business in both English and Spanish exemplified a support for language difference and a view that individuals who spoke Spanish could be seen as contributing members of the state and ultimately of the nation. By allowing political participation to continue without a language barrier, state officials decided that Spanish speakers would be viewed as full citizens — or at least the elite ones with no Indian blood would be afforded the status of citizen in good standing. Congress's acceptance of California as a state in 1850 with a Spanish language provision for publication of laws in its Constitution suggests language rights for Spanish speakers did not hinder Congress's decision to grant statehood as it later did for other territories like New Mexico.

The convention made a great effort to support Spanish and the Spanish-speaking delegates, but *Californios* were unable to participate as full members of the convention due to inadequate English skills. At one point, de la Guerra made a request that Spanish speakers abstain from a vote since the discussion dealt with semantics. The official summary reported: "The question appeared to be respecting certain English words, which they did not understand, and they desired to be excused from the voting."[31] Creating the clearest and most accurate statements in the Constitution required careful study of the semantics and intricacies of the English language. These discussions would be difficult if not impossible for even a great translator to explain. Acquiescing in their request, the convention released Spanish-speaking delegates from this vote. Spanish-speaking *Californios* received just two interpretations of the material presented at the convention with less than stellar results.

On September 15 — almost two weeks after the interpreter and clerk received their positions — José Antonio Carrillo addressed the convention in the absence of both the translator and his clerk. Stephen C. Foster, a delegate from Los Angeles who was bilingual, translated for him. Carrillo complained about the incompetence and disrespectful language on the part of the clerk toward the Spanish speakers. Upon hearing Carrillo's

30 Cal. Const. of 1849, art. XI, § 21 (superseded 1879).

31 California, *Report of the Debates*, 57–58.

concerns, the convention immediately rallied to the side of the *Californios*. Delegates remedied the offense toward one of its members by removing the clerk and replacing him with Judge White.[32] Anglos demonstrated their respect and good feelings toward their native Spanish-speaking members. They took time out of the convention to address and remedy Carrillo's concerns, and this highlighted the continued relevance that *Californios* had in state politics. A second conclusion can be drawn from this episode. The fact that the native Spanish-speaking delegates had to endure a clerk they disliked indicates how isolated they were at the convention.

Carrillo brought his concerns to the floor when both the interpreter and clerk were absent. This strategy could have been employed because he could not depend on the accurate translation of his sentiments from the interpreter and clerk. Or perhaps he hoped to avoid a public denouncing of the clerk and knew that he could enlist the services of a bilingual member of the delegation. Perhaps this was the first time the clerk had not attended and it was a coincidence that the well-respected translator, Hartnell, was not at the proceedings that day. Whatever the case, the absence of both interpreters from this particular session is troubling. Henrie and Hartnell were paid to attend sessions and inform native Spanish speakers about the debates and discussions on the floor. Would Stephen Foster and other bilingual members of the convention step in during their absence and translate? This would be a distracting alternative and perhaps a position that bilingual members would dislike, as they could not participate in the same manner if focused on translating. The convention members rallied behind their fellow member, but permitted a situation where a monolingual *Californio* addressed the group in a session with no official translator.

The absence of a translator halted discussions at the convention one other time when Spanish speakers asked to leave because of their inability to understand the proceedings. In this case, the person proposed to translate declined the position.[33] The monolingual *Californios* ended up remaining at the convention, and they allowed discussions and debates to proceed on sections where their constituents had few vested interests. They depended on their friends to keep them abreast of what those debates were

32 Ibid., 94–95.

33 Ibid., 399.

concerning, because when the subject of representation came up they immediately asked that the conversation be halted,

> They generally had very little objection to any of the provisions adopted by the Convention, but as this section was one in which they felt interested, and as they could not understand it without having it translated, and the arguments explained to them through an interpreter, they hoped at least that they would be allowed the privilege of a reconsideration, if it was deemed necessary.[34]

*Californios* had a great interest in the topic of the distribution of state senators and did not wish to allow this decision to be made without their input and approval.[35] Los Angeles delegates in particular were adamant about retaining their status by ensuring they received their share of state senators.[36] While the native Spanish speakers were able to persuade the other members of their opinions prior to voting, the absence of an interpreter demonstrated they could not participate as full members. The native Spanish speakers were not only separated by language, but also by location. They sat at another end of the room as the English debates occurred.[37]

Encouragement of *Californio* participation at the California Constitutional Convention of 1849 was fervid at first glance. Relying on a couple of translators and accepting a situation where native Spanish speakers rarely addressed the floor tells a different story. Monolingual Spanish speakers were largely isolated from the debates. Each native Spanish-speaking individual's sentiments and opinions could be expressed or obtained from a translator who was only summarizing debates. Bilingual individuals who spoke Spanish and English could have corrected portions of Hartnell's English translation if he went off course or failed to summarize a part of a debate if they had heard him. The Spanish summary came from an isolated discussion separate from the bilingual speakers. Key points could be lost or altered in translation. English language deficiency hindered native Spanish speakers' chance of fully representing their constituents, though

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34 Ibid., 400.

35 Ibid., 399–405.

36 Ibid., 400–14.

37 Botts acknowledged that "he was requested by one of the gentleman on the other side, (a member of the native California delegation)," which suggests a physical as well as linguistic division. Ibid., 400.

they did their part to get their voices heard on their most pressing issues. *Californios* would continue to find themselves at a linguistic disadvantage in the new state's government.

## OFFICIAL SPANISH USAGE

After California became a state, the first state legislature was in position to decide how to fulfill the new constitutional mandates. The Committee on Printing proposed the creation of an office of the state translator and by the end of January 1850, the act passed.[38] Both the California State Assembly and Senate would choose the state translator in a joint vote, and the position would have a term of one year.[39] The state translator would receive copies of the laws from the secretary of state.[40] *Californio* representatives greatly aided the legislature's efforts to find a state translator.

Pablo de la Guerra was one of the Senate representatives in charge of finding a suitable individual for the position of state translator. He was also given the task of locating the funding to support the work.[41] While a candidate was being selected, the Joint Select Committee on the Examination of Applicants for the Office of State Translator submitted a report. De la Guerra represented the committee when he spoke before the Senate. He claimed that the committee had found no candidates who they believed were "fully competent to discharge the important duty that must necessarily devolve upon the officer, in translating, with minute accuracy, the laws of the State."[42] Due to the fact that the state printer needed the support of a translator daily, the committee selected William Lourie, "who has evinced over all other applicants superior qualifications as Translator," for the interim position.[43] De la Guerra subsequently recommended the creation of a joint committee to examine the accuracy of Lourie's translations.[44]

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38 California Legislature, *Journal of the Legislature of the State of California At Their First Session* (San José: J. Winchester, state printer, 1850), 85, 122.

39 Cal. Code, ch. 7, §§ 1–2 (1850).

40 J.R. March 2, 1st Leg. (Cal. 1850).

41 California Legislature, *Journal of the Senate . . . First Legislature,* 776, 848.

42 California, *Report of the Debates*, 551.

43 Ibid.

44 California Legislature, *Journal of the Legislature . . . At Their First Session*, 150, 551.

The interim appointment failed to solve the problem of getting timely and accurate translations. José María Covarrubias submitted a resolution to the assembly a month after Lourie's appointment to examine the reason why the joint committee created to review his translations had not received any.[45] When Lourie submitted his explanation to the Assembly, it demonstrated the confusion of the young state government.[46] Lourie was never fully informed that he was selected for the position. He subsequently went to ask for items to translate, and was redirected to the secretary of state who had "no notice of what I applied for and had nothing for me to translate."[47] He finally began to receive work in March and claimed he was diligently translating those acts one at a time.[48] Lourie's letter suggested that he received documents from numerous individuals in the state. It was this confusion over who was to give the translator documents that likely led to the passage of a law requiring the secretary of state to transmit items to the state translator. The job of the translator was a large and difficult one with shifting expectations and responsibilities that were worked out in the first years of statehood.

The selective joint committee was unable to locate a suitable candidate even though prospective state translators applied and were nominated. Letters came in to de la Guerra requesting consideration for the post. Hopeful Toler inquired about the possibility for his appointment. His credentials demonstrated that he was a highly educated individual with business connections to Latin America, extensive legal training, and more than thirty years of claimed translator experience.[49] His impressive résumé and contacts suggest that the job of the state translator was taken very seriously and seen as an important position by those outside of the government. Vallejo recognized the significance of the post as well. He went out of his way to suggest a translator to de la Guerra.[50] None of the prospective

45 Ibid., 1023–24.

46 Lourie's name was spelled differently throughout the Legislative Journal (Lowry, Lowrie, and Lourie). The Lourie spelling was chosen because it was the way it was reported at the end of his letter to the Assembly.

47 California Legislature, *Journal of the Legislature . . . At Their First Session*, 1034.

48 Ibid., 1034, 1035.

49 Hopeful Toler to Pablo de la Guerra, 14 April 1854, box 22 fol 973, GFC.

50 Mariano Guadalupe Vallejo to Pablo de la Guerra, 13 February 1854, box 22 fol 997, GFC.

translators were native Spanish speakers.[51] This perhaps serves as a commentary on the newly conquered status of *Californios* that did not permit them to become educated in English with enough time to be competitive or qualified for the translator position, or that bilingual *Californios* had other priorities outside of government.

The Legislature voted numerous times on the best candidates without success. They ended the first day of voting with no state translator.[52] J.M. Covarrubias spoke before the Assembly on April 10 about his great disappointment that a state translator was not selected. He explained that the South was "almost entirely inhabited by people who do not know any other language than Spanish."[53] Covarrubias further conveyed Southern *Californio* sentiments, "they felt sorry for not knowing what was going on in the Legislature, as the information they received from their representatives was a very limited one, given by private letters."[54] He then pushed that a new date for election be decided upon and nominated Mr. Schleiden for the position.[55] Covarrubias was also involved in the joint committee's selection of competent candidates for state translator from the Assembly. A week after Covarrubias's prodding, Joseph H. Schull was selected for the position of state translator on April 17. He received the votes of Mariano Guadalupe Vallejo and Covarrubias. Lourie and Toler were the other possible translators nominated for the position.[56] De la Guerra was selected by the state senate to work on these tasks with E.K. Chamberlain (for examining candidates) and Robinson (for finding funds).[57] The Legislature authorized Schull to rent an office and to hire additional translators as necessary as long as the Committee of Examination approved them.[58]

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51 It is not clear how many of the prospective candidates may have been Anglo *Californios* who were conquered too. Many early settlers converted to Catholicism and became Mexican citizens, so they were also rightfully *Californios* although not native Spanish speakers.

52 The candidates included Schleiden, Jno. [Jonathan?] H. Schull, William Lowry [Lourie], Joseph Henriques, and Alfred Luckett.

53 California Legislature, *Journal of the Legislature . . . At the First Session*, 1172.

54 Ibid.

55 Ibid.

56 Ibid., 346.

57 Ibid., 776, 848.

58 J.R. March 11, 1st Leg. (Cal. 1850).

The journal of the first session of the California Legislature makes it evident that the state government needed translations in order to run. The legislative journal documents many discussions, reports, and acts that emerged during the proceedings dealing with translations and also with the delay of translations. As the joint resolution created to support the employment of additional translators explained, "there exists at present an urgent necessity for the translation of the laws into Spanish."[59] The state translator was listed as one of the nine major offices (e.g. governor, secretary of state, comptroller, treasurer, attorney general) of the state that would have expenses paid out of the general fund.[60] At eight thousand dollars, this salary was below only the governor ($10,000) and the state treasurer ($9,000).[61] The proceedings and laws passed during the first session of the California Legislature suggest that the state was committed to paying for and getting accurate translations. Native Spanish speakers continued in active roles in the state's governmental proceedings. The Legislature believed its efforts to fully establish a state translator position would provide a remedy for delayed translations. Unfortunately, the efforts of the first Legislature were wasted, and the position of state translator was short-lived and unsuccessful. The Legislature eliminated the State Translator position the next year.

By 1853, William Hartnell was authorized to translate items for the government. His position was not as prestigious as the first state translator; he received no salary and was not considered a state officer. Instead, he was paid piecemeal for the work he completed, at a price not to exceed two dollars per folio of one hundred words, and fifty cents per folio to be engrossed by the printer.[62] The lengthy time spent on a vote and examination of the translator candidates was greatly reduced after the first Legislature.

For the remainder of the years when Spanish translations were supported by the state, a committee of three was selected from the Assembly and another from the Senate to find a translator. In the early years, the committees were made up of *Californios* like Pablo de la Guerra, Ygnacio

59 J.R. March 9, 1st Leg. (Cal. 1850).
60 Cal. Code, Ch. 16, § 11 (1850).
61 Cal. Code, Ch. 25, § 1 (1850).
62 Cal. Code, Ch. XCV, § 1 (1853).

del Valle, Romualdo Pacheco, and Andrés Pico.[63] The committees were in charge of locating possible candidates and getting bids on the amount they would be paid. They presented their findings, and the Legislature would make a contract (with certain price limits as the one with Hartnell demonstrates) for the translations. The cost of translations greatly decreased over the years. When José F. Godoy requested payment for his services, he received it retroactively and the Senate voted for him to collect interest on his fees. The total in 1876 for Godoy amounted to a little over $2,500.[64] By 1878, instead of two dollars per folio, the bid that was won by Adelina B. Godoy was for sixteen cents per folio.[65] The selection of a woman and at such a low price may indicate how the position of translator changed over the first thirty years of statehood. It also could suggest that the availability of translators may have increased over this period, as more people knew they could get good-paying jobs by becoming bilingual. A bigger pool of competent individuals would increase competition, and could drastically reduce the compensation for services. These new contracts with the state translator no longer discussed the difficulty of the post. After the first year, there was no notation of the translator deserving an office or additional aid. Despite the reduction in status and pay, publication of Spanish copies of government documents, decrees, and speeches continued.

Printers published a significant number of Spanish translations of state material. As an example, Browne's *Report of the Debates of the Constitutional Convention* had 1,000 English copies made and 250 Spanish copies.[66] A joint resolution agreed upon by the Legislature in 1869 expands on the types of documents translated. Nine hundred sixty Spanish copies of the governor's biennial message and the reports of the controller, surveyor-general, and superintendent of public instruction were requested. The state treasurer's

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63 California Legislature, *Journal of the Third Session of the Legislature of the State of California* (San Francisco: G.K. Fitch & Co. and V.E. Geiger & Co., State Printers, 1852), 81, 94; California Legislature, *Journal of the Ninth Session of the Legislature of the State of California* (San Francisco: G.K. Fitch & Co. and V.E. Geiger & Co., State Printers, 1858), 252, 350.

64 California Senate, *The Journal of the Senate During the Twenty-First Session of the Legislature of the State of California* (Sacramento: State Printing Office, 1876), 13.

65 California Senate, *The Journal of the Senate During the Twenty-Second Session of the Legislature of the State of California* (Sacramento: State Printing Office, 1877), 144.

66 California, *Report of the Debates*, 163.

Romualdo Pacheco
*Courtesy The Bancroft Library, UC Berkeley*

report had 240 Spanish copies contracted. The governor's biennial message even included a request for 2,400 German copies. Despite these orders, many reports had only English language copies printed (e.g. adjutant general, attorney general, state librarian, state geologist, etc.).[67] The legislative discussions leading to the selection of some reports in Spanish over others,

67 J.R. Num. I, 18th Leg. (Cal. 1870).

were not present in the Legislature's journal. Spanish speakers would have to find other ways to translate those reports, if needed, at their own expense.

The number of Spanish copies varied over the years. In 1872, the Inaugural Address of California Governor Newton Booth and the Second Biennial Message of Governor H.H. Haight were each translated with 500 copies published in Spanish, while in 1876, the Legislature ordered 2,000 Spanish copies of the Inaugural Address of Governor William Irwin.[68] It is not clear from the Legislature's journal how the number of copies was determined and whether it was a political, administrative, or budgetary decision. The distribution of Spanish-language copies of laws appeared largely localized. In 1876, the counties of San Diego, San Bernardino, Los Angeles, Santa Barbara, San Luis Obispo, Monterey, Santa Clara, Contra Costa, Alameda, Marin, and Sonoma as well as the first, third, and seventh district judges were chosen to receive the 240 copies of Spanish language laws.[69] Perhaps requests from those counties dictated the number contracted. The state continued to order numerous Spanish copies of state documents up to 1879. The actual printing was sometimes stipulated as being contingent on the availability of funding.[70] By the 1870s, Spanish language translations were no longer deemed a logistical necessity. Native Spanish speakers were becoming a tiny minority in the state. The state continued to honor the Constitution and *Californios* by publishing laws in Spanish, although the state had larger immigrant language groups at that time (as evidenced by the occasional publication of German versions of state publications).

Notwithstanding efforts to get Spanish translations out to its constituents, California was never a bilingual state. A bilingual state would have enabled timely translations and interaction between individuals who spoke either language. California's translators never worked fast enough for this type of system to emerge. The commitment during the first year to create a well-paid position of state translator was an anomaly. The concerns of Covarrubias demonstrated that the southern portion of the state was awaiting translations about the actions of the government. *Californios* did not receive

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68 California Assembly, *The Journal of the Assembly During the Nineteenth Legislature of the State of California* (Sacramento: State Printing Office, 1875), 613; California Senate, *The Journal of the Senate During the Twenty-First Session,* 83, 90, 112.

69 Cal. Pol. Code, §§ 415, 528 (1876).

70 Cal. Code Ch. DIII, § 1 (1870).

immediate benefits from the Legislature's efforts as the translations took long and were rarely complete. They brought up the issue of missing translations to the Legislature on numerous occasions.[71] A list detailing precisely which of the laws were translated was once submitted after these requests. The list was long, but not exhaustive.[72] A committee during the ninth session attempted to remedy the situation by making an extensive list of laws still in effect. They hoped to create one comprehensive bound volume of laws in Spanish. Andrés Pico was chairman of the committee and presented the list for the "Schedule of Laws of 1856 and 1857, now in force" and he also suggested that the translations of laws still in the secretary of state's office be distributed.[73] Pico's actions indicated that Spanish speakers were not kept abreast of the laws on a regular schedule. Disseminating a complete book of laws would have cleared up any confusion that existed among native Spanish speakers about current state laws.[74] Spanish speakers were receiving a filtered and selective version of the state's official material.

Translating government material accurately and quickly was very difficult to accomplish because of the sheer volume of documents. *Californios* were frustrated and complained about slow and inadequate translations:

> *Todo va por ahora bien menos lo de la traduccion de las leyes pues el presidente como buen K.N. ha nombrado la comision. Sin poner en ella ninguno que hable español* / All goes well except with the translation of the laws, for the president who is a good K.N. [Know Nothing] has named the commission. Without putting a single person who speaks Spanish."[75]

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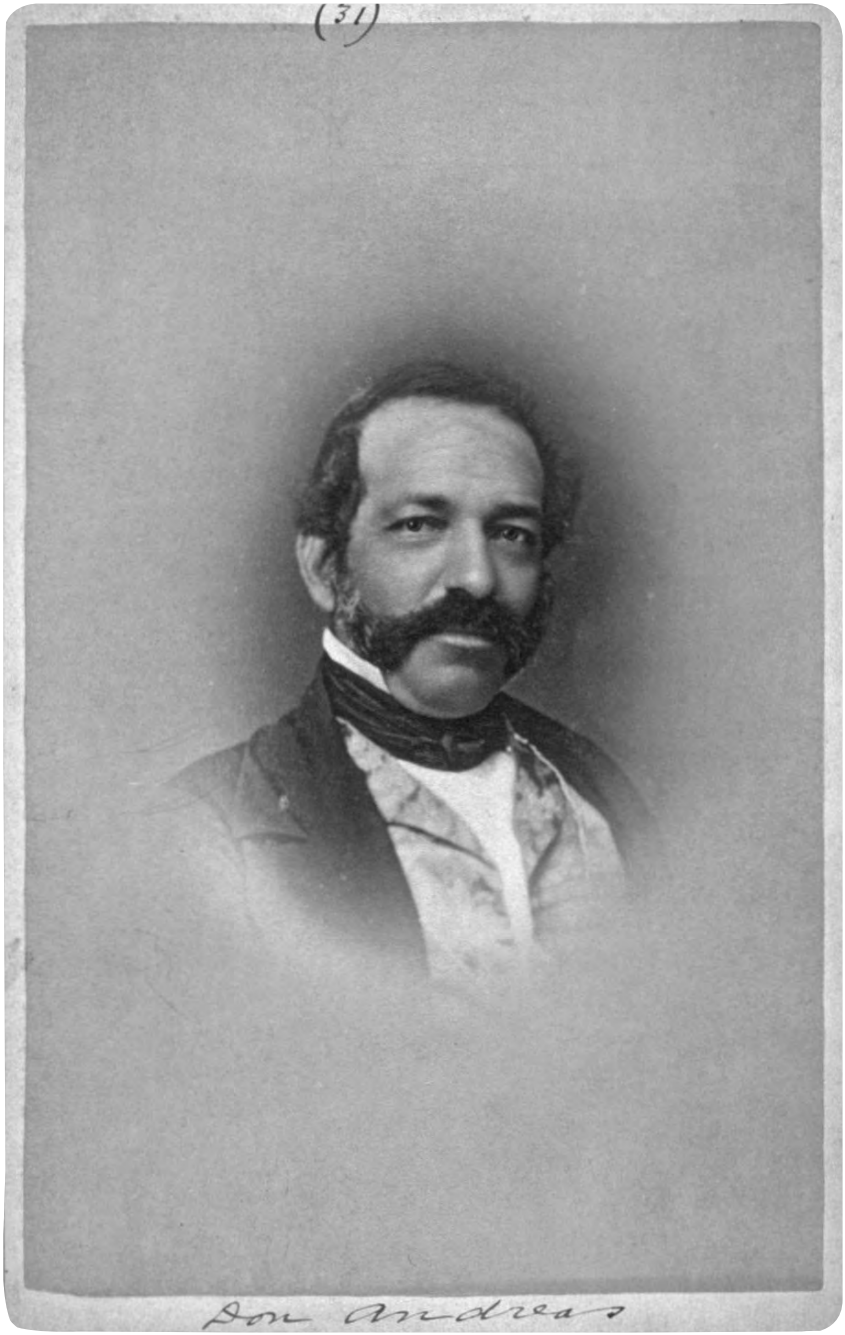
71 California Legislature, *Journals of the Legislature of the State of California at its Second Session* (San Francisco: Eugene Casserly, State Printer, 1851), 1413; California Legislature, *Journal of the Seventh Session of the Legislature of the State of California* (San Francisco: G.K. Fitch & Co. and V.E. Geiger & Co., State Printers, 1856), 152.

72 California Legislature, *Journals of the Legislature . . . at its Second Session*, 1449–52.

73 California Legislature, *Journal of the Ninth Session*, 550–55.

74 Sometimes the appeal for translations came from non-*Californios.* During the eighth session, Edward Harrison asked for the reason that the 1856 laws were still not translated. California Legislature, *Journal of the Eighth Session of the Legislature of the State of California* (San Francisco: G.K. Fitch & Co. and V.E. Geiger & Co., State Printers, 1857), 563.

75 Pablo de la Guerra to Antonio de la Guerra, 29 January 1850, box 9 fol 416, GFC (Spanish spelling and diacritics per the original).




**Andrés Pico**

*Courtesy The Bancroft Library, UC Berkeley*

De la Guerra criticized the Anglo majority for failing to place a native Spanish speaker on the committee that selected the candidates for translator. The report of the first Legislature gave the most respect to the translator position of any Legislature during this period, yet de la Guerra needed to assert himself in order to get on the committee. The translator was crucial to the daily operations of the government for *Californios*, but the importance of the position was lost on the president. Andrés Pico echoed de la Guerra's frustrations over translations by complaining about the many discrepancies between English and Spanish versions of state business. At times the translations were said to be so poor that they were almost "completely unintelligible."[76] While Spanish speakers expected and depended on the Legislature to commit to translations of official documents, it is clear that they took long to disseminate and were uneven in quality. *Californios* had to use their political presence in the Legislature to attempt to give their constituents the accurate and timely translations they deserved.

The slow process of translation undoubtedly affected *Californios* and, reportedly, the larger Spanish-speaking population in the hemisphere. Andrés Pico explained to the California Assembly that Spanish translations were essential to legal proceedings and would receive transnational exposure. He stressed accurate Spanish translations of the law were of day-to-day importance.[77] These versions were critical to southern county court decisions as many Spanish-speaking judges depended on them to determine that laws and convictions were being fairly administered. In addition, Latin Americans reviewed the translations and would criticize California if they were inaccurate or poorly done.[78] This transnational awareness reveals that *Californios* continued to have a positive view of their place in the larger Latin American world. They played a role in and identified with the southern part of the hemisphere. Spanish translations were not merely of ceremonial importance, but were required both for the state to function fully and to earn respect from Latin America.

Representatives from Southern California successfully proved this day-to-day Spanish language reality by gaining legislative support for Spanish

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76 Andrés Pico, "Address to California Assembly," *El Clamor Público*, April 10, 1858.

77 Since "a considerable number of justices of the peace come from the Spanish community." Ibid.

78 Ibid.

for *Californio* legal proceedings. Any witness in the state "who did not understand or speak the English language" was entitled to an interpreter.[79] In several counties, the state was required to provide defendants with their summons in Spanish so they could understand the charges. In Santa Barbara, San Luis Obispo, Los Angeles, San Diego, Monterey, Santa Clara, Santa Cruz, and Contra Costa counties, it was permitted "with the consent of both parties, to have the process, pleadings, and other proceedings" in Spanish.[80] By limiting Spanish proceedings to only certain counties with established Spanish-speaking populations, the state legislature was demonstrating a prejudice against mining regions or cities where South American immigrants were more likely to settle. The privileges of Spanish were meant for American citizens — for the *Californios*.

In order to give a fair trial to members of both language groups, counties that permitted Spanish proceedings needed to employ individuals able to do the work in both languages. G.A. Pendleton, a San Diego county clerk in 1866, distributed county legal documents and certified public posts completely in Spanish.[81] County clerks like Pendleton were not always fully compensated for their skills or recognized for the fact that much of their work in the county was conducted in Spanish.[82] Official county documents in Santa Barbara would alternate between officials' statements — judges, sheriffs, notaries public, and clerks — some of whom would write in Spanish and others who would write in English on the same page.[83] These examples could suggest a catering to native Spanish speakers by bilingual officials so they would understand the document, but that conclusion does not explain why there would be no translator hired for the English-speaking

79 Cal. Civ. Proc. Code, § 1184 (1876).

80 After 1862, only the first five counties listed were still permitted to have court proceedings in Spanish. By 1876, only the first four counties listed still permitted court proceedings in Spanish. Cal. Title XVII, 5575, § 646 (1865). Cal Civ. Proc. Code, § 185 (1876).

81 G.A. Pendleton, San Diego County Clerk, legal document, 3 July 1866, box 10 fol 624, Helen P. Long Collection, The Huntington Library, San Marino, California (hereafter cited as HPL); Julio Osima, San Diego County judge to James McCoy, San Diego County sheriff, 3 June 1867, box 11 fol 661, HPL.

