

VOLUME 8: 2013

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# CALIFORNIA LEGAL HISTORY



JOURNAL OF THE  
CALIFORNIA SUPREME COURT  
HISTORICAL SOCIETY

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Submissions and other editorial correspondence should be addressed to:

Selma Moidel Smith, Esq.  
 Editor-in-Chief, *California Legal History*  
 Telephone: (818) 345-9922  
 Email: [smsth@aol.com](mailto:smsth@aol.com)

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# TABLE OF CONTENTS

## ORAL HISTORY

HERMA HILL KAY, DEAN, BOALT HALL SCHOOL OF LAW, UC BERKELEY, 1992–2000. . . . .	1
INTRODUCTION	
<i>Eleanor Swift</i> . . . . .	3
EDITOR'S NOTE. . . . .	6
TOPICAL SUMMARY. . . . .	7
THE ORAL HISTORY OF HERMA HILL KAY. . . . .	11
CURRICULUM VITAE. . . . .	197
BIBLIOGRAPHY. . . . .	206

## SPECIAL SECTION: NINE SPEECHES BY JUSTICE ROGER J. TRAYNOR

PREFACE	
<i>Harry N. Scheiber</i> . . . . .	213
EDITOR'S NOTE. . . . .	216
ON LAWYERS AND JUDGES . . . . .	218
I. ON LAWYERS AS GUARDIANS OF DEMOCRACY AGAINST TOTALITARIANISM (1940). . . . .	218
II. STARE DECISIS VERSUS SOCIAL CHANGE (1963) . . . . .	221
III. OPENING ADDRESS, CALIFORNIA COLLEGE OF TRIAL JUDGES (1967) . . . . .	225

CONTINUED ON NEXT PAGE

SPECIAL SECTION:  
NINE SPEECHES BY JUSTICE ROGER J. TRAYNOR

CONTINUED

ON THE PUBLIC DEFENDER . . . . . 228

    I. REMARKS AS MODERATOR, NATIONAL DEFENDER  
        CONFERENCE (1969) . . . . . 228

    II. ADDRESS, NATIONAL DEFENDER CONFERENCE (1969) . . 235

ON CONSTITUTIONAL RIGHTS . . . . . 243

    I. THE RIGHT OF THE PEOPLE AGAINST  
        UNREASONABLE SEARCH AND SEIZURE (1941) . . . . . 244

    II. ON *MAPP v. OHIO* AT THE CONFERENCE OF  
        CHIEF JUSTICES (1962) . . . . . 249

    III. *MAPP v. OHIO* STILL AT LARGE IN THE  
        FIFTY STATES (1964) . . . . . 261

    IV. THE FIRST AMENDMENT’S MOBILE TRIANGLE: MEDIA,  
        PUBLIC AND GOVERNMENT (1974) . . . . . 274

HISTORICAL DOCUMENTS

BURIED TREASURES:  
CALIFORNIA LEGAL HISTORY RESEARCH AT UC  
HASTINGS COLLEGE OF THE LAW LIBRARY  
*Justin M. Edgar, Travis L. Emick, and Marlene Bubrick.* . . . . . 287

PERSONAL REMINISCENCES OF THREE  
STATE BAR LEADERS . . . . . 303

    WILLIAM P. GRAY  
    PRESIDENT OF THE STATE BAR, 1962–1963 . . . . . 304

    ANTHONY MURRAY  
    PRESIDENT OF THE STATE BAR, 1982–1983 . . . . . 307

    GILFORD G. ROWLAND  
    PRESIDENT OF THE STATE BAR, 1937–1938 . . . . . 309

## ARTICLES

- BUILDING THE NEW SUPREMACY:  
CALIFORNIA'S "CHINESE QUESTION" AND THE  
FATE OF RECONSTRUCTION  
*Roman J. Hoyos* . . . . . 319
- THE VINE VOTE: WHY CALIFORNIA WENT DRY  
*Jonathan Mayer* . . . . . 355
- CALIFORNIA'S IMPLAUSIBLE CRIME OF ASSAULT  
*Miguel A. Méndez* . . . . . 391
- CALIFORNIA LAWYER: AARON SAPIRO AND THE  
PROGRESSIVE-ERA VISION OF LAW AS PUBLIC SERVICE  
*Victoria Saker Woeste* . . . . . 449

## BOOK REVIEWS

- AFTER THE GRIZZLY: ENDANGERED SPECIES AND  
THE POLITICS OF PLACE IN CALIFORNIA*  
PETER S. ALAGONA  
*Review by Gordon Morris Bakken* . . . . . 465
- FREEDOM'S FRONTIER: CALIFORNIA AND THE  
STRUGGLE OVER UNFREE LABOR, EMANCIPATION,  
AND RECONSTRUCTION*  
STACEY L. SMITH  
*Review by Roman J. Hoyos* . . . . . 469



ORAL HISTORY  
HERMA HILL KAY



HERMA HILL KAY  
DEAN, BOALT HALL SCHOOL OF LAW, UC BERKELEY, 1992-2000

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*Oral History of*

## HERMA HILL KAY

ELEANOR SWIFT\*

### INTRODUCTION

Professor and former Dean Herma Hill Kay was celebrated a few years ago for completing her fiftieth year of teaching at Boalt Hall, the School of Law at UC Berkeley. Her commitment to our law school, and to legal academia, is remarkable. She was selected by the faculty, and appointed by the chancellor, to be the school's first woman dean; she has served on boards and committees for almost every significant legal academic institution in the country; and she has been honored many times for her many contributions.

Herma's commitment to Boalt continues to this day — in the classroom, at faculty meetings, and in her office, where she is finishing a book on the first fourteen women law professors in the U.S. and is still mentoring our junior faculty members.

What has struck me about Herma in the thirty-four years I have been her colleague at Boalt is her remarkable generosity of spirit. This generosity has inspired her, throughout her career, to create opportunities for others, especially for women, to thrive in legal academia and beyond. The creation of these opportunities for others is, I think, one of her most significant and

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\* Professor of Law, School of Law, UC Berkeley.

enduring contributions to the law and to legal education. I want to describe briefly only four examples.

First, as chronicled in her oral history (pages 83–93), Herma was an active participant in the substantive revolution in women’s rights that swept through California and the nation in the late 1960s and 1970s. Based on her stated conviction that “women ought to be free and conscious actors . . . [who] ought to determine their own role in this world,” she engaged in both academic and political work to promote women’s opportunities for self-realization. She participated in the enactment of no-fault divorce laws through her appointment to Governor Pat Brown’s Commission on the Family. The commission’s report paved the way for California’s adoption of a no-fault divorce statute in 1969, which in turn prompted Herma’s appointment as co-reporter of the Uniform Marriage and Divorce Act, a law reform project which had nation-wide impact. Women’s equality was then addressed directly by the American Law Institute’s Family Dissolution Project, for which Herma served on the Advisory Group, to ensure that upon divorce women would get equitable support and property awards. She also testified in favor of California’s ratification of the Equal Rights Amendment by the California Legislature.

Second, through her inspiration, active encouragement and concrete support, Herma generated opportunities for generations of Boalt graduates, men as well as women, to engage in legal activism on behalf of women and other underrepresented groups. Throughout her oral history, the names of Herma’s former law students appear consistently, as academics, judges, public servants and public interest lawyers.

Just before joining the Boalt faculty in 1979, I attended a national conference on Women and the Law. It was an exciting venture for me, as I was introduced there to many women law professors and legal activists engaged with the legal issues outlined above. At the conference, Herma was often surrounded by friends and admirers. I met many former students of hers who spoke warmly of the inspiration and encouragement she had given them.

My third example is an opportunity that Herma opened to me personally, and to future generations of Boalt students. In 1992, when Herma became dean at the law school, she asked me to take the leadership role in formulating a proposal to bring live client clinical education into the halls of Boalt. At that time, Steve Sugarman and I were co-teaching a class for students engaged in clinical work at the Berkeley Community Law Center,

which had been founded by Boalt students in 1988. I was more than thrilled to have this chance to put into practice one of my principal motivations for entering law teaching — to support students interested in public interest legal work. Clinics in the law school would give all students, and those interested in public interest careers in particular, the opportunity to work with real clients, under the supervision of clinical faculty. Such clinical work would train them to reflect on the skills they developed and the insights they gained about the role of law in promoting social justice.

The plan put forward by the Clinical Committee that I chaired, fully endorsed and supported by Herma (pages 137–141), was gradually approved by the faculty over the course of more than ten years. The live client clinics, the field placement program, and a full professional skills curriculum now flourish at Boalt. There is no doubt that this success was grounded on Herma's own commitment to develop these important clinical opportunities for our students.

Finally, I want to celebrate the special generosity with which Herma has embraced two of our younger law faculty colleagues who teach and write in her own fields of specialization — family law and conflict of laws. Some of Herma's work in the family law field is discussed above, and her introduction to, and abiding interest in, conflict of laws is described in the oral history (pages 43–57). These colleagues describe their ongoing relationship with Herma:

Herma invited me to sit in on her Conflicts class when I arrived last fall and invited me to guest lecture twice. We've also had lunch many times, and she's allowed me to pick her brain on issues large and small. She's been unfailingly encouraging of my work and teaching, and she's steered me back to the right track in my research when I have been discouraged. Perhaps most importantly, she's made me feel like my ideas are interesting and worthwhile, and that is invaluable coming from someone who has played such a large role in the development of the field.

Since I came to Berkeley, Herma has been my stalwart champion and mentor, relentlessly encouraging and extraordinarily generous. She has shepherded me through to tenure, insisting that she would not retire until I received tenure (though she warned me not to take too long in going about it!). I am enormously grateful for her kindness, friendship, and example.

Of course such interest in, and mentorship of, one's very own successors in teaching and research should be the norm for law faculty, but I fear it is not. This aspect of Herma's character, and of her commitment to the future of our law school, deserves to be celebrated and emulated.

One explanation of Herma's ongoing commitment to creating opportunities for others — for her students, her colleagues, and the less powerful who seek justice through law — may be the mentoring she herself received at home from her father (page 38), in college (pages 28–34), in law school (pages 43–48) and, in her career, from California Supreme Court Justice Roger Traynor (pages 60–61) and Professor Barbara Armstrong (pages 67–68). She appreciated the riches she received, and she has devoted much of her career to passing these riches on to others.

★ ★ ★

## EDITOR'S NOTE

The oral history of Professor and former Dean Herma Hill Kay was recorded in eight interviews by Germaine LaBerge, senior interviewer of the Regional Oral History Office at UC Berkeley, from June to September 2003. It is presented here in its entirety and has received minor copyediting for publication. Insertions in square brackets were added by Professor Kay shortly after the interviews concluded. She has generously assisted the present publication by reviewing the text and providing illustrations from her personal scrapbooks. Additional illustrations appear by courtesy of the UC Berkeley Law Library and the efforts of Archivist William Benemann.

The oral history is reprinted by permission of The Bancroft Library at UC Berkeley. The sound recording may be accessed at the Library, and the original transcription may be viewed at the Library and at the UCLA Department of Special Collections or online at [http://digitalassets.lib.berkeley.edu/roho/ucb/text/kay\\_herma\\_hill.pdf](http://digitalassets.lib.berkeley.edu/roho/ucb/text/kay_herma_hill.pdf).

In LaBerge's introduction to the original transcription, she acknowledged the assistance of four professors in providing background information for the interviews: Eleanor Swift, Jesse Choper, Earl F. Cheit, and Robert H. Cole.

The Curriculum Vitae and Bibliography following the oral history have been updated to late 2013 by Professor Kay for publication in this volume.

— SELMA MOIDEL SMITH

## TOPICAL SUMMARY

INTERVIEW 1: JUNE 2, 2003. . . . .	11
<p>Birth in South Carolina; family origins and occupations — Influence of upbringing as a Methodist minister’s daughter — A formative experience — Parents’ background — Schooling in the rural South — Importance of debate — Life on army bases during WWII — High school classes and interests; basketball, reading, and debating — Discrimination and politics in the South — Influence of sixth-grade teacher and parents on university choices — Life at Southern Methodist University; influence of Margaret Amsler, professor of law at Baylor — Boys’ Debate Team at SMU; other extracurricular activities — The chance meeting that led to the University of Chicago Law School; a transformative event — Student life in Chicago</p>	
INTERVIEW 2: JUNE 24, 2003. . . . .	38
<p>Father’s influence; his oratory and integrity — Early expectations of what type of career a law degree would lead to — University of Chicago Law School, 1956–1959 — four women students; study groups — Professors Karl Llewellyn and Soia Mentschikoff, and others — Research assistant to Brainerd Currie; his personal relationship to Roger Traynor — The competing Conflicts theories of Brainerd Currie and Albert Ehrenzweig — Currie’s recommendation of a clerkship with California Supreme Court Justice Roger Traynor; moving to California — Favorite classes and professors at Chicago; teaching methods, working on the Law Review — Taking the Spring 1960 California Bar exam — Changes in teaching at law schools — Social life in Chicago — Marriage and work — Falling in love with San Francisco — Clerking for Traynor at the California Supreme Court, 1959–1960 — Recommended by Traynor for teaching position at Boalt Hall School of Law — the interview with Professor Barbara Armstrong</p>	
INTERVIEW 3: JULY 7, 2003 . . . . .	64
<p>Hiring process at law schools — Dean William Prosser’s “extravaganza” at AALS conference — Student–faculty interaction; camaraderie at the law school; daily commute from San Francisco to Berkeley — Teaching Marital Property, Family Law, and Conflicts — Tenure article on quasi-community property — Barbara Armstrong’s support — Full professor, 1963 — Teaching law and anthropology at the Center for</p>	

Advanced Study in the Behavioral Sciences in Palo Alto with Laura Nader, 1963–1964, with encouragement from Dean Frank Newman — Getting to know other women faculty, and meeting with Boalt women students — Formation of Berkeley Faculty Women’s Group, 1969; and of the Boalt Hall Women’s Association — Mentoring women students in the early 1970s; their later successes — No-fault divorce law — Governor Pat Brown’s Commission on the Family, 1966; Judge Pfaff’s opposition — Working behind the scenes to get the governor’s commission appointed; appointment with Winslow Christian arranged by former student Bill Honig — Publication of the commission’s report in 1966 — reasons for Catholic support of no-fault divorce — The reason for wanting to do “something sensible” about divorce

INTERVIEW 4: JULY 9, 2003 . . . . . 83

California Family Law Act of 1969 — Appointment as co-reporter of the Uniform Marriage and Divorce Act project of the National Conference of Commissioners on Uniform State Laws, 1973 — American Law Institute’s project on the law of Family Dissolution, 2002 — Federal guidelines for child support awards; equal division of property; covenant marriages —Opposing concepts in northern and southern California in the California effort — Family Law Act amended to provide that counties could establish family law courts at their own expense — Composition of the governor’s commission, 1966, and the drafting of the California Family Law Act — Drafting the Uniform Marriage and Divorce Act — The ALI’s statement of the Principles of Family Dissolution; the restatements — Personal impetus; property settlement agreements — Manner of advancing equality for women and divorce reform — Testifying at legislative hearings on California’s therapeutic abortion law, 1961; the Equal Rights Amendment; the passage of the California Family Law Act — Teaching Law and Psychiatry with Irving Phillips, M.D., of UCSF

INTERVIEW 5: JULY 30, 2003 . . . . . 103

The report of the Academic Senate on the Status of Women, 1970 — Distinguished Teaching Award, 1962 — Herma Hill Kay and Pat St. Lawrence, first women on UC Berkeley Committee on Committees — Chair of Berkeley Division, Academic Senate, 1973–1974; ex officio member of Academic Council and Berkeley representative

assembly — Budget Committee; its composition and function; recommendations on salary equity by Calvin Moore and Herma Hill Kay — Competence of Senate committee staff; Committee on Tenure and Privilege — University-wide Academic Planning and Program Review Board; law school’s relationship to Academic Senate — Observations on shared governance; difficulty in finding volunteers to serve on committees — Law school committees: Appointments, Faculty–Student Cooperation, Admissions — Review of Continuing Education at the Bar, 1990s — Search committees, affirmative action and the Admissions Committee

INTERVIEW 6: AUGUST 4, 2003 . . . . . 127

Suggesting women’s equity study, 1970 — Changes in law school culture from 1960 to 2003 — Earlier candidacy for dean — Dean, 1992–2000; orientation as new dean; changing perceptions of dean’s role — Law school as a place made up of faculty, staff, students, and alumni — Aspirations for law school — Fundraising; getting financial reporting in order; development office; associate and assistant deans, directors — Starting the clinical program under Eleanor Swift and Charles Weisselberg; value of live client education; getting funding — Overcoming opposition to the clinical program; faculty status issues surrounding it — Reviving the annual fund; techniques in fundraising; notable donors — Relationship as dean with faculty; increasing the salary scale; professional degree fee; loss of competitive edge in attracting students — Relationships with other UC campuses; establishing student representation on law school committees — Attracting new faculty; relationships with central campus

INTERVIEW 7: AUGUST 7, 2003 . . . . . 155

Title VII of the Civil Rights Act, 1964 — Beginning of affirmative action in admissions at Boalt Hall, 1960s and 1970s — Investigation by the Office of Civil Rights, and consent agreement, 1993 — Task force on admissions policy; adoption of its recommendations in 1993 — Theory of “critical mass”; regents’ resolution, 1995 — Hate mail; students’ reaction to regents’ resolution; Proposition 209, 1996 — Effect of fall 1997 implementation of regents’ resolution on enrollment; outreach to students — The Cole Report, 1997 — Thoughts on the LSAT and GPA; comparison with University of Michigan’s admissions process — Students’ views; the role of the

Center for Social Justice in attracting a diverse student body — Support from faculty, alumni, and students during the admissions controversy

INTERVIEW 8: SEPTEMBER 18, 2003 . . . . . 176

Leadership role in Association of American Law Schools, 1986–1990; issues addressed; other women on committees — Research Award from the American Bar Foundation, 1990; becoming a Fellow; participation on the Research Committee; role in various sections of the ABF — American Bar Association; roles in Section of Legal Education and Admissions to the Bar, 1993–2003, and its Committee on Diversity and Legal Education, 1996–2000; Joint Committee on Racial and Ethnic Diversity — The American Law Institute; comparison with the National Conference of Commissioners on Uniform Laws; member of governing council since 1985; involvement with family law and employment law projects — Order of the Coif; the Russell Sage Foundation; the Rosenberg Foundation and its role in highlighting ethical issues for other foundations — Advisory board of Foundation Press; marriage and family; thoughts on combining child-rearing and professional life; creation of half-time tenure positions; hobbies and interests

CURRICULUM VITAE . . . . . 197

BIBLIOGRAPHY . . . . . 206

*Oral History of*  
**HERMA HILL KAY**

INTERVIEW 1: JUNE 2, 2003

LABERGE: I'm in Professor Herma Hill Kay's office at Boalt [Hall]. It's June 2, 2003, and this is our first interview. We always like to start at the beginning, so why don't you tell me the circumstances of your birth that you have been told.

KAY: You don't think I remember?

LABERGE: I doubt it. [laughs]

KAY: Well, I'm told that I was born on the eighteenth of August, 1934, and that my father, who was a Methodist minister but also an avid sportsman and deer hunter, was terribly nervous because the deer hunting season had opened on the fifteenth of August, and here he was hanging around waiting for me to be born.

LABERGE: [laughs] And this is in South Carolina?

KAY: South Carolina.

LABERGE: Okay.

KAY: So finally I appeared, and he went off to his deer hunt. That is all I have been told about the surroundings of my birth.

LABERGE: Do you have siblings?

KAY: No, I'm the only child. My father, whose name is Charles Esdorn Hill, had twelve people in his family — brothers and sisters — and my mother, Herma Lee Crawford, had ten in her family. I can only assume that they decided that was too many on both sides. [laughs]

LABERGE: What do you know about your grandparents on either side?

KAY: I actually only knew one on each side. The other on both sides had died before I was born. I knew my mother's mother, whose name was Molly Crawford. I think her true birth name was Margaret Lee Fraser; they called her Molly. My grandfather Benjamin Hawkins Crawford, my mother's father, died the year I was born, in 1934, but Grandmother Molly made a habit after her husband died of visiting all her many children, and she would come and spend three/four weeks a month at everybody's house. So I got to know her quite well. My father's father, whose first name I do not remember, I only called him Grandfather Hill — I can probably find that out from one of my many cousins — was a farmer in the lower part of South Carolina. His wife had died before I was born, and he was living with a companion who we all called Miss Minnie. I had no idea what Miss Minnie's last name was.

LABERGE: Do you know your grandmother's name on that side?

KAY: No.

LABERGE: Okay. How far away from you did either of your grandparents live?

KAY: We lived in various places because my dad was a Methodist preacher, and in South Carolina in those days you — what they called "rode circuit" — you had four churches at a time. You preached at two of them every Sunday, and you lived in wherever the main parsonage was and you just went to the other churches. We moved every four years — at least that's the way they did it. But we stayed in South Carolina except when he became a chaplain in World War II, and then Mother and I went with him to Texas where he was stationed. That would have been roughly between 1942–1945, somewhere around there. After he was discharged we came back to South Carolina and resumed all this again. And everybody else was in

South Carolina except for a few of Dad's relatives who lived in Georgia not too far away from the South Carolina line.

LABERGE: So there wasn't one main city you grew up in really?

KAY: Oh no, I was in thirteen schools by the time I graduated from high school.

LABERGE: Even that in itself says something about your adaptability. They do say that about children who move and have to make new friends. Tell me if there was some kind of contact with your extended family — you mentioned cousins. What kind of family outings and contact?



HERMA HILL AT THE  
AGE OF FOUR, 1938

KAY: We always went usually to my dad's home where Granddaddy Hill was — went there every Christmas. Everybody came there and sort of brought food and so on. My mother's family didn't have that kind of reunions. Mostly individual members would visit. In fact, we had the first Crawford family reunion in 1990 put together by one of my cousins — first and only, I should say.

LABERGE: So it was more yearly — it wasn't things like family dinners on Sundays, things like that?

KAY: No, we didn't live that close to any of them to do that. Given that you were in a Methodist minister's family, you had Sunday what they called "dinner," which was the middle of the day meal in South Carolina. You had breakfast, dinner, and supper in South Carolina. You had Sunday dinner with one or another of the parishioners.

LABERGE: Meaning they'd come to your house?

KAY: No, you'd come to their house after church. You'd go to their house and be fed, and usually they'd invite some of their family and friends, and so on. It was part of Daddy's job; it wasn't as though it was sort of a family social . . .

LABERGE: Yes, but you were part of that.

KAY: Yes, because Mother and I went to church twice a Sunday.

LABERGE: Right. Since we brought that up, tell me about that part of your background and how it's influenced you — and more about what that was like even during the week.

KAY: In the rural towns where we lived there were not very many people who had education past high school — not all of them had education to high school. My mom and dad were usually the only two people that you knew had college degrees. I think the fact that I was the “preacher’s daughter” sort of set me apart and meant that there was a kind of a social distance between me and the other children. But, you know, I sort of organized games and plays and little skits that we all put on together, stories and things like that.

LABERGE: And you were going to the local schools? Tell me about one

of the — your experience at school. From what you said, I assume you were a leader and probably the smartest girl in the class.

KAY: Not always, because a lot of the kids there were very smart — they just didn’t have a lot of the cultural surroundings that you would have if you were in the city. Can I start with my formative childhood experience? It happened when I was four years old.

LABERGE: Oh please, yes.

KAY: I told you my dad was a deer hunter. This was when the deer jumped in our window. [looking at album] This is the house where we lived,



4. Rev. and Mrs. Hill and their little daughter were sitting in this room reading the evening paper when the peace of the home and neighborhood was alarmed by the confusion caused when this beautiful beast crashed through the window and made repeated attempts to jump the wall of the room in the corner where he was felled.