82 David F. Newsom to Pablo de la Guerra, 22 February 1856, box 15 fol 710, GFC.

83 George D. Fisher, County Clerk and J. Carrillo, Juez del 2º Distrito (2nd District judge) Certification County Court of Santa Barbara, 21 April 1854, box 6 fol 292, GFC.

official's section. Officials writing and signing in different languages on the same document suggests more than a tolerance for bilingualism. Indeed it was routine for much of the region.

As a testament to the continued political power of *Californios*, Anglo office seekers also employed translators for their election campaigns. If a candidate hoped to carry the southern counties, he needed to reach out to the Spanish-speaking community. Democratic gubernatorial candidate "Juan" B. Weller sought to gain the support of the *Californio* elite by talking about the large land concessions made by *Californios* when the territory joined the United States. He made a statement that those affected should be compensated in some way by the government.[84] Democratic nominee S.B. Axtell had his speech translated into Spanish during his 1867 campaign as a representative of the 1st Congressional District, citing his main regret in addressing them as,

> *[m]i felicidad de encontrarme cara á cara con vosotros es solamente oscurecida por mi inabilidad de poderos hablar en vuestro idioma nativo . . . dulce y rica lengua castellana* / my happiness in meeting you face to face is only dimmed by my inability to be able to speak in your native language . . . the sweet and rich Castilian language.[85]

Axtell went beyond exhibiting a desire to comprehend the language and demonstrated an appreciation and respect for *Californios'* linguistic heritage.

Candidates sought *Californio* votes by making campaign promises and utilizing native Spanish-speaking advocates. Pablo de la Guerra was nominated as an elector for the Stephen Douglas ticket in 1860 and was asked to set up meetings in both Spanish and English in Los Angeles, Santa Barbara, San Luis Obispo, Monterey, Santa Cruz, and Santa Clara.[86] In 1868, de la Guerra was approached by the *Club Democrático* to give

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84 Coronel Juan [John] B. Weller, Campaign Speech, 25 July 1857, v. 2, 234, Documentos para la historia de California: Colección del Sr. Don Rafael Pinto, MSS C-B 91, The Bancroft Library, University of California, Berkeley.

85 S.B. Axtell, speech, 8 August 1867, box 28 fol 1103h, GFC (Spanish spelling and diacritics per the original).

86 Eugene Casserly to Pablo de la Guerra, 17 September 1860, box 4 fol 164, GFC.

a talk in Spanish about the current political situation.[87] Most elite, landowning, and educated *Californios* allied with the Democratic Party; *El Clamor Público*'s editor was one of the few *Californios* who chose to align himself with Republicans. Francisco P. Ramírez's editorials supported the party and he personally campaigned for candidates by giving speeches in Spanish. The Republican Party repaid his support at numerous times in his career.[88] Party politicians recognized the importance of having a well-known *Californio* statesman to communicate to the mass of monolingual Spanish speakers. Although a minority in the state, native Spanish speakers remained a significant — possibly election-deciding group — that could not be ignored.

Opportunities for translators in the new state were plentiful. Even during the 1870s' transition to English Only, bilingual individuals were necessary. As Sonoma County increasingly turned to English as its language of choice, it needed to translate its vast Spanish language archives. An 1870 law allowed for the translation of Spanish language documents (and those in any other foreign language) into English. The person employed was expected to be a "competent . . . , resident of the county," and was promised a just and reasonable salary decided by the recorder and the translator with Board of Supervisors' approval.[89] A check was put into place to ensure the accuracy of the translations.[90] Bilingual individuals served an important role in bridging the two monolingual segments of the state together and were rewarded for their skills as mediators for legal, municipal and state government documents.

The linguistic diversity of California's population increased in the years following 1849 with the influx of Europeans, South Americans, and Chinese immigrants, and Spanish became just one of many possible languages heard. This proliferation of different languages increasingly worried nativists who wanted the future of the state, the nation, and even the world to be an English-speaking one. Debates over language of instruction and English's supremacy surfaced repeatedly after 1870.

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87 Tadeo Sánchez to Pablo de la Guerra, 20 September 1868, box 19 fol 877, GFC.

88 Paul Bryan Gray, "Francisco P. Ramírez: A Short Biography," *California History* 84 (Winter 2006–2007); 26, 33.

89 Cal. Code, Ch. CCCCXXII, § 1 (1870).

90 Cal. Code, Ch. CCCCXXII, § 1–3 (1870).

## CALIFORNIA MOVES TOWARDS ENGLISH ONLY

When the second California constitutional convention met in Sacramento in September 1878, few state laws existed that demanded English Only practices. State laws dictated that all students learn in the English language in the public schools (except the San Francisco Cosmopolitan Schools) and a pawnbroker or "pledgee" was required to keep records in English. Any individual who did not keep accurate pawn records was guilty of a misdemeanor.[91] When the convention met, Spanish was still afforded a special place in a state that had many immigrants and languages. Spanish was used in some counties for court proceedings and Spanish language publications of current laws continued. The new Constitution completely dismantled these language privileges. Nativist sentiments brought forth by many at the convention (the Workingmen's Party had a significant representation at the proceedings) made certain the loss of the bilingual aspects of the state's government.[92]

As the initial proposals stated at the convention, delegates made English language knowledge and usage the expectation and preference for the schools, electors, and all participants of government. Numerous amendments sought to revise the Constitution by disenfranchising non-English speakers and taking out any stipulation that permitted languages other than English to receive favorable government or educational support.[93] The move to require all voters to read and write in English did not make it into the Constitution. The delegates easily passed the amendment providing that "all laws of the State of California, and all official writing, and the executive, legislative, and judicial proceedings, shall be conducted, preserved, and published in no other than the English language."[94] By the end

91 Cal. Penal Code, Ch. XI, § 339 (1876).

92 For more about the politics behind the constitutional convention, see Carl Brent Swisher, *Motivation and Political Technique in the California Constitutional Convention, 1878–79* (New York: Da Capo Press, 1969).

93 California, *Debates and Proceedings of the Constitutional Convention of the State of California, Convened at the City of Sacramento, Saturday, September 28, 1878*, vol. 1 (Sacramento: State Office, J. D. Young, sup't, 1880), 89, 100, 110, 117, 143, 220.

94 Cal. Const., art. IV, § 24.

of the convention, native Spanish speakers lost all their language ties to the state government.

Unlike during the first constitutional convention, the proceedings had no native Spanish-speaking delegates. At one point, Joseph Brown attempted to seat Major José R. Pico "as a representative native Californian."[95] He made his case amidst the jeers of the Workingmen's supporters who applauded the announcement that, "Mr. Pico was repudiated by the delegation."[96] Aside from Major Pico's personal achievements, Brown asserted that at least one member of the convention should be from a *Californio* family,

> I believe he is the only man of that race, that once possessed this whole country, that is on hand here, and I believe none of the representative Californians are here in this House; and I would state that the Spanish and Mexican population amounts to twenty-three thousand.[97]

Despite Brown's intervention, Pico was not seated as a delegate, and only friendly individuals from the southern counties who knew what life was like in that part of the state supported *Californios* in the proceedings.

Horace Rolfe, Charles Beerstecher, James Ayers, and Brown all spoke in support of continuing Spanish language proceedings and translations in local venues during the convention. Rolfe, a representative of San Diego and San Bernardino Counties, spoke specifically about how monolingual judges continued to preside in some courts using the Spanish language. Prohibiting Spanish would hinder the ability of Spanish speakers to seek justice. Eli Blackmer of San Diego agreed and praised non-English-speaking judges he knew as "among the best Justices of the Peace we have."[98] Ayers further echoed Rolfe by saying,

> there are townships in Southern California which are entirely Spanish, or Spanish-American, and in those townships the Courts of Justice of the Peace are carried on sometimes exclusively in the

95 California, *Debates and Proceedings*, 1: 50.

96 Ibid.

97 Ibid.

98 California, *Debates and Proceedings of the Constitutional Convention of the State of California*, vol. 2 (Sacramento: State office, J. D. Young, sup't, 1880), 801.

> Spanish language, and it would be wrong, it seems to me, for this Convention to prevent these people from transacting their local business in their own language. It does no harm to Americans, and I think they should be permitted to do so.[99]

Ayers's support was sincere, but demonstrated the marginalized status of Spanish speakers. Even a supporter of Spanish language provisions did not see any real detriment for the larger group of "Americans" to have *Californios* conduct their "local business" in Spanish. The language was relegated to a small, isolated group that was not particularly American or equal to Euro-Americans, but deserved respect since they occupied the land first.

Ayers and Beerstecher discussed the promise in the Treaty of Guadalupe Hidalgo that *Californios* would receive the same rights and responsibilities as all citizens. They believed the amendment would renege on the assurances given to *Californios* when the territory became part of the United States. Beerstecher even went so far as to talk about eastern states that also published laws in other languages such as Michigan, Wisconsin, and Pennsylvania. He thought the policy of "Western States" to publish the laws only in English should be left to the Legislature, that "we ought not to put any Know-Nothing clause into the Constitution."[100] Despite their support, other delegates saw the requirement to translate and publish laws in Spanish as "entirely unnecessary."[101] When W.J. Tinnin of the 3rd Congressional District claimed that there was no reason to support "tons and tons of documents published in Spanish for the benefit of foreigners," Rolfe responded by asking if Tinnin called the native population foreign. Tinnin's reply was that they had ample time to learn the language.[102] In the end, delegates hardly debated the amendment to move the government and courts to English Only. On December 21, the constitutional convention rejected the state's commitment to Spanish and the bilingual court system that had prevailed for the previous thirty years.

Rolfe attempted to strike down the portion of the provision that required local proceedings in English. He perhaps recognized that he could not convince the delegates of any broader privilege than that. Rolfe hoped

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99 Ibid.

100 Ibid.

101 Ibid.

102 California, *Debates and Proceedings*, 2: 801.

this exception would permit business to be carried out as usual in regions where everything was still conducted in Spanish. While he conceded that most people in the southern parts of the state did speak some English, for many it was imperfect and would be "inconvenient" to conduct proceedings without full fluency. Rolfe argued that a judge "will make mistakes in language which will be injurious to litigants before his Court."[103] He ended his appeal by reminding the delegates that the Americans, "or English speaking people," were the newcomers to the state who took the land from those who were here "when the Spanish was universally the mother tongue of the people. They are a conquered people."[104] Rolfe believed that by taking their land and making them American citizens, the state had an obligation to take them as they were and "give them an equal show."[105] Although his argument was meticulously stated, it was not supported by any aside from Ayers and Blackmer in discussion. A.P. Overton believed that by catering to Spanish speakers the state enabled them to continue to neglect English language learning and that California had "honorably" lived up to the contract of the original treaty.[106] The delegation resoundingly rejected the amendment 27 to 55.[107]

Rolfe did not introduce another amendment dealing with language. Ayers, a representative of the 4th Congressional District that encompassed the San Joaquin Valley, Southern California, and the mid portion of the coast (Santa Clara, Santa Cruz, and Monterey), did twice attempt to get the convention to reconsider their decision.[108] Ayers argued,

> The object of this amendment is to permit Justices' Courts, in some of the townships of the southern portion of this State, where the population is almost entirely composed of native Californians, to preserve their proceedings in the Spanish language . . . . It can do no possible harm.[109]

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103 Ibid., 2: 802.

104 Ibid.

105 Ibid.

106 Ibid.

107 Ibid., 2: 803.

108 California, *Debates and Proceedings*, 2: 829; California, *Debates and Proceedings of the Constitutional Convention of the State of California,* vol. 3 (Sacramento: State Office, J. D. Young, sup't, 1880), 1269.

109 California, *Debates and Proceedings*, 3: 1269.

Both attempts failed and no other delegate tried to change the amendment.

Besides removing their language rights, delegates ridiculed Spanish speakers during the proceedings. In a particularly lively exchange, 4th Congressional District representative, Byron Waters of San Bernardino, presented a petition from eighty citizens. The secretary "read the petition down to the names, and then hesitated, as they were mostly Spanish names, difficult to pronounce."[110] The response from the delegates was animated, "Cries of 'Read!' 'Read!'" were reported.[111] Waters interrupted the proceedings by exclaiming that the petition was no laughing matter. Laughter ensued in response to his comment. He continued saying, "I know every man whose name is appended to that petition. They are electors of that county, and have been for the last twenty years or more."[112] He persisted by saying that they had lived there since 1842. The names needed to be read for the record and Waters offered to read the names. Ayers interjected, "They are just as good names as if they were all 'Smith.'"[113] In the end, the delegates made an exception and dispensed with reading the names and the convention continued.[114] The "difficult to pronounce" Spanish language names of petitioning citizens caused delegates to burst out in laughter. This nativist reaction was bigoted, but not necessarily racial since they had no sense of what these signers looked like. The petition itself was in English, and the Spanish-surnamed petitioners might have been afforded respect had they arrived and spoken in the English language at the proceedings. It was instead the simple fact of their names that was ridiculed and relegated them to an inferior position. Language in this case served as the primary discriminatory indicator, rather than an individual's physical characteristics.

California became the first English Only state during the period immediately following the constitutional convention. While the amendment to deny the teaching of other languages in the schools of California did not end up in the final Constitution, three separate and lengthy debates discussing

110 Ibid., 3: 1282.
111 Ibid.
112 Ibid.
113 Ibid.
114 Ibid.

the merits of language instruction occurred.[115] Some delegates believed that the schools overburdened young students with material and preferred assurances that all students receive an adequate English education by omitting additional language learning. Other delegates believed that hindering the upper limits of a student's curriculum was a huge step backward for the state and an ill-informed and anti-intellectual one. These delegates managed to garner enough support for their views, and the constitutional requirement for English knowledge failed. Despite this victory for language learning, the state that emerged after the constitutional convention of 1879 was not supportive of language differences. An 1888 state law required police officers to be able to speak, read, and write English among other requirements.[116] Another law required all election officers to be able to "read, write, and speak the English language understandably."[117] Written proceedings of the courts would be in English and therefore necessitated that all jurors "[p]ossessed sufficient knowledge of the English language."[118] The state legislature embraced the English Only preferences of the constitutional convention and went further in expanding the rights of citizens who spoke English while relegating non-English speakers to being second-class citizens with few civic responsibilities or privileges.

The English Only trend continued into the 1890s when those illiterate in the English language lost their right to vote. An 1891 provision allowed voters to determine whether they wanted to require that every voter "be able to write his name and read any section of the Constitution of the United States in the English language."[119] In 1894, an amendment passed that put the English language requirement for electors into the state constitution.[120] In the fifteen years following the constitutional convention, English Only sentiments solidified. Only those individuals literate

115 California, *Debates and Proceedings*, 2: 1101–06; California, *Debates and Proceedings*, 3: 1397–98, 1409–13.

116 The law regarding policeman qualifications was very detailed. It included requirements for height (five feet seven inches or taller) and age (under fifty-five years of age). Cal. City and County Code, 15,046 § 124 (1880).

117 Cal. City and County Code, 15,046 § 97 (1880).

118 Cal. Civ. Proc. Code, §§ 185, 198(2) (1880).

119 Cal. Code, Ch. CXIII, § 1 (1891).

120 Cal. Const. art. II, § 1 [adopted 1894, superseded 1970].

and conversant in English would receive full rights regardless of the non-English speaker's citizenship or nativity status.

## CONCLUSION

California was never bilingual and was not committed to retaining Spanish. The official use of the language in government was largely out of necessity. Once the Spanish-speaking population got too small and had no real representation, the language concession made to the conquered people of California was completely rejected. This denial of language rights occurred even though there remained regions of the state that continued to operate completely in Spanish into the 1880s. The pressure to rid the state of Spanish language provisions came from political changes in the larger population, state elected officials, and delegates of the constitutional convention.

California no longer wanted to translate its politics or business, but not everyone supported a monolingual course of action. At the constitutional convention, John Wickes called to give some official recognition to Spanish because it "is a noble language, spoken by millions of people upon the American continent."[121] His suggestion went unheeded. Ayers made a remark that predicted the argument for Spanish used by many in the decades that followed,

> In the future it will be a popular question in this State to control the commerce of the vast populations which are to the south of us, and there is no manner in which we can more successfully obtain that control than by allowing our children to become more conversant with the language that prevails among the people.[122]

Ayers recognized the crucial role that Spanish played in hemispheric relations. Almost immediately following Ayers's encouragement of Spanish learning, Thomas Laine stated that there could be no education finer than the one in English, which was "of all the languages known now to this earth, the conquering language."[123] These were two different visions for America's future. These sentiments were precursors to stances held in the

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121 California, *Debates and Proceedings*, 2: 802.

122 California, *Debates and Proceedings,* 1: 1398.

123 Ibid., 1: 1398.

twentieth century supporting Americanization and Pan-Americanism. In California, the statewide support for the Spanish language would not return until the 1960s and 1970s. The second constitutional convention had set the state government's policy on language for the next eighty years.

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# THE LADY IN PURPLE:

## *The Life and Legal Legacy of Gladys Towles Root*

RICHARD F. McFARLANE*

Gladys Towles Root was a Los Angeles lawyer famous for flamboyant clothing, large hats and audacious trial tactics. Root used her legal skills to defend accused sex criminals, murderers, kidnappers, and other unsavory characters. She used the doctrine of legal insanity and aggressive cross-examination to get her clients acquittals or reduced sentences and successfully challenged California's miscegenation law as it applied to Filipinos. Root was as well known to the newspaper's society columnist as she was to the newspaper's crime reporters.

## THE HISTORICAL PROBLEM

In their essay, "Women, Legal History, and the American West," John R. Wunder and Paula Petrick observe that

> little scholarship has been published concerning western women and criminal law, and, except for divorce, little has been accomplished by way of women and civil law. Likewise, western women's roles in the

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A COURTROOM APPEARANCE BY GLADYS TOWLES ROOT, *LOS ANGELES TIMES*, AUGUST 31, 1948, P. 15

*Los Angeles Times Photographic Archive, Department of Special Collections, Charles E. Young Research Library, UCLA.*

> history of property and probate need more attention. No regional historical study of western law yet exists; similarly no history of women, the law, and the American West has been written.[1]

Although there have been some contributions to the literature since Wunder and Petrick wrote in 1994, women in the law remains an underresearched area. The present article is a biography, but one intended to be mindful of the maxim that "a biography to be really worthwhile must relate to something more than the life and activities of an individual."[2] Most lawyers' biographies ignore the contributions of attorneys to jurisprudence. For example, *The Invisible Bar* by Karen Berger Morello[3] is a valuable primer on women in the law, but largely ignores the contributions they made other than by just being there. It begins with Margaret Brent, who practiced law in Maryland in 1638, and concludes with the appointment of Sandra Day O'Connor to the U.S. Supreme Court in 1981. Virginia C. Drachman introduces her book, *Sisters in the Law*, stating, "The history of women lawyers is a powerful story of discrimination, integration, and women's search for equality and autonomy in American society."[4] *Sisters in the Law* begins in the 1860s and ends in 1930, the same year Root was admitted to the bar. It is well written, well researched and well documented, but it also ignores the contributions women made to American jurisprudence other than by simply being members of the bar. A notable exception is *America's First Woman Lawyer: The Biography of Myra Bradwell* by Jane M. Friedman.[5] This book begins with Bradwell's quest for membership in the Illinois bar, and goes on to discuss her friendship with Mary Todd Lincoln, her founding and editing the legal newspaper, *Chicago Legal News*, and her contributions to the woman suffrage movement. The book is well written and copiously endnoted to primary sources. Although Bradwell

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1 John R. Wunder and Paula Petrik, "Women, Legal History and the American West," *Western Legal History* 7 (Summer/Fall 1994): 197.

2 Owen C. Coy, "Introduction" in Caroline Walker, *Boyle Workman's The City That Grew* (Los Angeles: Southland Publishing Co., 1935), vii.

3 Karen Berger Morello, *The Invisible Bar: The Woman Lawyer in America 1638 to the Present* (New York: Random House, 1986).

4 Virginia C. Drachman, *Sisters in the Law* (Cambridge: Harvard University Press, 1998), 1.

5 Jane M. Friedman, *America's First Woman Lawyer: The Biography of Myra Bradwell* (Buffalo, N.Y.: Prometheus Books, 1993).

may or may not be America's "first" woman lawyer, *America's First Woman Lawyer* is the sort of lawyer's biography — whether of a male or a female attorney — that is generally lacking in the literature because it actually demonstrates that Bradwell was doing something as a journalist and editor, and as a suffragette, if not as an attorney or jurist. Some lawyer biographies are anecdotal, for example, *A Song of Faith and Hope: The Life of Frankie Muse Freeman* by Frankie Muse Freeman with Candace O'Connor,[6] *Lawyer in Petticoats* by Tiera Farrow,[7] and *Call Me Counselor* by Sara Halbert with Florence Stevenson.[8] These books have the advantage of being primary sources in their own right, but have little value in discovering the thinking of the lawyers, and how they came to form their legal arguments.

There are two previous biographies of Root: *Defender of the Damned: Gladys Towles Root* by Cy Rice,[9] and *Get Me Gladys: The Poignant Memoirs of America's Most Famous Lady Criminal-Lawyer*, also by Cy Rice.[10] *Get Me Gladys* is essentially a second edition of *Defender of the Damned*. Much of *Get Me Gladys* is word-for-word the same as *Defender of the Damned*. However, *Get Me Gladys* deletes the account of Jay Geiger's final illness and death and adds a chapter on Root's defense of the accused kidnappers of Frank Sinatra, Jr. Both books have the advantage of having been written with Root's full cooperation and quote her frequently. Indeed, both books amount to the authorized biography of Root; they could be called second-hand primary sources — primary in the sense of not being based on the work of any previous author, second-hand in the sense of being written by someone other than the subject. Sadly, neither book is documented with footnotes or endnotes of any kind. Some of the facts related by Rice, such as Root's work in the *Roldan* case on Filipino-Caucasian miscegenation, or Root's defense of Allan Adron or Frank Sinatra, Jr.'s kidnappers, are verifiable from contemporary newspaper accounts. However, some of the

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6 Frankie Muse Freeman with Candace O'Connor, *A Song of Faith and Hope: The Life of Frankie Muse Freeman* (St. Louis: Missouri Historical Society Press, 2003).

7 Tiera Farrow, *Lawyer In Petticoats* (New York: Vantage Press, Inc., 1953).

8 Sara Halbert with Florence Stevenson, *Call Me Counselor* (Philadelphia: J.B. Lippincott Co., 1977).

9 Cy Rice, *Defender of the Damned: Gladys Towles Root*, (New York: The Citadel Press, 1964).

10 Cy Rice, *Get Me Gladys: The Poignant Memoirs of America's Most Famous Lady Criminal-Lawyer* (Los Angeles: Holloway House Publishing Co., 1966).

other anecdotes such as the name of Root's first client, the Case of the Austere Pasadena Judge, and Root's only appearance before the U.S. Supreme Court cannot be verified independently of Rice's books. Both books contain descriptions of Root's costumes and coiffure, and lack critical analysis of her legal career and influence. Rice's books are relied upon by every other biographer of Root.[11]

The present study differs from the previous two in that it will expand on and correct the facts of Root's biography, and provide an appraisal of her legal career through an analysis of certain types of cases she handled. It will make an original contribution to the literature by focusing on one lawyer's contributions to the evolution of specific, selected legal doctrines.

## EARLY LIFE

Gladys Charlotte Towles was born in Los Angeles, California, on September 9, 1905. She was the second daughter of Charles Henry Towles and Clara Jane Deter Towles. Charles and Clara met in Topeka, Kansas, where Clara was secretary to the speaker of the Kansas House.[12] In 1892, they moved to Los Angeles, a city of about fifty thousand people.[13] During the 1880s and 1890s, Los Angeles was undergoing a boom in real estate and oil. Competition between the Southern Pacific Railroad and the Atchison, Topeka & Santa Fe Railroad had driven train fares from Kansas City to as little as one dollar.[14] Tens of thousands of mid-westerners came to southern California to seek their fortunes and enjoy the weather. Charles and Clara Towles were among them. Charles was the supervising agent for the Singer Sewing Machine Company. He was also a "gentleman farmer" and had invested well enough in real estate that he retired from business at the age

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[11] See, e.g., Dawn Bradley Berry, *The Fifty Most Influential Women in American Law* (Los Angeles: Lowell House, 1996), 157–67.

[12] Cy Rice, *Defender of the Damned: Gladys Towles Root* (New York: Citadel Press, 1964), 87; Cy Rice, *Get Me Gladys: The Poignant Memoirs of America's Most Famous Lady Criminal-Lawyer* (Los Angeles: Holloway House Pub. Co., 1966), 37.

[13] John D. Weaver, *Los Angeles: The Enormous Village, 1781–1981* (Santa Barbara, Calif.: Capra Press, 1980), 47.

[14] Remi Nadeau, *Los Angeles: From Mission to Modern City* (New York: Longmans, Green & Co., 1960), 73–75.

of fifty-five.[15] Charles and Clara are mentioned twice in the *Los Angeles Times*: once in 1903 in connection with the purchase of three lots in the Alvarado Heights area of Los Angeles, and later that year for the purchase of a lot and seven-room residence on Tenth Street between Grand View and Park View. The home cost $4,000.[16]

Gladys Towles attended Hoover Elementary School and Los Angeles High School.[17] She first appeared in the *Los Angeles Times* society pages at age ten doing a "butterfly dance" at the birthday party of a friend. Gladys entered the University of Southern California.[18] During her freshman year at college, Charles Towles said, "Gladys, you ought to be on the stage — not the theater, but life's real stage: the courtroom."[19] Charles Towles had wanted his daughter to become a lawyer.[20] He had wanted to become a lawyer himself, but "was forced to drop out of school for financial reasons."[21] Clara Towles wanted Gladys to become an actress.[22] In a sense, she became both.

Root took a Bachelor of Laws degree (LL.B.) from the University of Southern California.[23] What would become the law school at USC was organized on November 17, 1896, by "a group of law students meeting in the police court room of Justice Morrison in the old City Hall."[24] The group called itself "The Law Students' Association of Los Angeles."[25] Six months later, the group was reorganized as "The Los Angeles Law School."[26] In 1901, the Los Angeles Law School was reorganized as the "Los Angeles

15 Rice, *Defender of the Damned,* 87; Rice, *Get Me Gladys*, 37.

16 "Real Estate Transactions," *Los Angeles Times*, January 31, 1903, 19; "Among Real Estate Owners and Dealers," *Los Angeles Times*, August 31, 1903, B1.

17 Rice, *Defender of the Damned*, 87.

18 Ibid., 87.

19 Ibid., 92.

20 Ibid., 44.

21 Ibid., 87.

22 Ibid., 44.

23 Denise Noe, "The Life of Gladys Towles Root: A Feisty, Much Loved Child." http://www.trutv.com/library/crime/notorious_murders/classics/root/2.html. Accessed: July 15, 2011.

24 Allison Gaw, *A Sketch of the Development of Graduate Work at the University of Southern California, 1910–1935* (Los Angeles: University of Southern California Press, 1935), 5.