FROM THE HILL FAMILY  
SCRAPBOOK, OCTOBER 30, 1938

and that's the window that the deer jumped through, and here is — my dad had to kill it inside the dining room, and here he is with his shotgun over the deer. That's the shot of the window, and you see it was covered with all sorts of newspapers, and here I am at the age of four.

LABERGE: Did your father do these captions or your mother or . . .

KAY: I don't know who did this . . .

LABERGE: I mean, it's so dear! I want to just say for the tape, it says: "The little daughter is shown here in her father's arms."

KAY: I have no idea who put this together.

LABERGE: Oh, that's quite something — this was not Mr. Hill's first deer hunt. [laughs]

KAY: No, it certainly was not! There are all sorts of pictures of where it was, and the cutest part of it is that there are all these letters from his friends wishing him well from all over: "Do not shoot over quota before the next hunt." [laughs] I remember it quite well. And that, I think, gave me a sense of, shall I say, the fragility of life.

LABERGE: Oh, that is wonderful. Some of those things said "Orangeburg" — is that the biggest city around?



HERMA HILL WITH HER FATHER  
IN THE FRONT YARD OF THE  
FAMILY HOME, CAMERON, SOUTH  
CAROLINA, EARLY NOVEMBER 1938

KAY: Orangeburg was near where Cameron is [we lived in Cameron at the time], and it was Orangeburg where I was born.

LABERGE: Tell me a little bit about your parents' background — for instance, where they went to school, what you know about their family backgrounds, from which country they came, their education, how they met.

KAY: Well, my mother went to a women's college in South Carolina called Winthrop College. She and one of her sisters both went there and they both became schoolteachers. My mother graduated — let's see, I think I figured out where she was born and what year she was born. She was born in 1905 and she graduated from Winthrop in 1928. And my father was born, I believe, in 1902 and he went to college at Wofford College, where he got his training as a minister. And they, after they graduated, were sent to the same town for their first jobs. They had of course not met each other, but there she was — the new, unmarried teacher in town — and there he was — the young, unmarried minister in town — and I guess things came naturally. This was a town called Cottageville, South Carolina. They were married in 1930 and I was born in 1934. She stopped teaching when I was born. She taught third grade, and when I went to grammar school, which would have been in 1940, she started teaching again, which was quite unusual in those days.

LABERGE: Yes, unusual even for a woman to have a college degree.

KAY: The family, my father's family were from South Carolina — as far back as anybody knows. My mother's family were — her mother came from Tennessee and her father, Benjamin Hawkins Crawford, owned a blacksmith shop in Union, South Carolina, which is where their home was and where all of her brothers and sisters, except for the two older, were born. I don't think my grandmother had any formal education. I don't think anybody before me — no, none of them had any college education before my mother and father and some of their brothers and sisters. I have no idea what country they came from. The family legend on both sides is that they were a mixture of Scotch-Irish and English, but I don't think anybody really knows. There's no story of the immigrant coming over in the family, so I think they must have been around for a while.

LABERGE: Tell me about the schools you went to and what your experience was.

KAY: Mostly they were one-room schools — when the cotton crop was ready to be picked they closed the schools and you went out and helped pick the cotton.

LABERGE: And did you help pick the cotton?

KAY: Oh, everybody helped. Then there were, you know, usually one teacher with several grades of students — they didn't really differentiate the grades in those schools. When my mother taught she usually would drive to the nearest town where there were "real schools," as she called them. I don't think she ever taught in any of the country schools where I went until finally, as I was in high school, she decided that I needed to have a better high school than the one that was out where we were living. So she did arrange for me to get transferred, and then we did go in together, but of course she was teaching third grade and I was in high school. We weren't really in the same area. That prevented me from playing basketball, because they wouldn't let me have a waiver to play basketball outside of my district. I was not able to do that anymore.

LABERGE: That was something you liked?

KAY: Well, it was fun — we played the split court rules, those were the "girls' rules" in those days, but they didn't seem to care that I continued to compete in the high school debate tournaments. That didn't bother them, so I was able to do that.

LABERGE: Always different rules for sports it seems. [laughs]

KAY: That's right, absolutely. But the schools were — you would be surprised that you had any kind of education really, because they were not very good, they weren't very advanced.

LABERGE: Did you know that then or do you know it in retrospect?

KAY: I think I know it in retrospect. I think my mother knew it because she knew what I should be learning — and she was always very helpful with the homework and taught me the things that she was worried that I wasn't getting. [laughs]

LABERGE: Yes, yes. Did you like school?

KAY: I did, yes. I thought school was fun. I loved debating — that was great fun.

LABERGE: You started debating before high school?

KAY: No — well actually, the story that's been published all over is about my sixth grade teacher, and by that time we had been to Texas and back so this would have been roughly 1946 or so. My teacher, who taught this course that we called "Civics" in those days, decided that we ought to have some debate experience, and she decided we were going to debate the question "Resolved: the South should have won the Civil War." I decided to take the negative of that question. I figured I had history on my side. Nobody else was willing to take the negative, and so we had this debate in front of the class, which I won hands down, and then she said to me — I remember this quite clearly — she said, "If you were my daughter, I'd send you to law school." So I went running home to Mother and said, "Guess what! Miss" — whoever she was; I don't even remember her name — "thinks I should go to law school." And my mother was utterly firm about this. She said, "Don't be silly." She said, "You can't make a living as a lawyer. You will get an elementary education degree just like I did, and then," she said, "you will be able to support yourself." I mean she was — she did not joke around about that at all. She was very clear about it.

LABERGE: Is it because a woman lawyer couldn't make a living?

KAY: Oh, I'm sure that's what she meant and what she understood. There were no lawyers in our family, so I think this was just on the basis of her general impressions — and who knows, she may have had some problems doing what she wanted to do in school, education, and so on. Although she never had any trouble getting jobs teaching the third grade. But I think she had a sense of what the world was like for professional women.

LABERGE: As you went along in your life, how did both of those reactions influence you?

KAY: When you would go around the room at wherever you were going around the room, and people would say, "Tell us what you want to be when you grow up," I always would say, "I'm going to law school." Everybody would say, "Don't be silly, you're going to get married and have babies." "No, I'm going to law school." I did ultimately go to law school, but before that — in college — to satisfy my mother, I did start out with a major in

elementary education, which I dropped after the first semester because I was also taking things like philosophy and English literature, which was my love. And to go from those courses to the elementary education courses was just more than I could bear. So I said, “I’m sorry, I’m dropping this,” and at that point she stopped complaining about it.

LABERGE: That’s so interesting. So, debate in sixth grade. What else in elementary school? Outside activities, and by that I mean also things like picking cotton, which I wouldn’t have thought of.

KAY: Well, I didn’t do it that much. [laughs]

LABERGE: Right, but if everybody did . . .

KAY: Everybody did, yes. The things that we did — and again, this was sort of an outgrowth of my father’s profession. In the summertime, the religious groups — I don’t think this was just the Methodists, I think other denominations were all involved in it — would go to a sort of organized camp where you — they would have what they called a camp meeting, and it went on for a week or so. There would be little wooden shelters where you and your family could bring little cots and whatever. There were open fires where you could cook, and so on. People would preach all through the day, and people would come and bring their families, and then there would be campfires at night. So, that was a big thing. In the summer, we always went to the beach, usually at the Edisto or to Folly, and we would rent places to stay — I don’t know whose idea that was. It may have been my mother’s idea. She always enjoyed going to the beach so we always spent two weeks in the summer at the beach — that was our vacation.

LABERGE: Not with family members?

KAY: No, although I think occasionally there were people who were friends who would go down with us, but I don’t have a clear memory. I don’t remember it just being Mother and Dad and me. I have the sense that there were more people in the house, so I think there probably were other folks who went, too.

LABERGE: It sounds like your father’s profession really did dominate — more than some other families, maybe — what you were doing.

KAY: Oh, I think so. The life of a minister in the rural South had a lot of aspects — you know, it was counseling, it was teaching, it was preaching,

it was giving advice, it was just doing a lot of things that probably nobody does anymore. But he also liked gardening. What he called a garden was like an acre or so of vegetables. He used to do it with a hand plow, and we had corn and beans and tomatoes and carrots and all those kinds of things. My mother used to can all of these things, and I got in on the act too. I developed a sort of a penchant for making pickles — those things they called bread and butter pickles.

LABERGE: Yes, I do know those.

KAY: And usually in the summertime after church, there would frequently be special Sundays when people would bring food, and they would have these big wooden tables out under the trees, where people would eat things. And there was a — I haven't thought about this for years — there was a man who had not married. He was relatively well off for that community, so everybody was waiting to see who he would finally marry. One day he announced, after having eaten some of my pickles, that he was going to marry whoever had made these pickles, and when my mother trotted me out — I think I was about seven at the time — he decided he would have to wait for a very long time. [laughter]

LABERGE: Oh dear! You're painting a very wonderful picture of — this is rural South Carolina. When you went to Texas, what was that like, what do you remember about that?

KAY: Then, my dad was a chaplain in the army, so we lived either on the army base in housing for families of the service people or we may have occasionally, I think, had apartments near the base. Then, you didn't have the community connection, right? Then, he had his office on the base and we had — I remember once I had a birthday party and I wanted to invite some of the people who worked at his office, and my mother had to explain to me that there was this non-fraternization policy. He was a captain and I couldn't invite these privates. [laughs] So I had two parties — one for the privates and one for the other folks.

LABERGE: Where in Texas was this, do you know?

KAY: I was trying to remember yesterday the names of these — because I don't remember, but it would have been an army base in Texas. I don't



HERMA HILL'S FATHER, CHARLES ESDORN HILL, RECEIVING AN AWARD DURING HIS SERVICE AS A METHODIST CHAPLAIN IN THE U.S. ARMY DURING WORLD WAR II

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remember the names of them, but the towns we lived in: one was called Elgin and one was called Paris, Texas.

LABERGE: What do you remember about the war in general?

KAY: Nothing, except that my dad had to go over there.

LABERGE: He did?

KAY: Oh yes, he went. My mom and I went with him for about three or four months to New Jersey, which is where he embarked to go to — he was in Germany, and he wrote letters. We then went back to live in a house that had been Mother's family home in Union, South Carolina, and we

lived there while he was overseas. Then he came back and we went back to wherever his next church was, I think a little place called Nichols, South Carolina. That wouldn't have been right after he came back, but that was where we were living when I was in high school. And the high school, you know — that's where I played basketball in the little rural areas. You didn't have a one-room school any more, but it was not really very advanced. And I think it was at that point that my mother decided that I needed to go to the high school in Lancaster, South Carolina, which is where I finished high school.

LABERGE: And where she was teaching.

KAY: Where she was teaching, yes — in the grammar school.

LABERGE: So tell me a little bit about the high school — what the courses were like and how that change was for you.

KAY: It didn't give me any problem, I don't think. I don't really remember high school terribly well. I think I was president of one of those classes. I remember having to put on a class prom sort of thing.

LABERGE: What about classes? For instance, did you have science and language?

KAY: We had a French teacher who was absolutely taken aback by our accent. She had just started and she was, I think, not prepared for the students she was going to have. I remember her saying to me one day, when she was trying to get me to sound a French vowel, "How do you pronounce the word if you were going to put this book here?" And I said, "I would say I put the book 'own' [meaning "on"] the table." And she said, "And what would you say if I asked you to tell me about something that's yours?" I said, "I would say I 'own' the bracelet." And she said, "How can I teach you French? You don't speak English." [laughs] So, I never did well at languages. I think I convinced myself that I had no facility for languages, but I've never spoken anything but English.

LABERGE: But it was offered and everyone took — yes?

KAY: It wasn't mandatory, and we never had — my husband took Latin in high school. I don't think anybody ever thought of that in my high school, but I think you could do German or French. I don't think they even offered anything comparable to Spanish. I got through my one year of French and

promptly forgot everything I may or may not have learned. I loved English because I love to read. My biggest extracurricular activity was reading, and my father used to say to me every time we would drive back and forth from Texas to attend these Christmas family gatherings, “Why don’t you look out the window? You always have your nose in a book.” Which is true. I took the books with me that I was going to read while I was being exiled back to these places, and I read. That was, I think, what stimulated my imagination — what certainly led me to major in English when I got to college.

LABERGE: What did you like to read?

KAY: Oh, I loved the Nancy Drew books. I’ve read all the Nancy Drew books. Here was a woman who could do something, right? My granddaughter is now reading the Nancy Drew books and she’s utterly astonished to think that her grandmother read them. [laughs] She loves them too.

LABERGE: Yes, yes — but it’s true, and her father was the lawyer in town and she was helping.

KAY: Yes, yes, that’s right. Absolutely, absolutely — and she didn’t have a mother.

LABERGE: No.

KAY: She did not. [laughs]

LABERGE: I did too. I used to read those under the covers. That’s great. And what about debate in high school?

KAY: I was in the debating society and also — I was trying to think what year this was. I’ve got this thing somewhere at home — God knows where it is. There was a sort of oratorical contest that was sponsored by some conservative group. I think it was called the Freedoms Foundation at Valley Forge. Anyway, it was a national thing for high school students, and you would write your ten-minute oration and then you would deliver it. Mine was entitled [said in a Southern accent] “Our Constitution: Worth Havin’, Worth Defendin’.”

LABERGE: Just with that exact spelling, too?

KAY: That's right. [laughter] That's right, and I won the South Carolina contest. Then in the regional contest I lost to another girl — from Virginia — and she won the national. It was one of the first years a girl — high school girl — had won this thing. So, that was a sort of high point in my development. I've still got that speech somewhere — I don't know where it is.

LABERGE: Oh, that's wonderful! And the fact that you picked out the Constitution. You can clearly see how you got to law school, if we trace it all the way back. [laughs]

KAY: It was that sixth grade teacher — she certainly lit something in my imagination.

LABERGE: And what about — you don't have an accent.

KAY: I deliberately tried not to have an accent, because when I went to college we were debating, and that year the national question had something to do with racial discrimination. One of the examples everybody was using was segregated facilities, like theatres, movies, restrooms and so on, and water fountains. You had separate water fountains for blacks and whites in the South. And I would call them "wah-tuh fountains," and my debate coach said, "No, you can't do this. You have to learn how to speak English." So I did — I worked very hard . . .

LABERGE: By yourself or did you have a coach?

KAY: He was the debate coach, so he helped. I learned how to add my "i-n-g's," and how to try and not make two words out of any word that had a vowel in it. It was deliberately done.

LABERGE: It must have taken longer than a year.

KAY: It took a while, it did. But by the time I got to law school I don't think there was a problem. I think people weren't then saying, "Oh, she must be from the South."

LABERGE: Well, bringing up discrimination — what do you remember of growing up in the South and discrimination and segregation?

KAY: I remember very clearly — the separate seating facilities in the movies, where you had the black balcony. I talk a little bit about that in that piece I did on the attack on diversity in legal education. Did I give you that?

LABERGE: No.

KAY: I'll give you that because it does have some of the stuff — [stops and looks for paper] — it starts with some of the recollections there . . .

LABERGE: Wonderful. Maybe it's just as well I didn't read it, because this is all new to me, what you're telling me.

KAY: Yes. So I definitely had the sense that something wasn't right — that this was not the way people ought to be treated. As I point out in there, it really gave me a sense of how wrong the law was on this point.

LABERGE: Did you get that sense at home too, or was it just something in you?

KAY: No, I think it was my own experience. I don't remember ever having discussed this with my mom and dad, although I do remember that when my mom came out to live with me in college after my dad died, I introduced her to one of my friends who was black, and I think she was in shock. She didn't say anything about it, but I think she was a little shocked.

LABERGE: Yes. Continuing on that vein about your parents, what about politics? Is that something that was discussed at home?

KAY: Oh no. In South Carolina everybody was a Democrat. In fact, I remember once — it may have even been in the same civics class — we were talking about some election or another that was coming up, and my teacher said, "How do you vote?" And I said, "Well, you go down and you get a Democratic ballot and a Republican ballot, and you decide what you want." And she said, "Oh, you do?" I said, "I think so." She said, "Why don't you bring us back a Republican ballot." So of course I went down to city hall and there was no such thing as a Republican ballot. She was making a point of it. Of course, that was all before the South decided they were going to become Republicans. But there was no talk about politics — it was all cut and dried.

LABERGE: Obviously, you didn't go to school with black children or . . .

KAY: No, no. Not until I got to college.

LABERGE: But what kind of relationships did you have with black people, if at all?

KAY: There were children, occasionally, who were the kids of the people who were sharecroppers or the domestic servants, and so on. I say in my

article that, except for the black ministers who occasionally met with my father — he used to preach at some of the black churches as an invited guest from time to time — I never saw a black man in a shirt and tie. There were black undertakers. There were black ministers who — the Methodist Episcopal church was segregated and it had black churches and white churches. It's a while before that, after the integration was successful. In fact my father once — I guess this comes under politics, this one, because this affected what he did. He once preached a sermon saying that he thought this was wrong, that there should be integration between the churches. We were all children of God — there should be no distinction. That afternoon, people — I thought they were Ku Klux Klan; they may have been — drove up and down the road outside our house honking their horns and yelling out things. My father sat there all afternoon, that shotgun you saw in the picture across his lap, reading his Bible. After a while they stopped driving past. It was not a popular thing to do.

LABERGE: Yes — and obviously you remember that afternoon.

KAY: Oh yes. That was pretty impressive.

LABERGE: Yes. Any more anecdotes? Anything you wanted to add about school time or jobs — besides picking cotton?

KAY: I didn't have any jobs — no paying jobs. I used to teach Sunday School, but that was not a paying job.

LABERGE: You started teaching early on in your life?

KAY: Well, you know, everybody took turns teaching Sunday School. I probably did it more than most because I was the preacher's daughter. There is this nice story about when — we were in Texas. I don't quite remember why this happened, but it may have been that there was a Christmas when my dad couldn't go, or was stationed somewhere else and couldn't get away. [He may have been overseas.] My mother and I drove to South Carolina to this family Christmas thing. I remember on the way back — it was on New Year's Day — she had car trouble, and she had to be back in school the next day because her classes started the day after New Year's. She didn't know what to do, because everything was closed, right? So she drives into this filling station which was open, and they looked at her car and they said, "Well, there won't be anybody here until tomorrow. The mechanic will be

here but nothing can be done today.” My mother — who was not a helpless woman, my mother — sank down on this chair in the garage, and she looked at the man and she said [in Southern accent], “I just don’t know what I’m gonna do. I just have to be home tomorrow.” She didn’t say a word about being a teacher. “I have to be home tomorrow.” I want to tell you, a mechanic was there in about half an hour and fixed her car, and we went on to Texas. And I thought, you know, there’s something to this business about throwing yourself upon somebody’s mercy. It’s not all bad.

LABERGE: With a Southern belle accent kind of thing?

KAY: Yes. I mean, batting the eyes comes in handy occasionally. [laughs]

LABERGE: Yes. All these various things are things that you’ve learned or picked up without anyone saying, “This is how you act, this is how . . .” Isn’t that something? Also, it does sound like your mother was not at all helpless. She was quite a woman for her time.

KAY: She was. Yes, she certainly was.

LABERGE: What influences — besides your parents, obviously — do you think were the biggest ones as you grew up?

KAY: There was that sixth grade teacher.

LABERGE: Whose name you don’t remember?

KAY: Whose name I don’t remember, yes. Well, I have a letter somewhere, because the *New York Times* printed that story when I became dean here, and I got a letter from one of my classmates telling me that this woman had died. She was really sorry that she didn’t know that I was telling the story, and she mentioned her name. I think I’ve got that letter somewhere — I don’t know where I put it.

LABERGE: That’s also quite wonderful that one of your classmates saw the story, particularly if you were going from school to school. You probably didn’t have this bulk of kids you grew up with.

KAY: I guess people pick up stories that appear in the national press that has some local connection to it.

LABERGE: Yes, they reprint it.

KAY: Yes, that’s probably why.

LABERGE: It sounds like all along you had intended to go to college and your parents intended for you to go.

KAY: Oh yes. They definitely did, yes. This is another of my mother's strengths: there was this young tobacco farmer when I was in high school that I really didn't want to leave when we went to — I guess we went to Lancaster. It must have been when I was in the eighth or ninth grade or something like that. He had been my boyfriend and I didn't want to go, and so I said to my mother, "I'm not going, I'm staying here." "Well," she said, "what are you going to do?" "We'll get married," I said. Mother says, "That's wonderful. Now, of course, you can't go to college. You'll be raising tobacco all your life, probably have lots of children, but you can't go to college." Well, that was goodbye to the boyfriend. [laughs]

LABERGE: How smart of her to handle it that way.

KAY: After we moved, he and his friend got their car and they came up and visited us once. At that point, I couldn't figure out why. [laughs]

LABERGE: That's very interesting. How did you choose SMU [Southern Methodist University]?

KAY: My dad wanted me to go to a Methodist school, and I was deciding between Duke and SMU. Exercising very bad judgment, I chose SMU because it was not as close to home as Duke was. And because I remembered Texas and I thought I would enjoy going back there again. So I traipsed off to Dallas and started school at SMU.

LABERGE: You said that you were starting off doing elementary education.

KAY: I started off majoring in it . . .

LABERGE: Majoring in it, then changing to English soon thereafter?

KAY: Yes. I think I took elementary education courses, certainly for — I don't think I took them immediately. I think the first year was relatively sort of set up. It was at that point that I realized that there were more verbs than I thought ever existed, [laughs] realizing my education had not been quite as good as I thought it might have been. So I really did a lot of work there, getting myself up to speed with people who — even though SMU had a justifiable reputation as being a party school, there were still people who had been to high schools in places like Dallas and other places around

that were much better. So I had to do some work to get caught up. I think it probably wasn't until my second year that I started taking these elementary education courses, and then I decided I just couldn't do it.

LABERGE: What kind of work did you do to catch up? Was it like after school remedial classes or just extra studying?

KAY: Right, just focusing.

LABERGE: Tell me what kind of a school it was. What were your activities? And what the living conditions were — things like that.

KAY: Well, I spent the first year in the dorm. My father died the first semester I was in school, and my mother came out the second year and she and I lived together in Texas for the three years that I was in college. Then she died, just the summer before I went to law school. So I lived in an apartment with her for three years. The first year, I lived in the dormitory and it was there that I met a woman who was in my class. She was not my roommate, but she was in the same wing of the same floor. Her name was Rikki [Frederika] Amsler and her mother, Margaret Amsler, is one of the women that I'm writing about. She's one of the fourteen early women law professors. Rikki took me home with her for Thanksgiving the first semester we were there, and I told her mother that I wanted to go to law school. Her



HERMA HILL'S MOTHER,  
HERMA LEE (CRAWFORD) HILL, IN  
DALLAS, TEXAS, WHILE HERMA WAS  
A STUDENT AT SOUTHERN METHODIST  
UNIVERSITY, EARLY 1950S

mother thought it was a perfectly wonderful idea, [laughs] so she really encouraged me.

LABERGE: And she was teaching law then?

KAY: She was teaching law at Baylor.

LABERGE: Okay.

KAY: She had married one of her classmates and they practiced law together — she and Sam. She was teaching and practicing at the same time. She was clearly all for it. That just sort of solidified this notion that I had, and emboldened me — once I got into these elementary education courses — to say I just can't do this. So I got out of that, and then did a major in English with a minor in philosophy.

SMU was a very conservative place. The first year that we were there, they had this big flap with the religion department. We were required to take religion because it was a Methodist school, and they had gotten a fairly decent number of young people, professors, in that department who wanted to teach religion as — I don't think they quite dared go so far as to teach it as fiction, but they wanted to teach it as history, not as belief systems. The school let go a fair number of them, and a group of us got involved in supporting them. But many ultimately did leave. But then SMU was never able to go back to doing what they had been doing before, so the religion department really did become more of a historical approach to religion rather than a “this is the way it really is” kind of thing.