25 Ibid.

26 Ibid.

College of Law," and in 1904, it was reorganized a final time as the "Southern California College of Law" and incorporated directly into the University.[27] Under the direction of Dean Frank M. Porter, the law school offered a three-year curriculum leading to the double degree of A.B. and LL.B.[28] Root attended USC as an undergraduate and went to the law school without first obtaining a bachelor of arts degree.[29] Denise Noe writes, "In the 1920s and 1930s, in many colleges of law, people could transfer to the law school after three years of college work and that's what [Gladys] did."[30] In 1928, the law students at USC organized the Southern California Bar Association, including all of the law students";[31] presumably, Root was among them. During her years at USC, Root was an active member of the Phi Delta Delta law sorority.[32] Root sometimes performed "melody selections and character interpretations" at benefit concerts and social events supported by Phi Delta Delta.[33] She satisfied her love of drama and music by joining Phi Beta, national music and dramatic arts sorority.[34] She was a regular fixture of the society pages as the hostess of receptions, parties, benefit teas, and other social events, usually in connection with her membership in Phi Delta Delta, Phi Beta, or both.[35]

Rice suggests that Root joined the Junior Republican Study Club some time after she began practicing law as a way to meet potential clients.[36] However, the evidence shows that Root became active in Republican politics as early as 1928 when she, as a "representative of the Southern California Republican headquarters," announced the formation of a Hoover-for-President

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27 Ibid.

28 Ibid.

29 Noe, *op. cit*.

30 Ibid.

31 W. Ballentine Henley & Arthur E. Neeley, *Cardinal and Gold* (Los Angeles: The General Alumni Association of the University of Southern California, 1939), 112.

32 Juana Neal Levy, "Society," *Los Angeles Times*, March 14, 1926, C1.

33 Juana Neal Levy, "Society," *Los Angeles Times*, April 15, 1926, A6; Juana Neal Levy, "Society," *Los Angeles Times*, June 24, 1926.

34 Juana Neal Levy, "Society," *Los Angeles Times*, March 1, 1926, A6; Juana Neal Levy, "Society," *Los Angeles Times*, Nov. 28, 1926, C1.

35 See e.g. Myra Nye, "Society," *Los Angeles Times*, September 12, 1926, C1; Juana Neal Levy, "Society," *Los Angeles Times*, November 28, 1926, C1; Juana Neal Levy, "Society," *Los Angeles Times*, June 27, 1920, A6.

36 Rice, *Defender of the Damned*, 65–66; Rice, *Get Me Gladys*, 55.

club at USC.[37] Root was active in the Junior Republican Study Club and became its president.[38] Rice describes an incident in which Root, as president of the Junior Republican Club, had the idea to sponsor a reception for the President and Mrs. Hoover. According to Rice,

> [Root] was given carte blanche to manage the entire affair. The bottom of the treasury was scraped, and Mrs. Root was handed the money, which she took to a printer.
>
> The invitations read ". . . in honor of the President of the United States of America, Herbert Hoover."
>
> Proudly she showed one of them to her mother. The response was a stifled scream as the alarmed parent blurted, "Gladys! You're going to jail!"
>
> Jails held no terror for Mrs. Root. She asked, "Why, Mother."
>
> "Because you know he isn't coming," was the simple answer.
>
> Mrs. Root counteracted with a defiant, "Well, I didn't say definitely whether he was or not."
>
> Mrs. Towles collapsed into a chair. She was not a believer in smelling salts, but this was one time when she could have benefitted by a few sniffs.
>
> "You *knew* that he isn't coming," she stated categorically.
>
> "He *was* invited," Mrs. Root reminded her mother.[39]

Newspaper accounts verify some of the basic facts of this incident. The reception was scheduled for October 20, 1929, at the Hotel Knickerbocker in Hollywood.[40] Over one thousand tickets were sold to the event.[41] Lieutenant Governor H.L. Carnahan was scheduled to speak; honored guests included Mayor John C. Porter of Los Angeles and Mayor James Rolph of San Francisco.[42] However, President and Mrs. Hoover never committed to attend the reception in their honor. According to Rice, Root was expecting

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37 "Collegians Form Clubs for Hoover," *Los Angeles Times*, Sept. 29, 1928, A9.

38 Rice, *Defender of the Damned,* 66; Rice, *Get Me Gladys*, 56.

39 Rice, *Defender of the Damned*, 66–67; Root, *Get Me Gladys*, 56.

40 Rice, *Defender of the Damned*, 68; Rice, *Get Me Gladys*, 57; "Tribute to be Given by Club to President," *Los Angeles Times*, October 6, 1929, B10.

41 "Thousand to Attend Reception by Club," *Los Angeles Times*, October 16, 1929, A8; Rice, *Defender of the Damned*, 67; Rice, *Get Me Gladys*, 57.

42 "Club to Honor Hoovers," *Los Angeles Times*, October 20, 1929, 20.

to be embarrassed — if not go to jail — but at the last minute a telegram arrived from Washington, D.C., allegedly from Herbert Hoover thanking the Club for the honor and expressing regrets for not being able to attend.[43] The telegram was actually sent by a friend of her mother's.[44] The newspaper does not verify this last detail. Indeed, the *Los Angeles Times* does not report on the event at all. After this near fiasco, Root left politics to concentrate on her legal practice.

Gladys Towles married Frank A. Root in October 1929.[45] Frank Root was a deputy sheriff whose contacts at the county jail helped bring criminal defendants to Gladys's law practice.[46] A son, Robert "Bobby" Towles Root, was born in 1932.[47] Gladys and Frank divorced in 1943.[48] Frank Root died on March 15, 1970.[49]

Gladys Root married John C. "Jay" Geiger in 1943.[50] After her second marriage, Gladys kept the surname "Root" professionally because she had already established herself by that time.[51] However, she is sometimes referred to as "Mrs. Geiger" in the society pages[52] and, in at least one case, as "Gladys Towles Root Geiger."[53] Jay Geiger was the "West Coast representative of a national fashion magazine" and would later become his wife's

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43 Rice, *Defender of the Damned*, 69; Rice, *Get Me Gladys*, 58.

44 Rice, *Defender of the Damned*, 70; Rice, *Get Me Gladys*, 59.

45 *Root v. United States* (1974), 1974 U.S. Dist. LEXIS 6796 at 7; 74-2 U.S. Tax Cas. (CCH) P9758; 34 A.F.T.R.2d (RIA) 6091 at 7; Cy Rice in *Defender of the Damned*, at page 94, gives the date of Gladys and Frank's marriage as 1930.

46 Eric Malnic & Karen Wada, "Gladys Towles Root Dies; Colorful Lawyer Was 77," *Los Angeles Times*, December 22, 1982, D4.

47 Rice, *Defender of the Damned*, 94.

48 *Root v. United States* 8 (1974), 1974 U.S. Dist. LEXIS 6796; 74-2 U.S. Tax Cas. (CCH) P9758; 34 A.F.T.R.2d (RIA) 6091 at; Cy Rice in *Defender of the Damned*, at page 94, gives the date of Gladys and Frank's divorce as 1941.

49 Ibid., 8.

50 Rice, *Defender of the Damned*, 94.

51 Ibid.

52 "Junior Associate Meeting Held," *Los Angeles Times*, January 19, 1946, A8; "Couple Entertain," *Los Angeles Times*, February 3, 1946, C2; Brandy Brent, "Carrousel," *Los Angeles Times*, February 9, 1950, B8; Walter Clarke, "Vacationers' Parties Include Plane Ones, Too," *Los Angeles Times*, October 22, 1950, C10.

53 *Root v. United States* (1974), 1974 U.S. Dist. LEXIS 6796; 74-2 U.S. Tax Cas. (CCH) P9758; 34 A.F.T.R.2d (RIA) 6091.

business manager.[54] His sartorial taste matched his wife's.[55] He was known to wear pink satin tuxedos, coral-colored accordion-pleated dinner jackets with matching shirts, and sequin shirts.[56] He always wore a hat and carried an English walking stick.[57] He loved large pieces of jewelry.[58] Jay and Gladys entertained lavishly at their Hancock Park home and were often seen at Los Angeles's most trendy restaurants.[59] They were members of the Del Mar Club and the L.A. Athletic Club.[60] Their marriage was "supremely happy."[61] Jay and Gladys had one daughter, Christina Geiger, born in 1944.[62] Jay Geiger died October 12, 1958, after a long illness.[63]

## THE LADY IN PURPLE

Gladys Towles was admitted to practice law in California on September 18, 1929, in a special proceeding of the California Supreme Court.[64] Of the 187 lawyers admitted to practice that day, twelve were women. She was issued bar number 11321.[65] She opened her first law office in 1930 at Suite 620, The Bartlett Building, 215 West Seventh Street, Los Angeles.[66] Charles Towles

54 "John C. Geiger, Husband of Attorney, Dies," *Los Angeles Times*, October 13, 1958, B9; Rice, *Defender of the Damned*, 94–95.

55 Rice, *Defender of the Damned*, 171.

56 Ibid., 95.

57 Ibid., 171.

58 Ibid., 172.

59 "Junior Associate Meeting Held," *Los Angeles Times*, January 19, 1946, A8; "Couple Entertain," *Los Angeles Times*, February 3, 1946, C2; "Jubilees," *Los Angeles Times*, February 16, 1947, C9; Lucille Leimert, "Confidentially," *Los Angeles Times*, February 24, 1946, C6; Brandy Brent, "Carrousel," *Los Angeles Times*, February 9, 1950, B8; Walter Clarke, "Vacationers' Parties Include Plane Ones, Too," *Los Angeles Times*, October 22, 1950, C10; Rice, *Defender of the Damned*, 95–96, 169, 172–76.

60 William Hord Richardson, ed., *Los Angeles Blue Book, 1954* (Beverly Hills, Calif.: Society Register of California, 1953), 89.

61 Rice, *Defender of the Damned*, 171.

62 Ibid., 94.

63 "John C. Geiger, Husband of Attorney, Dies," *Los Angeles Times*, October 13, 1958, B9; Rice, *Defender of the Damned*, 94, 178–94; Rice, *Get Me Gladys*, 89.

64 "Many New Attorneys Admitted," *Los Angeles Times*, September 19, 1929, A1.

65 State Bar of California. Attorney Search. http://www.calbar.org. Accessed: July 15, 2011.

66 Petition for Writ of Mandamus, *Roldan v. Los Angeles County*, No. 326484 (Superior Court, Los Angeles County, filed August 18, 1931), 2 (Root's office address in-

gave his daughter enough money to pay the office rent for six months.[67] There is no record of what Gladys did during the months between her admission to the bar and opening her own office. It may be that she tried to get a job but could not.

Karen Berger Morello, author of *The Invisible Bar*, has documented how difficult it was for women to be hired by large law firms. Morello wrote, "The Depression years were the most difficult of times [for women lawyers] to find employment."[68] The Second World War brought a few more women into the large law firms and corporate legal departments, but they had little impact on overall hiring practices.[69] The Los Angeles Bar Association denied membership to women lawyers "for many years" on the grounds that "even though they had diplomas and certificates, they could never be 'full-fledged lawyers.'"[70] A separate Women Lawyers' Club was founded in 1918 with Clara Shortridge Foltz among the charter members.[71] O'Melveny & Myers, one of Los Angeles's oldest and most prestigious law firms, did not hire its first women attorneys until 1943.[72] As late as 1952, Sandra Day O'Connor, third in her class at Stanford University Law School and future U.S. Supreme Court justice, was only offered one job by a large California firm, and that was as a stenographer.[73] Shut out of major law firms, almost one third of women lawyers opted for solo practice,[74] and most of these women had general practices or specialized in probate or family law

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cluded in the left margin of her pleading paper); Rice, *Defender of the Damned*, 45; Rice, *Get Me Gladys*, 35.

67 Rice, *Defender of the Damned*, 45; Rice, *Get Me Gladys*, 35.

68 Karen Berger Morello, *The Invisible Bar: The Woman Lawyer in America, 1638 to the Present* (New York: Random House, 1986), 203.

69 Ibid.

70 W.W. Robinson, *Lawyers of Los Angeles: A History of the Los Angeles Bar Association and of the Bar of Los Angeles County* (Los Angeles: Los Angeles Bar Association, 1959), 168.

71 Ibid., 294.

72 William W. Clary, *History of the Law Firm of O'Melveny & Myers, 1885–1965* (Los Angeles: n.p., 1966), 1: 386, 2: 848–49.

73 Morello, *op. cit.*, 194; Dawn Bradley Berry, *The Fifty Most Influential Women in American Law* (Los Angeles: Lowell House, 1996), 208.

74 Virginia C. Drachman, *Sisters in the Law* (Cambridge, Mass.: Harvard University Press, 1998), 182, 184, 241, 259.

matters.[75] Only three percent of women lawyers practiced criminal law.[76] Root was among this three percent; however, that may have been the result of accident and circumstance rather than design.

Root's first client was Louis Osuna, "a small Filipino" who wanted to divorce his wife on the grounds of infidelity.[77] The statute operable in the 1930s was California Civil Code section 92 which stated, "Divorces may be granted for any of the following causes: One. Adultery. Two. Extreme cruelty. Three. Wilful desertion. Four. Wilful neglect. Five. Habitual intemperance. Six. Conviction of a felony. Seven. Incurable insanity."[78] Divorce could not be granted by the default of the defendant,[79] or by confession of adultery,[80] or if there was evidence of connivance,[81] collusion,[82] or condonation.[83] One panel of the Court of Appeal held that marriage was "not subject to dissolution upon the whim or caprice of one of the contracting parties or even upon their mutual consent [but] only for causes sanctioned by law."[84] Root began working on the divorce immediately; however, her client, Mr. Osuna, was an impatient man. Two days later, Root received a telegram, "Am in Los Angeles County Jail. Please come see me. [Signed] Louis Osuna."[85]

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75 Ibid., 182.

76 Ibid., 259.

77 Rice, *Defender of the Damned,* 48–53; Rice, *Get Me Gladys*, 39–43.

78 *California Civil Code Annotated* § 92 (Deerings 1941).

79 *California Civil Code Annotated* § 130 (Deerings 1941).

80 *California Code of Civil Procedure Annotated* § 2079 (Deerings 1941).

81 *California Civil Code Annotated* § 111(1) (Deerings 1941). "Connivance" was defined as "the corrupt consent of one party to the commission of the acts of the other, constituting the cause of divorce." *California Civil Code Annotated* § 112 (Deerings 1941).

82 *California Civil Code Annotated* § 111(2) (Deerings 1941). "Collusion" was defined as "an agreement between husband and wife that one of them shall commit, or appear to have committed, or to be represented in court to have committed, acts constituting a cause of divorce, for the purpose of enabling the other to obtain a divorce." *California Civil Code Annotated* § 114 (Deerings 1941).

83 *California Civil Code Annotated* § 111(3) (Deerings 1941). "Condonation" was defined as "the conditional forgiveness of a matrimonial offense constituting a cause of divorce." *California Civil Code Annotated* § 115 (Deerings 1941).

84 *In Re* Lazar (1940), 37 Cal.App.2d 327.

85 Rice, *Defender of the Damned*, 49; Rice, *Get Me Gladys*, 40.

**Gladys Towles Root in court, *Los Angeles Times*, July 20, 1955.**

*Los Angeles Times Photographic Archive, Department of Special Collections, Charles E. Young Research Library, UCLA.*

Root immediately went to visit her client. The only surviving account of the conversation is recorded by Rice. According to Rice, the conversation went like this:

> "Tell me what happened."
>
> "I come home. I see man getting in bed. He . . ."
>
> "Your bed?" she interrupted.
>
> "My own bed. With my own wife."
>
> "Go on," she urged.
>
> "They didn't hear me come in. So I sneak out again. I go buy gun and come back. He sees me, grabs his trousers, jumps out back window. I shoot at him." He paused for breath.
>
> Mrs. Root asked, "Did you hit him."
>
> "No, I miss."
>
> "And?"
>
> "Then I shoot her."
>
> Whistling softly under her breath, Mrs. Root asked, "What is the extent of her wounds?"
>
> "To big extent."
>
> "How big?"
>
> "To extent she now dead," Osuna related.
>
> From simple divorce the case had suddenly changed to murder.
>
> Osuna stated flatly, "I do it because divorce take you too long."
>
> "Too long?" Mrs. Root repeated, bewildered. "You only came to see me yesterday."
>
> "I know, I know," Osuna agreed. "But you say. 'The wheels of legal machinery turn slowly.' So I decided to speed them up."
>
> Mrs. Root said, "You went about it the hard way. It's murder now. Murder, you know, can cost you your life."
>
> "Not if you good lady lawyer," Osuna grinned. "You ever lose a case?"
>
> "No," she answered truthfully.
>
> "Good," Osuna said happily. "I tell all prisoners in jail about you."[86]

[86] Rice, *Defender of the Damned*, 51–52; Rice, *Get Me Gladys*, 41–42.

Osuna was good to his word. He told his fellow prisoners about his new lawyer and fifteen of them retained Root within the month.[87] Root was also good to her word. At trial, Louis Osuna was convicted of the lesser charge of manslaughter and sentenced to ten months' incarceration.[88] Rice is the only source for this account. I was unable to find any record of anyone named Louis Osuna being charged in Los Angeles for any crime during the 1930s. I believe the name "Louis Osuna" is a pseudonym used by Rice and possibly by Root to protect her client's confidentiality.

Jack the Bard of Main Street, a person described by Rice as a derelict who lived near Root's office building, once exulted:

> Root-de-toot, root-de-toot,
> Here's to Gladys Towles Root.
> Her dresses are purple, hats wide.
> She'll get you one instead of five.
>
> Root-de-toot, root-de-toot,
> Here's to Gladys Towles Root.
> I'm here to do repentance.
> She got me a suspended sentence.[89]

This poem appears in both of Rice's books as two separate quatrains. It accurately describes a criminal defense lawyer's standard for success: getting a client a reduced or suspended sentence is almost as good as an acquittal. Although many of Root's clients were convicted, they were convicted of lesser charges, or received reduced sentences, such as the accused kidnappers of Frank Sinatra, Jr. Rice claims that Root never lost a client to the gas chamber, and I have not been able to refute this contention, although it was a very close call in the case of *People v. Verodi*.[90]

Eventually, Root moved her office to 212 South Hill Street, Los Angeles, California.[91] Cy Rice describes the office thus:

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87 Rice, *Defender of the Damned*, 52–53; Rice, *Get Me Gladys*, 42–43.

88 Rice, *Defender of the Damned*, 63; Rice, *Get Me Gladys*, 53.

89 Rice, *Defender of the Damned,* 115, 232; Rice, *Get Me Gladys*, 107, 199.

90 *People v Verodi*, No. CR179108 (Superior Court, Los Angeles County, filed March 9, 1956); *People v. Verodi* (1957), 150 Cal.App.2d 137.

91 Rice, *Defender of the Damned*, 115.

> The façade is black stone trimmed in gold, but elsewhere on the outside and inside of the building her notorious passion for purple asserts itself. The door is purple glass. Her name on the window is purple script trimmed in gold. Inside the door one's feet sink into soft purple carpeting. Rugs, furnishings, and drapes are all the same eye-popping purple; the flower pots, containing artificial orchids, are of course purple. There are fourteen rooms, including a law library done in sea-green, a black marble bathroom containing a contour tub built to fit the bodily dimensions of Mrs. Root, a spacious dining room and kitchen.[92]

The building was damaged in a suspected arson fire on August 6, 1981.[93]

Root was best known for her fashion sense. Rice called Root "a Technicolor pinwheel in perpetual motion in Cinemascope."[94] Others called her "Circus Portia,"[95] the "Lady in Purple,"[96] and a "peacock from another planet."[97] One colleague remembers Root changing coats three times in one day during a particular jury trial.[98] Root called herself "a little nuts [and] a screwball."[99] She once explained:

> These are my working clothes. If I wore a sports dress or a tailored suit that the average person wears, I'd be miserable. I couldn't do my best. I have to have color and distinctive style. I like everything that is very feminine and luxurious looking. And different.[100]

Her taste for flamboyant clothing is well documented. For example, when defending one of the accused kidnappers of Frank Sinatra, Jr., she

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92 Ibid.; Rice, *Get Me Gladys*, 108.

93 Patt Morrison & Nieson Himmel, "Blaze Sweeps Vacant Office Building," *The Los Angeles Times*, D4.

94 Rice, *Defender of the Damned*, 7; Rice, *Get Me Gladys*, 12.

95 Beth Ann Krier, "Hats Off to the Hatted," *Los Angeles Times*, August 11, 1972, G11.

96 Cercilla Rasmussen, "'Lady in Purple' Took L.A. Legal World by Storm," *Los Angeles Times*, February 6, 1995, 3.

97 Roby Heard in Rice, *Defender of the Damned*, 74; in Rice, *Get Me Gladys*, 64.

98 Rice, *Defender of the Damned*, 74.

99 Ibid., 77.

100 Rice, *Get Me Gladys*, 85.

wore "a shocking pink dress and a huge hat trimmed with silver fox fur."[101] On another occasion, when she herself was the defendant, Root wore "a low-cut fuchsia-colored sheath, fuchsia shoes, and the usual large hat — fuchsia — with crushed net piled high atop the crown."[102] She once wore "a flowing champagne and beige coat of empire style and a high-crowned hat of turkey feathers."[103] Even her hair was color coordinated with her outfit.[104] Her choice of colors would often match her client's favorites.[105] Supreme Court Justice Stanley Mosk offered the following personal remembrance:

> Her flamboyant costumes and picturesque hats were admittedly deliberate attempts to be the focus of all attention whenever she appeared in court.
>
> But she ran into difficulty with one of my colleagues. The late Judge Charles Burnell had an unyielding policy, that since men must do so, women must also remove their hats in his courtroom. I suspect Gladys Root did not fully appreciate that form of sex equality.[106]

However, the legend is greater still. Rice offers the following anecdote dealing with Root's "sole appearance" before the U.S. Supreme Court:

> Mrs. Root has made only one appearance before the United States Supreme Court. It was a military case. An argument immediately erupted, not on a point of law but on decorum.
>
> She refused to don the conventional black robes. Argument failed to persuade her. She appeared in a tight-fitting bronze taffeta dress hemmed with brown velvet, bronze ankle-strap shoes, a topaz ring the size of a silver dollar, and a topaz pin of 190 carats at her bust. Over the dress was a monkey-fur cape, all white. Her

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101 "Sinatra Kidnap Trial Set to Open Feb. 10," *Los Angeles Times*, January 7, 1964, 8, col. 1.

102 Howard Hertel & Walter Ames, "Lawyers in Sinatra Trial Arraigned," *Los Angeles Times*, July 31, 1964, 18A.

103 Howard Hertrl, "Gladys Root Weeps After Court Hearing," *Los Angeles Times*, December 12, 1967, C16.

104 Rice, *Defender of the Damned*, 74–75, 76, 97; Berry, *op. cit.*, 162.

105 Rice, *Defender of the Damned*, 102,

106 Stanley Mosk, Letter to the Editor, *Los Angeles Times*, February 27, 1995, 4.

> huge hat was of the same material as the dress and her hair was dyed to match the topaz.[107]

This anecdote is repeated by many authors writing about Root, but it is not true. In this instance, Rice got his facts wrong.

As of 1964, when *Defender of the Damned* was published, Root had petitioned the U.S. Supreme Court once. In 1934, she petitioned the Court for a writ of certiorari, a motion for leave to proceed *in forma pauperis*, and for leave to file a writ of habeas corpus.[108] The motions were denied. There was no oral argument, no appearance before the Court, no occasion to wear bronze taffeta and white monkey fur. Root represented the defendant in one military case, an appeal to the U.S. Court of Military Appeals in 1953.[109] Army Corporal Tokuichi Tobita was convicted by a general court martial of rape and the conviction was affirmed.[110] There is no record of this case being appealed to the U.S. Supreme Court. Further, attorneys appearing before the U.S. Supreme Court do not wear black robes; such attire is worn by barristers in English courts. Traditionally, all attorneys practicing before the Supreme Court were required to wear formal "morning clothes," striped trousers, cut-way coats with tails. Today, only members of the Department of Justice and other advocates of the United States government adhere to the tradition of formal dress.[111]

According to Drachman, all women lawyers had a problem about what to wear.[112] She wrote:

> Before a woman lawyer left her home each day, she had to choose carefully an outfit that would convey at once seriousness and softness, objectivity and sentimentality, professionalism and femininity.[113]

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107 Rice, *Defender of the Damned*, 159.

108 *Groseclose v. Plummer* (1939), 308 U.S. 614, 60 S.Ct. 264, 84 L.Ed. 513. Root made two other appeals to the U.S. Supreme Court: *Till v. New Mexico* (1968), 390 U.S. 713, 88 S.Ct. 1426, 20 L.Ed.2d 254 and *Kowan v. California* (1969), 395 U.S. 335, 89 S.Ct. 1793, 23 L.Ed.2d 348. Both of these appeals were denied by the Supreme Court in two-sentence opinions "for want of jurisdiction," ibid.

109 *United States v. Tobita* (1953), 3 U.S.C.M.A. 267, 12 C.M.R. 23.

110 Ibid., 3 U.S.C.M.A. 272.

111 Kermit L. Hall, ed., *Oxford Companion to the United States Supreme Court*, 2nd ed. (Oxford: Oxford University Press, 2005), 1153.

112 Drachman, *op. cit.*, 93.

113 Ibid.

Belva Lockwood wore pink satin to meetings of the International Council of Women and a "plain black dress accentuated with lace or ruffles at the neck and wrist . . . [and] sometimes she wore flowers in her hair."[114] When arguing before the California Supreme Court, Clara Shortridge Foltz wore "a black silk business suit trimmed with velvet and lace, a gold broach at her neck, and golden butterflies attached to bands of black velvet at her wrists."[115] Nineteenth-century social etiquette required ladies to wear hats in public; however, the wearing of hats in courtrooms by women lawyers was controversial.[116] The controversy continued to Root's time.

Root's garish costumes were a personal statement, but were also a form of advertising. Until 1977, attorneys were not permitted to advertise their services in conventional ways,[117] so they had to find other methods to attract clients. Root's costumes were a billboard that identified her to all and sundry. Whenever she was mentioned in the press, her clothing was always part of the article. This also ran counter to Canon 27 of the ABA Canons of Professional Ethics which forbade "furnishing or inspiring newspaper comments . . . and other like self-laudation."[118] Nevertheless, Root stood out among other lawyers, and among other women lawyers especially. Although there were many other lawyers in Los Angeles during this time, and even other women lawyers, Root is the one mentioned, and she is mentioned for her clothing as much as for her skill as a litigator.

Root's costumes were also a deliberate trial tactic. They drew the jury's and witness's attention away from her client, and toward her. If the jury was looking at Root, at her dress, her feathered hat, and her hair dyed to match, they would not be looking at the defendant thinking about the crime of which he was accused.

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114 Ibid., 94.

115 Ibid.

116 Ibid., 95.

117 American Bar Association, Canons of Professional Ethics, Canon 27, reprinted in William M. Trumbull, *Materials on the Lawyer's Professional Responsibility* (Boston: Little, Brown & Co., 1957), 381. The U.S. Supreme Court declared state bans on attorney advertizing unconstitutional in *Bates v. State Bar of Arizona* (1977), 433 U.S. 350, 97 S. Ct. 2691; 53 L. Ed. 2d 810. See also Lawrence M. Friedman, *American Law in the Twentieth Century* (New Haven: Yale University Press, 2002) 464–66.

118 Ibid.

However, beneath the peacock feathers — literally and figuratively — was a hardworking lawyer. The secret of Root's success was an almost maniacal work ethic. She refused to "squander even a minute of precious working hours."[119] Root handled 1,600 cases per year, most of them sex crimes "plus a sprinkling of divorce, paternity, domestic, accident and civil matters."[120] She made on average seventy-five court appearances each month.[121] Sometimes, she was late for court. She was two and a half hours late for oral argument in the case of *Wood v. City Civil Service Commission of Los Angeles*. The irony is that the issue in the *Wood* case was the granting of a continuance because Root was engaged in another trial.[122] Root represented clients in 312 cases that resulted in officially reported decisions.[123] She was successful in getting her client's conviction reversed in about one fifth of those. She hired private investigators and, on at least one occasion, an astrologer, to assist her in defending her clients.[124] Rice reports that "at least thirty graduating law students received training in her office" as of 1964.[125] Root habitually worked well after midnight, went to bed at four in the morning, and then got up an hour later to go to work.[126] She had a "phenomenal memory, the ability to talk on the telephone, write a letter, and listen to three different conversations at the same time — plus a hard, cold, logical mind."[127] Rice reports that "one of her pet aversions was for any of her clients, overcome with joy, to embrace her."[128]

Root's law practice prospered financially. Rice reports that Root's "annual gross income runs into the high six figures" in 1964.[129] Assessed federal income taxes for the years 1959–1961 certainly bear this out.[130] Her wealthy

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119 Rice, *Defender of the Damned*, 54; Rice, *Get Me Gladys*, 43–44.

120 Ibid.

121 Rice, *Defender of the Damned*, 74; Berry, *op. cit.*, 158.

122 *Wood v. City Civil Service Commission of Los Angeles* (1975), 45 Cal.App.3d 105, 114n4.

123 See Appendix.

124 Rice, *Defender of the Damned*, 106; Rice, *Get Me Gladys*, 94.

125 Rice, *Defender of the Damned*, 94.

126 Rice, *Defender of the Damned*, 196–97; Rice, *Get Me Gladys*, 165–66.

127 Rice, *Defender of the Damned*, 92.

128 Ibid., 112.

129 Ibid., 76.

130 *Root v. United States* (1974), 1974 U.S. Dist. LEXIS 6796 at 5.

GLADYS TOWLES ROOT AT A COURTROOM APPEARANCE, *LOS ANGELES TIMES*, JULY 22, 1955. "WAR BRIDE'S TRIAL DELAYED FOR MEDICAL EXAMINATION" WAS THE HEADLINE WHEN ROOT DEFENDED A WOMAN ACCUSED OF SHOPLIFTING.

*Los Angeles Times Photographic Archive, Department of Special Collections, Charles E. Young Research Library, UCLA.*

clients paid "substantial" fees.[131] Root secured her fees with deeds of trust on clients' homes and other real property.[132] However, less well-heeled clients compensated Root with livestock, at least on occasion.[133] Once a client whom she successfully defended on a burglary charge paid her fees with part of the loot.[134] On another occasion, a client whom she successfully defended on a forgery charge paid her fees with a forged check.[135] Root, like her father, also invested in real estate.[136] She had interests in at least two real estate partnerships: Green Trees Enterprises, Inc., and Secure Defense Company.[137] She owned the building at 212 South Hill Street, Los Angeles, in which she maintained her offices.[138] She also inherited property from her father.[139]

In addition to being in court all day and visiting her clients in jail at night, she taught law at West Los Angeles School of Law.[140] She was invited to write a treatise on the defense of sex crimes by law book publisher Matthew Bender, but never completed the manuscript.[141] She helped found the Los Angeles Fellowship of Business Women, Ltd. and served as its legal advisor.[142] During her tenure as president of the Southern California Women Lawyers Association, Root led the group to raise one thousand dollars in cash and ten thousand dollars in law books for the Philippine Legal Aid System.[143] Her support for this cause may be related to her earlier representation of Filipino clients in various matters, including two miscegenation cases. She appeared on the *Tonight Show* with Johnny Carson "several times," and at least once on the *Merv Griffin Show*.[144]

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131 Rice, *Defender of the Damned*, 76.

132 See *People v. Jones* (1991), 53 Cal.3d 1115, 1132–33; *Brockway v. State Bar* (1991), 53 Cal.3d 51.

133 Rice, *Defender of the Damned*, 53.

134 Ibid., 78–79.

135 Ibid., 122–23.

136 *Root v. United States* (1974), 1974 U.S. Dist. LEXIS 6796 at 5.

137 *Alpine Palm Springs Sales v. Superior Court (Green Tree Enterprises, Inc.)* (1969), 274 Cal.App.2d 523; *People v. Jones* (1991), 53 Cal.3d 1115.

138 *Lee v. Takao Building Development Co.* (1985), 175 Cal.App.3d 565.

139 Ibid.

140 Perry M. Polski, "Gladys Root," *Los Angeles Times*, January 3, 1983, C4.

141 Rice, *Get Me Gladys*, 166.

142 "Founders to Give Dinner," *Los Angeles Times*, January 4, 1931, B10.

143 Robinson, *op. cit.*, 296.

144 Larry Bodine, "In Flux," *National Law Journal*, October 1, 1979, 43.

## ROOT FIGHTS FOR INTERRACIAL MARRIAGE

Whether or not Louis Osuna was Gladys Root's first client, another Filipino was the first client she represented before the California Court of Appeal. In fact, Root represented two Filipino-Caucasian couples challenging California's miscegenation law: Gavino C. Visco and Ruth M. Salas, and Salvador Roldan and Marjorie Rogers. According to Rice, Root considered her victory in *Roldan v. Los Angeles County*[145] to be the "most important conquest in her entire law career."[146] Yet its importance was short-lived because Root's argument — and the judicial decision based on it — was so narrow the Legislature could rewrite the law to prevent such marriages in the future.

Visco and Salas came to see Root in April 1931. Roldan and Rogers came to see Root "a few months after the Osuna trial — in [August] 1931."[147] Both couples wanted to get married, but the Los Angeles County Clerk refused to grant either couple a marriage license. Root promised to help them.[148] Visco and Salas, and Roldan and Rogers, may have come to Root because there was only one Filipino attorney in California at this time.[149]

## MISCEGENATION LAW IN AMERICA AND CALIFORNIA THROUGH 1930

Although there was no ban on miscegenation at common law,[150] statutes banning interracial marriage and regulating interracial sexual relations in America are older than the republic. Initially, miscegenation laws were

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145 *Roldan v. Los Angeles County* (1933), 129 Cal.App. 267.

146 Cy Rice, *Defender of the Damned*, 63; Cy Rice, *Get Me Gladys,* 52.

147 Rice, *Defender of the Damned*, 63; Rice, *Get Me Gladys*, 52. See also Dara Orenstein, "Void for Vagueness: Mexicans and the Collapse of Miscegenation Law in California," *Pacific Historical Review* 74 (August 2005): 384.

148 Rice, *Defender of the Damned*, 63; Rice, *Get Me Gladys*, 52.

149 Benicio Catapusan, *The Filipino Occupational and Recreational Activities in Los Angeles* (1934, reprint San Francisco: R and E Research Associates, 1975), 18.

150 William Mack & Donald J. Kiser, eds., *Corpus Juris*, (New York: American Law Book Co., 1925) 38: 1290–91; Eugene Marias, "Comment: A Brief Survey of Some Problems in Miscegenation," *Southern California Law Review* 20 (1946): 82; James Wood, "Comment: Statutory Prohibitions Against Interracial Marriage," *California Law Review* 32 (1944): 269.

intended to protect African slavery and white supremacy; later, eugenic reasons were offered as a justification.[151] The first English colony to pass a miscegenation law was Maryland in 1664.[152] This law applied only to *marriages* between freeborn women and slaves, not to relationships outside of marriage, and not to relationships between freeborn men and slaves. Since most interracial births in colonial America were to slave women of children sired by slave owners, under the common law most mulattoes would be born free.[153] In a few generations, slavery would be bred out of existence. In 1691, the Virginia House of Burgesses passed a statute banning any "English or other white man or woman being free" from marrying "a Negro, mulatto, or Indian man or woman, bond or free" on pain of banishment from the colony.[154] Various amendments in the eighteenth,

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151 Lawrence M. Friedman, *Private Lives: Families, Individuals, and the Law* (Cambridge, Mass.: Harvard University Press, 2004), 54–57.

152 Peter Wallenstein, *Tell The Court I Love My Wife: Race, Marriage and Law — An American History* (New York: Macmillan, 2002) 23; see also Leti Volpp, "American Mestizo: Filipinos and Antimiscegenation Laws in California," *UC Davis Law Review* 33 (2000): 798. Professor Volpp gives the date of Maryland's miscegenation law as 1661. Justice John W. Shenk of the California Supreme Court gives the date of Maryland's miscegenation law as 1663. *Perez v. Sharp* (1948), 32 Cal.2d 711, 747 sub. nom. *Peres v. Lippold*, 198 P.2d 17 (Shenk, J., dissenting).

153 Rachel F. Moran, *Interracial Marriage: The Regulation of Race and Romance* (Chicago: University of Chicago, 2001) 21. At English common law a person's station in life followed his or her father's. According to seventeenth century English jurist Edward Coke, "If a villein [bondsman] taketh a free woman to wife, and have issue between them, the issue shall be villeins. But if a nief [bondswoman] taketh a freeman to her husband, their issue shall be free." Edward Coke, *Institutes of the Laws of England* (1797; republished, Buffalo, N.Y.: William S. Hein Co., 1986), 2: 187. However, an older, thirteenth-century rule held, "He is born a bondsman who is procreated of an unmarried nief though of a free father, for he follows the condition of his mother." Henry Bracton, *On the Laws and Customs of England*, Samuel E. Thorne, trans. & ed., (Cambridge, Mass.: Harvard University Press, 1968), 2: 30. By the eighteenth century, William Blackstone wrote, "Pure and proper slavery does not, nay cannot, subsist in England." William Blackstone, *Commentaries on the Laws of England*, (1765; facsimile, Chicago: University of Chicago Press, 1979), 1: 325–27; see also *Somerset v. Stewart* (1772), 98 Eng. Rpt. 499, 510, 20 How. St. Tr. 1, 82; Alfred W. Blumrosen & Ruth G. Blumrosen, *Slave Nation: How Slavery United the Colonies & Sparked the American Revolution* (Naperville, Ill.: Sourcebooks, Inc., 2005), 1–14.

154 Ibid., 16 (internal footnote omitted). A tacit exception was made for the descendants of John Rolfe and Pocahontas, whom many of Virginia's most prominent families proudly claim as ancestors. Stuart E. Brown, Jr., Lorraine F. Myers & Eileen M.

nineteenth, and early twentieth centuries altered the details, but not the substance of Virginia's miscegenation law.[155] The Virginia law set a pattern that was followed by other colonies, and later states, for the next 250 years.

California passed its first miscegenation law on April 22, 1850. The act declared that "all marriages of white persons with Negroes or mulattoes are declared to be illegal and void."[156] In 1880, California amended section 69 of the Civil Code, to forbid county clerks from issuing marriage licenses "authorizing the marriage of a white person with a Negro, mulatto, or Mongolian."[157] In 1905, California's miscegenation law, now codified as California Civil Code section 60, was amended to read, "All marriages of white persons with Negroes, Mongolians, or mulattoes are illegal and void."[158] The amendment was passed to close a perceived loophole. Section 69 forbade county clerks from issuing marriage licenses if a white person wanted to marry a Mongolian, but, prior to the amendment, no law forbade whites and Mongolians from marrying. This is the statute that was in effect in 1931.

## FILIPINO IMMIGRATION TO THE UNITED STATES

Filipinos first immigrated to the United States on Spanish ships during the period of the Manila Galleon Trade.[159] Filipinos may have settled in

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Cappel, *Pocahontas' Descendants* (Baltimore: Genealogical Publishing Co., Inc., 1994). The "Pocahontas exception" was codified in the Racial Integrity Act, *Virginia Acts of Assembly*, ch. 371 (1924); see also Randall Kennedy, *Interracial Intimacies: Sex, Marriage, Identity, and Adoption* (New York: Pantheon Books, 2003) 483–84; Wallenstein, *op. cit*, 139. Notwithstanding the ban on European-Native American marriages, some very prominent Virginia statesmen, including Patrick Henry and Thomas Jefferson "championed the amalgamation of Indians and whites." Kennedy, *op. cit.*, 484.

155 Wallenstein, *op. cit*., 17–19.

156 Act of April 22, 1850, *Statutes of California*, ch. 35, § 3. The miscegenation law was passed before California was officially admitted to the Union. California was admitted to the United States by an act of Congress approved by President Millard Fillmore on September 9, 1850. Act of September 9, 1850, *Statutes at Large*, 9: 452.

157 Act of April 5, 1880, *Statutes of California*, ch. 74, § 1.

158 Act of March 21, 1905, *Statutes of California*, ch. 164 codified at *California Civil Code* § 60 (Deerings, 1906).

159 Volpp, *op. cit*., 803n34.

Louisiana in the 1830s and 1840s.[160] However, Filipinos began to immigrate to the United States in large numbers after the United States acquired the Philippine Islands at the end of the Spanish-American War.[161] Between 1924 and 1929, there were 24,000 Filipinos in California, only sixteen percent, or about 3,800, of whom were women.[162] By 1930, there were 40,904 Filipino men living in California, mostly agricultural workers,[163] and between sixteen and thirty years of age.[164] According to Volpp:

> The Filipinos lived in barracks, isolated from other groups, allowed only dance halls, gambling resorts, and pool rooms of Chinatown as social outlets. They led ostracized lives punctuated by the terror of racist violence. Many restaurants and stores hung signs stating "Filipinos and dogs not allowed."[165]

In Los Angeles, there were only 4,591 Filipinos, or 0.2 percent of the total population, in 1930.[166]

Despite the social isolation, or perhaps because of it, Filipino men met and formed romantic attachments to white women. W.E. Castle said,

> The individual prefers to mate only in his own group, and with his own kind, but circumstances may overcome racial antipathy . . . when mates of the same race are not available.[167]

Benicio Catapusan wrote, "No matter how rigid the man-made laws that tend to prohibit interracial marriages, they cannot ultimately prevent gradual intermixtures . . . despite the adverse sociological attitudes toward

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160 Ibid.

161 Arleen DeVera, "The Tapia-Saiki Incident," in Valerie J. Matsumoto & Blake Allmendinger, *Over the Edge: Remapping the American West* (Berkeley: University of California Press, 1999), 203.

162 Alison Varzally, "Romantic Crossings: Making Love, Family, and Non-Whiteness in California, 1925–1950," *Journal of Ethnic History* (Fall 2003): 18.

163 Moran, *op. cit.*, 37; DeVera, *op. cit.*, 203.

164 Volpp, *op. cit.*, 804.

165 Ibid., 805–13; see also DeVera, *op. cit.*, 201–14.

166 Constantine Panunzio, "Intermarriage in Los Angeles, 1924–33," *American Journal of Sociology* 47 (1942): 695.

167 W.E. Castle as quoted in Benicio T. Catapusan, Filipino Intermarriage Problems in the United States," *Sociological and Social Research* 22:3 (January/February 1938): 266.

such union."[168] Between 1924 and 1933, 701 out of 1,000 Filipino men married outside their community.[169] About half of these marriages were to white women.[170] "The legal status of Filipino intermarriages in California," wrote Nellie Foster, "has not yet been established, and the situation with regard to such marriages is one of confusion, of contradictory practices and policies, [and] of inconsistencies and insecurities."[171] The white partner, usually the wife, would be "diplomatically counted out" of her premarital social relationships, forced to resign from club memberships and abandoned by business connections and clientele.[172] The feelings were often mutual. Allison Varzally wrote:

> Anti-miscegenation laws and white supremacist notions limited interethnic crossings, but so did the social practices and views of minorities. Concerns about civil rights in the abstract gave nonwhites pause. Yet in general, they promoted co-ethnic dates and marriages in order to maintain familiar boundaries. Those who wandered beyond these boundaries were coaxed to return.[173]

For example, riots erupted between the Filipino and Japanese communities in Stockton, California, in 1930 when a Filipino man eloped with a Japanese woman.[174] Constantine Paninzio wrote in 1942 that

> the marriage of a white woman, even though of the servant class, to a Filipino is strongly disapproved by Americans in [Los Angeles]. . . . The Filipinos themselves disapprove of intermarriage with American girls. . . . since American-Filipino marriages are subjected to social punishment in the Phillippines even as they are in the United States."[175]

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168 Catapusan, "Filipino Intermarriage Problems," 266; Benicio Catapusan, *The Filipino Occupational and Recreational Activities in Los Angeles* (San Francisco: R and E Research Assoc., 1975), 52–54.

169 Varzally, *op. cit.*, 19; Panunzio, *op. cit.*, 696.

170 Panunzio, *op. cit.*, 695.

171 Nellie Foster, "Legal Status of Filipino Intermarriages," *Sociology and Social Research*, 16:5 (May/June 1932): 441.

172 Catapusan, "Filipino Intermarriage Problems," *op. cit.*, 269.

173 Varzally, *op. cit.*, 10.

174 DeVera, *op. cit.*, 201–10.

175 Panunzio, *op, cit.*, 695.

Despite the social pressure against Filipino-Caucasian unions, their legal status was ambiguous. The issue was whether or not Filipinos were included within the statutory term, "Mongolian." County clerks, who were obliged and authorized to issue marriage licenses, had differing opinions on this issue. The Sacramento county clerk denied a marriage license to Marino Pill, a Filipino, and Emma Lettie Brown, "a white woman born in Wisconsin."[176] Orange County also denied a Filipina-white couple a marriage license.[177] The Riverside county clerk decided not to issue marriage licenses to Filipino-white couples in 1930.[178] On the other hand, Tulare County apparently issued a marriage license to a Filipino-white couple.[179] On May 13, 1921, Assistant County Counsel Edward T. Bishop, writing for the Los Angeles County Counsel's Office, wrote to L.E. Lampton, Los Angeles county clerk:

> While there are scientists who would classify the Malayans as an offshoot of the Mongolian race, nevertheless, ordinarily when speaking of "Mongolians" reference is had to the yellow and not to the brown people and we believe that the Legislature in Section 69 did not intend to prohibit the marriage of people of the Malay race with white persons . . . We do not believe that the Legislature intended in its unscientific language in Section 69 to cover all the races of mankind.[180]

This legal opinion governed the issuance of marriage licenses in Los Angeles County until 1930.[181] However, five years later, on June 8, 1926,

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176 "Wedding Prevented: Marriage License to Filipino and White Woman Denied," *Los Angeles Times*, July 1, 1926, 1.

177 "Girl Fails to Prove Race," *Los Angeles Times*, January 31, 1930, 12.

178 "License to Wed Denied to Filipino," *Los Angeles Times,* November 7, 1930, A7.

179 "Girl's Mother Halts Plan to Wed Filipino," *Los Angeles Times*, December 6, 1929, 13. The marriage was halted because the bride was underage.

180 Edward T. Bishop to L.E. Lampton, May 13, 1921, as quoted in Foster, *op. cit.*, 447–48. Bishop had offered a similar opinion in December 1920 in regard to Leonardo Antony, "a Filipino and disabled veteran of the World War, who sought a marriage license to wed Luciana Brovencio, 19 years old, a Spanish girl residing in New Mexico." "Finds Filipino is Real Malay; May Wed White," *Los Angeles Times*, December 16, 1920, H10.

181 Volpp, *op. cit.*, 814.

California Attorney General U.S. Webb, writing to the San Diego County Clerk, issued a contrary opinion:

> While we find some difference, as will be noted, as to the number of classifications into which the human race should be divided, there seems to be no difference of opinion that the Malays belong to the Mongoloid Race and therefore, come under the classification of Mongolians. The Filipino, with the exception of the inhabitants belonging to the black race and to the whites constituting a negligible proportion of the population being Malays, are therefore, properly classed as Mongolians and marriages between them and white persons are prohibited by the provisions of Section 60 of the Civil Code.[182]

The opinions of lawyers, no matter how learned, and no matter how important the lawyer's political office, are not binding unless and until accepted by a court of competent jurisdiction and made a part of the court's ruling.

The first judicial decision on the issue of miscegenation was *People v. Yatko*, from Los Angeles County Superior Court.[183] Timothy Yatko, a Filipino, married Lola Butler, a white woman. At Yatko's trial for the murder of Butler's lover, the prosecution collaterally attacked the validity of Yatko's marriage to Butler so she would be permitted to testify against him. The prosecution argued that since Yatko was a Filipino, he was also a Mongolian, and his marriage to Butler was therefore void.[184] The judge agreed with the prosecution:

> I am quite satisfied in my own mind that the Filipino is a Malay and that the Malay is a Mongolian, just as much as the white American is of the Teutonic race, the Teutonic family, or of the Nordic family, carrying it back to the Aryan family. Hence, it is my

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182 U.S. Webb, *Opinion of the Attorney General No. 5641*, June 8, 1926, 483–84; see also, Foster, *op. cit*., 447.

183 Volpp, *op. cit*., 814–15; "Old Law Invoked on Yatko: Judge Declares Marriage Void to Allow Wife to Testify in Asserted Murder of Kidder," *Los Angeles Times,* May 6, 1925, A5; "Pleads Unwritten Law: Filipino Triangle Slaying Defendant Tells of Death Grapple In Victim's Apartment," *Los Angeles Times*, May 7, 1927, A2.

184 Volpp, *op. cit.*, 814–15.

> view that under the code of California as it now exists, intermarrying between a Filipino and a Caucasian would be void.[185]

Yatko was later convicted and sentenced to life imprisonment.[186]

Following the *Yatko* case, five other Los Angeles Superior Court judges ruled directly on the issue of whether Filipino-Caucasian marriages were void under California Civil Code section 60. Volpp wrote that these are the only cases directly on the issue. In *Robinson v. Lampton*, Stella F. Robinson sought an injunction preventing Los Angeles County Clerk Lampton from issuing a marriage license to her daughter, Ruby Robinson, a white woman, and Tony V. Moreno, a Filipino.[187] At trial, the arguments of counsel centered on whether humanity ought to be divided into five races or three.[188] Superior Court Judge Frank M. Smith agreed that there were only three races and ruled that Filipinos were part of the Mongolian race and therefore barred from marrying whites.[189]

In *Laddaran v. Laddaran* and in *Murillo v. Murillo*, the superior courts refused to annul marriages between Filipinos and Caucasians on grounds of race.[190] In the *Laddaran* case, Judge Myron Westover "refused to annul the marriage of Estanislao P. Laddaran, a Filipino, and Emma P. Laddaran, Caucasian."[191] Judge Westover made his ruling because "no proof was offered that a Filipino is of the Mongolian race and due to the fact that

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185 *People v. Yatko*, No. 24795 (Superior Court, Los Angeles County, 1925); Volpp, *op. cit.*, 816 (internal footnote omitted).

186 Volpp, *op. cit.*, 816; "Life Sentence to be Imposed on Yatko Today," *Los Angeles Times*, May 11, 1925, A17.

187 "Filipino Marriage Balked," *Los Angeles Times*, February 20, 1930, A5.

188 "Racial Tangle Halters Cupid," *Los Angeles Times*, February 25, 1930, A2.

189 *Robinson v. Lampton*, No. [unknown], (Superior Court, Los Angeles County, 1931); "Filipino-White Unions Barred," *Los Angeles Times*, February 26, 1930, A1; Volpp, *op. cit.*, 818–19, which says, "Unfortunately, the case number [No. 2496504] Foster gives, cited by other scholars, is incorrect, and I was unable to locate the decision. Happily, the decision was excerpted in contemporary newspaper reports." Moran, *op. cit.*, 38; Foster, *op. cit.*, 448, 945. My own research to locate the correct number was also unsuccessful. Ruby F. Robinson and her intended, Tony V. Moreno, were married in Tijuana, Mexico, before the court made its ruling, which was therefore moot. "Racial Tangle Halters Cupid," *Los Angeles Times*, February 25, 1930, A2.

190 *Laddaran v. Laddaran*, No. D95459 (Superior Court, Los Angeles County, decided September 5, 1931); *Murillo v. Murillo*, No. D97715 (Superior Court, Los Angeles County, decided October 10, 1931); Volpp, *op. cit.*, 820–21; Foster, *op. cit.*, 453.

191 "Filipino Vows Ruled Binding," *Los Angeles Times*, September 6, 1931, C12.

the question has not been determined by the higher courts."[192] In *Murillo*, Judge Thomas C. Gould "rejected [the] modern day scientific definition of Mongolian in favor of what the state legislature had in mind when it enacted the law."[193] Gould ruled that only "Chinese, Japanese and Koreans (who are popularly regarded as Mongolians)," are prohibited from marrying whites.[194]

In *Visco v. Los Angeles County*, Root represented Visco in a writ of mandamus proceeding to obtain a marriage license for his marriage to Salas.[195] County Clerk Lampton answered that "Gavino C. Visco is a Mongolian," and "Ruth M. Salas is a white person."[196] Root submitted affidavits on behalf of her clients stating that Visco was born in "Pasquin, Island of Imson, Philippine Islands, Provence of Ilocon Norte" and that his grandparents were born in Madrid, Spain,[197] and that Salas, her parents and grandparents were born in Mexico.[198] Superior Court Judge Walter Guerin, sitting without a jury, ruled that the couple could marry and ordered Lampton to issue the marriage license.[199] Unfortunately, findings of fact and conclusions of law were waived by the parties, so the court file has no record of why Guerin made his decision. However, the *Los Angeles Times* reports that Guerin ruled that the couple could marry because the bride, who was born in Mexico, was of American Indian descent and therefore the miscegenation law didn't apply.[200] According to newspaper reports, Lampton

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192 Ibid.

193 Volpp, *op. cit.*, 820–21; "Racial Divorce Plea Rejected," *Los Angeles Times*, Oct. 11, 1931, A5.

194 Ibid.

195 Petition for Writ of Mandamus, *Visco v. Los Angeles County*, No. 319408 (Superior Court, Los Angeles Co., filed April 8, 1931). Other authors sometimes refer to this case as *Visco v. Lampton*; however, original documents in the court's file show that Los Angeles County was the first named defendant, not County Clerk L.E. Lampton. Therefore, the proper name of the case is *Visco v. Los Angeles County.* Other named defendants were the State of California and "John Doe, Official."

196 Answer, *Visco v. Los Angeles Co.*, No. 319408. There are no other answers in the file. Although not explicitly stated, Lampton apparently answered on behalf of all defendants.

197 Affidavit of Visco, *Visco v. Los Angeles Co.*, No. 319408.

198 Affidavit of Salas, *Visco v. Los Angeles Co.*, No. 319408.

199 Judgment, *Visco v. Los Angeles Co.*, No. 319408.

200 Volpp, *op. cit.*, 819; "Filipino and Mexican May Wed, Says Court," *Los Angeles Times*, June 4, 1931, A8.

intended to appeal Guerin's ruling in *Visco*; however, there is no notice of appeal in the superior court file.[201] The *Visco* case is unsatisfactory because the ruling is based on the factual determination that the bride was not white, and therefore, that the miscegenation law did not apply.