I think I must have caught the attention of some faculty members — there was a man who was in the English department who taught poetry, whose name was Lawrence Perrine. He wrote a book called *Sense and Sensibility* about poetry. He was really one of my mentors encouraging me to — he thought that I would teach English, but I explained to him that I was really going to go to law school. [laughs] He was very, very good and very helpful. There were some other — I don't have any women role model teachers. In fact, I don't really remember women teaching. I'm sure they were. Certainly there were women in the elementary education department. I don't remember any women teachers in other areas that I had there. And I was active in debate, I was active in a lot of extracurricular activities, and I was a — are you ready for this? I was a cheerleader. [laughs]

LABERGE: For the football games and the basketball games . . .

KAY: Of course — naturally, yes. I don't think I did that for very long — I did it for maybe a year.

LABERGE: Sororities?

KAY: Oh yes. SMU, as I said, was a real party school. I hadn't really planned to do this — and I got there, I guess, about a week early, and there we were camped out in the dorms and all this rush stuff was going on. You would see mothers whose daughters were going through rush, and the mothers wanted the daughters to pledge the sororities that the mothers had pledged. And if they didn't get invited, they yanked the daughter out and went to another college so they could do it again. This was the most important thing, right? The right sorority. So I and some other folks then got picked up in this post-rush week, where they sort of swept in people who had somehow not been part of it for one reason or another. I was invited to join a very non-socially . . .

LABERGE: Prominent? [laughs]

KAY: Respectable—prominent [laughs], that's right. In Texas it was more or less respectability that — it was called Sigma Kappa. There is actually a chapter of it here at Berkeley. Years and years ago, when they found out — I guess, from reading one of these little profiles of me — that I was a Sigma Kappa, they invited me over to the house to talk at dinner. Which I did, and they have never had any further contact with me. But I did spend three years at SMU as a Sigma Kappa, so that took a lot of activity. And I was active in other kinds of student organizations.

LABERGE: Here we go. Okay, you were just telling me about being in the sorority and then other activities.

KAY: The debating took a lot of time. There were lots of tournaments, and I actually was on the boys' team. I didn't debate with the girls.

LABERGE: How did that come about?

KAY: Well, because I was one of their top debaters and they wanted me on that team. They didn't have any rules at that point that said you couldn't do it, so I debated with the boys.

LABERGE: What were some of the topics? Do you remember?

KAY: I don't really remember. They were mostly whatever was politically hot that they thought would attract people's attention. I don't remember that we did anything, you know, like "peace and war" or stuff like that. It was more like things that were a little bit less polarizing and that let you do some investigation. Arguments on either side, I think, is what they tried to have when they picked those things. And I was Phi Beta Kappa, my junior year — departmental distinction in English.

LABERGE: So it wasn't a party school for you. [laughs]

KAY: No. [laughs] I played a lot of bridge — the sorority played a lot of bridge.

LABERGE: Okay — and I think that was a time when people did play bridge. If you walked into a dorm here I don't think people are playing bridge any more.

KAY: Probably not, no. Are they playing any kind of cards now?

LABERGE: I don't know. I don't think so.

KAY: When I started teaching here, there were a group of the guys who used to play bridge every lunchtime. My class started right after the lunch hour, and so they would always dash in at the very last second. They'd crowd in as much of that bridge as they could. I think that didn't last here very long.

LABERGE: That must have been a different experience also to be living with your mother during college, which isn't what everybody experiences.

KAY: No, and she was teaching. She had a teaching job, and so it wasn't as though she was there during the day when I was gone. We would catch up with each other in the afternoon or the evening. She kept going back to those family Christmas things, I guess because she thought I wanted to, and so we did that.

LABERGE: I'm just thinking of national events and everything — this was sort of pre-civil rights, except it's when *Brown v. Board of Education* came in.

KAY: That happened when I was in college.

LABERGE: What do you remember about that? You wrote about it?

KAY: Yes, I wrote about it.

LABERGE: Tell me a little . . .

KAY: I remembered what I had experienced in the South, and I thought that it was quite an important decision that would really change a lot of things. And I thought that it was long overdue.

LABERGE: So interesting too that it was Earl Warren, and probably little did you think that . . .

KAY: I say that: little did I think that I would someday be dean at “his” law school.

LABERGE: Other than that, were students involved politically or no?

KAY: Not very much, no. They really did not. Dallas, Texas, was not Berkeley, California.

LABERGE: Exactly, exactly. Other than cheerleading, were there other kinds of athletics for women?

KAY: I didn’t go out for sports. I really didn’t have the time, and my not having been able to play basketball for the last couple of years I was in high school sort of soured my interest in it. And the debating was really an . . .

LABERGE: Encompassing . . . ?

KAY: Yes.

LABERGE: Do you have any more anecdotes about college or other influences besides the one professor? And your friend’s mother, Margaret Amsler?

KAY: I would visit them from time to time. She was always very, very gracious and very hospitable and very, very supportive. She was wonderful. Her daughter, Rikki, was not the slightest bit interested in law school.

LABERGE: What kind of advice did she give you?

KAY: Oh, she didn’t really have to give me so much advice. It was the fact that she didn’t think this was a crazy idea.

LABERGE: Yes, and it was possible to do it.

KAY: Yes, that’s right — it was possible to do it, and it did not seem at all out of the ordinary to her. Which was really, I think, what I needed because

my mother was so — really convinced. My father kept saying, “Oh, she can do whatever she wants,” but my mother really was worried about it. And I remember at one of my fundraising speeches that I used to make after I became dean, I said, “My mother said to me that if I became an elementary education schoolteacher I would be self-supporting and I would never have to ask a man for money. You know, I think she would be turning over in her grave if she knew how many men I am now asking for money.” [laughs] But of course I ask women for money too. [laughs]

LABERGE: Yes, yes! What other law schools did you apply to, and how did you decide on Chicago?

KAY: That was an interesting story. It was totally by accident that I got to Chicago. I took my college transcript when I was in my fall semester — my senior year — and I made an appointment to go over and see the dean of admissions at the SMU Law School. I was going to say, “Can I come here?” In fact, I did say, can I come here, and I had an appointment with him about one-thirty in the afternoon. Little did I know that he had just had lunch with the dean of admissions from the University of Chicago Law School.

In those days, Chicago had these full honor scholarships that they gave to colleges around the country because they wanted to attract a geographically diverse group of students. They were really at that point more or less a regional Midwestern school. They wanted to become a national school. I later learned that the substance of this luncheon discussion had been, “We’ve been giving you guys at SMU scholarships that you’ve been awarding for the last three or four years and you’ve never sent us anybody who distinguished themselves as students — can’t you do better?” So one-thirty comes, I’m walking into this man’s office and I hand him what was a pretty decent transcript, and said, “Can I come to law school here at SMU?” Like what I have since learned would be a typical reaction by an overworked administrator with a new problem — he looked at my transcript and said, “Well, of course you can come here, but wouldn’t you like to go to Chicago? I can get you a full scholarship.” Solving his problem, right? I was taken aback — I literally looked at him and said, “Where’s Chicago?” He said, “Very good law school. Go there; it won’t cost you a penny.” So I went to Chicago.

LABERGE: You still had to go through an application process, or was it a done deal?

KAY: It was a done deal. I mean, it was clear. We didn't have — we didn't take LSATs at that point. Oh yeah, it was definitely a done deal.

LABERGE: And you didn't know what a reputation Chicago had?

KAY: I had no idea, no — I mean it was just a total fluke. Looking back on it, in my conversations with women law students over the years, it's perfectly clear that if I had gone to SMU nobody would ever have heard of me again. Because at that point, to get into a school like Boalt as a teacher, you had to have graduated from a very well-known law school.

LABERGE: In some of your articles you called them the "feeder" schools.

KAY: Yes, that's right. It was, I think, probably the single thing that was the most transformative event that enabled me to do what I later did. It was all because of one lunch appointment, right?

LABERGE: Right. What was this man's name?

KAY: The dean of admissions at SMU?

LABERGE: Yes.

KAY: Well, let's see, this would have been 1956 or '55, I guess. The dean of admissions might be listed — those books are all downstairs.

LABERGE: You can fill this in, in the transcript when you see it. [SMU did not identify anyone as the dean of admissions in 1955–56.]

KAY: I gave you the name of the one from Chicago. His name was Jo Desha Lucas, and he told me the story after I got to Chicago.

LABERGE: So that's how you found out the story — not from your own dean?

KAY: That's how I found out — yes. No, he never told me about his lunch with Lucas, but I was certainly grateful to him.

LABERGE: You had a three-year scholarship?

KAY: A full scholarship.

LABERGE: Including room and board?

KAY: No, they didn't pay room and board. I rented an apartment. Now, did I have a housing allowance? I'm not sure if I had a housing allowance or not, but they didn't really have a dorm. I guess they did, but the law students by and large didn't live in dorms, so I rented an apartment on Sixty-first Street, which was across the Midway from the old law school, if you know Chicago.

LABERGE: I do.

KAY: Wind used to howl down the Midway in the wintertime — it was freezing there.

LABERGE: Now, at this point your mother was still alive.

KAY: My mother was alive when I got the acceptance, and so she knew that I was going to be able to afford to go to law school. I don't think she thought I'd last — I think she thought I'd drop out, but I didn't.

LABERGE: But she didn't go with — I mean she died in . . .

KAY: She died in Texas, yes. She died just before I was about to go — maybe a month or so before.

LABERGE: Which is also hard. I mean, you were young to have lost both your parents so early, and to go on and fend for yourself.

KAY: Yes, that's right. I've already lived longer than either of them. She died at fifty-one and my father died at fifty. [Anecdote deleted that appears again in next interview.]

LABERGE: How about jobs in the summers, or what did you do in the summers during college?

KAY: I read.

LABERGE: Stayed in Dallas or did you go back to South Carolina?

KAY: No, because Mother was in Dallas at that time, so we stayed in Dallas. Did we go to the beach? I don't think we went to the beach after Dad died. I think we just stayed in Texas.

LABERGE: And any traveling?

KAY: No. I had not been out of the country until after I graduated from law school.

LABERGE: Okay. And you'd never been to the North, obviously.

KAY: No.

LABERGE: What was that trip like? Tell me about your reactions.

KAY: I drove from Dallas to Chicago. At that point, I guess, I had not totally lost my Southern accent, because I was trying to find an apartment, and I was going through the ads. I would call up asking to be able to come and see anything that was close to the university, and people would say, "Sorry, it's been rented," or "It's not available." I was saying something to a friend of mine who lived in Chicago; I said, "Everything seems to be rented so fast." "Oh no," she said, "they think you're black." It's because they heard my voice. She said, "You go there in person and ask to see an apartment." So the next day I started doing that and it worked like a charm. It was really astonishing. We later learned — we didn't know it then, but a lot of that property that was there on Sixty-first Street and around the university was owned by the University of Chicago. But their ownership was disguised through land trusts. It was later, when they broke those trusts, that they'd learned that a lot of that property was owned by the university and they refused to rent to blacks. It was a real embarrassment for them when it became known.

LABERGE: Yes. When you got to Chicago who did you know?

KAY: I didn't know a soul.

LABERGE: You didn't know a soul, so you landed and . . .

KAY: Got this apartment — a third-floor walk-up — and I had not been there more than a couple of hours when there's this heavy knock on the door. I go outside and say, "Who's there?" Here are these two men who can only be described as goons, and they say, "You new here?" I said yes; they said, "You registered Democrat?" I said yes; "You need anything, you let us know." That was the [Mayor Richard] Daley machine. [laughs]

LABERGE: Oh, my gosh!

KAY: I used to watch the open-bed trucks being driven up and down the streets, to bring people out to the polls. And it was when I learned the meaning of the term "vote early and often" — in Chicago. [laughs]

## INTERVIEW 2: JUNE 24, 2003

LABERGE: Last time, we ended with you getting to the University of Chicago, and getting your housing and having trouble with that. But I thought, before we start in on that, we could just pick up a little more on your childhood. We talked about your mother's influence on you but we didn't talk so much about your father's. We talked about what he did, but not — for instance, you brought up, as we were finishing, that you went hunting with him but we don't have that on tape. We didn't really bring up what that church influence — or other influences he had — that may have impacted how you've lived your life.

KAY: I think the most important thing was that he had placed utterly no restrictions on my aspirations. He was always of the view that I could do whatever I wanted to do — not nearly as practical as Mother, who understood what the limitations and obstacles might be. Dad just seemed to think, "She wants to be a lawyer, fine." [laughs]

LABERGE: You never heard anything from him — don't go that route?

KAY: No, nothing at all. And, of course, he was an inspiration in the sense of his oratory. Having listened to him preach twice a Sunday for all of my life, I did get a sense of — his sense of integrity and the honor and candor. I never really thought he was a deeply religious person. I had the sense that he was more — it was a job to him, and I didn't get the sense of any kind of burning commitment. I got more the sense of a person who could come into a new community and understand what the needs were. I may have mentioned that he was very good at building new churches. I think they always sent him places where at least one of his four churches was falling down so that he would raise the money and get it built, and then he would go on to do it again. They really appreciated his organization and ability to get people united and doing that kind of a project. But in terms of saving souls — that didn't come across clearly to me.

LABERGE: Even at that young age, you could realize that?

KAY: I don't know when I realized it, but I had the sense that this was a job.

LABERGE: Has any of that impacted you in your — either spirituality or choice of religion or anything like that?

KAY: Not particularly.

LABERGE: Any other activities, things that you did with him besides, for instance, going hunting? Most girls growing up don't do that, I would think.

KAY: He had no sons — poor man. [laughs] No, I don't think we did anything else together other than that.

LABERGE: Let's go to the University of Chicago. It's 1956, and we have you in your house —

KAY: In my apartment . . .

LABERGE: In your apartment, rather. Before you even started classes, what did you envision yourself doing as a lawyer?

KAY: Oh, I guess I thought I was going to get a job in a law firm. I don't think I thought about teaching when I first went there. I got the sense of teaching while I was there and once I realized that I was pretty good at doing whatever it was you were supposed to be doing as a law student. Because my grades were high. And I saw — this is jumping ahead a little bit — but I saw Soia Mentschikoff. I never had any courses from her other than her participation in [Karl] Llewellyn's first-year course, where she came in and gave a lecture one day. But I had a sense, from seeing her and feeling her presence in the school, that this was something that could be done. And, of course, I had had that meeting with Margaret Amsler from Baylor sort of tucked away in my head, so I got the clear view that this was something that wasn't off limits. But it wasn't what I first started out trying to do. I first started out trying to get a job in a law firm.

LABERGE: With any specialty in mind?

KAY: No.

LABERGE: And what about courtroom work? Did you think of doing that too?

KAY: I don't think I ever thought of that — no. That somehow did not appeal to me.

LABERGE: Tell me what the first year was like, or what your impressions were.

KAY: It was, of course, a relatively small school — it still is. Chicago and Yale, I think, are the smallest of the top ten schools. I think we had

something like 110 in our class, which was relatively large for them, and it stayed about that size. By comparison, we have 270 here at Boalt in the first-year class and I think Harvard has something like 500, so it's really a difference in scale. The curriculum was all arranged in the first year so you didn't have to worry about making any choices. We were small enough so that we didn't have sections — we all had the same classes together. They didn't have small sections in those days, so there was not a smaller group of people that you got to know more than the others. And I think it was just more kind of feeling your way around people that you — we did have a study group and I know that was about four or five of us who met and studied together.

LABERGE: There were only four women, is that right?

KAY: Yes, there were four women. I pulled out the list of my class. There was only going to be three of us originally. One was a woman who practices now in Sacramento. Her name is Gloria Martinez. She was from a large family, as I remember, in Texas. She had something like five or six brothers, all of whom were lawyers, and so she decided she wanted to be a lawyer, too. She was in our class, and then the woman that I was closest friends with — whose name was, at that point, Amy Scupi — she and her husband Richard Scupi were both in the first-year class together. They've since gotten divorced but she and I have kept up with each other over the years. [Her name is now Amy Loeserman Kline.] We were all on the [*University of Chicago*] *Law Review* together — Amy and Richard and I.

The other woman was not planning to come to law school. Her name is Pauline Corthell. Her husband, who was admitted to the class, had been working in the steel mills in Chicago to earn some money during the summer, and he had this terrible accident and lost his vision just before he was about to enter school. So she came with him as a member of the class and read all his cases to him and helped him. He had to learn how to use Braille or whatever, and so they went through together and then they practiced law together after they graduated, for a while.

LABERGE: So she came sort of by default? She was in the classes anyway and . . .

KAY: She came by default. That's right, she wasn't planning on coming, and I guess it must have been something that occurred to them that might

be a way that they could do this, and so she came. So those were the four women who were in that class.

LABERGE: So it was like being in a boys' school, really.

KAY: Well, yes. Legal education was like that in those days. Chicago was very unusual in having a woman on the faculty. So Amy and I and Dick were a group that palled around together. We had made friends with a student whose name was Rufus Cook. Rufus was an African American from Alabama, and he had applied to law school at the University of Alabama. They of course, did not want him anywhere near their law school. So they said to him, "Get yourself admitted to any law school you want to go to and we'll pay your full expenses." His wife was also getting a Ph.D., and they paid her expenses too. So he went to law school at Chicago; she entered the Ph.D. program at Northwestern. Rufus was wonderful — every time the check was a little late he would write them a letter telling them how homesick he was. [laughs] So, he was a fun guy and he was part of our study group, too. It was all very interesting, and I think we had a very good faculty there.

I was particularly impressed with the professor of Contracts, Malcolm Sharp. Of course, Karl Llewellyn was the sort of "great man." Karl Llewellyn was Soia Mentschikoff's husband. He's the one who drafted the Uniform Commercial Code, and there's a famous story about them, about how they got to Chicago. Ed[ward H.] Levi, who was later U.S. attorney general, was the dean there, and when he became dean at Chicago — this is the story that he told me but it's been told lots of other places, too. He said to the faculty, "Who do you want? If you could have anybody you want, who would you like to have for this faculty?" They said, "We want Karl Llewellyn." So he did a little sleuthing around and discovered that Karl had a wife who was working with him on the commercial code. She was actually one of the first woman partners on Wall Street. Ed invited the two of them out to Chicago — Karl at that point was on the faculty at Columbia — to give lectures on the Uniform Commercial Code. While Soia was giving her lecture — he and she and Karl and [Edward H.] Levi were all sitting on the stage together — Levi passed a note to Llewellyn saying, "Are you interested in coming to Chicago and joining the faculty?" Llewellyn

passed back the same note with a little question written on it saying, “One or two?” And Levi said, “Two.”

So then they had the nepotism problem. He managed to persuade Chicago to hire Karl as the professor and to hire Soia as a professorial lecturer. She finally got faculty rank after Karl retired, but during that time she functioned as a full member of the faculty and nobody ever thought she wasn't. I've gone through her archives at Miami because she's one of the early women law professors that I am working on, and I can tell you that she never signed her name “Professorial Lecturer.” She always signed her name “Professor of Law” during that whole period. I'm sure they thought that this was just some kind of thing they had to do for Chicago's purposes, but she was certainly treated as a full member of the faculty — so that was very impressive.

Llewellyn and I, though, got off on the wrong foot. He taught a first-year course called Elements of Law, which he created, and he used as the material for it these two books that he had written. One was a book that he'd written in 1941 with E. Adamson Hoebel, the anthropologist, called *The Cheyenne Way*. They had gone out and done field research on the Cheyenne, and this was about their legal system. The other book that Llewellyn used was his book, *The Bramble Bush*, first printed in 1930, and finally in 1951. His final exam in this course was a series of true/false and multiple choice questions in the form: “LL” — standing for Llewellyn — “LL thinks . . .” and these multiple choice questions that you could answer. My view of this matter was that whatever LL thought he thought now was not the same thing as what he thought when he was writing those books. [laughs] And I just did an abominable job in this test — which, fortunately, at Chicago was the first quarter and the first quarter grades didn't count. You got a final grade in the next quarter of the course.

But Llewellyn was sufficiently displeased by my performance that he called me into his office, and he said, “You know, Miss Hill, you did a very bad job on my exam.” I said, “Yes, I know, Professor Llewellyn.” He said, “It's very difficult for a woman to succeed in law. You can't take Miss Mentschikoff as an example. Miss Mentschikoff is exceptional.” [chuckles] He said, “Now, I know that you may think this is just a test, but this is really an indicator of your ability to think like a lawyer. You're obviously a very bright young woman or you wouldn't have gotten the scholarship here.” So,

he'd obviously checked my records. He said, "I think you should withdraw; it would not be disgraceful. I'm sure you could do something else, but you shouldn't really waste any more of your time here. You're obviously not well-suited for the law."

I was so *shocked*. I mean, I didn't know what to say. I think I just sat there in my chair. He gave me this peering look — he had great bushy eyebrows — and he said, "Well, I can see that you don't understand or you don't believe what I'm saying. I'll prove it to you. The Property grades were posted this morning, tell me what you got in Property." I said, "Well, Professor Llewellyn, I got the highest grade in the class in Property." "Oh you did, did you?" he said. "You obviously aren't working for me the way you're working for Allison Dunham!" — who was the Property professor. "Now, you go out there — " Gone was all this "You can't make it in law school." It was, "You're not paying attention to *me*." [laughs] Years later I told Soia that story and she laughed and laughed, and she said, "You know, I could never pass his test either." I guess in a way it was too bad, because he and Mentschikoff had this evening once a week at their home when they invited students to come over. [She had been his student at Columbia.] People really kind of worshipped the two of them and spent a lot of time with them, and it must have been quite a wonderful sort of relationship to have, but I never dared set foot in their house after that.

LABERGE: That is too bad, but what a thing for him to say. Did it influence you then to want to do even better, or how did it make you act?

KAY: I felt as though I had gotten a reprieve. I managed to get past his exam the next time — I'm not quite sure why or how. It didn't hurt my GPA after I overcame that first bad showing.

LABERGE: And did he teach other classes that you took later?

KAY: No, I never took anything else from him. I never took any of Mentschikoff's courses either, because she was teaching Commercial Law and I was not really interested in that subject. Instead, my closest mentor in law school was Brainerd Currie who taught Conflicts.

LABERGE: Why don't you talk about him a little bit — how did he become your mentor and how did you come to like Conflicts?

KAY: He asked me to be his research assistant.

LABERGE: After having seen you in class or just out of the blue?

KAY: No, after having seen me in class. I'm trying to remember what else he taught. I remember taking Conflicts from him. He didn't teach — I didn't take Civil Procedure from him, I'm sure. I may not have taken anything else from him, so it may have been that I became his research assistant after I'd already taken the course — which would make sense, because then I would have known something about the subject matter. He's listed as having taught Admiralty — I never took his Admiralty course, and I didn't take Civil Procedure from him; I took it from somebody else — and Conflicts. So I think it must have been after I took the Conflicts course that he asked me to be his research assistant. He was working then on this new theory of his on governmental interest analysis, and he said, "I think there's some constitutional problems with this. Why don't you go out and do some research on the Equal Protection Clause and the Privileges and Immunities Clause." We wrote two articles together based essentially on drafts that I had done that he then took over. We worked together on these two projects and they were both published. It was really quite an experience, you know, writing an article with him — writing two articles with him — and working on the theory that he was espousing. He was a Southerner like me — I think he was from Georgia.

LABERGE: And did he have an accent?

KAY: Yes, he did. He had gone to school at Mercer [University], which is very proud of their famous graduate, and he went back there for a few years before he died, after he retired from Chicago. He was just a very gentle man. Very low-key and not at all rambunctious. He and Llewellyn were about as far apart as you can imagine anybody being. So, that was a wonderful experience. And he was great friends with Roger Traynor, who was also interested in the conflict of laws, and it was Currie who sent me to Traynor for the clerkship with Traynor.

LABERGE: I read that article,<sup>1</sup> not word for word, but some of it was based on one of Roger Traynor's decisions, so I wondered how that all — how they got to know each other and how that came about.

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<sup>1</sup> Herma Hill Kay, "A Defense of Currie's Governmental Interest Analysis" 215 *Recueil des Cours* II (Hague Academy of International Law, 1989 – III).