The fifth case is *Roldan v. Los Angeles County*. It is the only one of the five cases to be appealed and receive a published decision that became, briefly, a binding precedent. Foster, writing at the time *Roldan* was pending in the courts, wrote:

> [T]here seems to be a tendency in the recent decision of the Superior Court of Los Angeles County to sustain the legality of Filipinos' intermarriages. . . .
>
> If such marriages are not sustained, on the ground that Filipinos are Mongolians, the social consequences will be very serious and far-reaching.[202]

## GLADYS ROOT'S CONTRIBUTIONS TO THE DEVELOPMENT OF THE LAW ON INTERRACIAL MARRIAGE

Roldan and Rogers came to see Root in about August 1931. It may be that they had heard of Root's successful representation of Visco and Salas through coverage in the *Los Angeles Times* or through the local Filipino press. Although the *Roldan* case was not the first time Root had represented a Filipino in a miscegenation case, the facts here were quite different than the facts in *Visco*. Whereas Salas was born in Mexico and was, or claimed to be, of Native American descent, Rogers was "born in England of English parents, her progenitors on both sides of the family for generations having been English."[203] Therefore, Root could not simply avoid the law; she had to challenge it. The superior court file contains no briefs or documentary evidence. In his findings of fact and conclusions of law, superior court Judge Walter S. Gates found that "neither Salvador Roldan nor

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201 "Right Denied Irish-Indian to Wed Spanish-Filipino," *Los Angeles Times*, June 6, 1931, A6.

202 Foster, *op. cit.*, 453.

203 Findings of Fact and Conclusions of Law, *Roldan v. Los Angeles County* No. 326484 (Superior Court, Los Angeles Co. filed August 18, 1931), 2.

Marjorie Rogers are Mongolians" and ordered Lampton to issue the marriage license.[204] The County of Los Angeles and County Clerk Lampton appealed, probably because the facts were so much clearer than in *Visco*.[205]

In the appeal, California Attorney General Webb, as *amicus curiae*, and County Counsel Everett W. Mattoon, for Los Angeles County, argued that the term *Mongolian*, as understood in 1880, included Filipinos.[206] In addition to arguing that the term *Mongolian* did not include Filipinos, Root argued that "attempts to induce public officials and courts to construe law to bring Filipinos under the general classification of Mongolians is influenced by labor, social and immigration agitation."[207]

The Court of Appeal ruled three-to-three to affirm the superior court. Writing for the court, Judge Harry R. Archibald relied on definitions of *Mongolian* found in various dictionaries and encyclopedias[208] and on the legislative history of the 1878–1879 California Constitutional Convention[209] to find

> that the *common* classification of the races was Blumenbach's, which made the "Malay" one of the five grand subdivisions, i. e., the "brown race," and that such classification persisted until after section 60 of the Civil Code was amended in 1905 to make it consistent with section 69 of the same code. As counsel for appellants [that is, Root and her co-counsel, George B. Bush] have well pointed out, this is not a social question before us, as that was decided by the legislature at the time the code was amended; and if the common thought of to-day is different from what it was at such time, the matter is one that addresses itself to the legislature and not to the courts.[210]

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204 Ibid., 3; "Filipino Opens Battle on Intermarriage Ban," *Los Angeles Times*, April 12, 1932, 10.

205 "Filipino Race Question Given to Higher Court," *Los Angeles Times*, April 20, 1932, A3.

206 Appellants' Opening Brief, *Roldan v. Los Angeles County*, No. 8455 (Cal. Ct. App., filed June 17, 1932); Brief Filed By . . . Amicus Curiae, *Roldan v. Los Angeles County*, No. 8455 (Cal. Ct. App., filed July 8, 1932).

207 Respondent's Brief, *Roldan v. Los Angeles County*, No. 8455 (Cal. Ct. App., filed August 1, 1932), 9.

208 *Roldan*, 129 Cal.App. 268–70.

209 *Roldan*, 129 Cal.App. 270–73.

210 *Roldan*, 129 Cal.App. 273 (italics in the original). The reference to "Blumenbach" is to Johann Friedrich Blumenbach (1752–1840), a German physiologist and anthropologist. Based on the analysis of human skulls, Blumenbach divided humanity

The appellants petitioned the California Supreme Court for rehearing, but the petition was denied on March 27, 1933.[211]

The holding in the case is based entirely on the statutory interpretation of the word *Mongolian*. By not addressing the issue as a "social question," Root probably won the case for her client, because of longstanding precedent upholding miscegenation laws.[212] In 1933, public feeling was not ready for the end of miscegenation laws, and courts follow public opinion, though to a lesser degree than legislatures and members of the executive branch. Nevertheless, by avoiding the larger social question, the court's holding in *Roldan* could easily be deprived of lasting effect through legislative action. It was.

## AFTER *ROLDAN v. LOS ANGELES COUNTY*

Salvador Roldan and Marjorie Rogers were married on April 4, 1933.[213] Although of great significance to Mr. and Mrs. Roldan, Root's victory in *Roldan v. Los Angeles County* was of negligible support to other Filipino-Caucasian couples. Nine days before the Court of Appeal issued its opinion, State Senator H.C. Jones introduced two bills which added the word "Malay" to California's miscegenation statutes.[214] Senator Jones was a political ally of Attorney General Webb, who was himself a member of the influential Commonwealth Club of California.[215] In addition to the Commonwealth Club, the California Joint Immigration Committee, which was

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into five races: Caucasian, Mongolian, Malayan, Ethiopian, and American. *The New Encyclopedia Britannica: Micropedia* (15th ed., Chicago: Encyclopedia Britannica, 1991), 2: 303.

211 *Roldan*, 129 Cal.App. 267.

212 See for example, Brief on Behalf of Appellee, *Loving v. Virginia*, 31–38, reprinted in Phillip B. Kurland & Gerhard Casper, eds., *Landmark Briefs and Arguments of the Supreme Court of the United States: Constitutional Law* (Bethesda, Md.: University Publications of America, 1974) 64: 824–31.

213 "Intention to Marry," *Los Angeles Times*, April 4, 1933, 14.

214 Orenstein, *op. cit.*, 385; "Racing Bill Approved . . . Filipino-White Marriages Opposed by Senate," *Los Angeles Times*, March 16, 1933, 8, col. 6.

215 Orenstein, *op. cit.*, 379, 381, 385; According to Professor Foster, in 1929, the Immigration Section of the Commonwealth Club recommended that Civil Code section 60 be amended to specifically ban marriages between Filipinos and whites. Foster, *op. cit.*, 443.

sponsored by the American Legion, the Sons and Daughters of the Golden West, and the California Federation of Labor, asked its members to urge passage of the bills.[216] The new section 60 of the Civil Code read, "All marriages of white persons with Negroes, Mongolians, members of the Malay race, or mulattoes are illegal and void."[217] The companion statute amended section 69 of the Civil Code and directed the county clerk to note on all marriage licenses whether a bride or groom is "white, Mongolian, Negro, Malayan, or mulatto," and forbidding the issuance of a marriage license "authorizing the marriage of a white person with a Negro, mulatto, Mongolian or member of the Malay race."[218] Both statutes were approved by Governor James Rolph, Jr., himself a member of the Native Sons, on April 30, 1933, and took effect on August 31, 1933.[219] According to Volpp, this action "*retroactively* [voided and made] illegitimate all previous Filipino/white marriages."[220]

After the phrase "member of the Malay race" was added to California's miscegenation law, Caucasian-Filipino couples left California to marry in other states. Couples went to Oregon, New Mexico, Utah, and Idaho, with New Mexico favored because "that State does not even have a law proscribing Mongolian-white marriages, and because it is easily accessible to persons residing in Los Angeles."[221] Miscegenation laws were "doomed by the civil rights movement and, more broadly, by society's commitment to equality and multiculturalism."[222]

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216 Volpp, *op. cit.*, 822.

217 Act of April 20, 1933, *Statutes of California*, ch. 104 codified at *California Civil Code Annotated* § 60 (Deerings 1934).

218 Act of April 20, 1933, *Statutes of California*, ch. 105, codified at *California Civil Code Annotated* § 69 (Deerings 1934).

219 Ibid.; see also Volpp, *op. cit.*, 822.

220 Volpp, *op. cit.*, 822 (Italics in the original). Professor Volpp does not offer any examples of Filipino/white couples actually having their marriages declared void and illegitimate. Under the rule in *People v. Godines* (1936), 17 Cal.App.2d 721, this result is unlikely.

221 Panunzio, *op. cit.*, 697. In 1937, Utah Attorney General Joseph Chaz ruled that Filipinos were Malayans — not Mongolians. "Filipino-and-White Marriages Ruled Legal In Utah," *Los Angeles Times*, June 11, 1937, 5.

222 Lawrence M. Friedman, *American Law in the Twentieth Century* (New Haven: Yale University Press, 2002), 56.

Although the Court of Appeal's decision in *Roldan* was effectively overturned by the Legislature, the California Supreme Court would be the first to find a miscegenation law unconstitutional. Pascoe wrote, "Beginning in the late 1870s, judges declared that the laws [against miscegenation] were constitutional because they covered all racial groups 'equally.'"[223] This changed with the case *Perez v. Sharp*.[224]

Andrea Perez, who identified herself as a white person, wanted to marry Sylvester Davis, who identified himself as African American.[225] W.G. Sharp, Los Angeles county clerk, denied Perez and Davis a marriage license pursuant to California Civil Code section 69.[226] The California Supreme Court declared that

> marriage and procreation are fundamental to the very existence and survival of the race. Legislation infringing such rights must be based upon more than prejudice and must be free from oppressive discrimination to comply with the constitutional requirements of due process and equal protection of the laws. . . . Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality. For that reason, legislative classification or discrimination based on race alone has often been held to be a denial of equal protection.[227]

The Court also found the statutes to be "invalid because they are too vague and uncertain."[228] This decision was a major advance in civil rights. By invalidating miscegenation laws on constitutional grounds, the Court put the matter beyond mere legislation. *Perez* built on the precedent established by

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223 Peggy Pascoe, "Miscegenation Law, Court Cases, and Ideologies of 'Race' in Twentieth-Century America," *Journal of American History*, 83 (1996): 50 (and cases cited there).

224 *Perez v. Sharp* (1948), 32 Cal.2d 711, sub. nom. *Perez v. Lippold*, 198 P.2d 17. W.G. Sharp replaced Earl O. Lippold as Los Angeles County Clerk while the case was pending, and therefore was substituted as the named defendant.

225 Ibid., 32 Cal.2d 712.

226 Ibid.

227 Ibid., 32 Cal.2d 715.

228 Ibid., 32 Cal.2d 728.

*Skinner v. Oklahoma*[229] and served as a precedent in *Loving v. Virginia*.[230] The *Perez* decision is best understood as a step in the evolution of civil rights. Between the *Roldan* decision in 1933 and the *Perez* decision in 1948, California had experienced a tremendous growth in population brought about by mobilization for World War II. This growth in population included Americans of every race, and their interaction was inevitable. America had also just completed a war against Nazi racism and was shamed by its actions against Japanese Americans. World War II and the Cold War opened America's eyes to the hypocrisy of racism in California and in America. Simply put, political and social institutions in California had evolved slightly faster than elsewhere in America.

The first marriage license issued in Los Angeles County after the *Perez* ruling went to a Filipino-white couple: Guillermo O. Esquerra and Miriam Elizabeth Russell.[231] They were married immediately after obtaining the license.[232] Although the California Supreme Court found the miscegenation law to be unconstitutional, the ruling in *Perez* did not reach the race reporting requirement found in Civil Code section 69.[233] The California Legislature repealed Civil Code section 60 and amended Civil Code section 69 to remove the race reporting requirement in 1959.[234]

Federally, it would be almost twenty years before miscegenation laws were declared unconstitutional. It is certainly ironic, and perhaps appropriate, that the decision which held miscegenation to be unconstitutional came from Virginia, the state with the longest tradition of miscegenation laws.[235]

Root made a small contribution toward the removal of miscegenation laws in the United States. In *Visco*, she avoided the law by having her client

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229 *Skinner v. Oklahoma* (1942), 316 U.S. 535, 62 S.Ct. 1110, 86 L.Ed. 1655 declaring that there was an inherent right to reproduce.

230 *Loving v. Virginia* (1967), 388 U.S. 1, 875 S.Ct. 1817, 18 L.Ed.2d 1010 declaring that all miscegenation laws are unconstitutional.

231 "Mixed Marriage License Granted," *Los Angeles Times*, November 19, 1948, A1, col. 3.

232 Ibid.

233 *Stokes v. County Clerk of Los Angeles County* (1953), 122 Cal.App.2d 229.

234 Volpp, *op. cit.*, 824; Act of April 20, 1959, *Statutes of California*, ch. 146.

235 Maryland repealed its miscegenation laws prior to the decision in *Loving v. Virginia* (1967), 388 U.S. 1, 6 fn5, 875 S.Ct. 1817, 18 L.Ed.2d 1010. March 24, 1967, *Laws of Maryland*, ch. 6.

declare her lineage to be Native American. Her argument in *Roldan* was based on statutory interpretation of the word *Mongolian*, rather than on constitutional grounds as in *Perez* and in *Loving*. Thus, the victory was short-lived. The California Legislature promptly passed legislation specifically banning marriages between Filipinos and whites, thereby preventing wider application of the decision. It would be fifteen years until the political and social climate changed enough to permit the California Supreme Court to rule as it did in *Perez*. It would be another twenty years before the political and social climate changed enough to permit the U.S. Supreme Court to rule as it did in *Loving*.

## THE KIDNAPPING OF FRANK SINATRA, JR.

Root's last high-profile case was the defense of John William Irwin, one of the accused kidnappers of Frank Sinatra, Jr., son of the famous singer.[236] Not only did the case itself make headlines, but Root herself and her co-counsel, George A. Forde, became defendants in a related case that made a trip to the U.S. Supreme Court and consumed four years of her life. This case illustrates Root's use of the blame-the-victim defense strategy. It also demonstrates the lengths to which she went to do so.

Sinatra, Jr., had his professional singing debut on September 12, 1963.[237] According to Sinatra biographer Kitty Kelly, Sinatra, Jr., "was a pale imitation" of his father.[238] Sinatra biographer Randy Taraborrelli describes Sinatra, Jr., as "a prototypical lounge lizard."[239] Two months later, on Sunday, December 8, 1963, Frank Sinatra, Jr., was taken blindfolded from his hotel room in Lake Tahoe, Nevada, by "two husky gunmen [who] carried young Sinatra, his mouth sealed with a strip of adhesive tape out of the lodge and into a car that sped off into the night during a snowstorm."[240] The kidnappers and

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236 *United States v. Amsler et al.* No. 33087-CD (U.S. District Court, Southern District, Central Division, filed Januray 2, 1964).

237 J. Randy Taraborrelli, *Sinatra: Behind the Legend* (Secaucus, N.J.: Carol Publishing Group, 1997), 296.

238 Kitty Kelly, *His Way: The Unauthorized Biography of Frank Sinatra* (New York: Bantam Books, 1986), 329.

239 Taraborrelli, *op. cit.*, 294.

240 "Kidnap Sinatra Jr. In Tahoe Storm," *Los Angeles Times* December 9, 1963, 1; Taraborrelli, *op. cit.*, 298–99.

their hostage passed several police roadblocks and crossed the California-Nevada state line to a hideout in the San Fernando Valley area of Los Angeles.[241] On December 11, Sinatra, Sr., and FBI agent Jerome Crowe delivered the ransom of $239,985 (fifteen dollars was used to buy a valise to carry the balance) to a drop-off point between two parked school buses on "Wilshire Boulevard, near the Sawtelle [Avenue] Veterans Facility."[242] Frank Sinatra, Jr., was released unharmed after his father paid a ransom of $240,000.[243] On December 14, 1963, Barry Worthington Keenan, Joseph Amsler, and John William Irwin were arrested for the crime, and the ransom was recovered.[244]

Since the kidnapping of Charles A. Lindbergh, Jr., in 1932, kidnapping has been a federal crime.[245] The statute was amended in 1938 to make kidnapping a capital offense, unless the victim was released unharmed prior to imposition of sentence, in which case it was punishable by up to life imprisonment.[246]

Keenan, Amsler, and Irwin were indicted and tried beginning in February 1964 in the U.S. District Court in Los Angeles.[247] Keenan and Amsler were indicted on one count of transporting the victim across state lines.[248] Irwin was indicted for aiding and abetting.[249] Because Sinatra, Jr., was released unharmed, the maximum penalty possible on conviction was life imprisonment, rather than death; however, the indictment did not specify that the victim was released unharmed and the death penalty remained a legal possibility.[250] This technicality would be significant on

241 Ibid., 303.

242 Ibid.

243 "Sinatra Safe," *Los Angeles Times*, December 11, 1963, 1; "Valley Net! Predawn Search of Kidnapers," *Los Angeles Times*, December 12, 1963, 25; "Guard Relates How He Took Frankie Home," *Los Angeles Times*, December 12, 1963, 3; see also Taraborrelli, *op. cit.*, 308–09; Kelly, *op. cit.*, 330.

244 "FBI Seizes 3; Recovers Ransom," *Los Angeles Times*, December 14, 1963, 1; Taraborrelli, *op. cit.*, 309.

245 "Lindbergh Kidnaping Act," June 22, 1932, *Statutes At Large*, 47: 326, codified as amended *United States Code Annotated,* title 18, § 1201 (West 2005).

246 Act of May 18, 1934, *Statutes At Large*, 48: 781–82.

247 *United States v. Keenan, et al.* No. 33087-CD (SD Cal., filed January 2, 1964).

248 "3 Named by Grand Jury in Sinatra Jr. Kidnaping," *Los Angeles Times*, January 3, 1964, E7.

249 Ibid.

250 Ibid.

appeal. Root represented Irwin.[251] According to Rice, "She was hired by an industrialist, a former employer of Irwin."[252] Attorney Charles L. Crouch represented Keenan. Forde and Morris Lavine represented Amsler.

Root began "blaming the victim" by casting doubt on the truth of the kidnapping almost as soon as she was retained. In court on Monday, December 24, 1963, Root, "wearing a large white feathered hat and a black suit trimmed with white fox fur and a fox head," asked that her client's bail be reduced and referred to the allegations as, "This kidnaping — if there was a kidnaping,"[253] After the indictment, Root suggested that "other persons" besides the defendants were involved.[254] The *Los Angeles Times* continued, "Mrs. Root, known for her wearing of enormous hats and elaborate earrings, would not explain this hint that possibly not all of the 'persons' in the case had been arrested."[255] The defense attorneys suggested in the press that a mysterious "Wes" or "West" would be called as a witness to exonerate the accused.[256] No such witness was ever called to testify.

At trial, Root accused Sinatra, Jr., of being in on the entire plot, which was a publicity stunt. In *Sinatra: Behind the Legend*, Keenan is quoted as saying, "One of the attorneys — not my own — came in one night and said to me, 'Look, if this was a publicity stunt and you are able to tell us that it was a publicity stunt, then that would be a very strong defense.' "[257] Neither Keenan's statement nor Taraborrelli's other research clearly identify Root as the source of the hoax defense; however, given Root's statements in the press, and after considering the record in *Root v. United States*, it appears likely that Root was the source of the hoax defense.

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251 Gene Blake, "Woman Attorney Hired to Defend John Irwin," *Los Angeles Times*, December 21, 1963, 16.

252 Rice, *Get Me Gladys*, 212.

253 "Doubts Raised on Kidnaping in Sinatra Case," *Los Angeles Times*, December 23, 1963.

254 "Sinatra: Secrecy Still Clouds Kidnaping Case," *Los Angeles Times*, January 4, 1964, N3.

255 Ibid.

256 "'Hoax' Defense Pressed in Sinatra Case," *Los Angeles Times,* February 18, 1964, 27; Walter Ames and Arthur Berman, "Still Hopes for Exoneration by 'West,' Amsler Testifies," *Los Angeles Times*, March 4, 1964, 2; Howard Hertel and Arthur Berman, "No 'Mystery' Witness Called; Sinatra Kidnap Defense Rests," *Los Angeles Times*, March 6, 1964, 1.

257 Taraborrelli, *op. cit.*, 311.

The hoax defense was not successful. Keenan and Amsler were convicted of kidnapping and immediately sentenced to life imprisonment, plus seventy-five years each.[258] Irwin was also convicted, and was later sentenced to sixteen years, six months imprisonment.[259] Keenan's and Amsler's sentences were later reduced to twenty-five years and five months.[260]

All three defendants appealed their convictions to the United States Court of Appeals for the Ninth Circuit.[261] Amsler's and Irwin's convictions were overturned and remanded to the district court for retrial on the grounds that the trial court did not follow the correct procedures for trying a capital offense.[262] Keenan withdrew his appeal before the appellate court rendered its decision.[263] Keenan would ultimately serve four and a half years in prison.[264] On remand, Amsler and Irwin pleaded guilty to superseding indictments, and were sentenced to five years of probation.[265] Ultimately, it was a very good result for Amsler and Irwin.

The defense allegation that the kidnapping was a hoax angered Frank Sinatra, Sr. According to Taraborrelli, Sinatra resolved to take the defense lawyers, including Root, to court.[266] Indeed, on July 29, 1964, a federal grand jury indicted Root and Forde on three counts of subornation of perjury and obstruction of justice.[267] They entered pleas of "Not Guilty" and moved to dismiss the indictment on the grounds that the indictment

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258 Howard Hertal and Arthur Berman, Jury Finds Three Guilty in Sinatra Kidnaping," *Los Angeles Times*, March 8, 1964, G1.

259 Ibid. See also "Sinatra Case: Judge Reduces Two Sentences," *Los Angeles Times*, July 19, 1964, 35.

260 "Sinatra Case: Judge Reduces Two Sentences," *Los Angeles Times*, July 19, 1964, 35.

261 *Amsler v. United States*, No. 19509 (9th Cir., decided May 3, 1967).

262 *Amsler v. United States*, 381 F.2d 37, 53 (9th Cir. 1967). The Court of Appeals held, "It is the possibility of an imposition of a death penalty under the indictment, not the evidence produced at the trial, which determines if the accused is entitled to the procedural benefits available in capital cases." Ibid., 45.

263 Ibid., 42.

264 Taraborrelli, *op. cit.*, 313.

265 Howard Hertel and Henry Sutherland, "Keenan Admits He Instigated Kidnaping of Sinatra's Son," *Los Angeles Times*, January 9, 1968, 3.

266 Taraborrelli, *op. cit.*, 314.

267 Indictment, *United States v. Root*, No. 33933-CD (SD Cal., filed July 29, 1964); Walter Ames, "2 Sinatra Trial Lawyers Indicted," *Los Angeles Times*, July 30, 1964, 1.

was vague.[268] The motion was granted.[269] On December 9, 1964, the federal grand jury again indicted Root and Forde for conspiracy, subornation of perjury, and obstruction of justice.[270] This second indictment was 148 pages long.[271] Again Root and Forde moved to dismiss the indictment, this time on the grounds that it was confusing. In a memorandum decision, Judge Peirson M. Hall "carefully and repeatedly examined the indictment and the authorities cited by the parties, . . . and [could not] conscientiously come to a judgment that the defendants are sufficiently informed by the indictment of the charges against them."[272] Judge Hall did not "indulge in a prolonged dissertation of [his] views."[273] However, on appeal, the United States argued that while "the appellees persuaded the Court below that [the first indictment] should be dismissed for lack of specificity"; the "present indictment is attacked for having pleaded too much."[274] Root and Forde lost the appeal on all points, and the case was remanded. Root took her appeal to the U.S. Supreme Court which denied certiorari.[275]

Back in the district court, Root was urged to "'keep up the fight'" by sympathetic colleagues.[276] "'You can see I'm still fighting . . . . It's just the embarrassment,'" said Root.[277] Charges against Forde were dropped on March 6, 1967.[278] Root's attorney Morris Lavine, formerly counsel for Amsler, argued for dismissal on legal grounds and "humanitarian grounds,"

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268 "2 Indicted Sinatra Case Lawyers to Enter Pleas," *Los Angeles Times*, August 31, 1964, 22A.

269 Appellant's Opening Brief, *United States v. Root*, No. 20360 (9th Cir., filed November 29, 1965) 6n6 (citations to reporter's and clerk's transcripts omitted).

270 Indictment, *United States v. Root*, No. 34352-CR (SD Cal., filed December 9, 1964).

271 Ibid.

272 Ibid.

273 Ibid.

274 Appellant's Opening Brief, *United States v. Root*, No. 20360, (9th Cir., filed November 29, 1965), 13.

275 *Root v. United States* (1967), 386 U.S. 912, 87 S. Ct. 861, 17 L.Ed. 2d. 784.

276 Howard Hertel, "Gladys Root Weeps After Court Hearing," *Los Angeles Times*, December 12, 1967, C16.

277 Ibid.

278 Howard Hertel, "Gladys Root Weeps After Court Hearing," *Los Angeles Times*, December 12, 1967, C16. Forde died August 28, 1970 of an apparent heart attack while vacationing in Hawaii. "George A. Forde Dies: Sinatra Case Attorney," *Los Angeles Times*, September 9, 1970, 27.

because of Root's failing health.[279] On April 8, 1968, the indictment was finally dismissed by Judge Hall, with a concurrence of the U.S. attorney.[280]

"I'm just very happy. I knew I was innocent and that ultimately I would be exonerated," said Root.[281]

## FINAL YEARS

By the 1970s, Root was suffering financial and professional hardships.[282] In 1970, Root was assessed $125,000 in unpaid income taxes for the years 1959, 1960 and 1961.[283] As a result, the government seized real property and sold it.[284] She sold her Hancock Park mansion and moved to "less resplendent quarters."[285] She also moved her office to a "seedy — but still gold and purple — office in a crumbling building on Hill Street."[286] Apparently, Root also was "the subject of substantial litigation by her daughter."[287] It is possible that she would have faced State Bar discipline had she lived.[288]

In addition to financial and professional problems, her health began to fail in the late 1960s and 1970s. She broke her right hip in an automobile accident in June 1966, suffered a cerebral hemorrhage and stroke in

279 Ibid.

280 "Gladys Root Cleared in Kidnap Case Count," *Los Angeles Times*, April 8, 1968, OC-A12.

281 Ibid.

282 Eric Malnic & Karen Wada, "Gladys Towles Root Dies; Colorful Lawyer Was 77," *Los Angeles Times*, December 22, 1982, D4.

283 *Geiger v. Commissioner* (1969), 28 T.C.M. (CCH) 795, TCM (RIA) 69159 *affirmed sub nom. Root v. United States* (1974), 1974 U.S. Dist. LEXIS 6796; 74-2 U.S. Tax Cas. (CCH) P9758; 34 A.F.T.R.2d (RIA) 6091 at 5.

284 Ibid.

285 Malnic & Wada, *op. cit.*

286 Ibid.

287 See *People v. Jones* (1991), 53 Cal.3d 1115, 1132–33.

288 Root's partner, attorney David Brockway was disciplined by the State Bar in 1991 in connection with the case *People v. Jones* (1991), 53 Cal.3d 1115. Brockway was suspended from the practice of law for three months and placed on probation five years for conflicts of interest resulting from securing his fee by taking a mortgage on the client's home. Root was initially involved in the transaction. *Brockway v. State Bar* (1991), 53 Cal.3d 51, 59–65.

January 1967, and broke her left hip in August 1967 in a fall.[289] During her last years, she endured dialysis treatment three times a week.[290]

On Tuesday, December 21, 1982, Root — wearing all gold — appeared before Judge Peter Smith in the Los Angeles County Superior Court in Pomona where she was defending two brothers accused of sodomy-rape.[291]

She said, "Give me a few moments . . . I'm having trouble breathing." Then she collapsed on a courtroom bench.[292]

Root was rushed to Pomona Valley Hospital where she was officially pronounced dead of a heart attack.[293] She was buried at Forest Lawn Memorial Park, Glendale, California, on December 24, 1982.[294]

## CONCLUSIONS

Dawn Bradley Berry justifiably lists Root among *The Fifty Most Influential Women in American Law*.[295] Root is a legend, and her legend is the flamboyant lady lawyer from the society pages who devoted herself to helping the destitute and despised. The Circus Portia was the self-appointed, self-styled champion of human rights, taking cases other attorneys routinely turned down, working tirelessly for her clients.

Root was first a performer. Rather than the stage or the cinema, she chose to perform in the courtroom. Her court appearances, especially her trials, were carefully stage managed to garner attention for herself and to deflect it from her clients. Her eye-catching costumes were just that, costumes. At a time when women were very much a minority in the legal profession, she chose to stand out, rather than blend in. Of course, her clothing choice was a matter of personal taste, and she liked the attention she received. However, her clothing was also a form of advertising at a time when attorney advertising was forbidden, or at least discouraged. People

289 Hertal, "Gladys Root Weeps After Court Hearing," *op. cit.*

290 Perry M. Polski, "Gladys Root," *The Los Angeles Times*, January 3, 1983, C4.

291 Malnic & Wada, *op. cit.*

292 Ibid.

293 Ibid.

294 "Rites for Gladys Towles Root Stated," *Los Angeles Times*, December 22, 1982, OC-A7.

295 Dawn Bradley Berry, *The Fifty Most Influential Women in American Law* (Los Angeles: Lowell House, 1996) 157–67.

in Los Angeles recognized "The Lady in Purple" even when they did not know her personally or have reason to retain her services. Thus, whenever someone was arrested, he knew to call out, "Get me Gladys!"

Root did her job as a lawyer exceedingly well and it meant a great deal to her. She carried out her lawyer's oath to zealously represent her clients, even at great risk to herself. Many of the practices she began, such as employing investigators, are now common practice among the criminal defense bar. She used her femininity as a shield and a weapon in defending her clients. Her cross-examination of victims and witnesses discredited unfavorable testimony. She also used props, such as the fabled grandfather clock in the *Adron* case, in which she had the clock wheeled into the courtroom to demonstrate the hypnotic effect on the defendant of its ticking, "Shoot, Shoot, Shoot," to win an acquittal. And she used innuendo, such as the mysterious "Wes" in the *Irwin* case.

Because she was a woman, Root was shut out of the large, established law firms that existed in Los Angeles. Therefore, she turned to solo practice. Root became an expert defending accused sex criminals, at first by happenstance, and then because it was a niche that proved successful. Since very few other attorneys wanted to defend them, Root faced less competition for clients.

Root sought to benefit society at large with her legal work as did Clarence Darrow, Charles Houston, Jr., and Thurgood Marshall. Her brief in *Roldan v. Los Angeles County* hinted at larger societal issues, but the court's ruling in *Roldan* was based on a narrow, statutory interpretation. Thus, the Legislature was able to pass amendatory legislation to specifically ban Malay-white marriages within a month of the appellate court's decision being issued.

Root was a "career girl" at a time when few women were in the work force, and very few were in the legal profession. In 1955, when Root was at the height of her career, there were 387,385 lawyers in the United States, of whom only 5,036, or 1.3 percent, were women.[296] She used her position to assist and encourage other women entering the legal profession.

Root's large hats sat above a brilliant legal mind. California's jurisprudence and legal history are much richer and more colorful because of her.

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296 Lawrence M. Friedman, *American Law in the Twentieth Century* (New Haven: Yale University Press, 2002), 457.

# ANTI-CORRUPTION CRUSADE OR "BUSINESSMAN'S REVOLUTION"? —

## *An Inquiry into the 1856 Vigilance Committee*

BY DON WARNER*

## INTRODUCTION

In a work published during the year 2000, the noted California historian Doyce B. Nunis stated that "a judicious history" of the 1856 San Francisco Vigilance Committee "has yet to be written."[1] He had written the same in 1971.[2] It would appear that no one has publicly disagreed with Professor Nunis's opinion in the ensuing forty years.

This article is, by necessity, not a complete history of the Vigilance Committee. It will, however, examine in a judicious manner the facts pertaining to one central question concerning the Committee's existence and operations. That question is whether the Committee's actions conformed to the ostensible reason for which it was formed: to protect the citizens of

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1 Doyce B. Nunis, Jr., ed., Another View of the San Francisco 1856 Vigilance Committee: Robert George Byxbee's Letter to His Sister, June 1856 (Los Angeles: Zamorano Club ["Keepsake"], (2000), 5.

2 Doyce B. Nunis, Jr., ed., The San Francisco Vigilance Committee: Three Views [by] William T. Coleman, William T. Sherman [and] James O'Meara, 1856 (Los Angeles: Los Angeles Westerners, 1971), 9 [hereinafter "Three Views"].

San Francisco from a situation in which crime was rampant, and murderers were systematically going unpunished.

The methodology for this examination will be to use existing primary source material, produced by the Committee itself, to describe the Committee's actions as they pertain to the question of whether they served its ostensible purpose.

This is an important task because the Second, or Great, San Francisco Vigilance Committee, which controlled the city during the months of May through August 1856, was a major event in the early history of California. It can claim several superlatives. Although not the most deadly of the state's insurrections, it was the best organized, the longest-lived, and the most successful in its resistance to the established governments of the day. It was, and remains, the most controversial.[3]

The controversy is not about whether what the Committee did was an insurrection. All would agree — the Committee itself and those who opposed it, called the "Law-and-Order Party," and its defenders and detractors in the years since — that it was an insurrection, an open rebellion against an established government.[4] They differ, however, on whether the Committee's actions were justified under the circumstances.

It is necessary to disambiguate the term "justified" because there are several possible meanings. Actions may be justified legally, politically, or morally. The Committee's actions in deliberately hanging four men cannot be *legally* justified, under the criminal statutes in effect in California at that time.[5] Those actions may be justified politically, however, as acts

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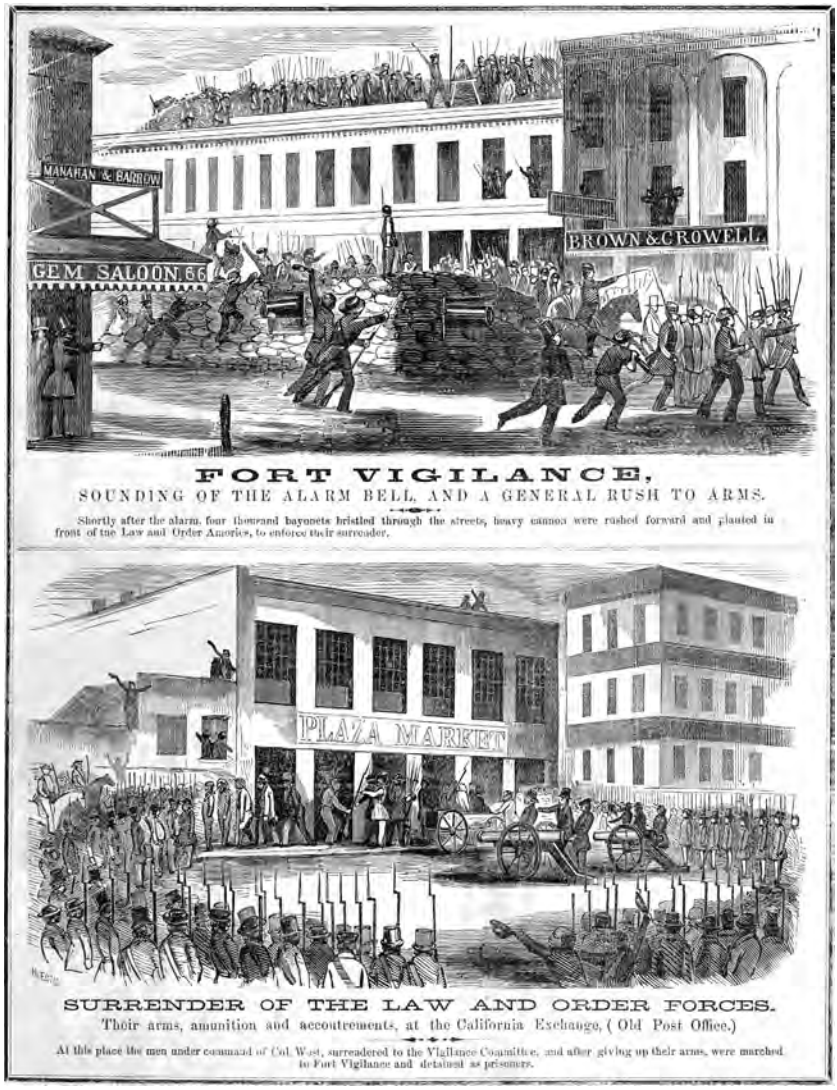
[3] It has also been the subject of a mountain of historical writing. In that vein, please note that this article is not a historiography of the Committee. That was done, well, in Professor Nunis's 1971 introduction to *Three Views*, and updated through 1985 in Robert Senkewicz, Vigilantes in Gold Rush San Francisco (Stanford: Stanford University Press, 1985), 203–31. No additional history of the Committee has appeared since then.

[4] Webster's Encyclopedic Unabridged Dictionary (1989), 738.

[5] Stats. 1850, Ch. 99. Sec. 13: "Murder is the unlawful killing of a human being with malice aforethought, either express or implied." Sec. 14: "Malice is that deliberate intention unlawfully to take away the life of a fellow creature, which is manifested by external circumstances capable of proof." Sec. 29: "Justifiable homicide is the killing of a human being in necessary self-defense, or in defense of habitation, property, or person, against one who manifestly intends or endeavors, by violence or surprise, to commit a felony."




(TOP) "**FORT VIGILANCE,**
SOUNDING OF THE ALARM BELL, AND A GENERAL RUSH TO ARMS. SHORTLY AFTER THE ALARM, FOUR THOUSAND BAYONETS BRISTLED THROUGH THE STREETS, HEAVY CANONS WERE RUSHED FORWARD AND PLANTED IN FRONT OF THE LAW AND ORDER ARMORIES, TO ENFORCE THEIR SURRENDER."

(BOTTOM) "**SURRENDER OF THE LAW AND ORDER FORCES.**
THEIR ARMS, AMMUNITION, AND ACCOUTREMENTS, AT THE CALIFORNIA EXCHANGE, (OLD POST OFFICE.) AT THIS PLACE THE MEN UNDER COMMAND OF COL. WEST, SURRENDERED TO THE VIGILANCE COMMITTEE, AND WERE MARCHED TO FORT VIGILANCE AND DETAINED AS PRISONERS."

California Letter Sheets 1850–1871. *Huntington Library, folder #112, UID: 48771.*

in rebellion or revolution, a rising of the people to overthrow a government that has acted against the people's interests. A right of rebellion was claimed at least as far back as the barons at Runnymede and, most notably, by the American patriots during the Revolution. Section 2 of article I of the original 1849 Constitution of California reflects that right, as it existed at the time of the Vigilance Committee.[6] The question remains, however, and it is not resolved by the language of the 1849 Constitution, whether the right may be exercised through extra-legal means. If it cannot, then the question of justification under the right of rebellion merges into the question of moral justification: whether the Committee's acts conformed to its claimed intent.

If the Vigilance Committee was organized and acted in order to reform the criminal justice system in San Francisco, because, due to corruption, it was allowing murderers to walk free, then the Committee's actions would seem to have been warranted, since judicial reform is the rationale that was offered on behalf of the Committee.

If, on the other hand, the true purpose of the Vigilance Committee was to carry out an extra-legal change of city government under the cover of an attempt at reform, justification would be lacking.

However, a strict dichotomy such as that just stated is inevitably, and quite properly, subject to several caveats. Two seem especially important.

First, what is meant by the term, "the Vigilance Committee?" The organization had within its membership several thousand men, and it remained in existence, and in control of San Francisco, for just one week shy of three months. Was it so monolithic, so centrally controlled, that one may with confidence impute a single, discreet motive for its actions? Or was it loosely enough organized that the various parts or factions within it may have been acting in accordance with differing purposes?

The second question is related to the first. Given the relative longevity of the Committee's existence, and the tumultuous nature of the events that unfolded during that time, can a single motive be imputed when circumstances may have changed so much that ascribing the same motive to later action may not be relevant?

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6 "All political power is inherent in the people. Government is instituted for the protection, security, and benefit of the people; and they have the right to alter or reform the same, whenever the public good may require it."

This question is of fundamental importance to the inquiry set forth herein. As will be described in detail below, one of the Committee's most influential detractors, then Militia general and later General of the U.S. Army William T. Sherman, seemed to concede that the actions taken by the Committee during the first week of its existence, principally the execution by hanging of two men, James Casey and Charles Cora, may have been necessary in order to forestall mob violence sparked by Casey's shooting of a popular newspaper editor. In essence, the Vigilance Committee "got out ahead of the mob" and removed the reason for the intense public feeling that, otherwise, might have gotten out of hand.

But what, Sherman writes, about the ensuing ten weeks? Should not the Committee have disbanded, since its work was done with regard to the incident that ignited the populace? Moreover, what do the actions taken over the latter ten weeks say about the Vigilance Committee's real purpose? This question seems to be at the heart of the controversy over the Committee's motive that has continued through 155 years.

Keeping those two questions in mind, this article will investigate the controversy over the justification of the Vigilance Committee's actions, trying to replace opinion with facts, obtained from primary source materials.

The methodology of the investigation will be revealed in the organization of this article.

Following this Introduction, Section I will set forth a brief description of the events that led to the Vigilante Committee's formation, its actions while it was in power, and its disbanding. This is intended to orient the reader who has not actively studied the Committee and set the context for the issue to be discussed herein. It is not intended, as stated above, to be either a complete history of the Committee nor a historiography of writings about it.

Section II will begin the actual investigation by looking at the writings of two men who were major actors in the events described — William T. Coleman, the president of the Vigilance Committee, and Sherman, one of his principal antagonists—as well as James O'Meara, a journalist who was present in the city during the Vigilantes' reign. These three accounts were included in the Los Angeles Westerners' *Three Views*, which

was scrupulously edited by Nunis.[7] Thus, they have reliability. They also serve to establish the context for the actual Vigilante documents described and discussed in the following section.

Section III delves into the most primary of all primary sources, manuscripts in the marvelous collection of Vigilante Committee documents held by the Huntington Library in San Marino, California. Portions of those manuscripts provide evidence of the day-to-day activities of the Committee and its agents. Some of this evidence is salient to the question of the Vigilance Committee's motivation. The descriptions of these materials herein are detailed and extensive, because the story that they tell gains power from the details.

A final evidentiary section, number IV, deals with the issue of trial records from the period. This record is regrettably sparse, because all of the official records of the San Francisco courts were destroyed in the great earthquake and fire of April 1906. There are, however, records of a sort, of the five capital trials held by the Vigilance Committee itself. More importantly, there is a narrative of the court trial of Charles Cora, apparently prepared during, or concurrently with, the trial itself. This narrative provides the only available insight into what actually happened in the criminal courtrooms in the years just before the organization of the Committee.

Section V will be a summary of the evidence as discussed, and a statement as to the author's conclusion concerning the controversy about justification: Was it a valid effort at judicial reform, or was it, in essence, a political coup?

## I. OVERVIEW OF THE VIGILANCE COMMITTEE

The immediate antecedent of the 1856 Vigilance Committee was the Committee of 1851. It arose in response to the depredations of a number of gangs, many of whose members were former convicts who had immigrated from Australia.[8] The gangs developed the technique of setting fires in

[7] Coleman's and O'Meara's pieces are presented unedited in *Three Views*; Sherman's had been edited previously — the edited portions are returned to the text in an additional section.

[8] Mary Floyd Williams, History of the San Francisco Vigilance Committee of 1851: A study of social control on the California frontier in the days of the gold rush (Berkeley: University of California Press, 1921), 61–72, 121–24, 179.

order to loot the burned buildings. On several occasions large parts of the gold rush city had burned as a result.[9] The 1851 Committee eventually executed four alleged villains and exiled many others from San Francisco.[10] One of its presidents was the merchant and shipping magnate William T. Coleman.[11]

A few years later, in the mid-1850s, tensions in San Francisco were again high. A series of market panics and bank failures had contributed to the unrest.[12] A veteran of one of those failures, a man who styled himself James King of William (because there were too many "James Kings" in his hometown) left banking to found a newspaper, the *San Francisco Bulletin*.[13] In the paper, he began a strident crusade against corruption in city government. Much of his vitriol seemed to be aimed at the wing of the ruling Democratic Party led by U.S. Senator David Broderick.[14] In addition, some of King's editorials criticized members of the Irish immigrant population, and the Catholic Church.[15]

King's crusade was supported by a feeling among the general public that murderers were not being published under the existing legal system.[16]

One member of the government, and of Irish extraction, was James Casey, a San Francisco county supervisor who had migrated to the city from New York.[17] Casey published his own newspaper, a weekly with smaller circulation, and less importance, than King's *Bulletin*.

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9 *Id.* at 164, 179, 181, and 239.

10 *Id.* at 208–17, 270–71, 293–302.

11 *Id.* at 191.

12 Hubert Howe Bancroft, Popular Tribunals, vol. II, (San Francisco: The History Co., 1887), 22–23 [hereinafter Popular Tribunals].

13 *Id.*

14 *Id.* at 26–27.

15 R.A. Burchell, The San Francisco Irish, 1848–1880 (Berkeley: University of California Press, 1980), 128–29.

16 "Although a thousand homicides were committed in San Francisco between 1849 and 1856, only one legal execution took place." James Scherer, "The Lion of the Vigilantes" William T. Coleman and the life of old San Francisco (Indianapolis, New York: The Bobbs-Merrill Co., 1939), 152. This received wisdom is repeated in many works about the period, although 1/1000 is the most extreme fraction used. Nonetheless, the numerator is always very small, and the denominator very large.

17 Three Views, *supra* note 2, at 92–93.

In November 1855 an incident occurred which brought the public temper in the city close to the boiling point. William Richardson, a federal marshal, was shot to death by a small-time gambler, Charles Cora.[18] When Cora was tried for murder in January of 1856, the jury hung, unable to reach a verdict.[19] Cora remained in the San Francisco jail, awaiting a retrial. James King demanded the formation of a new Vigilance Committee to redress the murder of Richardson by Cora.[20]

By this time there had been several threats on James King's life. He seemed to court them. At one point, in an editorial, he wrote: "Mr. Selover, it is said, carries a knife. We carry a pistol. . . . We pass every afternoon, at about half-past four to five o'clock, along Market Street from Fourth to Fifth Street. The road is wide and not much frequented as those streets farther in town. If we are to be shot or cut to pieces, for heaven's sake let it be done there."[21]

In the spring months of 1856 King's crusade thundered on in the pages of his paper.[22] Within it developed a feud between him and Supervisor Casey, carried out mainly through editorials in their newspapers. In May, King stated that Casey had once resided in Sing Sing Prison back in New York. Though true, the revelation enraged Casey, who demanded but was denied a retraction.[23]

In the late afternoon of May 14, 1856, Casey accosted King at the corner of Washington and Montgomery Streets. He said something to King; witnesses (of whom there were many) differed on what was said. Then Casey raised a revolver and fired a single ball into the left side of King's chest.[24]

King was taken into a nearby building and quickly received medical attention.[25] By nightfall Casey was incarcerated in the San Francisco City Jail, an institution overseen by Sheriff David Scanell, a member of Casey's political faction and another object of King's wrath. Also resident in the jail was Charles Cora, still awaiting retrial.[26]

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18 *Id.* at 79–84.

19 *Id.* at 84.

20 In a coy manner. *See* William H. Ellison, A Self-Governing Dominion: California, 1849–1860 (Berkeley: University of California Press, 1950), 236–39.

21 San Francisco Bulletin, December 6, 1855.

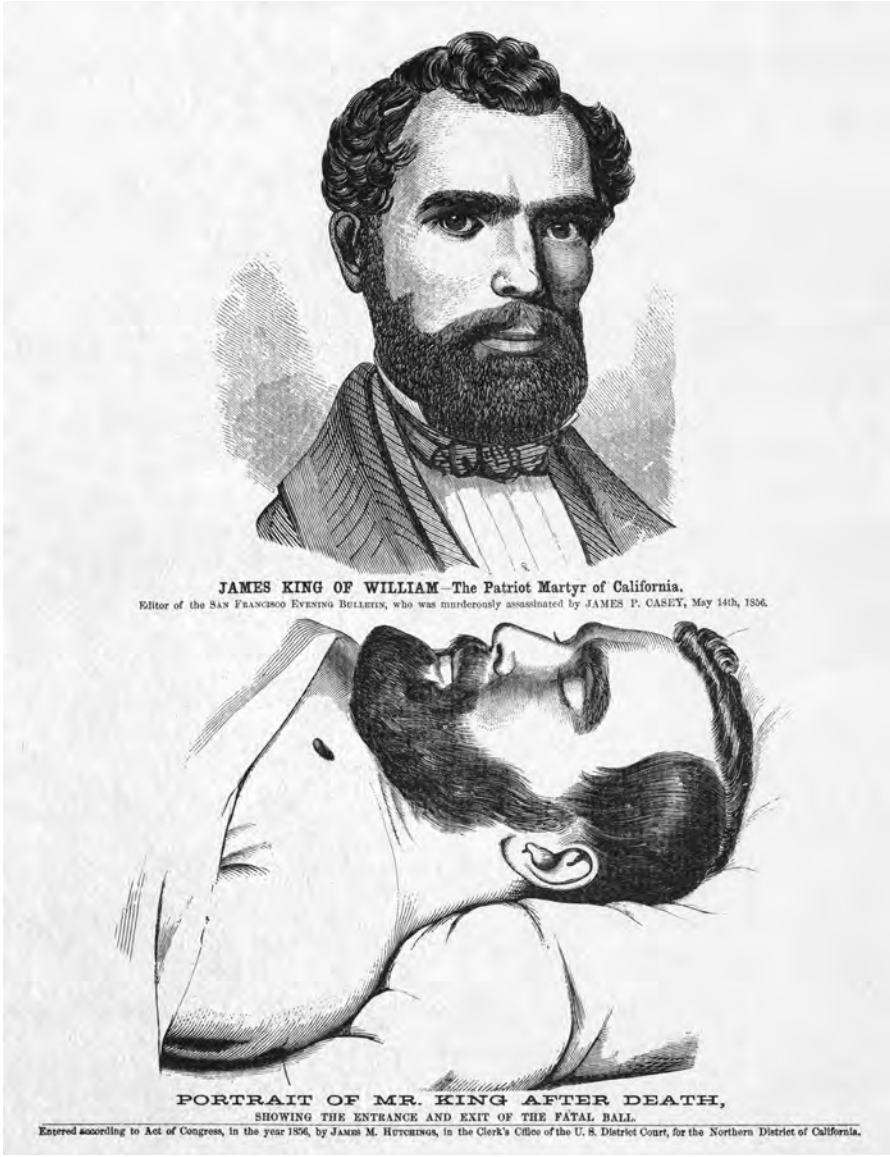
22 Ellison, *supra* note 20, at 237–38.

23 *Id.*

24 *Id. See also* Three Views, *supra* note 2, at 85.

25 *Id.*

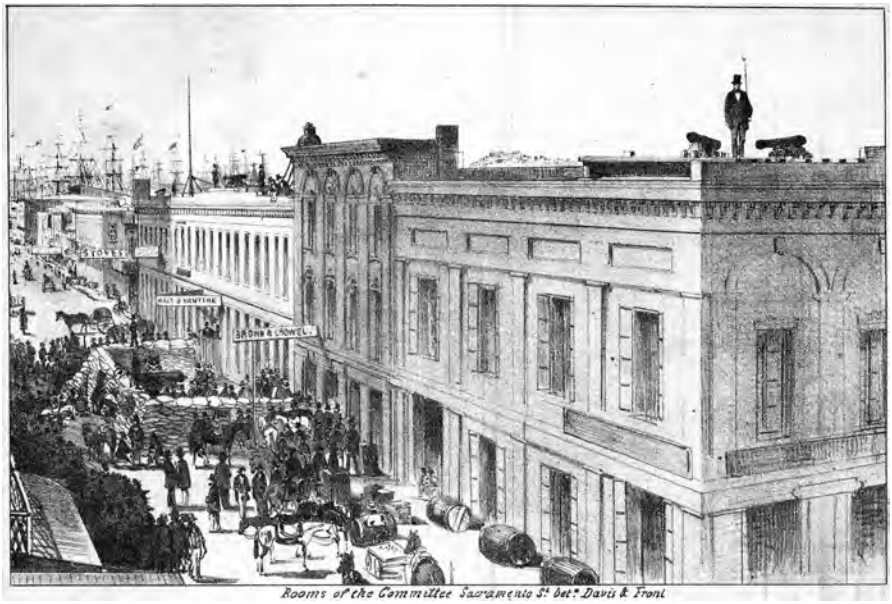
26 Three Views, *supra* note 2, at 85; Ellison, *supra* note 20, at 238–39.




(top) "James King Of William —
The Patriot Martyr Of California.
EDITOR OF THE SAN FRANCISCO EVENING BULLETIN, WHO WAS MURDEROUSLY ASSASSINATED BY JAMES P. CASEY, MAY 14TH, 1856."

(bottom) "Portrait Of Mr. King After Death,
SHOWING THE ENTRANCE AND EXIT OF THE FATAL BALL."

*Joseph Armstrong Baird,* California's Pictorial Letter Sheets, 1849–1869 *(San Francisco: David Magee, 1967), Catalogue 120.*




**"Rooms of the Committee — Sacramento St. betn. Davis & Front"**

California Letter Sheets 1850–1871. *Huntington Library, folder #7a, UID: 48671.*

Word of the shooting spread quickly. The city was in an uproar. A few men who had been prominent in the 1851 Committee met, and under the leadership of Coleman, issued a call for a new Vigilance Committee.[27]

The tension between the two possible motivations for the Committee's work emerged immediately upon its formation. The Vigilance Committee's Constitution, adopted during the second day of its existence, stated that the organization's purpose was to ensure that "no thief, burglar, incendiary, assassin, ballot-box stuffer, or other disturber of the peace, shall escape punishment, either by the quibbles of the law, the insecurity of prisons, the carelessness or corruption of the police, or a laxity of those who pretend to administer justice. . . ."[28]

However, in the same document, the Committee recognized the potential for the other argument, that a coup might be its aim, by stating this

[27] Ellison, *supra* note 20, at 239–40; *see also* Three Views, *supra* note 2, at 32, where Coleman himself writes, "I finally consented to take charge and organize the committee, provided I should have absolute control — authority supreme."