KAY: I don't know how they met. I'm just not positive — whether they met at one of these conferences that everybody was going to. I don't think they had met before Traynor went on the bench, but I'm not sure about that. I did this little piece about Traynor and Currie,<sup>2</sup> sort of an intellectual history of their work together and the way they influenced each other, because Traynor was one of the first judges actually to adopt Currie's theory, and used it in California. Then Currie modified his theory in response to an opinion that Traynor published. So he would come out — come to think of it, he was out here when Barbara Armstrong and Kathryn Gehrels, who's a graduate of our school, were working in the Office of Price Administration during the war. Currie came out to take over that regional office and worked directly with Kathryn. Kathryn and Barbara were very close friends, and Barbara and the Traynors were very close friends, so it may be that that's the genesis of it. But I couldn't say for sure about that. Did you ever do an oral history of Traynor?

LABERGE: No.

KAY: Too bad.

LABERGE: I know — it's really too bad.

KAY: But anyway, Currie was just a wonderful mentor and, of course, I did become interested in conflicts. Then, when I came out here to interview for the teaching job, that was one of the courses I wanted to teach. They hired me to replace Barbara, as I said, but they also were willing to let me teach Conflicts. So I started teaching that as well.

LABERGE: It must have looked awfully good that you had written the articles with him.

KAY: Well, yeah, it was fun, you know. I don't know how this fits with your plan — you've got a different point for talking about my beginning days at Boalt, but I remember . . .

LABERGE: Right, but just go on with whatever you were going to say.

KAY: When I was being interviewed for the job — Albert Ehrenzweig, who was the great professor of Conflicts here at Boalt at that point — and when he was interviewing me he said, "I see on your résumé that you say you

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<sup>2</sup> Herma Hill Kay, "Chief Justice Traynor and Choice of Law Theory," 35 *Hastings Law Journal* 747 (1984).

have written these two articles with Currie, but,” he said, “I must have missed them. Did he give you a recognition in the footnote?” And I said, “Oh no, but of course I had a different name then.” [My name on the law school record was “Hill,” but the article was published under the name “Schreter.”] [laughs] So he said, “Oh!” Then he realized that I was a full co-author and not just someone Currie had thanked in a footnote. Albert Ehrenzweig did not at all agree with Currie and so I think it must have been a kind of blow to him when I was hired to teach alongside of him in the same subject matter.

LABERGE: Because you would have this totally different take?

KAY: Yes, yes.

LABERGE: I wonder, what is it now? Is that the main theory now, the governmental interest or not?

KAY: Everybody has adopted parts of it. It has seeped into the learning in the field. Almost nobody, not even California, now follows it the way Currie set it forth. Of course, he died so soon after he had first announced it that then he wasn’t really able to adapt it and change it in response to criticisms. I and others have done that in the intervening years. But no, he certainly introduced a method of policy-oriented analysis that has definitely become now the major starting point of analysis in the field.

LABERGE: What was Ehrenzweig’s theory?

KAY: Ehrenzweig had this notion of the proper law in the proper forum, and he wanted to do everything jurisdictionally. He wanted to take this — in civil procedure, we have this way of allowing a court that has jurisdiction but that doesn’t think it’s the best court to exercise jurisdiction, to decline to exercise its jurisdiction. And have the parties stipulate or submit to jurisdiction somewhere else. We call that “forum non conveniens,” meaning “inconvenient forum.” Albert wanted to turn that around, what he would call “forum conveniens,” and say you would look at the proper court on jurisdictional principles. One of the things that would make it the proper court would be that it could then apply its own law. So it was really kind of a local law theory. He then went on to try and suggest an evolution of common law kinds of principles that he called “true rules.” These were rules that forums had adopted by looking at the different principles and

accepting some and rejecting others. He saw these rules as evolving over time. He was revered as a conflicts scholar on the Continent. He was never really accepted quite that well in the United States.

LABERGE: I noticed you pointed that out that there was a difference from the international conflict of laws and their take on it, than American.

KAY: Yes.

LABERGE: What else did you take from Currie, or maybe you didn't — maybe, was that it?

KAY: That was the main thing. I mean, you know, I never became friendly with the family or anything — it was really entirely a professional relationship. I got to know his son later, David Currie, because David was — he and Roger Cramton, who had just started teaching at Chicago when I was there, had done the first edition of their casebook on the conflict of laws. They invited me to come in as a co-author on the second edition. So I worked with David after I graduated, but I never knew David when I was in law school.

LABERGE: Since we're talking about Brainerd Currie, why don't we just go on with this, how he introduced you to Roger Traynor, and then we'll come back and do more about law school.

KAY: By that time I had gotten the sense that teaching might be really nice, and since there was so few women in teaching, he said — and this was the common path. He said, "You know, you ought to get a clerkship with the Supreme Court, but it's hard to do that unless you've had a clerkship with another judge. I can probably get Roger Traynor to take you." I thought, "Wonderful!" Because, of course, I had read Traynor's opinions in the conflicts field and in lots of other fields, too. In those days, Traynor was considered the best state court judge in the country, and the California Supreme Court and New York Court of Appeals were right up there as the two best state courts in the country. So it would have been just an enormous honor to clerk for Traynor. I never saw Traynor. He never interviewed me for the job, but Currie said take her, and so . . .

LABERGE: And you never came to California to look/see?

KAY: Interview? No, not at all. Traynor made me this offer — and at that point, I had gone down to New York to interview for jobs in law firms. There were some law firms — I mean, most of them shut their doors in my face, of

course, but that's a story for another time. But at least one of them, when the interviewing partner heard that I had this offer from Traynor, thought, "Oh, well!" All of a sudden I could see that his interest in me had gone up. [chuckles] So there was some question about whether they were willing to hold up their offer — if they were going to make one — for me to go out to California. I remember coming back and talking to Currie about this, and Currie had said, "Well, you know, you probably ought to do some practice but we can't play footsie with Traynor. You have to let him know whether you're going to do this or not." I remember that very well: "can't play footsie with Traynor."

So I said, "If you think it's the right thing to do, I would certainly like to clerk for Traynor." And so it was arranged. I drove out from Chicago to California after I graduated and started working for Traynor and worked for him for the normal clerkship period of one year. Then Traynor tried very hard to get [Earl] Warren to take me as a clerk on the U.S. Supreme Court and Warren didn't do it. At that point I got the offer from Boalt, who'd found me in Traynor's office. I never did try anymore to clerk for the U.S. Supreme Court and started teaching here after having spent a year with Traynor.

LABERGE: Let's go back to law school — what were some of your favorite classes and any other memorable professors?

KAY: Conflicts was by far my favorite class. I saw you had on your little list a question about family law and Max Rheinstein.

LABERGE: Yes. I don't know where I read that.

KAY: I don't know either, but Rheinstein taught Family Law and he also taught Decedents' Estates and Trusts. He was not my cup of tea. He was very Germanic — he had a conventional attitude about the family, that the husband is the head of the family, and all this. I kind of sat there and thought, I don't think this is quite the way [laughs] we want family law to develop. So I was never close to him. Mary Ann Glendon was the one who became his disciple, and she took his comparative law course and spent some time in Germany, I think, with his mentorship, and of course went into comparative family law, which was his strength.

LABERGE: Did you have an interest in family law when you were doing that course?

KAY: Not really. You have to understand in those days, and to some extent even now, if you look at people who are coming into teaching fresh out of law school and a clerkship, it's not as though you've specialized in anything. You start teaching, and if you like what you're teaching, then you tend to go into that subject as your scholarly project. It was Barbara's courses that I was taking over — these were Family Law and California Marital Property — and then I did Conflicts because that was what I asked for, and I did a seminar. Those were my scheduled courses. I mean, those are still the courses that I'm teaching now, except that I added Sex-Based Discrimination because of the book that Ruth and Ken and I wrote in 1974. [Kenneth M. Davidson, Ruth Bader Ginsburg and Herma Hill Kay, *Sex-Based Discrimination: Text, Cases and Materials*, St. Paul, Minnesota:



HERMA HILL KAY WITH JUSTICE RUTH BADER GINSBURG  
AT THE UNVEILING OF GINSBURG'S PORTRAIT BY THE D.C.  
CIRCUIT COURT OF APPEALS, SEPTEMBER 9, 1999

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West Publishing Co., 1974] So those have been the courses that I've taught ever since I started teaching in 1960. And of course there was plenty of work to do in family law. [laughs] There was no doubt about that, but you wouldn't have known it from taking the course from Rheinstein.

LABERGE: That's interesting that it came about because that was the course you were teaching, too. It wasn't that you had this burning interest to do that.

KAY: No, no.

LABERGE: Tell me more if you can about, for instance, your study group or just that process of both learning the law and how the teaching was done, whether it was Socratic or . . .

KAY: It varied. We had people who did the Socratic method. I guess I got well known among my fellow students because I would take all these notes in class and then I would make outlines. I remember at one point when we were all taking — I believe it was Federal Courts — from Phil Kurland. He said at the beginning of the class that he always gave his students, at the beginning of the class, the choice of whether they wanted to have an open book or a closed book exam. It didn't matter to him, because people did it both ways at Chicago. My classmates all looked around the room and focused on me and said, "Closed book." They didn't want me to have my outline! [laughter]

It was very hard-working; it was a very serious place. It was not one of these party type schools and it didn't have — I don't remember much of a social life other than people going to places with each other, having dinner at each other's houses, and so on. When I joined the *Law Review* — Amy and I were both on the *Law Review* and it used to have these little parties, and so on. That became a small group of where we all worked together, and, of course, that was quite an honor. I was made book review editor of the *Law Review* and at that point I was second in the class. It was all done by grades. And then we had a transfer student who came in from another school who edged me out, so I wound up graduating third in the class. But Amy and I, I think, really kind of made a bond around the *Law Review* experience, and so on. We were all, of course, smoking cigarettes in those days — it was before the surgeon general's report came out — and I remember at one point during this *Law Review* party, where people had brought their spouses and significant others, Amy looked at me and said,

“Herma, do you realize that you and I are the only two women in the room who are lighting our own cigarettes?” I said, “No, I hadn’t really noticed that, Amy.” She said, “Well, we are!” [laughs]

LABERGE: [laughs] That is telling, both of the times and something about chivalry.

KAY: Yes, yes.

LABERGE: And that was third year, the *Law Review*?

KAY: No, second and third. You came in, you did your student note the second year, and then you became an editor, or whatever job you had in the third year. And in those days you typically had only one law review in the school. At Berkeley now we have nine student-edited journals, but in those days the *Law Review* was the major thing and it was where you really learned how to write — your writing got edited several times. It was a really wonderful experience.

LABERGE: Who edited it? Professors or other students?

KAY: No, no — other students. The third-year editors would edit the student work of the second years, and whether or not you got your note published depended on how well you had gone through that process. No, the faculty had nothing to do with it — that’s the wonderful thing about the student-edited law journals. It’s a phenomenal training experience, but the rest of the university can’t quite understand why you have student-edited journals as your peer review journals. [laughs] They do it quite differently — they have the faculty edit the journals.

LABERGE: You were a member of the Order of the Coif.

KAY: Yes. Oh well, that’s just purely grades, the top 10 percent of the class.

LABERGE: Okay. What other professors might’ve been influential or memorable?

KAY: I liked Malcolm Sharp, he was the Contracts professor. I enjoyed Harry Kalven, who taught Torts, and he and Sharp were both involved with the sociologist Hans Zeisel — Kalven primarily — on that study of the jury that came out of Chicago. It was a big scandal, because they were taping the jury proceedings with the consent of the judge but without the knowledge of the jurors. This created all kinds of — I think they were investigated by

congressional committees, and Sharp, who was quite liberal, was accused of being a Communist and all this, you know. There were all kinds of flaps going on around there.

I enjoyed taking Antitrust from the dean, who taught it along with his brother-in-law who was in the Department of Economics, Aaron Director.

LABERGE: The dean was Ed Levi then?

KAY: Yes, it was Ed Levi. Nobody was taking that course except the members of the *Law Review*, so it was a very high-powered course. I remember we all had great problems with Professor Director, who was sort of a dyed-in-the-wool member of the Chicago School of Economics. We had this one pitched battle with him over child labor laws, which he was repudiating and we were defending. Things got so far out of hand that Levi came in the next class session and lectured us severely and told us that none of us knew anything about economics and certainly not enough to dispute with Professor Director, and could we please just shut up and take notes. [laughs] I think that turned me off law and economics forever.

LABERGE: [laughs] I am taking it from all this, that you did answer in class, you didn't shy away from answering.

KAY: Oh no, not at all. Walter Blum was a tax professor, and Blum was wonderful. This was in the Corporations Tax class. He announced at the beginning of the class that Miss Mentschikoff had made it clear to him that he needed to treat women the same way he treated men because this was a professional school. Therefore he had decided that he was going to call on a man and he was going to call on a woman, then he was going to call on a man then he was going to call on a woman. And that was just fine except that I was the only woman [laughs], so I learned more about corporate tax than I ever wanted to know. He never stopped doing it — he did it from the beginning to the end, and that was quite an experience. But he was a very nice man and he still thinks that's funny. [laughs]

LABERGE: Did you have Nicholas Katzenbach?

KAY: I don't think so, no. He was fond of hanging around the lunch room and socializing with the students so we used to talk to him a lot, but I don't think I took anything from him. I also enjoyed Francis Allen who did Criminal Law. He was a marvelous classroom teacher. I think if I hadn't

gone into family law I probably could have gone into criminal law because he really gave you a sense of the theory of the criminal law. But just looking down this list: Allison Dunham — the property teacher who recognized my talents and was also in commercial law — he and Llewellyn had worked together on the commercial code. That was about it.

LABERGE: What about the bar exam — did you take it in Illinois, did you take it in California?

KAY: No, I never took the Illinois bar; I took the California bar because I knew I wasn't going back to Illinois. My only possibilities were — I thought I would probably go back to Wall Street, because I thought that I would have to practice for a couple of years before anybody would be interested in giving me a teaching job, which by that point I wanted to do. But then, when I got the faculty offer here, I . . .

LABERGE: The California bar was enough.

KAY: Yes. Well, I took the California bar before I started teaching here. I took it the year I was clerking for Traynor. I didn't get out here in time to meet the residency requirement for the August bar, so I took the spring bar — I think it was in February. That was a whole different experience because the February bar was — and still is to some extent — a bar that's taken primarily by people who didn't pass the first time around.

LABERGE: Exactly, yes. But you passed the first time around in February, right?

KAY: I did, yes. But I went and sat down in this room — we were taking it over at Hastings [College of the Law], which was where they used to give it in those days. I'm sitting there waiting to get the exam passed out, and these two men were sitting behind me and one says to the other one, "Hmm, they've really changed the procedure over the last five years." I thought, Oh, my God! [laughs] What is this?

LABERGE: [laughs] Did you take a bar review class when you came out, or did you learn community property?

KAY: No. I rented the outlines, because they were doing the bar review course at a time that I couldn't really do it given the work I was doing with Traynor. So I just studied the outlines and didn't seem to have a lot of problems with it.

LABERGE: Including learning community property?

KAY: Yes. Community property was required at that point, but it wasn't that — it's not analytically that difficult; the devil is in the details.

LABERGE: Looking back — now that you have been a teacher — at your education, how has it changed and what did you see about the value of it?

KAY: I think law schools are quite conservative still in the way they go about doing their teaching mission. The bulk of classroom teaching is done using the casebook method, which was invented by [Christopher Columbus] Langdell at Harvard, and then you'll see minor variations. I mean, our casebook on sex-based discrimination was one of the few that used a lot of textual material and essays on related fields of the law to frame the issues of sex discrimination. But many of the early family law books tried to get away from just cases and cases by adding social science literature — they used to refer to “materials,” which meant non-legal materials.

People used a lot of problems as a basis for class discussion. Barbara [Armstrong] used to use problems, both in Marital Property and in Family Law. I never liked problems very much myself. I liked more the analytical challenge of fitting the cases together and trying to see how they played off against each other. But by and large, I don't think there are very many people now who use the Socratic method in its strict, rigorous way, where the professor never says anything except ask questions. I think, by and large now, people tend to do more lecturing and more discussion, rather than just the questioning. We haven't really gotten away as much as you would think we might.

The big innovation, of course, was the clinical education movement, which didn't affect Berkeley in a major way until I became dean, but it got started at other schools much earlier than that. And that really was a more hands-on method of teaching students by doing, and then you had a sort of dichotomy between the skills instruction and the live client instruction, which is what we do here. We do some of both, but what I wanted to bring in was the live client instruction. I think that is very important. That, more than anything else, gives the student the chance to have some sense of what the practice of law is going to be like — and therefore what his or her role is going to be as a lawyer — while there's still time to bring that back into the

classroom instruction, which I think is really where you get the richness that the clinical method can bring in.

LABERGE: Did you ever practice law?

KAY: No, I never did.

LABERGE: But you still understand the importance of all that.

KAY: Yes. Well, I am a member of the California Bar, but I have never done full-time private practice. I've done a few cases here and there, but not very many.

LABERGE: Before we move on to California, what about social life? You talked about everybody eating in the dining commons, or whatever. And your own personal life — because you mentioned that your name was different when you came out here than when you were writing with Professor Currie.

KAY: I had married Jean Paul Schreter during law school. He was an artist, and he was from New York. We got married, and then he came with me to California.

LABERGE: Did you do things in Chicago? Did you get into the jazz scene or anything else?

KAY: No, no, we didn't. I took a job during the summer of my first year working for a law firm downtown as a secretary, and just as luck would have it, I worked for one of the few women partners, whose name was Lillian Kubicek. She was another dynamic person who was interesting to watch. She took me to a few corporate closings so I had some sense of what these people were doing sitting around these huge tables — every time somebody changed something, having to re-type the whole document because, of course, you didn't have word processors at that point. [laughs] And God forbid you should add a footnote — we numbered them all by hand. That was an interesting experience and gave me some sense of what life was like in a big firm. In the summer between my second and third year I was working at the *Law Review* so I didn't have time for anything else. Then, of course, I came out to California. But it was mainly just going out with your friends and those *Law Review* parties that I remember. Other than that, I don't remember — well, we went to museums a lot because Jean wanted to see what the shows were and all that. He spent his time painting.

LABERGE: Did you go through graduation ceremonies at Chicago?

KAY: No, because the timing was such that . . .

LABERGE: You just packed up and . . .

KAY: Packed up and left, yes.

LABERGE: Well, what were your first impressions of California?

KAY: Oh, I fell in love with San Francisco. We lived in San Francisco because the California Supreme Court was not housed in Sacramento. It sat there once or twice a year for hearings but it never had its offices there. So we lived in San Francisco, way out in the Richmond District. It was just cold and foggy and I didn't care — I thought it was wonderful. I used to take the bus down to the Court. Then, when I got this job in Berkeley, the question was, well, are we going to move to Berkeley? Jean wanted to stay in the city because that's where the art community was that he was involved in, and I didn't much want to move to Berkeley anyway because it was kind of staid and dull. [laughs] So we continued to live in San Francisco. Even after he and I separated and got divorced I never moved to Berkeley — so I've never lived in Berkeley.

LABERGE: What was your introduction like at the Supreme Court — who met you, who taught you?

KAY: Traynor met me. That was the reason for getting out there so quickly — because he was about to go away. I forget what he was doing. He used to go and visit at various places during the summer. He would go and participate in judicial conferences, and so on, in Europe. He was about to leave, I think the day after I got there, so that was a meeting that I never would forget. I was on board, right, so we're sitting like you and I are sitting now in chairs facing each other, and he said, "You know, I wrote this dissenting opinion and I wonder what you think of it." It was in a community property conflicts case, and I said, "Justice Traynor, you wrote that opinion over ten years ago." He said, "I know when I wrote it; do you think it was right?" [laughs] I later wrote something about that case and said that I thought he was right.<sup>3</sup>

LABERGE: What opinion was it?

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<sup>3</sup> Herma Hill Kay, "Conflict of Laws: Foreign Law as Datum," 53 *California Law Review* 47 (1965).

KAY: It was his dissent in *Estate of Perkins*, 21 Cal. 2d 561 [*California Reports*, Second Series] (1943). It was an opinion where he wasn't sure he had come to the right result, and it was just so impressive to me that even all those many years later, he still was turning over that problem in his mind as to whether he really had done the right thing. Of course I fell in love with him on the spot. He was just such a wonderful man to work for, and he was so careful not to offend his clerks. He had two clerks. He was not chief justice then, he was an associate justice, and the justices were allowed one, what they call annual clerk, and then they had one permanent clerk and a secretary. His permanent clerk was a graduate of Boalt Hall whose name was Don Barrett, who was an utterly marvelous man — he died not too long ago. Traynor never had a full-time secretary. He traded off with somebody else so that he would have two clerks, right? So he had me and he had another clerk, and we did totally separate things.

Traynor would assign each of us an opinion to work on, a draft opinion. I remember he used to give me the conflicts–family law opinions to work on. I remember coming into him with a draft of this one case, and he read the draft that I had done and he really — I could tell that he wasn't really sure that the way I had used a particular case was right. And he said, "Would you bring me the case, I just want to be sure the citation is correct." So I went and got the case and brought it to him. Of course, it wasn't the citation he wanted to look at; it was the holding. When he saw that what I'd said about it was right and that it could be used to build a particular kind of argument, which was an argument he wanted to make, he called Don Barrett in. He said, "Don, look at this!" It was such fun.

He was just so wonderful to work for. He was just really great. It was the only nine-to-five job I ever had. It was really nine to five. The California Supreme Court did not have that large a caseload. There was just all this luxury, spending all the time writing these cases. Traynor's opinions were cited in all the casebooks, and one of the reasons they were cited is because he used to make a practice of — when he was deciding a common law case — he would cite all the cases from around the country that were on point. Now, when you didn't have Lexis and Westlaw, you had to find all those cases by hand, and it was his clerks who did that. So it was a real challenge to do an opinion that he was willing to let go out with even *some* of your work still intact. It was just a real honor to do that. You had all this time to

work on it and to perfect it the way he wanted it perfected, and it was just wonderful.

LABERGE: When he was assigned an opinion, would you then have meetings and you would discuss . . . ?

KAY: No, he would tell you.

LABERGE: He would just hand it to you? With a direction?

KAY: No. “You do a draft.” Now, I don’t know whether he did that with all his clerks but he did that with me, and primarily I think — I mean I didn’t ever do any of the criminal cases. My co-clerk did the criminal cases. I did primarily the family law–conflicts cases. Those were the days when the California Supreme Court had a more varied calendar, rather than primarily a criminal law calendar, which is essentially what it’s got now. But no, he didn’t talk about the case at all. There was a bench memo that was circulated before oral argument. So the Court’s practice was to tentatively assign the opinion by assigning to a judge the bench memo to prepare. Then, if the bench memo was the way in which the Court was tentatively prepared to go, the judge who had done the bench memo would prepare a draft of the majority opinion, which may have become unanimous. If it didn’t find favor with enough justices, then it might become a dissent — if you were going to do a dissent. So, to that extent there was direction, in that the bench memo provided a line of argument, but I don’t remember being told how to do the bench memo either. And we used to do bench memos for all the cases that were on the calendar to decide whether or not the Court was going to grant hearings. A lot of them were never granted. But he wouldn’t really talk to you about it until you brought in the draft. Then he would go over it line by line, and would tell you that he liked this or he didn’t like that, or tell you to start over again, or tell you he wanted to look at this aspect of it or that. But it was very undirected, I thought. It was really quite challenging.

LABERGE: What about the other justices and the other clerks — did you get to know them?