[28] *See* Popular Tribunals, *supra* note 12, at 112.

disclaimer in Article Seventh, "That the action of this body shall be entirely and vigorously free from all consideration of, or participation in the merits or demerits, or opinion or acts, of any and all sects, political parties, or sectional divisions in the community. . . ."[29]

Within two days after the shooting of James King a large number of men had enlisted as members of the Committee, military units were being formed, and officers chosen.[30] (No exact count of the eventual total membership exists, but the figure most commonly cited for the size of the Committee's "military companies" is about five thousand men.[31])

J. Neely Johnson, the governor of California, who had been elected on the Know Nothing ticket the year before, came to the city from Sacramento and entered into discussions with Coleman and the Vigilantes' Executive Committee.[32] Johnson had recently appointed William Tecumseh Sherman, a San Francisco banker who was a West Point graduate, to be the commanding general of the local division of the California Militia.[33] Sherman sat in on Neely's discussions. To his dismay the governor acceded to the Vigilantes' demand that they be allowed to place their own guards in the jail, alongside the city's guards.[34]

Sherman began to try to call men into the Militia and to arm them. His recruiting had some success, but the Vigilance Committee's efforts were bringing in more men, and faster.[35] A loosely organized anti-Vigilance faction emerged, called the "Law and Order Party."[36] Many of the more prominent members of this group were lawyers and judges.[37]

The next major event occurred a few days after Johnson and Coleman had made their joint guarding agreement, and after the Committee had reached a sufficient level of organization, including the securing of a base of operations on Sacramento Street, called "Fort Vigilance" (popularly

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29 *Id.*

30 Ellison, *supra* note 20, at 240.

31 Popular Tribunals, *supra* note 12, at 93; Three Views, *supra* note 2, at 85, 93.

32 Three Views, *supra* note 2, at 51.

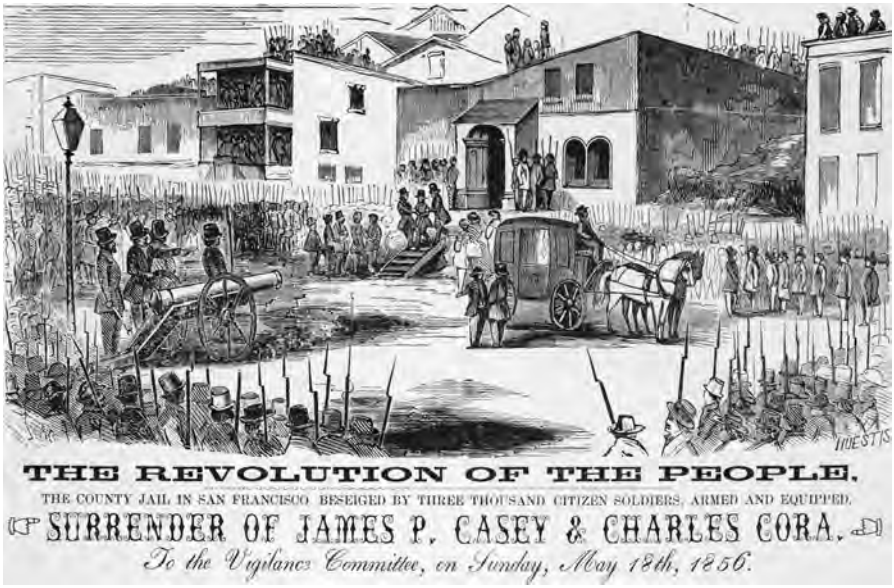
33 *Id.* at 50.

34 *Id.* at 52.

35 *Id.* at 50.

36 *Id.* at 86.

37 *Id.* at 33.




"The Revolution Of The People.
THE COUNTY JAIL IN SAN FRANCISCO BESIEGED BY THREE THOUSAND CITIZEN SOLDIERS, ARMED AND EQUIPPED. SURRENDER OF JAMES P. CASEY & CHARLES CORA. TO THE VIGILANCE COMMITTEE, ON SUNDAY, MAY 18TH, 1856."

*Joseph Armstrong Baird,* California's Pictorial Letter Sheets 1849–1869 *(San Francisco: David Magee, 1967), Catalogue 214.*

known as "Fort Gunnybags").[38] The Vigilantes' military force, numbering by most accounts about twenty-five hundred troops, marched to and surrounded the city jail.[39] The release of Casey *and* Cora into the Committee's custody was demanded, and the two men were taken to Fort Gunnybags.[40]

Neely Johnson issued a proclamation declaring the Vigilance uprising to be an insurrection and calling for it to disband. The Executive Committee ignored the proclamation and many Vigilance members derided it.[41]

[38] An empty warehouse was occupied and fortified against attack by placing around it sand-filled bags to a height of about four feet. The Committee also secured some cannon, which were placed in gaps in the gunnybag fortification.

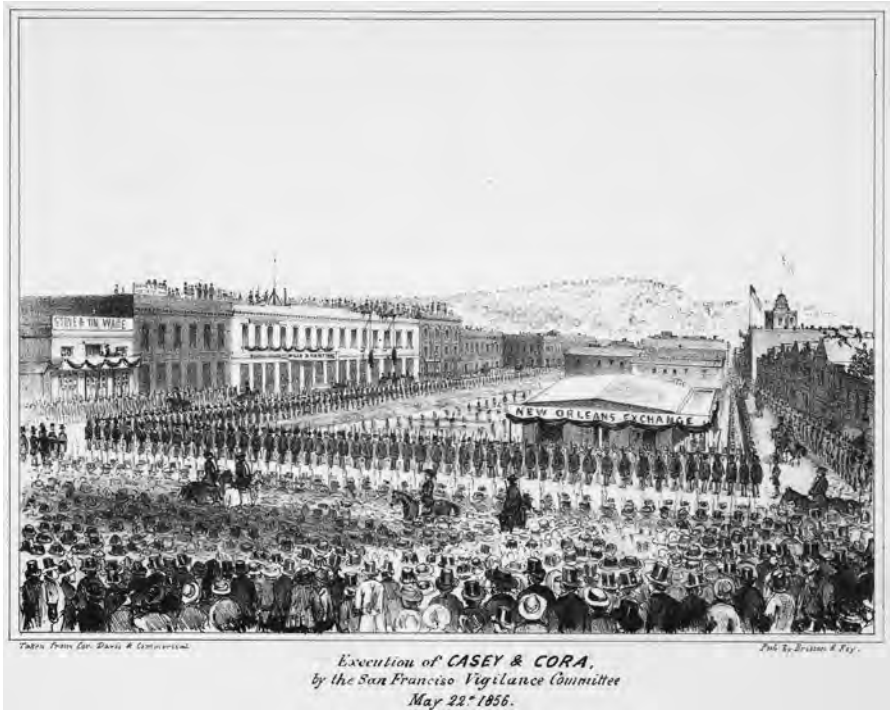
[39] Ellison, *supra* note 20, at 245; Three Views, *supra* note 2, at 89.

[40] *Id.* at 245.

[41] Popular Tribunals, *supra* note 12, at 296–98.

In the meantime King, under doctors' care, seemed to rally. Then his condition quickly deteriorated and he died.[42]

Soon after they were immured in Fort Gunnybags, Casey and Cora were tried before a jury consisting of the Vigilante Executive Committee, and quickly found guilty of murder. The two were sentenced to hang.[43] On May 22, they were hanged from scaffolds built out from the upper




"Execution of Casey & Cora,
by the San Francisco Vigilance Committee May 22d. 1856.
[taken from cor. Davis & Commercial — pub. by Britton & Rey.]"

*Henry H. Clifford,* California's Pictorial Letter Sheets 1849–1869 *(San Francisco: Castle Press, 1980).*

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42 One of the attending physicians, Beverly Cole, later testified that the immediate cause of King's death was not the gunshot wound, but poor medical treatment. Cole was himself a member of the Vigilante Executive Committee. *See* George D. Lyman, *The Sponge. Its Effect on the Martyrdom of James King of William*, in Annals of Medical History (1928), 460–79; *see also* Popular Tribunals, *supra* note 12, at 113.

43 Popular Tribunals, *supra* note 12, at 233.

windows of Fort Gunnybags, as King's funeral cortege wended its way to Lone Mountain Cemetery.[44]

There followed a period of less dramatic activity on the part of the Vigilance Committee. It primarily occupied itself in compiling blacklists of candidates for exile from the city and in deporting those it selected.[45] At the same time the Committee's opponents increased their efforts to mount a countervailing force. Sherman had thought that he had received a guarantee of arms for his troops from U.S. Army General John Wool, the commandant at Benecia, the nearest Army facility. Then he was told by Wool that only President Pierce could authorize the transfer of arms from the federal to the state authorities. In other words, the answer was no. Sherman resigned his command.[46]

A new and powerful personality entered the scene on behalf of Law and Order. David Smith Terry, a justice of the California Supreme Court and a prominent politician from the Stockton area, tried to assist in obtaining arms for General Volney Howard, General Sherman's successor. The entry into the city on June 21 of a small shipload of arms led to a melee in the streets. In the course of this, Justice Terry stabbed Vigilance Committee Sergeant Sterling Hopkins in the neck.[47] Hopkins, like King before him, went under medical care, and Terry was captured by the Vigilance Committee and detained in Fort Gunnybags.[48] In the immediate aftermath, the Committee's military wing descended on all the Militia armories in and around the city, capturing them and seizing whatever arms they may have held.[49]

Contemporary sources reported that the Executive Committee was not happy to have caught Judge Terry. As Coleman wrote in later years, the Terry incident was "the most unexpected and severest task of the year."[50]

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44 Ellison, *supra* note 20, at 246–48.

45 As the discussion in Section II will set forth in detail, this is a period that is critical to the inquiry herein. At this point the Vigilance Committee had acted to satisfy "the mob" through its speedy capture, trial, and execution of Casey and Cora. *See* Ellison, *supra* note 20, at 248.

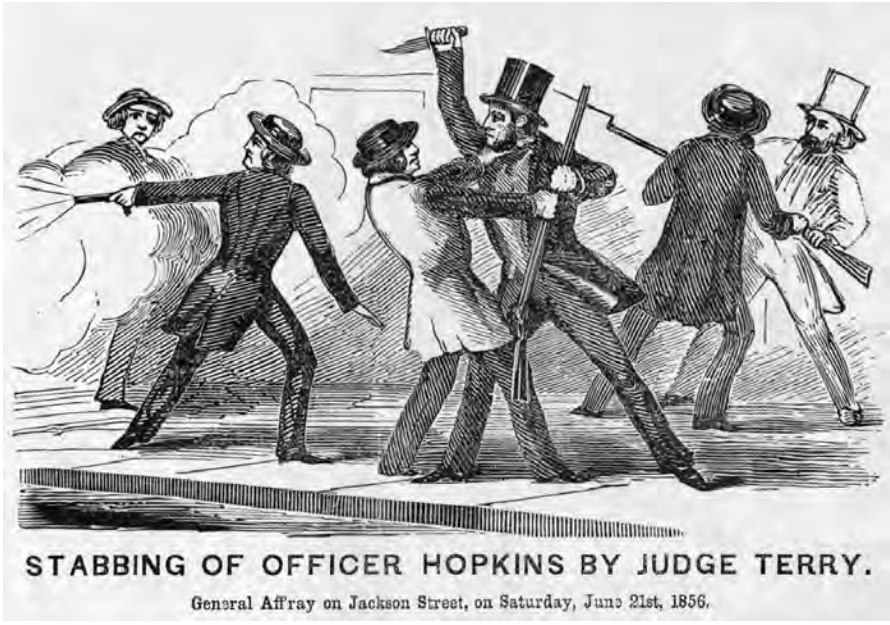
46 Three Views, *supra* note 2, at 58–59; Ellison, *supra* note 20, at 251–53.

47 Ellison, *supra* note 20, at 256–57.

48 *Id.* at 258.

49 Three Views, *supra* note 2, at 60.

50 *Id.* at 37.




"Stabbing Of Officer Hopkins By Judge Terry.
GENERAL AFFRAY ON JACKSON STREET, ON SATURDAY, JUNE 21ST, 1856."
California Letter Sheets 1850–1871. *Huntington Library, folder #112, UID: 48771.*

Terry was a high state official with a great deal of political support outside of the city. But the citizenry, encouraged by King's *Bulletin*, were adamant that, as Sherman put it in a letter, "if Hopkins died, Judge Terry would be hung."[51]

The Executive Committee began to try Terry, very slowly. Happily for all, during the course of the trial, Hopkins recovered.[52] The choice before the Committee then became not whether to hang Terry, but whether to send him into exile. In the end, on July 24, the Committee convicted Terry on the charges before them, and then released him.[53]

During the period of Terry's captivity and trial the Committee also tried, convicted, and hanged two more accused murderers, Joseph Hetherington and Philander Brace.[54]

51 Letter, W.T. Sherman to H.S. Turner, July 2, 1856.
52 Three Views, *supra* note 2, at 37.
53 *Id.* at 37; Ellison, *supra* note 20, at 260–62.
54 *Id.*

On August 18, a few weeks after Terry's release, the Committee declared the civic emergency at its end and their work completed. A grand parade was held, and the Committee formally disbanded.[55]

Four months after the disbandment, at the next round of elections, a new political party, called the "Peoples' Party," appeared to contest for positions in the city/county government. It was composed entirely of former Vigilance Committee officers, members, and adherents. The Peoples' Party was enormously successful in that election, and in succeeding elections over the next decade.[56]

## II. ACCOUNTS BY THE TWO PRINCIPAL ANTAGONISTS AND ANOTHER CONTEMPORARY

Of great value to the historian of the Vigilance Committee, and important in setting the scene for the information contained in the Huntington manuscripts, are accounts written by two men who were present in San Francisco during the reign of the Committee.

The two men are William Tell Coleman, the only president of the 1856 Committee, and William Tecumseh Sherman, who was in charge of the local division of the California Militia. By his position, Sherman was the principal antagonist of the Committee, and of Coleman, during the critical early days of the Committee's organization and activity.

The most important parts of these witness accounts are reproduced in Nunis's edition of *Three Views*.[57]

Sherman's contribution is a series of letters written contemporaneously with the events reported to correspondents "back in the States." All of these letters were originally published in 1891 in *Century Magazine* soon after Sherman's death.[58] Coleman's piece is a discussion of all three of the Vigilance Committees of which he was a leader, those of 1851, 1856, and

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55 *Id.*

56 Ellison, *supra* note 14, at 264–67.

57 The third "view" is a piece written by James O'Meara, who styled himself "A Pioneer California Journalist," which he was.

58 Three Views, *supra* note 2, at 18.

1877. It was published the month before Sherman's letters, in the same magazine.[59]

### *William T. Sherman*

Sherman's attitude was, of course, staunchly anti-Vigilante, and Coleman's the opposite. In 1856 Sherman had been the outsider, running a branch of a St. Louis bank, maligned because of his support for "law and order."[60] In the next decade, he took Atlanta, marched to the sea, accepted the surrender of the last significant Confederate army, and fought the Plains Indians, becoming only the second general in the history of the U.S. Army (after Ulysses S. Grant) to achieve the rank of General of the Army.[61]

Here is Sherman, writing to his father-in-law, the Hon. Thomas Ewing, on June 16, 1856, shortly after he had resigned as general of the militia:

> You already know of the hanging of Casey and Cora by the Vigilance Committee. When that was done we all supposed the Vigilance Committee would have adjourned and things be allowed to resume their usual course, but instead, they hired rooms in the very heart of the city, fortified them, and each day the papers announced some act that looked like a perpetuation of their power. . . .[62]

On July 2, reporting on the Terry capture, Sherman wrote to his friend and business partner, Henry S. Turner:

> At the same time all the armories of the State Volunteers were surrendered [to the Vigilance Committee], giving up their arms and accoutrements — a regular *coup d'etat a la Louis Napoleon*. Thus from that day the State of California ceased to have any power to protect men here in defense of her sovereignty. . . .[63]

Finally, a letter to his brother, U.S. Representative (later Senator) John Sherman, sent on August 3, after Hopkins had recovered, but before the release of Terry. Sherman reviewed all of the events of the summer:

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59 *Id.*

60 *Id.* at 59.

61 William Tecumseh Sherman, Memoirs of General W.T. Sherman, v. II (New York: D.A. Appleton and Co.: 2nd ed., 1886).

62 Three Views, *supra* note 2, at 55.

63 *Id.* at 60.

> For three months we have been governed by a self-constituted committee who have hung four men, banished some twenty others, arrested, imprisoned, and ironed many men, and who now hold a judge of the Supreme Court in their power, the authorities being utterly unable to do anything. . . .

Later in the same letter: "If there is not an entire revolution and withdrawal from the Union, then all these acts of violence must come up before our courts on action for civil damage. . . ."[64]

Thus Sherman's views, at the time, of the Vigilance Committee. His *Memoirs*, published years later in 1875, gives very little space to the Vigilance episode, and claims that he was drawn into his involvement by his "reluctant consent."[65] Summarizing his thoughts, he wrote of the Committee:

> As they controlled the press, they wrote their own history, and the world generally gives them the credit for having purged San Francisco of rowdies and roughs; but their success has given great stimulus to a dangerous principle, that would at any time justify the mob in seizing all power of government; and who is to say that the Vigilance Committee may not be composed of the worst, instead of the best elements of society?[66]

### *William T. Coleman*

Coleman's contribution to *Century Magazine*, as reprinted in *Three Views*, is surprisingly brief, considering the importance of the 1856 Vigilance Committee as a part of his résumé, and considering the vehemence of his prior disagreement with Sherman, or at least the Sherman of the 1875 *Memoirs*. That disagreement is expressed in another reprint in *Three Views*, a photocopy of a piece that appeared in the San Francisco *Morning Call* of April 20, 1884. This article is titled, "The Vigilantes of '56 — William T. Coleman's Record of the Early Days," but it is written in the form of an

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64 *Id.* at 50.

65 William Tecumseh Sherman, Memoirs of General William T. Sherman by Himself, v. II. (New York: D.A. Appleton and Co., 1875), 131.

66 Three Views, *supra* note 2, at 61.

interview with, and quotations from, Coleman, and in a style that is highly similar to that of Hubert H. Bancroft.[67]

The *Morning Call* piece, published nine years after Sherman's *Memoirs*, cites a "manuscript" by Coleman as follows: "In his manuscript, Mr. Coleman speaks in the pleasantest manner of General Sherman as a gentleman of unquestioned honor, but declares that his published account of [the Coleman/Sherman/Neely Johnson meeting regarding placing Vigilante guards in the jail], and of vigilante matters in general, is the incorrect result of a defective memory."[68]

But seven years later, when he was asked to contribute to *Century Magazine* an account of the Vigilance Committees of 1851 and 1856, and a third, in 1877, called the "safety committee," Coleman made no mention of Sherman. Whenever an event is described in which Sherman took part, he is included only in the collective descriptive "several gentlemen."[69]

Coleman's recollections were printed in the magazine the month before Sherman's letters appeared. Given the strong anti-Vigilante nature of Sherman's descriptions and opinions, it is surprising that Coleman did not take the opportunity to write again and rebut them. Perhaps the magazine did not provide him with that opportunity.

In any case, these are some of the things that Coleman *did* say in his description of the 1856 Committee and its works.

He was, also, a reluctant participant. Coleman recounts what happened when he went to Portsmouth Plaza, San Francisco's town square, on the evening after Casey's shooting of King: "Members of the old committee [of 1851] sought me in numbers and urged me to organize a new committee. I declined these importunities; several meetings were held in different places, and urgent appeals were made not to allow a repetition of the failure of organization as was done a few months previously when Cora killed Richardson. The result of all was that I finally consented to take charge and organize the committee, provided I should have absolute control — authority supreme."[70]

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67 *Id.*

68 *Id.* Note 2, Appendix I.

69 *Id.* note 2, at 31–39.

70 *Id.* at 31–32.

Nothing in the rest of his account indicates that he ever relinquished that supreme authority.

Coleman described the constituent members of the Vigilance Committee in its early days, and its principal antagonists. He ascribes their enmity to the earlier criticisms made by James King of William in his newspaper, the *Bulletin*:

> He had severely, though in the main justly, castigated that portion of the press that upheld or apologized for excesses or irregularities in political affairs. He had aroused a Roman Catholic influence hostile to himself by ill-advised strictures on one of their clergy. He had invited the bitter animosity of a large portion of the Southern element. . . . All of these elements, separately and combined, were inimical to King, who had . . . made himself many bitter personal enemies. Thus, the committee was assailed as his champion by all these parties, when in fact it was not such, but was merely the champion of justice and the right. . . .[71]

But Coleman goes on to add another layer to his description of the Vigilance Committee's adversaries. "With the opposition were some of the best people of the country. Their party and friends had all the city and State offices; they had with them the law and most of the lawyers, and all of the law-breakers."[72]

A description of all the meetings and maneuvers that led to the capture of Casey and Cora and their imprisonment in Fort Gunnybags leads to "[t]he trial of Casey and Cora [which] was soon begun and carried on with all the attention to legal forms that marked the trials of the first committee. No outside counsel were permitted,[73] but all witnesses desired by the prisoners were summoned and gave their testimony in full. Both were convicted of murder in the first degree and sentenced to be hanged."[74]

What of the period directly after the hangings? Sherman decries the Committee's failure to disband at that point, its principal task having been

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71 *Id.* at 32.

72 *Id.* at 33.

73 N.B.: this means that no counsel were permitted who were not, themselves, members of the Vigilance Committee.

74 Three Views, *supra* note 2, at 35–36.

completed. Coleman does not indicate that such a move was even contemplated. He describes the delegation of three members of the Committee sent to meet with Governor Neely Johnson and San Francisco's mayor, with a "hands off" message: "that we did not encroach on the regular execution of law or the maintenance of order, provided the laws were enforced or carried out; . . ."[75]

"The next important work," Coleman writes, "was the action to be taken with regard to notorious ballot-box stuffers and other desperate characters. They were a curse to the country."[76] He describes the debate as to what to do with the desperate characters once they were identified and prosecuted. It is decided that execution is too harsh — they must be banished from the city "with a warning never again to return under pain of death."[77]

How to identify the proper subjects of this treatment? "[A] black-list was made of all these notorious characters."[78] After the blacklist was made, "evidence was collected, and orders were soon given for the arrest of these men. . . ."[79]

And that is all. Coleman describes no investigation with regard to whether the courts had actually released serious criminals unpunished, or who, indeed, such malfeasants might be. The blacklist process occupied the Committee for another few weeks. Finally on June 18, a month after its formation, the Committee was ready to consider disbanding, when the

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75 *Id.* at 36. This message brings up the question of what the Committee actually did to see how well the laws were being carried out. As discussed below, the manuscript records of the Vigilance Committee maintained by the Huntington Library provide assistance in answering that question.

76 *Id.* at 37. At just this point, on June 9, 1856, the Committee published an "address" to the people of California. This document, several thousand words in length, offers the Committee's justifications for their actions to that date, and those that they were about to undertake. Its most salient sentence, for the purpose of this study, was the following: "The Committee of Vigilance believe that the people have intrusted [sic] to them the duty of gathering evidence, and, after trial, expelling from the community those ruffians and assassins who have so long outraged the peace and good order of society, violated the ballot-box, overridden law, and thwarted justice." POPULAR TRIBUNALS, *supra* note 12, at 322. The entire text of the "address" supports the inference that the Committee based its belief in what the people wished on the Committee's own popularity in the city.

77 *Id.*

78 *Id.*

79 *Id.*

incident involving Justice David Terry occurred, and the long coda of the Terry imprisonment, trial, and release went forward. In the interim, as Coleman briefly mentions, the Committee's last two murderers, Hetherington and Brace, who had been scooped up in the course of the blacklist exercise, were hanged.[80]

Coleman describes the eventual disbanding, on August 8, 1856, and adds this final comment:

> The conclusion of the Vigilance Committee of 1856 brought a complete revolution, politically and financially. At the general election occurring soon after, the old political regime with its retainers was retired. . . . A new era followed; the "people's" party swept everything before them and gave the city the delightful novelty of an honest, nonpartizan [sic], and economical administration, which continued for about nine years.[81]

The two entries in *Three Views* are the only writings of Coleman that relate directly to the question examined here. Much was written *about* him, including a full-scale biography, "*The Lion of the Vigilantes*" *William T. Coleman*, by James A.B. Scherer (1939). This book devotes 74 of its 315 pages to the 1856 Committee and Coleman's role in the direction thereof, but the quotations of Coleman's words found in those pages are all from secondary sources.[82]

### *James O'Meara*

James O'Meara, billing himself as "a Pioneer California Journalist," published in 1887[83] a pamphlet of 57 pages titled, "The Vigilance Committee

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[80] *Id.* at 37–39.

[81] *Id.* at 39.

[82] There are, of course, many biographies of Sherman, but, not surprising in view of his immense *curriculum vitae*, little attention is paid to the San Francisco era. The shining exception is *William Tecumseh Sherman: Gold Rush Banker* by Dwight L. Clarke (San Francisco: San Francisco Historical Society, 1969), but its quotations of Sherman are from the same letter sources described above, as well as from the *Memoirs*.

[83] James O'Meara, The Vigilance Committee of 1856 by a Pioneer California Journalist (San Francisco: James A. Barry, 1987), published within a year of both Bancroft's and Royce's works, and four years before Coleman published his piece in *Century Magazine*.

of 1856."[84] Though it was not published in a newspaper, the work is in a journalistic style, of the highly opinionated sort typical of the nineteenth century in America. O'Meara did not take an active part either for or against the Vigilance Committee, but from the text of his work, clearly he disapproved of it.[85]

With regard to the central question addressed in this article, O'Meara is direct and forceful in his opinion, and he adduces facts to back it up.

> First, as to the cause or pretence for the organization of the Vigilance Committee: It is declared by its ex-members and supporters, or apologists, that it was necessary for the reason that the law was not duly administered; that the Courts, the fountains of justice, were either corrupted or neglectful of their duties; that juries were packed with unworthy men in important criminal cases, that there were gross frauds in elections, by which the will of the people was defied and defeated. . . .[86]

As splendidly as O'Meara sets up these pro-Vigilante arguments, he then proceeds to knock them down with facts that he asserts he knows first-hand:

> It is not true that the Courts were corrupt, neglectful, or remiss. Judge Hager presided in the Fourth District Court, and his integrity and judicial qualifications, or judgments, have never been questioned or impeached. Judge Freelon presided as County Judge; the same can be remarked of him. There was no material fault alleged against the Police Court.[87]
>
> What of the composition of the juries?
>
> It is true, however, that in important criminal cases, and sometimes in civil suits, the juries were often packed. But why? I will state: Merchants and business men generally had great aversion to serve on juries, particularly in important criminal cases, which

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84 Three Views, *supra* note 2, at 69.

85 *Id.* at 67.

86 *Id.* at 76.

87 *Id.*

> are usually protracted . . . because their time was too valuable and their business interests required their constant attention. . . .
>
> Had the merchants and solid citizens then drawn as jurors, fulfilled their duty to the cause of justice, to the conservation and maintenance of law and order, they would have had no cause or pretence for the organization which they formed.[88]

O'Meara continues to the third part of the Vigilantes' self-justification:

> Concerning the frauds in election: Yes, there were frauds, outrageous frauds, at every election: repeaters, bullies, ballot-box stuffing. . . . More than one member of the Vigilance Executive Committee had thorough knowledge of all of this, for the very conclusive reason that more than one of them had engaged in these frauds. . . .
>
> Out of the . . . Executive Committee, the detectives of that body might have unearthed these honorable and virtuous purifiers and reformers;[89] with them, perhaps others whose frauds were no less wicked and criminal; but in business transactions, and not in political affairs.[90]

O'Meara then lists particular examples of frauds carried out by members of the Executive Committee.