KAY: Yes. One of the clerks was a graduate of this law school whose name was Sandra Shapiro, and she and I became quite good friends. We have not seen each other for many, many years now — almost since I became dean

— but we were very good friends. Ollie Marie-Victoire was there when I was; she later became a judge. She clerked, I think, for Justice Schauer. My colleague at Boalt, Professor Bobbie [Babette] Barton was there before I was there — she had been a clerk for Chief Justice Phil Gibson. Traynor lived in Berkeley, and he and Don Barrett would drive in every morning together from Berkeley. Some of the clerks who lived in Berkeley used to drive in with them, so they had an opportunity to talk with him that I didn't have since I lived in the city, but he always took us to lunch. He liked to go to lunch . . .

LABERGE: You mean every day?

KAY: Every day, yes, unless he had something else to do. He always took us to lunch and we went to this place called May's Oyster House, which is still there on Polk Street but it's no longer May's Oyster House — you can still see its sign. It was a fish restaurant that was on the order of Sam's or Tadich's in the old days. He would go and he would have a salad and fish and coffee and dessert. I couldn't stand it — I would go, I would eat this lunch, and when we got back to the office, I would go to sleep.

LABERGE: Because it's like a dinner.

KAY: Yes! I wasn't used to eating in the middle of the day, and I think that was the source of my habit — I mean I haven't eaten lunch since. [laughs] I never eat lunch. People laugh at Jesse Choper and me — we neither of us eat lunch. Everyone says not eating lunch is one of the requirements for being dean at Boalt.

LABERGE: He told me that — he said he never goes to the Faculty Club.

KAY: Yes, we never eat lunch. But that was a very nice informal way, and he never talked, of course, about the work at that point. He would talk about whatever was of interest, politics, the world at large, things about the law, people he had known. It was just fascinating to listen to him.

LABERGE: What kind of advice or mentoring did he give you for the future? Did he encourage you to teach?

KAY: Yes, he did. As I say, he tried to place me with Warren, and Warren wouldn't — I think it was at that point he didn't really want to have women clerks, he didn't take this request very seriously. Then, the Faculty Appointments Committee always looked to see who was clerking for Traynor. He

never told me this story, but the chair of the Appointments Committee told this story — whose name was Rex Collings. He was a faculty member here. He taught Marital Property; he was one of Barbara's protégés. Rex called Traynor and said, "Justice Traynor, do you have any good men clerking for you who want to go into teaching this year?" And Traynor said, "No, I don't have any men who want to go into teaching, but I have a woman who is as good as any man I've ever had. Would you like to interview her?" [laughs] So I got shipped over to Berkeley to interview.

LABERGE: And they didn't say "forget it"?

KAY: Oh no, they would never say "forget it" to Traynor. He had been their faculty colleague before he was appointed to the court.

LABERGE: That is really wonderful.

KAY: Yes, isn't that marvelous?

LABERGE: Yes. Did he tell you this many years later?

KAY: He never told me this. Rex Collings told me this.

LABERGE: But did Rex tell you many years later rather than right then?

KAY: Yes, he didn't tell me then; he told me many years later.

LABERGE: After he tried you out. [laughs]

KAY: Yes. [laughs]

LABERGE: Do you have other anecdotes about this Supreme Court, or should we go on to Boalt?

KAY: No. I mean, it was just a really — in retrospect I think of it, as I say, as the softest job I ever had in terms of time. You went there in the morning, you never took any work home, and you did your work there, and your evenings and weekends were free. That hasn't happened to me before or since. [laughs]

LABERGE: And you were really there at the start of the height of the Supreme Court's prestige and influence.

KAY: I think it became more influential after Traynor became chief justice and that, of course, was after I had left the Court. And when Ray Peters joined the Court — but no, they really maintained their reputation until after Traynor retired. They had in those days a terribly regressive retirement

system. You weren't compelled to retire based on your age, but every year you stayed past — and I can't remember whether it was sixty-seven or seventy, but every year you stayed past a certain cut-off point, they reduced your retirement pay. Traynor was not a wealthy man — as I said, he'd been a law teacher before he went to the Court — and he couldn't afford it, so he had to retire. Justice Marshall McComb, who was independently wealthy, never retired.

LABERGE: Tell me about your interview with — did you have the interview with Rex Collings, or who did you interview with? Is this the hat story?

KAY: This is the hat story, yes. [laughs] In those days I owned by actual count twenty-eight hats. I loved hats.

LABERGE: That's when women wore hats.

KAY: Oh yeah, they did. They wore hats, they wore gloves — that's right. I came over to Berkeley for this interview, and except that there was no “job talk,” it was done the same way it's done now. You were taken around to interview with faculty in their offices. Sometimes it was one-on-one; sometimes it was two or three. And they took you to lunch, and then you had like a little — I don't remember having dinner, but I think there was a little reception or something. But anyway, I was wearing my hat. The hat that I had chosen to wear was one that had sort of a brim, and it had sort of a . . .

LABERGE: A veil?

KAY: No it wasn't a veil, it was like a brim. The hat was velvet, sort of a crushed velvet, and it was light beige. It was terribly elegant, very elegant. But in those days I had shoulder-length hair, and it was in the spring and it was rather warm in Berkeley. The hat came down right to the top of my forehead, and my hair was plastered under it. So, at the end of the day, I'm having tea with Barbara in her office . . .

LABERGE: Had you ever met her before?

KAY: Never. I'm having tea with Barbara in her office — and this was about three or four o'clock, just before there was going to be a reception — and we're sitting in her office and the phone is ringing. Barbara picks up the phone and says, “Yes, yes, I know.” Slams the phone down. Then it would ring again. “Yes, yes, of course!” Puts the phone down. “Yes, I know. I'll tell her.” Puts the phone down, and she looks at me across the desk and she

says, “You’re going to have to take your hat off. The men want to see what you look like.” I said “Well, Professor Armstrong, you know, I can’t take my hat off.” She said, “Why not?” Barbara was not one to be bluffed easily. I said, “Well, because my hair . . .” I said, “If they want to hire me, they’re just going to have to hire me with my hat on.” Barbara gave me a hard look. Then she said, “All right. Perhaps when you come back for your second day of interviews, you could wear a smaller hat.” “Oh yes, Professor Armstrong, of course,” I said, “but I didn’t know there was going to be a second day of interviews.” And she looked at me and she said, “There will be now.” So the next week I came back for a second day of interviews. I wore a little pillbox. Everybody could see what I looked like, and I was hired.

LABERGE: That is so funny. I wonder if you would have been able to tell a male professor that and they would have “got” it.

KAY: I don’t think a male professor would have told me to take off my hat. [laughs]

LABERGE: Probably not. And did you wear gloves also?

KAY: Of course. I did take my gloves off, but I didn’t take my hat off.

LABERGE: Who do you remember meeting besides . . .

KAY: I remember meeting Adrian Kragen. Adrian — I asked him about this; he claims not to have remembered this at all. He remembers the interview but he does not remember what he said to me. He said, “Mrs. Armstrong is the only woman who’s ever been on this faculty, and,” he said, “she has all the men terrified.” I mean, she was a faculty member when Adrian was a student here. That oral history you have from him has this wonderful story about how he got admitted. Barbara and Traynor went out to convince the dean to admit him as a student. He took classes from her, so he knew what she was like. He said, “She’s the only woman faculty member we’ve ever had.” And he said, “You know, she’s got all the men terrified of her. What I want to know from you,” he says, “is can you fight your way out of a paper bag?” I thought, What? [laughs] What is this man talking about? I said, “Well, you know, I’ve never been asked about anything like that, but I assume — if you mean, can I hold my own — I probably can.” Adrian absolutely denies saying that, but I remember it very well.

And, of course, there was that interview with Ehrenzweig, who asked me about the articles I co-authored with Currie. Then he explained to me that he had a set of materials that he used to teach the Conflicts course and that I would be expected to use them. I said, "All right." I walked out of his office, and I then went to be interviewed by Professor Sho Sato, who was the first Japanese American, I believe, ever to teach at the university. He said, "Who have you talked to?" I said, "I just came from Professor Ehrenzweig's office, and he said that I was required to use his teaching materials." Sho looked at me and said, "That's absolutely not the case. You can use whatever you like." "Well," I said, "I'm glad to know that, because I don't think I'd want to use Professor Ehrenzweig's material." Albert, I think, was determined to put his finger on me right away.

Let's see, who else do I remember interviewing?

LABERGE: Frank Newman?

KAY: I don't remember. [William] Prosser was dean at that point and hired me. Prosser left the year after he hired me, and Newman became dean in 1961. Yes, I must have met Frank. I don't remember. I remember Collings, of course, and Albert. The four H's had come the year before I came — Halbach, Hetland, Henke, and Heyman were all there. I met them, but they were really my fellow juniors. I remember Arthur Sherry, who was teaching Evidence — very nice gentleman. Nick Johnson was hired the same year I was hired, so we both came together. I think that's about everyone I remember from that first round of interviews.

LABERGE: So you met absolutely everybody on the faculty.

KAY: Practically everybody on the faculty, yes.

LABERGE: Which probably today is not the case?

KAY: No, well, we have a larger faculty now. But we try to see to it that as many faculty members as possible either have office interviews or — of course, the tradition of giving job talks didn't exist in those years, but now everybody gives job talks. So we try to get the faculty to go and listen at least to the job talk if they're not able to interview the person in their office.

LABERGE: Do you want to stop here and pick up — is that a good place?

KAY: That's fine.

## INTERVIEW 3: JULY 7, 2003

LABERGE: I'm with Professor Herma Hill Kay and it's July 7, 2003. Last time when we ended, we ended with you just being hired and going through your interview process with Barbara Armstrong and all of the others. But before we start you wanted to amend or change something you'd said the last time.

KAY: When I was talking about Ehrenzweig's approach to choice of law I had said that it was called the "better law theory," which it was not. It was instead called "the true rule." The "better law theory" is attributed to Professor Robert A. Lefflar from Arkansas, but we can get into that later. [I made this change in the transcript.]

LABERGE: Let's go back to 1960. We did the interview — I don't think we did the offer, what you were offered and what your first day was like and things like that. Who made the offer to you to come on the faculty?

KAY: People elsewhere in the university, I think, don't understand how law schools do things. I mean, law schools do not make written offers. Law schools just hire you. [laughs]

LABERGE: Even today?

KAY: Even today there's no such thing as a written offer. The dean usually does it. The dean was William Lloyd Prosser, who came to us from Minnesota, who is the last external dean we've had. He hired me in the summer — well actually, it would have been in the spring of 1960 to start in the fall of 1960. Did I tell you the story about the question he asked me about whether I could sing?

LABERGE: No. [laughs]

KAY: I didn't understand why he asked me this question until later, but I later learned that it had to do with the skits at the meetings of the Association of American Law Schools [AALS] — which happened every year, at that point; between Christmas and New Year's — in Chicago. The attendance was, at that point, of course, virtually all white men. And Prosser would take the lead in putting on a skit, a musical performance that they called the "extravaganza." I think it started the first time or one of the early times when they met in San Francisco, and Prosser, who was a great fan

of Gilbert and Sullivan, would stage these things. The association has published a little booklet of his songs and things, and skits. He didn't have any women to play any of these roles, so after he hired me he said, "Can you sing?" I said, "Dean Prosser, I can't carry a tune." He says, "Oh, that's too bad. If you have to hire a woman, you at least ought to get a leading lady."

LABERGE: [laughs] What a great line, but I'm sure you didn't feel so great about it.

KAY: It was totally lost on me. It was not until after I asked Barbara what he was talking about that I learned about the skits. She said, "Not to worry — I don't sing either and I never go to Chicago." [laughs] The poor man — here he had two women on his faculty, but neither one of them could be a leading lady.

LABERGE: And did you go to those meetings?

KAY: I did — I didn't go terribly early. I remember going to one of them and seeing the great Soia Mentschikoff sort of holding court in the hall at Chicago. It used to be at a place, which I think no longer exists, called the Edgewater Beach Hotel. In fact it was Soia who, when she became the first woman president of the association, changed the meeting times so that instead of being between Christmas and New Year's, it was after New Year's, which is when it now is. She also separated the hiring function from the program function, both of which were great accomplishments. It was always my view that the men wanted to get out of the house between Christmas and New Year's to get away from all the visiting family and kids, [laughs] so they went off to Chicago and had this wonderful meeting for themselves. Then, when women started joining the faculties, it became pretty obvious that this was not a great time to leave home and have professional meetings. I think Soia had that in mind when she got the date changed.

LABERGE: That's a wonderful little fact, too, of how that happened. Because you brought that up, maybe we could talk about camaraderie in the law school. I know about the Faculty Club dinner and party now, and many law professors are the ones who are the singers and the writers, but did it start here at the law school?

KAY: No, I think it started at the AALS meetings, in the “extravaganzas.” It was Jim Hill, who graduated from Berkeley — he was in the class of 1961, and I had him in class . . .

LABERGE: Although he was much older.

KAY: Yes. A lot of those men had been in the war and come back, and all that. Jim was in the class, took Conflicts from me, and he’s the one who took over writing the skits after Prosser retired. He used to do the one for the Faculty Club, and he would do the skits that the law faculty put on in response to the student roast at Christmas. That went on for years and years and years. It got to be so professional, we had a group of students who were into film and they — I wonder if anybody still has a copy of that thing? I think some of the members of that class do. It was called *The Little Red Wagon* — have you ever heard about that in interviewing?

LABERGE: I haven’t, no.

KAY: I think it was called *The Little Red Wagon* and the theme was this poor bewildered law student who dragged his books around in this little red wagon. He goes through his law appointments at the school, and in the process satirizes the professors, and all that. It was so well done that after a while the class kind of lost their interest in it. They couldn’t top it so they sort of stopped doing it for a while, and then later it came back. Now it’s more in the form of a talent show rather than a roast of the faculty. But Prosser used to take the faculty to lunch at the old Trader Vic’s in Oakland, not the one in Emeryville — this was much earlier. We’d all have lunch and then we’d go together to watch the student skit. Then there would be this response that Prosser would put on, and which we all participated in . . .

LABERGE: Including you?

KAY: Yes, except I never sang. I just stood there [laughs] and mouthed the words. After Prosser heard me try, he understood why I had demurred.

I was living in San Francisco at the time, and his wife, Eleanor, tried to persuade me to move to Berkeley. She did all the wonderful things that dean’s wives used to do — she would invite the faculty to dinner and to parties, and she would make cookies and she would bring them around on Saturday morning. I remember Eleanor saying to me, “If you live in San Francisco, I won’t be able to bring you cookies.” It’s true! She was never

able to bring me cookies because I never moved to Berkeley. There was a lot of visiting back and forth — lots of dinner parties that people had, and people actually came over and had dinner with us in San Francisco. It wasn't as far as they thought. But at that point I don't think anybody was living in San Francisco — almost everybody was living in Berkeley or over the East Bay hills.

LABERGE: So does the law faculty still put something on today?

KAY: No, not formally.

LABERGE: They've all moved over to the Faculty Club party, I guess.

KAY: Yes, right.

LABERGE: Okay. Maybe you could talk a little bit more about that camaraderie. Or how about, maybe, one of the first faculty meetings you went to. How you were welcomed and how you became known.

KAY: Well, Barbara was there of course. If it hadn't been for Barbara I think it would have been much more difficult, but she was utterly marvelous. She had the faculty in to tea. Not all of them, but she had her friends. Frank Newman was one of them who always came to have tea with Barbara, and I always was invited to have tea. It was just a little very informal kind of — she didn't drink coffee so she didn't go to the lounge where the men were. They usually came at ten in the morning and she didn't do that. She liked her tea in the afternoon, and so it became quite a congenial place to be.

LABERGE: Is this once a week?

KAY: No, I think it was every afternoon. She always had tea, and people who wanted to drop in for tea — I don't remember doing it every day, but I remember doing it occasionally. So she was there, very supportive. The faculty meetings — Prosser ran the faculty kind of like an iron hand. It was not until he went to Hastings — which he did about 1961, 1962, I think, because Newman became dean almost immediately. I remember Newman having faculty meetings at the Faculty Club. We'd all go there and have lunch, and sit around this table. They were pretty formal affairs. We didn't start having faculty meetings in the law school — oh goodness, let's see. [Sandy] Kadish had faculty meetings in the law school. [Ed] Halbach, I think, also had faculty meetings in the law school. Yes, I think that's right.

LABERGE: He followed . . . ?

KAY: He followed Newman. So I think Newman may have been the only one who had the meetings over at the Faculty Club.

LABERGE: What kind of restrictions were there on women going to the Faculty Club?

KAY: Oh, the only restrictions were if you wanted to go to the main hall. That was what you couldn't go to, and you couldn't walk through the main hall to get to the meeting rooms behind it, which was Barbara's problem. She had to be lifted over the railing in order to get to committee meetings that were held back there.

LABERGE: But that never happened to you?

KAY: Never happened to me, no. For a long time there was a lunchroom in that building across the street, which is now the Bancroft Hotel. It's next to Strada, the coffee house. The building used to be owned — or occupied; I'm not sure they owned it — by the Association of University Women, and they had a little lunchroom downstairs. As you walk down Bancroft Way past it, you'll still see a little flight of stairs going down. The little flight of stairs going down three or four steps led to a lunchroom. There was a round table in the middle of the room that was the law school's lunch table, and anybody who didn't have anything to do for lunch would go over there and would have lunch with anyone who was there. After my afternoon drowsiness in Traynor's office that I told you about last time, I stopped eating lunch so I didn't go very often. But people came by, and I thought, Well, you know, it's probably a good thing to do. So I would go and drink my coffee or something while they were having lunch. But I don't remember Barbara going to lunch on a regular basis. I don't remember being taken to lunch by her on a regular basis. I remember seeing her mostly at her teas, and of course when I was teaching the Marital Property course, I would go and have a special tea with her before I went to class to go over what I was going to talk about that day. I told you that story. I don't know how I would have gotten through that course without Barbara, in effect, teaching it to me as I went along.

I used to drive from San Francisco to Berkeley and there was a little parking lot out in front of Boalt Hall, because College Avenue came

through the campus. College dead-ends now into the campus. Well, College used to go into the campus and, in fact, I think those two buildings that are parallel to us right here and are now being used for other programs still have College Avenue addresses. You might check that. But College used to go through and there was a little parking area there, where you could park straight in — not parallel to the street but angle parking. There was a little hedge where you would walk through to get to the law school, and that's where I parked every morning — wore my hat, my gloves, took them off when I got to my office — and drove back in the afternoon. I did it every year until the 1989 earthquake, when we lost the use of the Bay Bridge for six weeks, at which point I started taking BART [Bay Area Rapid Transit]. I've been taking BART ever since, but I used to drive every day. So, because of that geographical separation, I wasn't around in the evening — and, of course, I was married at the time — so I didn't do the sort of pick-up stuff that a lot of the other faculty did. If they were working, they'd go out and have something and come back and work some more. I would go home and then would not come back over to Berkeley in the evening unless we had been invited to have dinner or something special was happening, so it was more of a separation for me between Berkeley and San Francisco.

LABERGE: That says something about you too, that you still made your mark and became an integral part of the law school even though you didn't do those evening things. It might've been a detriment, but it wasn't.

KAY: I suppose it could — it didn't seem to be. [laughs]

LABERGE: No. Tell me about your other courses besides California Marital Property, and how you handled those.

KAY: That was the first one. We had a practice of having new faculty members teach only one course in the first semester, so I taught only Marital Property in the fall of 1960. In the spring of '61, I did Conflicts and Family Law. Those were my three courses, and then I did a seminar — usually in Family Law — for my fourth course. Those were the courses that I taught until I started doing the Sex Discrimination course in 1973–74 as the book was coming out.

LABERGE: And the Family Law had also been Barbara's class?

KAY: Yes, Barbara had taught Family Law and Marital Property, and Conflicts was Albert's course — Ehrenzweig's course. They just divided that into two sections, because it was on the bar exam. Family Law was never on the bar exam. Marital Property was on the bar exam, and it was Rex Collings who taught the other section of Marital Property until he died. Then, I think, Justin Sweet may have taught it a year or so, but I was the primary one who taught it after Rex died. Now I'm the only one who teaches it, because, even though it's still on the bar, people tend to think that they could pick it up by taking the bar review course, so we don't need more than one section.

LABERGE: Yes. When would you do your writing, and what did you do in summers?

KAY: I would write in the summers and do what writing one could in between classes. Classes took up a great deal of time at first but they didn't take up that much more, and I was promoted to full professor in 1963, which is very fast.

LABERGE: What did you have to produce for that?

KAY: I produced my tenure article, which was on marital property and the conflict of laws.<sup>4</sup> It was about this new statute that had just been enacted in California — the “quasi-community property statute,” as it was called. Then I had a couple of book reviews — I think I had done that book review of Rheinstein's book by then. This was Newman's idea. I mean, Newman wanted to put Boalt on what he thought was the Harvard plan, which was that you would be appointed as a tenure track faculty member and then after three years you would be given tenure as a full professor or you would be let go. I think I was the first one who actually did that. It was never a formal university procedure, but it was something that the law school did. Later on, when we had a couple of tenure battles and people couldn't meet that schedule, we went back to doing what everybody else did. Then we adopted the mid-career reviews — we did that when I was on the Budget Committee — and then we became sort of like everybody else.

LABERGE: Do you mean everybody else on campus or other law schools?

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<sup>4</sup> Herma Hill Schreter, “‘Quasi-Community Property’ in the Conflict of Laws,” 50 *California Law Review* 206 (1962).

KAY: Other departments on campus, yes.

LABERGE: When you came in, in 1960, who else came with you? Who were the new professors?

KAY: Nicholas Johnson came and he left after a couple of years and went back to Washington, D.C. And then, as I said, the Four H's came just before me. Then Nick and I came, and Preble Stolz — who had also been to Chicago — came soon thereafter. Bobbie Barton went full time soon thereafter.

LABERGE: I was wondering if they also got tenure in three years or was there — how did that work?

KAY: I'd have to check that — I don't remember.

LABERGE: There wasn't an issue, in any case?

KAY: I don't think so, I mean we didn't really start having tenure issues until sometime later.

LABERGE: In the seventies?

KAY: Yeah.

LABERGE: Barbara Armstrong retired when?

KAY: She had retired formally before I came. Yes, she was teaching as an emeritus recall. In fact, she didn't really like this notion. She thought that when you retire you should retire [laughs] and let other people teach. But then Frank, again, got me this year down at Palo Alto with the Center for the Advanced Study in the Behavioral Sciences where Laura Nader and I were working together on law and anthropology, and that was in '63-'64. So Barbara was recalled as an emeritus that year to teach, and she understood that she had to come back and teach her courses — which had become my courses — because I was going to be given the year off, and that was fine. But then I think she didn't teach after that. She kept her office in the building and was working on the updated version of her two-volume treatise on California family law, but she didn't teach regularly as an emeritus.

LABERGE: Tell me about the year that you took in Palo Alto.

KAY: That was really nice. They always had individual people who applied, and then they had groups who were working together. Laura and I weren't

really a group but we were there together, and we put on a little conference on law and anthropology. Later, we participated in a conference sponsored by the Wenner-Gren Foundation. It was held at Burg Wartenstein, in Gloggnitz, Austria, in 1966. It was quite a spiffy place. I think it was that piece in the *American Anthropologist* that I was working on while we were there. It then became part of that volume on law and anthropology that she edited.<sup>5</sup>

LABERGE: How did you get interested in anthropology and how did you learn about it?

KAY: It may have come from Llewellyn because Llewellyn had worked with Hoebel on *The Cheyenne Way*. I had never taken courses in anthropology but I thought it was really kind of interesting, more interesting than sociology, because it really allowed you to look at individual cultures as a whole rather than trends and so on, which the sociologists did. Then I think my interest was sparked when Laura Nader and I met each other at that first tea that the president's wife gave for faculty women and the wives of faculty members. She used to have that over at the Women's Faculty Club. I think that was the only year I ever went. The purpose of it was to get the faculty wives to join in the section clubs — I'm sure you've heard people talk about those. It wasn't really what you wanted to spend your time doing if you were a junior member of the faculty, and neither Laura nor I did that. But there we were, both having been invited and we happened to — somebody introduced us and it may even have been Mrs. Sproul, I'm not sure who. But anyhow we did meet, and we started talking, and she was interested in doing village law and I was interested in anthropology.