After describing the shooting of Richardson, the hung-jury trial of Cora, and the shooting of King, O'Meara goes on to the removal of Casey and Cora from the county jail and into Fort Gunnybags. He brings up the case of a man named "Rod. Backus," who had been sitting in jail after his murder jury had failed, like Cora's, to reach a verdict. Why, O'Meara asks, was Cora taken by the Vigilantes and not Backus? "[Backus] had been a boon companion of many of the young men of the Committee before he committed the murder in Stout's alley."[91]

O'Meara did not focus, as had Sherman, on the moment after the hanging of Casey and Cora, when, at least arguably, the hunger of the "mob" for retribution had been assuaged and the Committee could have disbanded without the Terry incident and the further hangings of Hetherington and

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88 *Id.* at 77.

89 The author reads this as sarcasm.

90 Three Views, *supra* note 2, at 78–79.

91 *Id.* at 91–92.

Brace. As to the final purpose of the Committee, however, he has much to say. First, he describes the exhibition at the Vigilance Committee's final military parade of Committee memorabilia: a stuffed ballot box; the nooses that hanged Casey and Cora; and "shackles and gyves, . . . all the other instruments and paraphernalia of the gallows and the cells. . . ."[92]

> The city and county election was soon to follow. The Committee men did not neglect the opportunity which their powerful organization had given them. The Executive Committee became practically a self-constituted nominating convention. . . . For every . . . office Vigilance men were named the candidates. None others had chance or hope. Their ticket was elected.[93]

## III. THE VIGILANTE MANUSCRIPTS[94]

A substantial number of Vigilante Committee manuscripts found in the trove[95] held by the Huntington Library in San Marino, California,[96] bear on the issues that are examined here.

The Huntington manuscripts are kept in ten document boxes, of which four contain documents that bear on the day-to-day activities of the

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92 *Id.* at 124.

93 *Id.* at 125.

94 This part of the article describes, in considerable detail, the relevant material that was found in the manuscript holdings of the Huntington Library. These descriptions are detailed because there appears to be no other set or collection of Vigilante manuscripts in existence that reflect the actual work of the Committee. An exact picture of these manuscripts, as they are, is the best way to understand and envision who the men of the Vigilance Committee were and what they did.

95 The word "trove" is used for two reasons. First, because this is clearly the largest, and perhaps the only, such collection in existence; second, because it seems remarkable that somehow, through some agency, handwritten documents produced by such a large number of individuals in a confused and perilous time, could have been first assembled, and then preserved, until they came to the Huntington in two purchases in 1916 and 1931.

96 The California State Library, the Bancroft Library at UC Berkeley, and the San Francisco Public Library were also visited, but none contained any contemporary manuscripts or other documents with information bearing on relevant aspects of the Vigilance Committee's activities. A review of all available bibliographical writing produces the conclusion that there is no other substantial holding of 1856 Vigilance Committee working documents in existence.

Committee.[97] They are the best source extant for detailed information about the activities of the Committee, having been created by members of the Committee during the course of those activities. Insofar as they reflect the effort to detect and remedy corruption in the courts, they would support the conclusion that the Vigilance Committee was, indeed, carrying out the course of action mandated in its Constitution, to promote "security of life and property . . . and perform every just and lawful act for the maintenance of law and order, and to sustain the law when properly administered."[98] On the other hand, insofar as they do not reflect such an effort, but instead describe primarily an effort to hunt out and punish members of the "Irish faction of the Democratic Party," then the adjuration against political actions found in Article Seventh of the Constitution will have been ignored.[99] These records, therefore, are the touchstone that will help to answer, as far as it may be done, the central question of this article.

Box 1 is the Miscellaneous part of the collection, containing manuscripts of all types, filed in folders, some numbered, some labeled, many not.

In Box 1 are the only manuscripts that relate to any Committee activities other than the "Black List" procedures reflected in the documents in Boxes 2 and 3, below.[100]

The first document in this box is a "rap sheet" for one John Cooney, showing 36 arrests, almost all for assault, between 1853 and 1856, with the eventual outcome of each case. Cooney was deported from California by the Vigilantes.[101]

At first glance the second document seems to reflect an effort to get at the truth about the magnitude of unpunished crime in 1856 San Francisco. It is a newspaper clipping, with neither the name of the paper nor the publication date shown. It is titled "Jottings from the Record of the Court of

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97 The other boxes contain documents related to the military operations of the Committee, such as unit rosters and pay records, and Committee members, including thousands of applications for membership.

98 Popular Tribunals, *supra* note 12, at 112.

99 *Id.*

100 The descriptions of the contents of documents made in this part of the article are, except when separately footnoted, based on actual physical examination of each document by the author.

101 Popular Tribunals, *supra* note 12, at 592–95.

Sessions." At that time the court of sessions was the higher-level criminal court in the City and County of San Francisco. It received appeals from the police court, and its original jurisdiction included felony cases and grand jury indictments.

The clipping begins with this statement:

> We to-day continue the transcripts from the docket of the Court of Sessions, for the purpose of showing how, by means of packed juries and the connivance of corrupt officials, the hounds have managed to escape punishment. We think, as we before said, that before we get through, those who were so eager to defend Judge Freelon and Attorney Byrne because we went back to a period before their being in office, will be glad to take a stand in the back ranks.

Then there is a list of docket entries for 14 cases, seven of them litigated entirely in 1851. None of them involves a charge of murder. Most of them ended with the discharge of the prisoner.

Why is this here? Why did the Vigilance Committee (we presume) clip it and keep it? It is safe to assume that the court of sessions handled more than 14 cases over the course of more than five years. Thus, this clipping appears not to be a systematic investigation of Judge Freelon or the court of sessions.

The third document shows more promise. It is a three-page manuscript listing arrests by the San Francisco police over a period of about eight months, ending on July 30, 1856, near the end of the Vigilantes' reign. The arrests are arranged by date; thus, this initially appears not to be simply evidence supporting an effort to gather material for a blacklist.

There are 78 individuals listed, followed by the crime of which the individual is accused, names of witnesses, and, in a few cases, the outcome of the case. Since this is a list of recent arrests, the only outcomes listed are either assignment to a court (usually the court of sessions), or "discharged." Nine alleged murderers are listed, including "Chas Cora." James Casey is not listed.

Most interesting is this subscript: "The above embraces the most important arrests by the Police since Nov. 1st 1855 to July 30th 1856 — there are many cases where I know the parties to be either in state prison or out

of the country that I have not noted also Chinese and some Mexicans." It is signed "Hesse."

Who was "Hesse?" The only Hesse listed in Bancroft's extensive index at the end of *Popular Tribunals*, v. II, is "Hesse, Mrs., murderess."[102] The name does not appear among the many applications for membership that are part of the Huntington's manuscript collection. From context it would seem that Hesse was a lawyer, and a member of the Vigilance Committee.[103] But his research does not offer proof as to the need for a Committee, because it covers only cases so recent that no court resolutions were available. Based on the subscript, which describes other arrests that he left out, there seems to have been no effort to achieve a complete picture of criminal activity in the city. Since it continues through July 30th, 1856, the research was done quite late in the period of Vigilante control of the city. Making a reasonable inference, this would seem most likely to be just another, late-term, attempt to add names to the "black list." This conclusion is, arguably, reinforced by "Hesse's" statement that he has omitted the names of individuals who were out of the country or in prison — and thus not subject to deportation by the Vigilance Committee.

Also found in Box 1 were thick folders containing documentary evidence, apparently collected for trials before the Executive Committee, on Charles Cora, James Casey, Philander Brace, and Justice David Terry. Also included, and fascinating to a litigator but not relevant to this examination, are witness lists and other notes apparently created by a prosecutor for use at Terry's trial.

A document that bears, at least indirectly, on the question of the Committee's motivations is a report by Hampton North, who is self-described as the "County Marshall" and was also in overall charge of the city jail. The report is on the "State of the Police in San Francisco." From the report, the state of the police was miserable. The 75 officers were paid, when they were paid, one dollar a day in scrip, which then had to be hypothecated

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102 Popular Tribunals, *supra* note 12, at 758. None of the earlier-published works reviewed herein contains an index.

103 Despite the lack of an application for membership in the Huntington's collection. It is reasonable to conclude that members of the Vigilance Committee's inner circle, and others close to them, did not have to go through the application for membership procedure.

(cashed in) at a discount for cash. Also, from July 1, 1855, until some time in June, 1856, the officers were not paid at all. Then they were each paid with scrip in the face amount of $525, which was "hypothecated" for $105. The financial state of the jail was so poor, North reports, that the prisoners were "starving."

Finally, a 16-page document, labeled on the back, "Report of the Grand Jury for the Term Ending June 1st, 1856," and labeled on the front , "Investigation of County Affairs." It is written in an elegant, clear hand with only one phrase crossed out and rewritten in the 16 pages, leading to the inference that this is a formal copy of the official document. It is not dated, but the matters covered seem all to have occurred in calendar years 1854 and 1855.

There are several marginal notes written in other hands, some in ink and some in pencil. It is impossible to determine whether these notes were written by someone on behalf of the Vigilance Committee. None of the marginal comments provides any insight into the Vigilance's view of this apparently official document. In essence, it is an audit report that discloses many instances either of negligence or actual malfeasance on the part of county officers, resulting in the loss, or the overspending, of county funds. Much of the material is the record of sworn testimony by county officers, including school and hospital commissioners, and several county supervisors, not including James P. Casey.

Casey does appear in the testimony, however, several times. None of the audit deficiencies is directly attributed to Casey, but the general tenor of the document is to depict Casey, among others, as a man to be watched. The following is an excerpt from the sworn testimony of one J.W. Brittain:

> Mr. [Mayor] Van Ness was at first bitterly opposed to the admission of Casey as Supervisor but afterward he displaced Slocum & put Casey in (sic) Chairman of the Auditing Committee. Mr. Green also opposed him — but afterwards made friends with him.

Box 2 is labeled "Denounced Members and Other Suspicious Characters." The 26 file folders in this box are denoted by the first letter of the last name of the "suspicious character." Each folder contains one or more documents. They reflect the Committee's efforts to investigate and obtain evidence concerning the misdeeds of individuals put on the blacklists

referred to by Coleman.[104] Several of the folders disclose that some of the men denounced to the "black list investigating committee" as "suspicious characters" were also found to be members of the Committee.

In all, there are 201 documents in Box 2 that reflect denouncements and actions taken, either by the Investigating Committee, or the Executive Committee, in response thereto. Almost all of the documents, 191 in total, reflect only allegations concerning ordinary (not corruption-related) misbehavior.

Ten documents contain allegations that describe official corruption, using the broadest sense of the term. These may be placed in several categories, as follows.

*Corruption by the Police*[105]

1. An anonymous statement that one M. DeHaan "bribed some officers." This was referred to the Investigation Committee, but the file shows no further action.[106]
2. Someone whose last name was Gray "committed a murder at San Mateo, he was given into the custody of Officer Fish Dennison." Dennison is a "companion" of Gray, so he let him go. No indication of referral or follow-up.
3. An accusation against officer Jack McKenzie: A "Frenchman" was convicted of a robbery; paid a fine of $500, which McKenzie kept. No investigation, referral, or follow-up.

*Other Official Corruption*

1. No. 4761 accuses one Pete McGlothlin of selling his "commission" (perhaps his seat as a delegate) to the Democratic Party Convention for $20 to a man named Brannigan who "made $100 out of the deal." No referral, no follow up.
2. An accusation against Kent, the coroner and city sexton, that he padded his accounts by burying animal bones in city graves, and by

104 Three Views, *supra* note 2, at 37.

105 Each of these cases was checked against the excellent (for the times) index in *Popular Tribunals*, and nothing was found.

106 Actions by the Vigilantes are generally reflected in handwritten notes written, usually in pencil, on the document but placed at 90 degrees from the original handwriting.

splitting corpses to fill more than one grave. He was asked to resign by the Vigilance Committee.[107]

*Judicial Corruption*

1. A man named Levi Parsons accuses Supreme Court Justice Hugh Murray of offering to sell his vote in *Wood v. City of San Francisco* for $20,000. There is nothing further in the file, but Bancroft reports that Murray left Sacramento at about this time and did not return to the bench until after the Vigilance Committee had disbanded.[108]

*Perjury*

1. An accusation by William Quimby that John Colby perjured himself several times. This was at the trial of Colby's divorce. No referral, no follow-up.

*Accusations Involving the Vigilance Committee*

1. Accusation that a man named Henry Toy tried to bribe his way out of the Vigilance Committee's jail in Fort Gunnybags. The Committee notes that it can find no mention of a Toy in its records.
2. Two men named Willis and Jordan shook down a "darkey" by telling him they were members of the Vigilance Committee police. No referral, no follow-up.

*Accusation Involving the Grand Jury*

1. Accusation by No. 132 against one John O'Meara (not the O'Meara of Three Views) that he was placed on the "present grand jury by Sheriff Scannell for some reason other than the public good." "He associates with the *worst men*." Investigating Committee note: "See if he is a brother of the O'Meara who edits Casey's paper." Executive Committee note: "O'Meara allowed to resign from the Vigilance Committee." No other follow-up.

Boxes labeled 3A and 3B hold 73 and 36 folders,[109] respectively, containing "Documents Related to Ballot Box Stuffing and Fraudulent Elections." The process disclosed by these documents is the same as that used for other alleged crimes recorded in box 2, except that the activity investigated is,

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107 Popular Tribunals, *supra* note 12, at 446.

108 *Id*. at 333.

109 The reason there are two "Box 3's" is that the 109 folders were together too thick for one box.

generally, election fraud. Much of the activity reflected in these documents involved investigations of Supervisor James Casey and his associates in the "Irish wing" of the local Democratic Party.

The two boxes, 3A and 3B, also contain numerous sworn statements by witnesses to alleged ballot box fraud, and a few reports by the Investigating Committee. All reflect the same procedure as found in box 2: denouncement, investigation of some of the denouncements, and a few notations of action taken — either removal from the Committee's rolls, or deportation from California. At least a plurality of the documents relates to allegations against a few men: Casey, Sheriff Scannell, city jailer Billy Mulligan, and their allies.

In the 109 folders there are four documents of particular interest.

1. James Kearney, a policeman, relates that he arrested one Dan Aldrich, who had assaulted him. "He was released about an hour afterwards by a written order from Mayor Van Ness." Later, Aldrich was fined $250 by Judge Freelon, but he never paid it. No indication of a referral or follow-up.
2. Robert Nixon states that Paddy Martin told him that if Dave Mahoney had given him (Martin) $2,000 he would be Sheriff instead of Scanell. No referral or follow-up.
3. Anonymous: "W.F. McLean elected supervisor sold out to Casey for $50." Committee note: "Rumor."
4. Pat Cooney, a printer, informed an anonymous writer that Charles Gallagher demanded and received $250 for procuring the appointment of men on the police." Committee note: "Call Lockwood, McKibben." Nothing further.

The folders in Box 3 disclose a huge amount of election fraud and intimidation. One popular method of persuading a man not to vote, or to vote according to orders, was to pull out a pistol and to threaten to blow his head off. This shows up in many folders.

No link is shown, however, between the election fraud and the original incitement and the ongoing rationale for the Vigilance Committee: corruption in the functioning of the courts so as to allow dangerous criminals to go free.

### *Accusations Not Found*

Even more important than what was found in the piece-by-piece examination of the Vigilance Committee's records is what was *not* found. In the boxes there was:

1. No material re packing of juries.
2. No material re bribery or other attempts to influence jurors.
3. No material re bribery or other attempts to influence trial judges.
4. No material re subornation of perjury.
5. No material re spoliation of evidence.

In sum, the Huntington manuscripts provide a torrent of evidence as to the energy and determination with which the Vigilance Committee went about creating blacklists and investigating those who were listed. This was true as to crimes in general, and especially as to allegations of election fraud. There is no evidence of any investigation to link voting fraud to corruption in the courts. The only two documents that disclose any effort to look into the courts' failure to punish crimes are the newspaper clipping and the report by "Hesse." Both appear to present "cherry picked" information. There is no record of any follow-up effort as to either.

An apologist for the Vigilance Committee, on reading this conclusion, certainly could argue that the absence of documentation of such activity does not prove that it did not take place. But these documents are all that remain to us of the Committee's working papers, and they *do* reflect a tremendous amount of energy devoted to blacklisting, the task that Coleman describes and Sherman bemoans. If the Vigilance Committee had actually done anything to clean up the courts, wouldn't there remain at least a few manuscripts reflecting that activity?

## IV. TRIAL RECORDS

The original research plan for this article included a review of official court of sessions and police court records from the period 1854–56 in order to determine the factual basis for the "one thousand murders — one hanging" received wisdom. One possibility was that it would be discovered that constitutional and common law guarantees of rights of criminal defendants might have played a significant role in acquittals, or convictions on

reduced offences, thus creating whatever the actual statistic might have been as to the ratio of murders to hangings. The impoverished state of the police department might also have been a factor, as revealed in the court records.

However, all records of criminal trials in San Francisco prior to 1906 were destroyed in the fire that followed the great earthquake in April of that year.[110] There is a record of only one San Francisco criminal trial from that period — the trial of Charles Cora for the murder of U.S. Marshal William H. Richardson. This record exists because it was prepared some time before the fire for inclusion in the *American State Trials* series.[111]

Obviously, given a sample number of one, the record of the Cora trial can disclose nothing about the general nature of criminal trials in San Francisco in the years just before Casey shot King. It does, however, tell us much about the atmosphere in San Francisco in the months between the end of the trial and the shooting of James King on Montgomery Street.

The format of the *American State trials* is first, a Narrative, setting up the circumstances that led to the trial; then the names of the trial's participants with short biographies of each; the report of the coroner's jury; description of the initial procedural motions and decisions; verbatim reports of opening statements; digests of witness testimony for the prosecution, then the defense; closing statements, again verbatim; and then the final result. There is no indication as to who wrote the Narrative. Throughout the Narrative there is commentary. In the Cora report this is uniformly hostile to the defendant. For example: "The character of the victim as opposed to that of the slayer made the homicide peculiarly odious in the popular

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110 Northern California Historical Records Work Projects Administration, Inventory of the County Archives of California : no. 39, the City and County of San Francisco, vol. II (San Francisco: Northern California Historical Records Survey Project, 1940), 410, pars. 243, 248, 251, 254, 357. N.B.: An earnest but, in the author's opinion unsuccessful attempt to fill this gap was reported in Kevin J. Mullen, Dangerous Strangers: Minority Newcomers and Criminal Violence in the Urban West, 1850–2000 (New York: Palgrave MacMillan, 2005). Acknowledging the pre-1906 gap in official records for San Francisco, the author of *Dangerous Strangers* attempted to fill the gap by examining crime reports in local newspapers. This method seems inherently flawed, likely to produce skewed data that would be misleading and worse than no data at all.

111 "The Trial of CHARLES CORA for the Murder of William H. Richardson, San Francisco, California, 1856," in American State Trials, v. 15, 16–54.

mind[.]"[112] Footnote to the first naming of Cora: "He was an Italian."[113] "Let there be an impartial jury, and give the assassin a fair trial." "If he be guilty he must be *hung!*"[114]

The brief biographies make clear that this was far from the usual murder trial of the era. One of Cora's lawyers was Edward D. Baker. Baker was a well-known lawyer at the time He was also Abraham Lincoln's long-time friend, soon to be the first U.S. senator from Oregon, and finally a colonel in the Union Army who was killed at Ball's Bluff, his first battle.[115] His co-counsel, James McDougall, had been California's attorney general and would later serve in Congress and in the U.S. Senate. The judge, John S. Hagar, would also later represent California in the Senate.[116]

Much was made in the Narrative and at the trial of the fact that Cora's "paramour," Belle Ryan or Belle Cora, was a wealthy madam who supplied the funds for his defense, including a $5,000 fee to Baker.[117]

Throughout the trial, it is clear that the prosecution was worried about the possibility of a verdict of manslaughter, a lesser offense included in the indictment.[118]

There is no indication in the record as to whether any evidence was excluded by the judge. The prosecution presented five eyewitnesses who described Cora holding Richardson by the shirt, helpless, and then gunning him down with a single shot to the chest.[119] The defense then presented the same number of eyewitnesses who described what, in the language of the day, was called an "affray." The two men, having stepped outside a bar, drew weapons; Cora, having managed to avoid a downward thrust of Richardson's knife, shot him in self-defense.[120] Both sides presented witnesses who

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112 *Id*. at 16.

113 *Id*.

114 *Id*. at 17 [emphasis in original].

115 *Id*. at 21. *See also, generally,* Elijah R. Kennedy, The Contest for California in 1861; How Colonel E.D. Baker Saved the Pacific states to the Union (Boston, New York: Houghton Mifflin Co., 1912).

116 *Id*. at 19, 22–23.

117 *Id*. at 17–18, 46–48.

118 "[The prosecutor] said that the verdict must be one of conviction or honorable acquittal." *Id*. at 33.

119 *Id*. at 27–29.

120 *Id*. at 30–33.

described several meetings between the two men, some hostile in character, some not, over the two days before the fatal encounter.[121] In closing statements, counsel wrangled over the reliability of the panels of witnesses and the character of the two men and their reputations for violence.[122]

The case went to the jury. After 41 hours of deliberations the foreman reported the jury to have found it impossible to reach a verdict. The *American State Trials* report describes four ballots, and then a period of 24 hours' deliberation after the last ballot when no juror would change his vote. The final tally was eight for manslaughter and four for murder.[123] In his 1914 *Autobiography*, Baker's law partner points out that three of the Vigilance Executive members who sat as a jury in Cora's trial before that body had also been on the jury in Judge Hagar's court, and of the three, two had voted for manslaughter, and one, on one ballot, for acquittal.[124]

It is not excessive to say that Cora was tried principally on issues of ethnicity and social class. Cora was Italian; he lived with his mistress who was a madam; no matter that, without dispute, he had no reputation for violence. Richardson was a U.S. marshal; he was high in the social pecking order of San Francisco; no matter that several of the prosecution witnesses admitted that he was drunk the afternoon of his death, and had a reputation for violence.[125]

*American State Trials* also reports the trials for Casey and Cora,[126] Hetherington and Brace,[127] and Justice David Terry[128] before the Vigilance Executive Committee. Review of those reports discloses that the Committee tried to provide some safeguards for the defendants, except that Casey and Cora, accused of two separate crimes, were tried together,

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121 *Id.*

122 *Id.* at 33–35.

123 *Id.* at 53–54.

124 Isaac J. Wistar, Autobiography of Isaac Jones Wistar, 1827–1905; half a century in war and peace (Philadelphia: The Wistar Institute of Anatomy and Biology, 1937), 314.

125 "Trial of Cora," *supra* note 111, at 27–29. Indeed, part of the prosecution's summary of the case, aside from attacking the probity of the defense witnesses, was to argue that Richardson was too drunk to attack Cora. "Trial of Cora" at 50.

126 American State Trials, v. 15, 97–116.

127 *Id.* at 117–24.

128 *Id.* at 125–65.

as were Hetherington and Brace, similarly accused. The most profound difference between the Vigilance trials and the official trial of Cora is that the counsel and the juries were composed only of members of the Vigilance Executive Committee.[129]

## VI. ANALYSIS AND CONCLUSIONS

So, based on a thorough review and analysis of the various sources presented above, what is the answer? Was the Great Vigilance Committee a true reform effort, or a coup?

### *The Witnesses*

Only one of the witnesses, William T. Sherman, was writing in the heat of the events as they were occurring.[130] His "law and order" stance is, of course, consistent with his role in that far greater insurrection that took place five years after San Francisco's Vigilance summer. It is also more in tune with political and ethical thought of today. His views, especially as to the Committee's failure to disband after the first two hangings, have great weight.

Coleman's writing seems most singular with regard to what he did not address. He portrays the Committee as less overwhelmingly popular and powerful than do several of the other writers. He does not appear to have considered disbanding the Committee until just prior to the Terry incident, after which, as he saw it, they had to continue, in essence to protect their jurisdiction. Perhaps most importantly, he takes all authority, and thus all responsibility for the committee's actions, on himself, effectively answering one of the caveats presented at the beginning of this article: Was the Committee so loosely organized and controlled that no clear motive for its actions can be stated? The answer to that is "no." Mr. Coleman ran the show.

O'Meara, a professional journalist, most clearly and completely states the case against the Committee's justification for its activities. He explodes

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129 *Id*. at 55–124.

130 This is not true with regard to his *Memoirs*, but the great majority of the points that come from him come from his letters to friends, relatives, and business associates in "the States."

the "corruption of the courts" argument, item by item. His comment about the reluctance of businessmen to serve on juries has a modern flavor that also rings true.

In sum, the detailed and apparently probative eyewitness accounts, including Coleman's, support the "coup" side of the question.

### *The Vigilante Documents*

These manuscripts, the best evidence of all, because they are the most reliable source of facts about what happened that year, support the following conclusions:

*One*, the Committee made no effort to ascertain whether or not the assumption that the courts were corrupt and murderers were escaping justice thereby, was true.

*Two*, the Committee, through its efforts, did establish as a fact that there was a great deal of election fraud, including ballot-box stuffing and bullying, associated with recent elections in San Francisco.

*Three*, the Committee did obtain some evidence, gathered primarily by the official grand jury, that there was substantial corruption on the part of city and county officials.

*Four,* the Committee did nothing to connect either the election fraud or the other official malfeasance to its purported *raison d'être*, court corruption. And,

*Five,* the Committee devoted a great deal of effort to seeking out evidence to support its deportations of alleged wrongdoers.

Overall, the Vigilance documents go as far as it is ever possible to "prove the negative" that the Committee was not really trying to do what it had said it would — ensure that the people would be protected from crime and violence through reform of the criminal law system.

### *The Trial Record*

We have only the record of Cora's trial. He seems to have been *the* singularly unlucky person in the whole affair. This is derived both from the facts as set forth in the trial report, including the evidence of social prejudice against his background and lifestyle, and from the disastrous circumstance that he was in the city jail when the Vigilance Committee army came to get Casey.

### *Summary and Conclusion*

W.T. Sherman may have been right, although he was grudging in the way that he stated it: Perhaps there was no other way to avoid a far greater civil cataclysm than for Coleman et al. to form a Committee, capture Casey, and, when King died, to hang Casey. The inclusion of Cora in the hanging seems to have been motivated more by the desire to support the claim that Casey would not have been subjected to justice in the court of sessions than it was by the need to deal out justice itself.

After that point in time, Sherman's basic argument wins the day, especially in light of the record produced by what is in, and what is not in, the Huntington Library's Vigilante documents. The Vigilance Committee, from that point, was occupied solely with a political housecleaning, aimed primarily at the "Irish" wing of the Democratic Party. They did such a good job that the "Peoples' Party" held sway in San Francisco for about a decade thereafter.

Finally, to return to Professor Nunis's statement published in 1971 and republished in 2000, that "A judicious history" of the San Francisco Vigilance Committee of 1856 "has yet to be written." I hope that this article will inform the debate over the justification for the Vigilance Committee's actions, in a judicious manner. A corollary hope is that it will spark enough interest so that, if there are any more original Vigilante manuscripts still in existence that are not at the Huntington Library, they will be brought to light.

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