So we taught a joint seminar in law and anthropology. I want to say it might have been even as early as '62. I think we did it before I went to Palo Alto. We had students from the anthropology department and we had students from the law school, and Dean Prosser thought it was an abomination. In fact, he wrote an article in 1966 called "The Decline and Fall of the Institute" — the theme of which was, What is legal education coming to? — in which he refers disparagingly to courses on legal anthropology. (The article was ostensibly about medical education.) Prosser really couldn't understand what this was all about. We taught it off and on for several

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<sup>5</sup> Herma Hill Kay, "The Offer of a Free Home: A Case Study in the Family Law of the Poor," in (Laura Nader, Ed.) *Law in Culture and Society* 304–326 (1969).

more years because Laura would send several of her Ph.D. students down to Mexico, which is where she did her field work and where I went with her and spent about six weeks there one summer. They all went through this course and it was really great fun. I enjoyed it quite a bit.

LABERGE: Well, as far as getting the course approved, how were you able to teach it if your dean didn't approve? Did it go through some other Committee on Courses?

KAY: Oh no, we still are not subject to the Committee on Courses.

LABERGE: Oh, you mean the law school isn't?

KAY: The law school isn't, no. But the trouble we had — it was wonderful. How things have changed! The trouble we had was Laura wanted to list our course in the Department of Anthropology, I wanted to list it in the law school, and we wanted to use the same course number. At that point, although the Committee on Courses didn't have any jurisdiction over me, they had jurisdiction over her. They said to us, "But if you have the same course number in these two different schools, people will think it's the same course," and Laura said, "It *is* the same course." [laughs] They just couldn't relate to that, so I think we had to add an A or a B or something to the number in one of the schools. It was really unheard of to do this.

LABERGE: But you didn't need to get permission to teach it?

KAY: I'm sure if Prosser had said, "You can't do it," there would have been a problem. But Prosser wasn't dean anymore after that. Newman was dean.

LABERGE: He was just commencing.

KAY: He was just commencing, yes. Newman thought it was great. [laughs]

LABERGE: Yes. Now, back to the tea with Mrs. Sproul: were you invited because it was your first year so it was just the new women? I was wondering if it was also Laura Nader's first year.

KAY: Yes, it was her first year. We both came at the same time. I don't remember now whether it was only for the new people or whether it was for — I mean if it had been for all the faculty wives, it would have been huge. I think maybe it was for the new people — the new men faculty's wives and the new women faculty, when they started getting women faculty.

LABERGE: Because I wonder how else you got to know women faculty.

KAY: Well, not well, and there weren't that many. There was a point when — now I'd really have to go back and dig up names for this. I did talk about this. You went to a memorial service this morning [for Assistant President, Emeritus, Dorothy Everett]. There was a woman — I don't think she was a faculty member; I think she was in administration — and she had called together a meeting of women faculty to talk about issues that she thought were of common concern. I think it may have had something to do with child care or maternity leave or insurance coverage — something like that. She may even have been from the Office of the President — I'm not positive, but anyway the message that several of us got was that we ought to go back to our departments and start meeting with our women graduate students. Well, we didn't have any women graduate students at the law school. I think I still have a copy of that memo somewhere. It was addressed to "Dear Boalt Hall Girl" [laughs] inviting them to join in a meeting to be held in the student lounge — the women's lounge, which had been liberated by a couple of the women students — to sort of talk about how they should get together and start meeting. People, later, came to see that as the organizational meeting of the Boalt Hall Women Law Students Association.

That would have been in the early seventies, because Nancy Davis — who was my research assistant when we were working on the casebook, which came out in 1974 in the first edition — was at that meeting. And it was Nancy and a few of her classmates who started — got the dean to support them in publishing these little pamphlets that they sent to college counselors who were counseling people what to do after they graduated. They were called "Wanted by the Law: Women," and they were a definite effort to encourage women to come to law school. It really had quite an impact on boosting our enrollment of women in the early seventies. I spoke about this at the reunion of Boalt Hall Women held in spring, 1998. It all went back to whoever that woman was who called the meeting.

KAY: This is the second letter. It refers to a meeting in April, 1969.

LABERGE: And we're talking just about Boalt students?

KAY: That's right. Boalt women students is what we're talking about. [looking at files]



PROFESSOR HERMA HILL KAY, BOALT HALL  
SCHOOL OF LAW, 1969

LABERGE: It's wonderful that you still have all those files in there. Some of them are mimeographed and . . .

KAY: I don't see the one that I'm looking for — I hope I didn't put it somewhere. I pulled a lot of this stuff out when I was writing that article on UC women faculty and I may not have put it all back in the same folder. Oh, here it is — April 28, 1969.

LABERGE: Shall we read this out loud or should we . . .

KAY: I can read it. I was just looking to see whether in the notes behind it, I mention the name of that woman — I don't think I did. Now this was dated April 28, 1969: "Dear Boalt Hall Girl: This letter is written to inform you of the recent formation by a majority of the women faculty on the Berkeley campus of a new organization called the Berkeley Faculty Women's Group. We are interested generally in the status of women on the Berkeley campus. Our immediate concerns include the problems of recruitment and advancement of women faculty members and the admission of women

students to graduate schools. It was suggested at a recent meeting of the Faculty Women's Group that each woman faculty member inform the women graduate students in her department of the group's existence and schedule a meeting with the female grad students in her department to discuss the students' immediate concerns. In my view, all women students at Boalt Hall are graduate students and I have accordingly sent this letter to all the Boalt Hall girls. I have reserved the small women's lounge for a meeting on Wednesday, May 7, at twelve noon. I realize that there is a conflict with Mr. Buxbaum's section of Corporations but it appears impossible not to conflict with any class and still meet at a fairly convenient hour. I hope you will come on May 7 to this working meeting. If you are not able to come, however, please let me know what you think can be done to improve the status of women at Boalt Hall. Yours sincerely, Herma H. Kay," and it's signed — title, "Herma H. Kay, Professor of Law, Vice Chairman of the Berkeley Women's Faculty Group."

LABERGE: Okay, well now we need to know about that faculty group. [laughs]

KAY: That's right. Now, let's see — these are notes on the meeting with the women students. [looking at files] These are later statements about admitting women to Boalt Hall, but I don't know that I have anything else in here that would give the name of that woman. [looking at files] Signature list of students who were there — copies of student newspaper . . .

LABERGE: What's the name of the student newspaper?

KAY: The name changed from year to year. This one was called *The Writ*. This is the women's issue. [looking at files] Betty Neely.

LABERGE: Oh, Betty Neely. She was in the Berkeley campus administration. She had something to do with the Disabled Students Program, I know that. She worked in the dean's office.

KAY: Here's a little memo from her dated March 16, 1970, attaching something — "thought you would be interested in this to see East Coast action." I don't know whether she was the one. I mean the name sounds very familiar.

LABERGE: She worked with [Dean of Students] Arleigh Williams.

KAY: I do seem to think of her as being more — I think she was not faculty . . .

LABERGE: I don't think so either . . .

KAY: No, but I mean I think the woman who convened that meeting was not a member of the faculty. I think she was an administrator. She may have been Betty Neely. [looking at files] Now here's a follow-up letter, June 20, 1969, addressed to "Dear Boalt Hall Women: As you requested at our meeting in April, I have reserved the small women's lounge for a meeting of Boalt Hall women students on Thursday, July 10, 1969, at twelve noon. The two items on the agenda are discussion of participation in orientation week to make the first-year girls feel welcome here, and a discussion of interviewing experiences by graduating third-year girls and any other girls who have been looking for summer jobs. I hope that as many of you will come as possible. Sincerely, Herma H. Kay." And then for many years, the Boalt Hall Women's Association, which was the group formed as a result of these original meetings, would have a reception for the first-year women. Bobbie and I used to go to it — we'd tell the same war stories year after year. Sandra Epstein mentions the formation of the Boalt Hall Women's Association.

LABERGE: In her book *Law at Berkeley*?<sup>6</sup>

KAY: Her book *Law at Berkeley*, yes, that's right.

LABERGE: I think there may be a chapter anyway.

KAY: Yes, she has a section on "Women at Boalt Hall" in Chapter 9. She talked to me about some of this. She does not have any of those names in there.

LABERGE: What do you remember about just that Berkeley women's faculty group and who else was involved?

KAY: I don't remember that it lasted very long. If Neely was the one I'm thinking of, I think she originally had this idea of benefits — which would tie in with the job you said she had. When the faculty people got together and started talking about it, it was more graduate students, admission, and

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<sup>6</sup> Sandra P. Epstein, *Law at Berkeley: The History of Boalt Hall*, p. 321 (Berkeley: Institute of Governmental Studies Press, 1997).

faculty women status that we were interested in. So my impression is that it didn't last very long — maybe a year or so, not much more than that I don't think — a few sporadic meetings.

LABERGE: And was Bobbie Barton the only other . . .

KAY: She was the only other faculty woman at the law school at that point.

LABERGE: Okay. I found a name of another group which I think must have come from that — the Association of Academic Women.

KAY: Yes, yes.

LABERGE: That was an outgrowth of that original one?

KAY: I think it was, yes, but I have a very hazy recollection of what that was and what, if anything, I had to do with it.

LABERGE: We're still talking just in the early sixties, seventies — your women students and how you mentored them besides starting this group.

KAY: Some of them have written a little bit about this. When I was looking in that file drawer, I was looking for an article by Lujana Treadwell, who was a graduate in the class of 1977. She later came back to Boalt to be one of my assistant deans, in charge of public relations and publicity. You know the comic strip *Doonesbury*?

LABERGE: Oh yes.

KAY: She was in Joanie Caucus' class.

LABERGE: Oh okay, all right. [laughs]

KAY: That was the class of '77. Anyway, she wrote a wonderful piece about her class, and I think she mentioned some of these things.

LABERGE: Some of your students formed a law firm.

KAY: Yes, Equal Rights Advocates — that's right. That was Mary Dunlap and Nancy Davis and Wendy Webster Williams, who's now on the faculty at Georgetown. And Nancy has just been appointed to the bench, and Mary, unfortunately, has died. But yes, they were all my students and they formed Equal Rights Advocates. We'll want to talk about that at greater length.

LABERGE: Okay, we'll come back to that then.

KAY: Yes. But just in terms of — I mean, I always had women research assistants and . . .

LABERGE: On purpose or . . .

KAY: Well, I was working on women's legal issues, and it just seemed to work out that way. I have had some men research assistants. One of my men research assistants is now in the philosophy department at Princeton, Mark Greenberg. They were quite a wonderful group of young women who worked with me over the years — a lot of them worked on this women law professors' project, putting in the data and helping to get that all set up. Obviously, when people started getting jobs you would write letters of recommendation for them, and the women who had been in my classes tended to come to me. Some of them went to other — male — members of the faculty as well when they were looking for jobs and clerkships and things like that.

LABERGE: Maybe we'll switch gears and go to how it came about that you wrote the no-fault divorce law, starting with — you testified before, I think, the Assembly or the Legislature on family law and then were appointed to a governor's commission. How did that all occur?

KAY: Well, most of that's written about.

LABERGE: Okay.

KAY: The question is, where did I write about it most fully? I think the fullest account of that is in my article in the *University of Cincinnati Law Review*.<sup>7</sup>

LABERGE: I wonder if this is one of the ones you already gave me. I'm not sure.

KAY: Probably. I gave you the overview article that I did, in which I summarized a lot of the story. This one probably has more of the details in it. Yes, this has a lot of details in it so I don't know how much of this you want.

LABERGE: Just off the top of your head, who asked you to be on the governor's commission?

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<sup>7</sup> Herma Hill Kay, "Equality and Difference: A Perspective on No-Fault Divorce and Its Aftermath," 56 *University of Cincinnati Law Review* 1 (1987).

KAY: It started as an inquiry by the Assembly and in those days California used to have — the Legislature met, as I remember, in alternate years. Is that right?

LABERGE: Yes.

KAY: They would establish temporary committees to hold interim hearings during the year they were not in session, and then they would come back with legislation that they were planning to propose. The Assembly began in 1963 to look at the implementation of the grounds for divorce and whether or not the grounds were being applied uniformly, particularly whether there should be standards to guide judges in setting alimony and support awards, determining child custody, and if so, the content of those standards. The Assembly committee held four hearings. The committee held its first meeting, I think, in January. I was invited. There must have been somebody who was working with the committee who put together a witness list, and then they had invited witnesses and then they had other witnesses that would then be permitted to testify, sign up to testify. This was written up by Howard Krom.<sup>8</sup> [looking through files again]

Now I think that he went through all of these hearings. “Assemblyman Pearce Young started a movement to initiate a study to identify the problem areas and gather information with a view towards developing a legislative program to strengthen family relations.” So then they had a resolution which set up this interim committee, “gave the committee authority to invite experts in the field for the purpose of research and analysis.”

LABERGE: Okay, so that’s why you were invited.

KAY: That’s why I was invited, yes. The interim committee was created in 1963 and Governor Edmund G. Brown sent a statement to the Assembly Judiciary Committee on January 8, 1964. I think that was the first hearing — let’s just see if he says that later on. “He planned to follow the hearings closely with the view to asking that the committee expand the study to include the citizens advisory committee composed of judges, lawyers, clergymen, sociologists and psychologists. The first of the hearings was held in Los Angeles on January 8 and 9, 1964.” That was the one that Brown sent

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<sup>8</sup> Howard Krom, “California’s Divorce Law Reform: An Historical Analysis,” 1 *Pacific Law Journal* 156 (1970).

the statement to. It was held in Los Angeles because that's where the court of conciliation was. That was the one that Judge Roger Pfaff, who was the presiding judge of the Consolidated Conciliation and Domestic Relations Court of Los Angeles County, was in charge of. His big interest was in reconciling people who wanted to get divorced, and he testified that his court, using its reconciliation facilities, was able to persuade sixty-four out of one hundred of these couples to reconcile. A year later, three out of four were still together. There was some suggestion that when he sent out the post-cards to ask how many of them were still together, he didn't count the ones who didn't answer. So this three out of four number was a little suspicious, but he was all in favor of reconciliation.

LABERGE: Before this ever happened, did you have in your mind this was something that ought to be done?

KAY: I was interested in the substantive law of divorce, and interested in working towards a no-fault divorce law, away from divorces based on fault. That was what I was testifying to when I was invited to give this testimony in 1963 — the first one in 1964. Here in this article, this Cincinnati article of mine which was published in 1987, after mentioning Pfaff, I said, "Several other witnesses were less concerned about patching up existing flaws than with achieving structural change in the divorce law itself. Two of these witnesses were law professors who later became members of the Governor's Commission on the Family." Now the governor's commission was appointed in 1966 after the assembly had finished doing what it was going to do. I was referring to my testimony and also the testimony of Professor Aidan Gough of the University of Santa Clara School of Law. It was Aidan and I who sort of worked behind the scenes to get this governor's commission appointed.

LABERGE: Okay. How would you work behind the scenes?

KAY: One of our graduates was, at that point, working in Sacramento in the governor's office and he was able to arrange a meeting with Winslow Christian who later became a judge and who was then working for the governor. We had a meeting with him and were able to tell him what we thought needed to be done, and he recommended that the governor do this and the governor did it.

LABERGE: Who was your student, do you remember?

KAY: Yes, his name was Bill Honig. He graduated in 1963.

LABERGE: Who was then State Superintendent of Education?

KAY: Yes, that's right. He later was elected to that office.

LABERGE: He has an oral history, by the way.

KAY: Does he?

LABERGE: Yes. I can't remember if he talked about this.

KAY: He may have forgotten it. It may have been a small thing to him.

LABERGE: But it was a big thing, I mean, it's those kinds of things that aren't written down — those kinds of meetings you get.

KAY: That's right. That is certainly the case.

LABERGE: And still Pat Brown was the governor.

KAY: Oh yes. We thought we were going to have several years to work on this project. But when Reagan was elected governor in 1966, it became pretty clear that we'd have to finish it earlier. A little known fact about Ronald Reagan's political history is that he signed the first no-fault divorce law in the country.

LABERGE: Yes. Well, what did you have to do with other people being appointed to that commission?

KAY: Aidan Gough was hired as the executive secretary of the governor's commission. This is the Report of the Governor's Commission on the Family. It came out in December of 1966. Aidan was named the executive director. Pearce Young, who had been the assemblyman who got this started, was named as co-chairman along with Richard Dinkelspiel, who was a lawyer in San Francisco — not a divorce lawyer but a general lawyer who was Catholic. It has always been my view that, because of him, and also because of our wanting to establish this family court, we got the support of the Catholic Church. In New York, of course, where they were trying to reform New York divorce law about the same time, the Catholic Church was one of the strongest opponents to no-fault divorce. It wasn't even no-fault at that point; it was just to expand the New York divorce law beyond adultery. But we had the support of the Catholics in California.

LABERGE: And also Pat Brown was Catholic.

KAY: He was, yes, that's right. So we had the members of this committee — and there's the roster — do you want that?

LABERGE: Sure. And if you have any anecdotes about how they were appointed or what you knew about them. You know, we could just copy that or refer people to that report.

KAY: I think the report is now out of print. [laughs] But we can make a copy of this page if you want to append it. Maybe we'd better do this at the next session.

LABERGE: Oh fine, that's okay. That's good.

KAY: Yes, I think that would be better.

LABERGE: It's amazing. You were not very old, you weren't many years out of law school, and you were the expert.

KAY: I don't think I talked much to Barbara about this, but to read the family law doctrines and cases as it existed in the early sixties was to want to do something more sensible about it. Fortunately, we had this opportunity which just sort of came out of nowhere because of the Assembly interim committee's hearings that we were then able to get involved in and be active in, and to help turn into something that turned out to be quite important. But I think probably that I ought to review this again.

LABERGE: Okay, so maybe next time we'll start with that.

KAY: Yes, I think that would be better.

#### INTERVIEW 4: JULY 9, 2003

LABERGE: Today is July 9, 2003, and this is interview number four with Herma Hill Kay. Do you have anything you'd like to say before I preface this? You've thought of something?

KAY: Yes, I have thought of a question. This is probably one of the few items about which this will happen in the course of these interviews, but because I spent so much time — literally from 1963 to 2001, or maybe 2002 — working on divorce law reform, and because, in the course of all that time, I have written so much about it, a great deal of the detail of what was

being attempted and what was accomplished and at what point, is all in writing. So it does not seem sensible for me to try to reproduce in this oral history what is in the written record. I gather that what you really are after is more the kind of personal side of what went on?

LABERGE: Exactly, exactly — just right on target. You could work there [the Regional Oral History Office]! [laughs]

KAY: [laughs] It finally occurred to me what you were after.

LABERGE: We can refer people to the various reports and publications.

KAY: And I think that would be helpful.

LABERGE: Yes.

KAY: Okay. Well then, just to do an overview of what's referred to now as the divorce law reform movement or the divorce revolution, depending on whose language you want to borrow, it really started in California in the early sixties. And it went, in California, from 1963 — when the Legislature began hearings on the subject of divorce without any thought towards this broader agenda — to 1969 when the California Family Law Act was enacted into law, becoming effective on January 1, 1970. Then it moved to the national arena, in part because I was appointed as co-reporter of the Uniform Marriage and Divorce Act, a project that had been undertaken by the National Conference of Commissioners on Uniform State Laws, otherwise referred to as NCCUSL.

That project had been begun by Professor Robert Levy, who was the family law professor at the University of Minnesota as the reporter, and Bob and I worked together on that project until the commissioners completed it in 1970. There were a couple of years' negotiation period because NCCUSL liked to have its uniform acts approved by the ABA [American Bar Association]. It took a couple of years for the ABA to get comfortable with what it was willing to approve, and that happened in 1973. Then there was a long period of time when legislatures around the country considered what they wanted to do with their divorce laws, and at that point there were three versions of no-fault laws that they could look at in addition to the California law. There was the original draft of the Uniform Act, which had a 1970 date on it; there was the Uniform Act with amendments, which came out in 1971; and then there was the final promulgated official version in 1973. I was

a little astonished as I re-read my Cincinnati article this morning, coming over on BART, how much detail went into that effort. There was a period of time when the state legislatures around the country were looking at it, and I cite there the legislation from all the states, cases interpreting it from many states, and by 1985 every single state had enacted some form of no-fault divorce. There were only fourteen states that had really done what California had done, which was to abolish all the fault grounds for divorce and enact what I referred to as, what I call a true no-fault law. And those states are still a minority — most states just have added “irreconcilable differences” to their list of fault grounds, like adultery, desertion, and so on.

But after 1985, it became pretty clear that something had happened to the bargaining position between husbands and wives at divorce that made it more difficult for wives to get the kind of support that they needed, and — in states that didn’t have an equal property division, like California did — the kind of property awards that they should have. So in 1989, the American Law Institute [ALI] decided to revisit the earlier divorce reform effort, to accept as established the no-fault ground for divorce but to look at the financial aspects of family dissolution and the aspects dealing with child custody. That was American Law Institute’s project on the law of family dissolution, which just was published last summer — the summer of 2002. That now is available for either adoption by the states or for use by judges in looking at principles and best practices, and so on. In contrast, the Uniform Marriage and Divorce Act was a little tiny, thin pamphlet, while the ALI project is that great big green book over there, so it’s enormously detailed and has a wealth of supporting scholarship and so on. It is now the final word in this divorce reform effort, which — depending on your point of view — has been either successful or has destroyed the American family.

LABERGE: When I read your chapter in this — *Divorce Reform at the Crossroads*<sup>9</sup> — you cited Lenore Weitzman. The gist I got from it is that she was criticizing.

KAY: She wasn’t criticizing the no-fault ground. She was arguing that there were unintended consequences that had arisen from the new law. She had come out with a startling finding, which later proved to be inaccurate —

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<sup>9</sup> Stephen D. Sugarman and Herma Hill Kay, ed., *Divorce Reform at the Crossroads* (New Haven: Yale University Press, 1991).

and she even had to admit that her numbers were not accurate. She had come out with a finding in her book<sup>10</sup> in which she said that one year after legal divorce, men's standard of living had gone up by 43 percent and women's standard of living had gone down by 73 percent. Some sociologists doubted the accuracy of that finding, which made front page news all over the country, and when Lenore's book came out, *The Divorce Revolution*, she was doing interviews around the country about this. The sociologists said this is the most widely cited sociological finding of the century and it has to be wrong. Finally, somebody did a re-analysis of her own data and couldn't come up with the conclusion that she had reached. She then went back and looked at it again and said that there had been an error, and the disparity was not as great as she had thought it was but there was still a disparity and that, of course, was still important. But the wind was a little out of the sails from that side, and that's what the ALI undertook to fix. What they did was to change alimony from being a discretionary allowance granted by judges to an entitlement that would be granted based on certain factors that occurred during the marriage. If the wife had given up career opportunities in order to take care of children or take care of elderly parents or so on, she would be compensated for her loss incurred by virtue of having done these things during the marriage and for the marriage enterprise. If that provision is widely enacted, it will be really significant and will go very far towards answering Weitzman's objection.

The other thing that was done, and this came from Congress, was the creation of federal guidelines for child support awards. The federal government undertook to do that because of our total inability to enforce child support. There are millions of dollars every year of outstanding child support awards that can't be enforced. So what the federal government did was, first, to be sure that there were guidelines for the minimum amount that has to be awarded, and then to say that there will be a federal mechanism for locating and trying to enforce awards against parents who are not paying. Now, of course, if the parent ordered to pay doesn't have the funds to pay, there's nothing anybody can do about that, but at least the federal guidelines have taken a lot of the uncertainty out of those awards.

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<sup>10</sup> Lenore J. Weitzman, *The Divorce Revolution: The Unexpected Social and Economic Consequences for Women and Children in America* (Free Press, 1985).

The other thing that the ALI project did was to recommend that marital property be divided equally at divorce. Many of the common law states have adopted what they call “equitable distribution,” a concept that came from the original Uniform Act that NCCUSL had promulgated. Several court opinions reasoned that an equitable division *prima facie* starts with an equal division, and it would be up to the person asking for an unequal division to show why an equal division was unfair. So that now, even though we still have only a few states that require an equal division, we have a lot more states that, at the time of divorce, will undertake as an initial matter to divide property equally even though it’s not equally held during the marriage.

The most recent development is a kind of backlash against no-fault divorce that’s been gaining some interest in state legislatures in the last four or five years called a “covenant marriage.” The covenant marriage proposal was drafted by a friend of mine who’s on the law faculty at Louisiana State University, Katherine Shaw Spaht. She’s written articles in which she says that since no-fault divorce very nearly destroyed the family, what we ought to do is now to provide an alternative model for lifelong marriage that people getting married can elect to choose, and she called it covenant marriage. Covenant marriage has three characteristics. First, the couple must have a specified amount of premarital counseling; second, they must sign an agreement that they intend their marriage to be lifelong; and third, if difficulties arise during the marriage they agree to undergo marriage counseling. Now, divorce is allowed in covenant marriage, but it’s back to the fault-based grounds again — adultery, desertion, et cetera. And there is a two-year waiting period before the divorce can be granted, and during that waiting period, support orders can be entered. There are some aspects of the plan that allow punitive awards for breach of contract because, after all, the person who is breaking up the marriage has violated his or her promise, right?

Covenant marriage has so far been accepted only in three states: Louisiana, where it began, Arizona, and Arkansas. In all three of those states virtually nobody is opting for it. The people who tend to opt for it, as you might expect, are fairly conservative religious couples. So it is the one kind of counterattack to no-fault divorce that has emerged but it has not so far been, as a practical matter, very significant.

That’s the overview.

LABERGE: Great.

KAY: Now, to go back to the California effort, it really was a tug of war between opposing concepts in northern California and southern California. It was represented by the difference in point of view between a group of us in northern California — law professors; mental health practitioners, mainly psychiatrists; and divorce lawyers; mainly matrimonial specialists — and the people in Los Angeles, who were affiliated with the so-called “court of conciliation” headed by Judge Roger Pfaff. Judge Pfaff’s view was basically that nothing needed to be done. Maybe a few things could be done to make it more effective to get couples to reconcile, but what you want to do about divorce was to try and talk people out of getting divorced when they got to court, if nobody had talked them out of it before they got to court.

The idea that those of us in northern California were advancing was that you shouldn’t hold marriage over the heads of people as a punishment. If the marriage had broken down in fact, it ought to be ended in law; you ought not to force people to make showings that usually were trumped up showings about adultery or cruelty. You ought simply to say this marriage is broken down in fact and therefore it should be ended in law. The notion was that you would signal that symbolically by, instead of naming the court proceeding *Jones v. Jones*, it would be called *In re the Marriage of Jones*. It would not be an adversarial proceeding, it would be a fact-based inquiry into the status of the marriage. There would be a specialist judge of the family court, and there would be a mental health staff attached to the court, and they would provide counseling to the parties. There would be an intake counseling session for everybody who filed for divorce. After that, the couple could opt for conciliation counseling if they wanted to try and reconcile. If they didn’t want to try to reconcile, they could opt for divorce counseling, in which the effort would be to get each of them to understand what life was going to be like after the divorce: what the financial problems will be, the problems with custody of the children, problems of getting a job if a spouse hadn’t worked outside the home — all that kind of thing.

Judge Pfaff was adamantly opposed to that, and during this whole period what he wanted was essentially to kill this approach if possible. He succeeded in killing the family court. He did not succeed in killing no-fault divorce. That’s the bottom line, the short version of what happened.

LABERGE: So, still in California we don't have the family court?

KAY: We do now. We don't have a statewide family court, which is what the governor's commission proposed, but some years after all this happened, the Family Code was amended to provide that counties could, at their option, establish courts of this kind to be funded by the counties. San Francisco has one that was started by one of our graduates, a former student of mine, Judge Donna Jean Hitchens, who was the presiding judge of the [Unified] Family Court and is now the presiding judge of the Superior Court for the City and County of San Francisco. There was for a time — I'm not sure there still is — one in operation in Alameda County. But Los Angeles has still clung to the court of conciliation. There are a lot of people down there who still follow in Pfaff's footsteps, although I think that they're not quite as adamant as he was that reconciliation is the only possible avenue.

But that's how it shaped up, and all of the detail of the hearings and what went on in the legislature is set out in my Cincinnati article. Now, after the Legislature was unable to get very far, Governor Brown did appoint his Governor's Commission on the Family, and I told you before about how that got done. The membership of that governor's commission included the people who had been working on divorce reform in northern California. It included people from southern California who had been active and testified before the Legislature. It included judges from both north and south. Judge Pfaff was named a member of it, but by that time he had gotten ill and was unable to attend any of the sessions. When the draft report was finally circulated, he wrote a letter to Richard Dinkelspiel, the co-chairman, saying he didn't agree with any of it. But by that time, he was not an active force on the governor's commission. Now do you want me to go through the names of the members?

LABERGE: Sure, you may have something to say about them, how influential — were there mental health professionals on that list too?

KAY: Mm-hmm. Let me start by identifying the ones who were the central players. They were primarily from the northern California group. This statute was drafted during meetings held in a motel at the San Francisco Airport which is still there. We used to reserve a meeting room, and the people from southern California would fly up and the people from San

Francisco and the valley would drive out. Then we'd spend all day working on drafts, and so on. So the people from northern California who were the central players in this were Professor Aidan Gough, he was from Santa Clara Law School, taught family law, and he was named executive director of the governor's commission.

LABERGE: Did that make a difference that that was a Catholic school also?

KAY: Probably so. Yes, I think it did, because he had great connections, of course, with the church. He and I divided the work between us. I did almost all of the drafting of the statute and Aidan did almost all of the writing of the report.

LABERGE: How did that occur?

KAY: I was into legislative drafting, I guess.

LABERGE: And offered or . . . ?

KAY: I think he and I just sort of divided it up. I had been drafting some provisions that we presented to the legislative hearings and he was more interested in writing the analysis and the story about how this happened. The report runs to page 59, and then there is the act with the commentary and the proposed statutory language, and that runs from page 60–117. Then there are footnotes, and the list of members, and footnotes and references. So he and I were the ones who did that.

There were two attorneys from northern California who were quite active in the drafting effort and they were Kurt Melchior, who's still in practice in San Francisco, and Kathryn Gehrels, who has died. She was at the time the chair of the Committee on Family Law of the State Bar. She was a graduate of this law school, a very close friend of Barbara Armstrong, and had taken me under her wing when I took over Barbara's family law course and taught me about the practical side of family law. The chair, Richard Dinkelspiel, was very faithful about coming to all these meetings as co-chairman. He died recently. The other co-chairman, the legislator Pearce Young, didn't come to hardly any of the sessions but he was kept informed of what was going on.

The people who were active from the mental health side were primarily Dr. Irving Phillips, who was professor of psychiatry with a specialty in child psychiatry over at UCSF at Langley Porter. He also has died now.

He was a very close friend of mine — not at the time, but later became a very close friend of mine. He and I taught a seminar on family law jointly together off and on for several years. Then there was Dr. Don Jackson, who was the director of the mental research institute in Palo Alto. He was a psychiatrist. Dr. Albert Long, who was from San Francisco Presbyterian Medical Center Department of Obstetrics and Gynecology, was also a clinical professor at Stanford and at the University of California. Those were the mental health and medical people who were active. That was really the working group.

The people from southern California who were most actively involved, in the sense that they would comment on drafts, and try to come to all the meetings, were two practicing lawyers. Harry Fain, who was the vice chairman of the Family Law Section of the American Bar Association, also was involved with the NCCUSL Uniform Act contemporaneously with our finishing the California project. Dorothy Davis, who was the immediate past chairman of the Committee on Family Law of the State Bar of California, was a matrimonial law specialist from Los Angeles.

Then there were judges from both northern and southern California. Judge Pfaff, of course, was from southern California, and from northern California there were two judges, Joe Babich from Sacramento and Robert Bostick from Oakland. Neither of them was terribly active, but they would come and talk about what could and couldn't be done with the courts, and were helpful in lending that kind of insight into what was going on.

The governor appointed one member of the clergy, Reverend Booker T. Anderson, an African-American minister from Richmond, California. He attended only one or two sessions. Let's see, who haven't I mentioned in here? Marcia Greenberg, who was a member of the state social welfare board, was there as a resource person on how the various proposals would affect families who were living in poverty. Dr. Edward Stainbrook, who was chief of psychiatry at the USC medical school, came only to a few meetings. Judge Richard Vaughn from San Diego also came to very few meetings. An attorney from southern California named Stuart Walzer, who was the vice chairman of the Committee on Family Law of the State Bar of California, was very active. He and Dorothy Davis and Harry Fain were the three attorneys from southern California who tried to keep an eye on what was

going on. Harry Fain was the one who was the most faithful in attending meetings.

Then there were members of the Legislature who would be able to introduce the draft into the Legislature. There was Don Grunsky, from Watsonville, who was a member of the Senate, and Pearce Young, the co-chairman, who was from the Assembly, and there was also a senator named Stephen Teale . . .

LABERGE: Who was a doctor, was that — maybe not. I'm not sure.

KAY: Well, I don't know. It just says "Honorable Stephen P. Teale, Member of the Senate." He was from West Point, California. I have no idea whether he was a doctor or not — doesn't say M.D. after his name.

LABERGE: Okay.

KAY: I don't think I hardly ever saw him. And then, Winfield Shoemaker from Santa Barbara was the other legislative member of the commission.

LABERGE: Who was the mastermind to put this group together? It wasn't really the governor, I'm assuming.

KAY: No. The core northern California group — essentially it was Aidan Gough and me together with Kathryn Gehrels, Irving Phillips, Kurt Melchior, and Richard Dinkelspiel — we were the six people who got together after the legislative study had ended and said somebody needs to pick up the ball. That's when, through Bill Honig, we got an audience with Winslow Christian, and the governor agreed to appoint his Governor's Commission on the Family, which he did about six months before he went down to defeat at the hands of Ronald Reagan. Most of the names came from those who had participated in the legislative hearings. The governor's office suggested the others. So, when we realized what was happening, we focused on the divorce parts and let everything else go by the wayside. Brown was able to receive the report before he left office, and Reagan signed the bill once it was enacted.

Grunsky then introduced a bill, and it was at that point — and this is also all in my Cincinnati article — that a southern California legislator, at the instigation of the conciliation court group and Pfaff, introduced a rival bill that left out the family court and monkeyed around with the language so that they made the no-fault ground much less clean than it had been

when we drafted it. In fact, it may even have been in that article that you read in the book where I was quoted as saying, “What divorce law reform?” because it had been really so watered down. But the shift from fault to no-fault was so dramatic and the judges knew what was intended by it, so it became fairly clear after some years that even with the absence of the safeguards that we thought a family court would have brought, it really became unilateral divorce. Somebody at one point said if somebody says the marriage is broken down irretrievably and the other person denies it, that in itself is evidence that the marriage is broken down. [laughs] So, you really couldn’t get anybody to deny the divorce.

So then the next question was, “All right, what are you going to do about the property and the children?” The one thing that I thought was really harmful that the Legislature did over our objections was that, although they excluded testimony about fault from the grounds for divorce and the award of alimony, they did not exclude it from the award of child custody. So that if a husband had a judge he thought would be influenced on the financial awards by his wife’s extramarital affairs, he would bring in the evidence to show that she was an unfit mother and shouldn’t have custody of the children — even though he didn’t want the children himself. Finally, in 1994, the Legislature took that out of the statute so that fault is no longer admissible on the issue of child custody in California.

So that was the California story. Then when we shifted to the national scene, you had the Commissioners on Uniform State Laws — in effect, picking up from California — carrying out some of those initiatives in a much cleaner way, but then having to battle with the Family Law Section of the ABA, which was worried about destroying the American family. But finally they went along with most of it. By and large, it was a social movement whose time had come. People didn’t really think that you ought to have to spend your life in a marriage that was no longer functioning as a marriage, and that it was better to get it legally over with so that you could go on with your life.

In fact, one of the most amusing things, that I recounted recently in a paper I presented last year at Hofstra [University] on family law, was that at that very first hearing in January of 1964, when they were talking about trying to avoid divorce, the representative of the Department of Social Welfare, a man named Hazen Matthews, said, “We’ve got about 700

families that we're working with who are living outside of marriage because they can't afford to get divorced from their spouses, many of whom they haven't seen in years, and what we would like is for the Legislature to fund somebody who could get these people divorced so they can marry the people they're living with and legitimate their children." [laughs]

LABERGE: Yes. [laughs]

KAY: I always thought that was the funniest thing.

LABERGE: That you were actually helping the family.

KAY: Exactly! I mean, which family do you want to save? The one that is no longer active, or the one that has replaced it in fact? [laughs]

LABERGE: Right, yes. How much involvement did you have then in writing the Uniform Act?

KAY: Bob Levy and I divided up drafting the provisions. There's a marriage section that nobody, I think, ever enacted, that he drafted. I drafted the divorce sections and the property division sections. He drafted the alimony, child support, and child custody sections. That's how we divided the work up between us.

LABERGE: For non-lawyers who are going to read this, could you say a little bit about what the Uniform Act means? It's not law in the United States, but who looks to it and what do they use it for?

KAY: This all goes back to divorce actually, and I mentioned that in that overview article that I published in the *California Law Review* that I gave to you.<sup>11</sup> Way back in 1869, President Theodore Woolsey of Yale University published a book arguing that some states were getting way too liberal in allowing divorces to be granted, and what was needed was to set up a federal law so that marriage would be uniform across the United States. They, of course, thought they could get a uniform law that would be supportive of marriage and very strict as to divorce. They tried to get a group of states to call for Congress to enact a marriage and divorce law, but that never worked. So then what they did was to try and establish national law reform

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<sup>11</sup> Herma Hill Kay, "From the Second Sex to the Joint Venture: An Overview of Women's Rights and Family Law in the United States during the Twentieth Century," 88 *California Law Review* 2017 (December 2000).

groups, and the group they got started was the National Conference of Commissioners on Uniform State Laws. It was supposed to prepare laws that would be adopted in every state and provide a uniform law by acting together.

The first thing they tried to do was to draft divorce law, which was an utter failure because they couldn't get anybody to agree on what it should be, so they just abandoned the effort. They then took up business law and they drafted the Uniform Commercial Code, which was a great success, and it was adopted in all the states. So when NCCUSL came back to doing divorce reform in the end of the sixties, they were really returning to a project they'd started in the late 1880s and had never been able to accomplish. The idea was that you would have these model laws drafted and states would be able to adopt them as legislation and that's how they would become uniform law. The American Law Institute, on the other hand, started out by drafting what they called Restatements of the law so that you would have this volume, sometimes two and three volumes — Restatement of Contracts, Restatement of Torts, Restatement of Property, Restatement of whatever common law subject you wanted to have restated. Common law is law that was created by the courts' case-by-case decisions in each state. They would identify what the trends were and they'd say this is the majority view, that's the minority view, here is how the law — we think — this is our restatement of what the law is. The Restatements were enormously influential, particularly in Europe, where people treated them as being the last word on what American law was, when in fact a Restatement had no legally binding effect of its own except insofar as courts would say, "We're about to change the law of negligence and we think that we ought to follow section x, y and z of the Restatement of Torts." Then it would become law in that state, and then, of course, NCCUSL would prepare subsequent editions in which they would say "and the Restatement has been adopted by —" listing the states where it had been adopted. Both of these organizations are still in operation and they're still working along both of these separate two lines.

What the ALI did on the family law project is really quite different from a restatement — it is not intended as a restatement. It is intended as a statement of the principles of family dissolution. So the idea is that parts of it or all of it, although I can't imagine any state adopting all of it, could

be enacted by the legislature — they could repeal all their current laws on marriage and divorce and enact this. Or they could be adopted by state courts, in terms of their making decisions and following the principles. The really new part, in terms of coverage, of the ALI project is that it also covers dissolution of families where there was never a valid marriage in the first place. It applies to people, men and women, living in what we call non-marital cohabitation outside of marriage, and it also applies to same-sex couples. It's now being used as a model in some other countries but also in some states where gay and lesbian couples are coming forward to try and get, primarily, child custody issues resolved in the courts. Because you have people who have not been married and so if one of them, in the case of a lesbian couple, one of them has given birth to a child, she is the legal mother — the other partner has no legal standing at all in most states. Some states allow adoptions by what they call the “second parent” of the same sex, but that's still pretty rare. So this will fill a real void if it's picked up and used as a model by courts and legislatures.

My involvement in that is that I'm a member of the ALI and I'm a member of the ALI Council, which is its governing group. The council appoints some of its members to serve on the advisory group to each of its projects, and I was a member of the advisory group to the Family Dissolution Project. So was Bob Levy, although he was not a member of the council. The advisory group is larger than just the council. In fact, there are usually only one or two people from the council, which is about a sixty-member group, on each of these projects, and the other advisors are ALI members. [Professor Susan Appleton of Washington University in St. Louis law school and a former student of mine was also a council member who was an advisor to the project.] The actual work was done by several people, but the three co-reporters who were there when it was finished were Professor Ira Mark Ellman, who's at Arizona; Dean Kate Bartlett, who's now the dean at Duke Law School and was a faculty member there; and the third member was Professor Grace Blumberg, who's at UCLA. Ira and Kate were students of mine.

LABERGE: Just on a personal note, the fact that you're a woman and feminism was being enunciated then, what effect did that have on your approach to this or your interest in doing it? I know that you started family

law just because that was what you were given, it wasn't that you said, "I want to do this."

KAY: No, that's right, but as I point out in the Cincinnati piece, nobody was trying to make men and women equal at the time we were drafting these early divorce reform laws. We were mainly trying to keep people from engaging in blackmail and chicanery and all that. It was not really until the very end of the process that the legislator from southern California, Assemblyman James A. Hayes, wrote a legislative statement about unequal distribution that we later learned he wanted to use in his own divorce in order to get more property than his wife. He wrote this statement of legislative intent after the bill had already been passed and signed by the governor, in order to provide some guidance to judges who read this substantially equal division exception as meaning that, if necessary, you had to sell the family home in order to equalize the division.

He wanted to get them away from that, but in writing that legislative statement he also called attention to the increasing numbers of "working married women" and referred to their approaching equality with men. I'll read you this because it's so much fun. It says, "When our divorce law was originally drawn, women's role in society was almost totally that of mother and homemaker. She could not even vote. Today, increasing numbers of married women are employed, even in the professions. In addition, they have long been accorded full civil rights. Their approaching equality with the male should be reflected in the law governing marriage dissolution and in the decision of courts with respect to matters incident to dissolution."

Now that passage was taken by many judges as sort of an open invitation to deny alimony, which is no doubt how he intended it, but it certainly was nothing that a feminist would ever have said. It was after that happened that there was some suggestion we ought to look at how property settlement agreements could be enforced and handled to put some limits on that. People began looking seriously at what it would really mean, and what was being sought then were provisions changing the law of marriage to provide for equal management of community property by women. Until 1951, women in California had no power even to manage their earnings if they were community property, because the husband was the head of the household, and he managed everything. It was not really

until 1991 — when you got stringent provisions enforcing a fiduciary duty of the spouse managing the property to account to the other spouse, and to be responsible for decisions affecting the property — that women really were protected against men who were using the property however they saw fit. So, that was where the movement for equality came from, not from these divorce statutes. [Judge Isabella Grant of San Francisco called for reform in the laws governing property management, and Professor Carol Bruch of the UC Davis Law School (also one of my students) was active in drafting them.]

LABERGE: Right.

KAY: But as I also point out in that article, just because of the timing when the Uniform Act was promulgated — the first one, the NCCUSL version in 1970, then 1971, 1972 — that was when the Equal Rights Amendment was also up for ratification, and also a lot of the abortion laws were being debated in the states. This was before the Supreme Court decision in 1973, *Roe v. Wade*.<sup>12</sup> So you had a lot of state legislatures that were looking at no-fault divorce, the Equal Rights Amendment, and abortion — all of them issues profoundly affecting the status of women — at the same time. So, obviously, people's attitudes about women and their proper role in society became very crucial in a lot of the debate over this matter.

LABERGE: And for yourself, you were a professional woman and you have great empathy for women who weren't. I wonder where that came from — it wasn't just from reading the casebooks.

KAY: Oh, it was probably from my growing up as a preacher's kid, don't you think? [laughs]

LABERGE: Or something your mother said about you don't want to be dependent on a man — who knows? But do you know anything about just your own consciousness growing?

KAY: No, except that I guess I've always felt very strongly — and this came from my father — that women ought to be free and conscious actors. They ought to determine their own role in this world. So I was very opposed to anything that would stand in the way of their self-realization. I feel the

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<sup>12</sup> *Roe v. Wade*, 410 U.S. 113 (1973).

same way about racial equality. There shouldn't be any barriers placed in front of anybody to do what that person wants to do and is able to do.

LABERGE: Yet you have done it in a way that's not strident, if that's the right word. You're not a Kate Millet. I'm not exactly sure if that's how you — do you know what I mean? Somehow you've learned a way to do it that's been very effective and you've gotten things done, but not offending certain people who would just take up the banner just because of that.

KAY: I have always thought that you ought to try and make things effective, and that usually meant working within the system. I've not been one to pound on the barricades, but then I was accepted inside, too. I didn't have to pound on barricades.

LABERGE: In this later book that's talking about the divorce reform, it talked about in the eighties, the California Legislature also re-looking at this. What part did you have in that?

KAY: I just gave some testimony. I was not very active in it.

LABERGE: So have you passed the torch to somebody else?

KAY: Our graduate and my former student, Professor Carol Bruch, who just recently retired from the law faculty at UC Davis, really has been the one. She was the guiding force behind the management and control provisions and also behind the enforcement provisions, the fiduciary obligation and all that. She's been very active over the years in working with the Legislature and making changes in the community property laws, also in the child custody laws. Now that she's retired — fortunately she hasn't stopped working on these issues yet, but I'm not quite sure who's going to take up the torch. I think Grace Blumberg has done a fair amount of that from UCLA because of her activity in the ALI project.

LABERGE: What about the Equal Rights Amendment and/or abortion, did you have any involvement with those?

KAY: I was active in both of those. I was asked to testify in the California Legislature when we adopted our therapeutic abortion law. We were one of the first three states to adopt the therapeutic abortion law in 1961, and I testified at the legislative hearings. I didn't have any hand in drafting — I mean, there was really almost nothing to draft. What you wanted to do was repeal! [laughs] The drafting of that was done by some lawyers from

southern California. I just testified — did a lot of speech-making, supported it around the state. After *Roe v. Wade*, I had very little involvement in that. Although, before that happened, there was a lot of work to be done in California. The ob/gyn department out at UCSF Mount Zion put on a program — it was in January 2003, the thirtieth anniversary of *Roe* — in which they honored the pioneers, including me, because I was one of the lawyers who represented the San Francisco doctors whose licenses were threatened because they performed abortions for German measles when that wasn't permitted.

LABERGE: So you represented them in court?

KAY: Yes. Well, I really just went on the brief, but yes, I was listed as one of the co-counsel in that case. Then Maggie Crosby, who's at the ACLU, did a lot of the litigation involving minors' rights to abortion. She and I were both honored. It was a very nice event. They published quite a nice book with pictures going back to the early days of what was done to women when they had miscarriages, and all of this. The doctors were really quite heroic, because they were risking a lot to do what they did. They were what was standing between women and the back-alley abortionist in those days. The Shively Seven, that's what they were called, after Dr. Shively, who was the first of the named defendants in that case where they were going to pull their licenses.

Now, on the Equal Rights Amendment, I didn't do much more than just testify on that. I was not active making speeches about the ERA and things like that.

LABERGE: Testifying before the California Legislature or Congress?

KAY: No, the California Legislature, for ratification.

LABERGE: When this bill passed — the Family Act in 1970 — were there any stories about getting people's votes, calling people? How that came about, particularly because it was now Governor Reagan.

KAY: No, no — actually there was no opposition to it.

LABERGE: Really?

KAY: The only opposition was the battle I've described between the northern California folks and the southern California folks on whose vision was going to be enacted. The only opposition — and I say this in the Cincinnati

piece too — the only vocal opposition came from a group of divorced men who thought that they paid too much alimony and they didn't see their children enough. They were the ones who ultimately were behind the later California proposal for joint custody. That was their idea, their notion. They picked up on the equality theme. They argued that the fathers weren't being treated equally because mothers always got custody of the children. So they got the joint custody legislation through, which I always thought was a bad idea. It hasn't really panned out very well, because, even when you grant joint legal custody, it usually winds up with the mother having sole physical custody as a matter of practice, regardless of what the order says. But they were the only ones who were opposed to it, and they were opposed to it because they thought it was going to help women get more alimony. Which they didn't want.

LABERGE: You brought up teaching the class with Dr. [Irving] Phillips. If you could talk about that, but also, when you were writing this, for instance, how did you know to bring in mental health professionals? Or was that just part of the package and you kind of learned along the way? Because you were still a young woman.

KAY: Well, there were expert witnesses. They were brought in most significantly on child custody matters, but there were people in the field. There were psychiatrists on law faculties — the first one was at Pennsylvania; Dr. Andy Watson — who wrote about family law issues and also criminal law issues and also incidentally about how law professors went about brutalizing law students to teach them somehow to “think like lawyers” by their over-zealous use of the Socratic method.

LABERGE: [laughs]

KAY: He had some really pungent things to say about how much some of his colleagues seemed to enjoy humiliating these first-year law students. So he was at Penn, and then there was a psychiatrist on the faculty at Harvard. He wasn't so interested in family law, but occasionally he would say some things about it. Then there were the folks at Yale who were working with Anna Freud. They came out with this book — three of them finally, but the first one was called *Beyond the Best Interests of the Child*. This was [Joseph] Goldstein, Anna Freud, and Albert J. Solnit. Goldstein was the law professor and Solnit was a psychoanalyst. They would provide expert

testimony at these big child custody battles. In those days you had to prove what was in the best interests of the child and it was a future determination and nobody knew how to do it, so you'd have psychiatrists on both sides, and you'd have psychologists, and you'd have the home study done, and all that. It just went on and on forever, so I don't think I thought of it — it was there.

LABERGE: It was just there.

KAY: Yes.

LABERGE: And the class that you taught?

KAY: That was a class, we called it The [Seminar on] Law and Psychiatry, and we used to pick a subject — sometimes it was custody, sometimes it was divorce — and we had students from the law school and the medical school. It was kind of like the thing that Laura Nader and I did with the law and anthropology course: students came from both departments. We had law students and we had psychiatric residents from Langley Porter, and we would meet mostly here at Boalt. But I remember one year the law students were really shocked when Dr. Phillips said, “All right, we're going over to Langley Porter and I'm going to show you how to interview a psychiatric patient, and show you something about transference and counter-transference,” and all this. He picked out one of the many patients who thought he was Jesus Christ. He interviewed “Jesus Christ” — the law students couldn't believe it, [laughs] but they got an eyeful.

Looking back, I think probably the model for my interest in this kind of joint teaching came from a course I took at Chicago taught by a Torts professor, Harry Kalven, that he taught jointly with a faculty member from the divinity school. It was called a Seminar on Righteousness and Justice. We had students in the law school and students from the divinity school. Again, it was like a clash of cultures. I don't quite remember what religion these folks were from the divinity school there, but they really believed in casting out devils. I remember one session, they couldn't understand why the law wanted to go through all this involved criminal process — you know, why didn't the lawyers and the judge just pray for the defendant's soul. [laughs] What did it matter whether he did it or not? We thought, “Wow! There's some fundamental ground here that separates these two callings.”

I think the idea of having people who are being trained for these quite different professions but who still, obviously, focus on common issues — of bringing them together while they are being trained is quite attractive. Irving Phillips died some years ago and I haven't offered an entire course with anyone else. Now I invite Dr. John Sikorski, who's a clinical professor of psychiatry at UCSF. John is quite well known as a psychiatrist who does child custody evaluations. He's a certified court evaluator in these matters. John comes over every year, either to my family law course or to my family law seminar and talks about psychiatric and other mental health evaluations of children in the divorce process. [He also teaches a course at UCSF on Forensic Psychiatry.] Students always relate quite well to him because he's very effective and obviously quite good at what he does.

#### INTERVIEW 5: JULY 30, 2003

LABERGE: Today is July 30, 2003, and this is interview five with Herma Hill Kay. Unless you have something — a pick-up something from last time — we'll go on to the university committees.

KAY: Sure.

LABERGE: Okay. I have here with me a report of the Academic Senate on the status of women in 1970.

KAY: Yes.

LABERGE: It's so interesting — what they notice is that, "at this time, no woman has ever been elected to the Committee on Committees, the Committee on Educational Policy, or the Committee on Academic Planning," and it looks like you were the first woman.

KAY: I was the first of two women. There were two of us, but can I see the date of that?

LABERGE: Were you looking for this?

KAY: Yes. I've got a copy of that report somewhere. That was the Report of the Committee on Senate Policy, and that was one of the first committees I was on. Let's see if he listed members of the committee here in the back. Usually they do somewhere, but I'm not sure he did in this one.

LABERGE: I'm not sure if they did.

KAY: Appendices. Conclusions. [looking at report] Let's see. It looks like a very short report for that particular — here it is. Okay. “Respectfully submitted” — oh, maybe this is the subcommittee. I guess that's a subcommittee. Yes — “appointed to subcommittee.” Okay, all right. So he doesn't list the names of the people who were on the Senate Policy Committee, but I was on that committee. He was chair. In fact, I had a lot to do with getting the committee to prepare this report.

LABERGE: Oh good. Well, let's talk about that. When you say “he,” is it [Frank] Newman?

KAY: No, Sandy Kadish. Kadish was the chair of the Committee on Senate Policy. I was trying to start from the beginning of my career, and I was remembering the first Academic Senate committee that I was appointed to. This was because of Newman's deanship. Newman came in as dean in 1961 after Prosser left. Now, interestingly Newman said in that interview you gave me to read, that he thinks he was dean when I was hired. He was not dean when I was hired. Prosser was dean when I was hired. But when Frank came in as dean in 1961 — because he had been so active in the Academic Senate — he tried to get the younger faculty members to be active in the Academic Senate. And because it was a moment when there were not that many faculty women in the university, I was very welcome on any committee that he wanted to get me involved in.

So the first committee that I served on was the Academic Senate Committee on Teaching. That was in 1964–68. I was later chairperson of that committee, in 1984–85. It was the first Academic Senate committee I ever served on, and I believe that what we did was to recommend to the division that it establish the teaching award. Again, I was one of the first people — [Chancellor] Chang-Lin Tien and I were among the first people to get that Academic Senate Teaching Award. Although, when the award was first established, only one award was granted every year. Then, because there were so many people nominated, we started to give several honorable mentions. Some years later, whoever was on the committee decided that they would do away with all the honorable mentions and just list everybody as recipients who either got it or who was honorably mentioned. Now, of course, they give the award to five or six people every year. So my

name is still listed every time they print a list of people who have gotten the distinguished teaching award; and I always say, well, it was really only an honorable mention, but they have swept it all in together now. So that was the first committee I served on.

After that, Mike Heyman — and I don't know what position he held at that point; he might've been on the Committee on Committees — was talking to me about what committee I would serve on next. He suggested Academic Freedom; for some reason I couldn't do what they needed to be done. He suggested some other committee, I forget which, but it also didn't work, and then he said, "What about the Senate Policy Committee?" Well, the Senate Policy Committee was a fairly new committee at that point, and it was created to be an advisor to the chair of the division and to recommend things that they thought the chair ought to look into or that ought to be recommended to the division or maybe sent to other committees for study. So I said, "Yeah, I can do that." So he appointed — whoever it was who appointed me, because the members of the Senate Policy Committee were appointed by the Committee on Committees. You did not run like you ran to be elected to the Committee on Committees, right? So I was appointed to it in 1968 and I know that Kadish was the chair at some point. Here he's signing as chair of the subcommittee report in 1970. I served on that committee from 1968–70.

This study was done because we were getting very concerned about the women who were or were not being promoted and hired as they should. My résumé shows that I was chairperson of the Berkeley Women's Faculty Group in '69–'70, while I was still a member of Senate Policy. That group was self-organized and I don't remember if I was the first chair of it or not, but we were trying to get some data gathered about women faculty: how they came to Berkeley, where they were, how long they stayed, and all that. That was what the Senate Policy Subcommittee was supposed to do. This was the first report on the status of women that the campus ever issued. So those were two committees I was on.

After that, I think, Professor Patricia St. Lawrence, from the genetics department, and I were the first women who were elected to the Committee on Committees [in 1971]. We had never met each other. I'd never heard of her; I think she'd heard of me. We wound up being elected the same year

and we served on the committee together. I think we were both grateful to find each other there.

LABERGE: Tell me a little bit about running and what you had to do.

KAY: It's the same thing that happens now. Everybody who's a member of the division gets a form that comes in the mail and says, would you like to nominate somebody or you can self-nominate if you want to be elected as — and I think there are elections for divisional representatives as well as to some specific committees. The Committee on Committees is one of them. I think there are other committees — I think there are more in the college than there are among the professional schools — that people are elected to. Somebody from the law school — it must have been, probably even Mike or Frank or somebody — nominated me to run. Then your name goes on a ballot, along with the names of the people who nominated you. Then members of the division get a ballot to vote for these people, and Pat and I were elected.

The Committee on Committees appoints the members of the other committees who are not elected, so you get to know a lot of people around the campus and what they do when serving on that committee. You always send out a form to everybody who's a member of the Academic Senate during the spring semester saying, "The Committee on Committees is about to appoint members to Senate committees; would you like to volunteer for any committees." Sometimes that's helpful and sometimes it isn't because often the people that you really want to serve never volunteer and the people who volunteer aren't the ones you want to serve. [laughs] But anyhow, that information goes to the Committee on Committees, and then each member of the committee is supposed to talk to people in his or her field or department, and come up with nominations for particular committees.

Of course, the law school is always a very popular source of committee members for things like Privilege and Tenure, and Academic Freedom, and some of these policy committees. Newman, Kadish, and Heyman had great traditions of service, and so the law school viewed this as something that we were supposed to do. It wasn't enough just to serve on internal law school committees, you were supposed to make yourself available to the campus as well.

LABERGE: How many people on the Committee on Committees?

KAY: I don't remember, I would guess . . .

LABERGE: About ten-ish?

KAY: Something like that.

LABERGE: So you and Pat St. Lawrence were the first two women ever on it.

KAY: That's right, and she has died now. I don't remember when she died but I think it was maybe half a dozen years ago, something like that. So we were on that committee. Now, if you notice, I become chairperson of the Berkeley Division as of January 1, 1973, and I had been on the Committee on Committees. We had had just a terrible time getting somebody to serve as the chairperson of the division. Nobody wanted to do it, and finally — I was in England at the time visiting in Manchester, the faculty of law there — and I get this call from Berkeley saying, "Well, we've found a chairperson," and I said, "Who?" They said, "It's going to be you." [laughs] I said, "What do you mean, it's going to be me?"

They talked me into doing it. I really served, not for a full term — because a full term would have been for two years and I served essentially for a year and a half.

LABERGE: Who called you and talked you into it?

KAY: Whoever was the chair of the committee. It may have been Milton Chernin. Milton was a great guy. I always thought he was fabulous. He was the dean of the School of Social Welfare for years and years, and he was secretary of the division for years and years. His picture is there hanging over the fireplace in the Men's Faculty Club.

LABERGE: Oh, okay. I didn't know who that was.

KAY: That's Milton Chernin. Great man.

LABERGE: So then you're the first woman chair also?

KAY: I was the first woman chair of the Academic Senate, that's right, and because I was chair of the Academic Senate, I was then ex officio a member of the statewide Academic Council and Representative Assembly, and that is where Karl Pister and I met Sally Sperling.

LABERGE: He was chair of the Academic Council. I can't quite remember if it's that year but he was chair of the Academic Council.

KAY: Sally at one point was chair of the Academic Council.

LABERGE: Maybe they served together — one was a vice chair and one was chair or something like that.

KAY: Yes, maybe so.

LABERGE: Well, tell me what that entails. When you're chair of the Academic Senate, do you still teach? Do you have time?

KAY: Yes.

LABERGE: Oh, you do. How much time does it take to do?

KAY: The only committee in those years that you got any release time at all for serving on was the Budget Committee. So everything else you just fit in. At least, at the law school you didn't have to serve on any law school committees while you were doing it, but it was not a release time kind of position at all.

I'm trying to trace these years back here. I was on the Academic Council and I'm positive that Sally was the chair of it when I was on it in 1973–74, because it was utterly astonishing how she mobilized the group. She was on it because she was the chair of the Academic Senate from Riverside, which is where she was a faculty member. But she may have been elected. I think the chair was elected, because I remember they tried to get me to be chair years later and I didn't want to do that. So that's where I met her, and she was just terrific. She was a professor of psychology at Riverside and she really had a vision of how to make that group influential. Before that, it had really just been a sounding board for the UC president — he was forced to consult with the council, but he just came by. And that was when [Charles J.] Hitch was president.

Hitch was president, and he and Sally formed a really nice working relationship. Sally really made us, on the committee, do our homework — to serve not just as somebody who said, "Yes, thank you, Mr. Hitch," and then went back home, but who really took an interest in the issues that were facing the university and tried to get the campuses to take positions on it. Coming from somebody from a campus like Riverside, I think that made more sense because that made the council a group that would be representative of the entire university. People from other places — particularly Berkeley, but also UCSF and Los Angeles — were not so crazy about that,

because their view was that there were essentially only three campuses and the rest of them were kind of [laughs] there as hangers-on. But she did really a terrific job of building up the influence of the Academic Council.

LABERGE: What issues do you recall that you dealt with?

KAY: I don't recall anything very specific. I think the process was more important than the substance. It was significant that Sally created an expectation of meaningful consultation.

LABERGE: I was trying to find out — one thing might have been separate salary scales for professional schools. Does that ring a bell or not?

KAY: Well, I know, from the law school's perspective, we were working on that, but whether that came to the Academic Council, I don't remember.

LABERGE: Okay, because I know both engineering and business — there was one other maybe — who didn't have a separate salary scale although the law school did.

KAY: Well, the law school and the medical school were the schools that first had separate salary scales, and then the others . . .

LABERGE: But in any event, it was after the Free Speech Movement and after the bulk of the protests.

KAY: That's right.

LABERGE: Before that — you wrote that wonderful piece about Richard Jennings when he was chair. Were you going to meetings?

KAY: Yes. The meetings were — I mean there were meetings of the division and everybody could go to those. They usually had one in spring and one in the fall, and then there were meetings of the Representative Assembly. When I was chair, the Representative Assembly had just, I think, then formed. I see I'm listed as a member at large of the Berkeley Representative Assembly for '74-'76. That was after I stopped being the chairperson of the division, and I think that I was motivated to do that — I was not the law school's representative; I was a member at large — because I thought nobody wanted to do it, and you just had this terrible problem with quorums.

We'd formed the Representative Assembly because we couldn't get a quorum of the division except when you had things like the crises Richard was dealing with, in the Free Speech Movement, where you couldn't get a

room large enough to hold everybody who wanted to come. But in normal times, everybody was happy to just let what they referred to as the “old Senate hands” take care of everything. Unless there was some crisis, they didn’t bother to come, so you could never do anything, parliamentarily, because you couldn’t get a quorum. I started saying, “All right, we’re going to pass this motion subject to a mail ballot.” We did that a couple of times, which worked, but it was costly. Then I would say, “We’re going to pass this, subject to its being ratified at the next meeting in which we have a quorum.” [laughs] Probably it was pushing the law a bit, but you got so frustrated because you had to carry on these activities and there were things that the Senate was charged with doing that it couldn’t do if it didn’t have a body large enough to do its business.

So, when we formed this Representative Assembly, my recollection is that it was done primarily to solve that problem. You would get a smaller group that would have the authority to act in between meetings of the general division meetings, and you would get people who were sufficiently dedicated so that they would show up. As you see, I stuck with it for a couple of years after that as a member-at-large for a two-year term. But my recollection is that we started having trouble getting quorums even at the Representative Assembly, which was really, I thought, distressing. I don’t know what it’s like now. I haven’t been to a division meeting in years. [laughs] I’ve gotten just as bad as everybody else now.

LABERGE: But you were a little busy also. [laughs]

KAY: Just a little. Okay, so that was the Representative Assembly. Then there seems to be a two-year hiatus, then I was appointed to the Academic Senate/Administration Committee on Faculty Retirement Policy, and then to membership in the university-wide committee — no, that was later. We’ve got this a little bit out of order here.

I was appointed to the Budget Committee in 1979, which was the year after I got off the Committee on Faculty Retirement Policy. The Budget Committee really is the committee that has the most authority on the Berkeley campus. It’s a committee that other campuses — every campus has a variation on this. This is why I was a member of the university-wide Committee on Academic Personnel. That was similar to my being on the Academic Council when I was chair of the division. Both the Academic

Council and CAP [the Committee on Academic Personnel] are committees that are made up of people who are the chairs of their respective divisions of division committees. On all the other campuses, they call this the CAP. At Berkeley it's called the Budget Committee — it had utterly nothing to do with the budget at the time, but it was called the Budget Committee. [laughs]

LABERGE: Yes. So, for researchers in the future, tell me what the Budget Committee does.

KAY: It varies among the campuses. Its core function is to offer advice to the chief campus officer, the chancellor, or the chancellor's designee, on academic personnel actions. Now, at Berkeley, when I served on it and I think it's still true almost to this day, the Berkeley committee acted on every single academic personnel action affecting anybody who was an academic appointee anywhere on the campus. That included initial appointments at non-tenure or tenure ranks, merit increases, appointments to tenure, promotions to tenure, promotions above scale, retirements, recalls from retirements to do emeritus teaching, lecturers, lecturers with security of employment — I mean anything you could imagine, this committee did.

Now at UCLA, for example, by contrast, Chancellor [Charles] Young, who was chancellor there for I think over twenty years, delegated an enormous amount of this responsibility to the deans. He even delegated authority over initial non-tenure appointments. The UCLA CAP people didn't pick up until the question was raised of whether you're going to give this person a permanent position. I don't think that committee ever did anything with merit increases, certainly not at the lower stages. So the deans and department chairs had much more authority at UCLA than they did at Berkeley, but the lore at Berkeley was that it was the Budget Committee that maintained the quality of the campus faculty. If it were not for the Budget Committee's insistence on uniform high standards, Berkeley would slide from its position of preeminence. There were these wonderful sorts of tales, stories that kind of epitomize — a lot of them I think were apocryphal, but there's a story about this one up-and-coming young scientist who was appointed at Berkeley, who did not get tenure and who left and went somewhere else. Some years later he was awarded the Nobel Prize, and the reaction at Berkeley was, well the Nobel Prize committee has

lowered its standards — if he couldn't get tenure at Berkeley, obviously he shouldn't deserve the Nobel Prize. [laughs]

The year I was chair of this committee there were a few battles. Departments would sometimes dig their heels in. They absolutely had to have this person; if they couldn't have this person it was going to be terrible. So they would go and try to get the chancellor to intercede. Well, we had no legal authority. We only recommended to the chancellor. The chancellor was free to disregard our recommendations, but the chancellor almost never disregarded our recommendations, and he certainly never did it without paying a call to the committee, either in person or by sending a vice chancellor or provost when he was away from the campus. I remember one case in which the department really, really, really wanted this person and we really, really, really didn't think this person should be hired — this was a hire at a tenure rank, not an entry-level hire. We kept recommending no and the chancellor kept wanting to think about it. The department said to the candidate, "Oh well, it'll happen eventually, so why don't you just come and we'll make you a visiting professor," which they could do without anybody's approval. So the man sold his house and came out to Berkeley, and the chancellor went along with our recommendation, refused to hire him, so here he was, without a permanent appointment.

LABERGE: Chancellor being [Albert] Bowker then? Or Heyman?

KAY: No, it wasn't — this was not Heyman. I mean Heyman did become chancellor while I was in the committee, but I think it may have been Bowker at the beginning.

LABERGE: Do you want to say what department or not?

KAY: No, and in truth and in fact I've forgotten. [laughs]

LABERGE: [laughs] Okay, that's all right.

KAY: But I do remember that finally, I mean he stayed — he was allowed to stay on a second year as a visiting professor, and I think during that year — the problem was his scholarship, I remember that. During that year he published something that convinced the Budget Committee that maybe he was probably okay after all. But that gives you some idea of — here the man had sold his house, for heaven sakes! So I think that there was a sense there in that committee that it was really charged with doing more than

just the ministerial function, that it was charged really with maintaining the academic quality of the campus. The same thing would happen on requests for salary increases to meet competing offers, and that's why it was so important to maintain control over the approval of the merit increases. Because once you've got people who were being sought competitively by other schools, if the departments had the authority over how high they could set the salaries without any review, then you would have an uneven salary schedule across the campus. Now I must say that I thought that was a great idea when I was chairing the committee. When I became dean, I could see that it was not such a great idea, but that there are really two sides of the argument.

LABERGE: Was Bob [Robert] Brentano in that committee with you?

KAY: He was, yes, for two years, and Alan Searcy was the chair of the Budget Committee in 1979–80 when I first went on. The other members were Neil Bartlett, Burton Benedict, George Leitmann, Robert Mortimer and Cal . . .

LABERGE: Moore.

KAY: Yes, Cal [Calvin] Moore. Cal and I prepared an internal report that the Budget Committee did on women faculty's salaries when the question arose of whether women were being paid the same as men, whether they were being treated the same. Somebody said it would be too hard to get that done because you'd have to have comparables from all the departments and everything. Well, in those days the committee was smaller than it is now and we met in this little room over in California Hall there on the first floor, and the room, all around the walls, was lined with filing cabinets. In the filing cabinets were the academic personnel files of everybody who was then currently on the campus. I said, "Why is this a problem? We have the files here, all we have to do is read them." So the chair said, "Well, Herma, do you want to do that?" I said, "Sure." Cal Moore said, "Herma shouldn't have to do this by herself, I'll help her." [laughs]

So Cal and I went through, and we literally picked somebody who was comparable to each of the women and we read every single one of those files. And we reported to the committee and there was — in fact, I got the committee to send me a copy of the report because it's in the division records. The committee reported that there had been a certain number of

cases and it had reviewed them, and it thought that some women had not been put forward for merit increases as often as they should have, compared to men in their departments. Rather than trying to do anything on a universal scale, we sent the findings back to the department and said to the chair, “When you put this person up for a merit increase the next time take this into account, and you can ask for an extra amount for salary equity.” And that’s what happened. There were about fifteen or sixteen cases I think that actually were upgraded like that around the campus.

I mention this report in my UC Davis article that you have on UC women’s law faculty, because Martha West, who’s my co-author on the sex discrimination book, was the person who was behind the effort at UC Davis to get the Davis division to approve a salary study of women. It was just a huge fiasco there. I mean the people — the men on the committee considered that they were being attacked personally, because if women weren’t being paid fairly then it was because they hadn’t treated them fairly, because they were the ones at Davis who were doing this. They had to have mail ballots to get the study approved, and there were attacks in the press — it was just horrible. Martha’s written an article outlining this which I cite there, and she was just astonished to realize that we had done this so easily at Berkeley, but of course it came internally from the committee itself. It didn’t cause any problem at all, because we had done it, we had made the recommendations, and it was just done. She was just astonished that anything like that could’ve happened.

LABERGE: This particular year, how much relief time did you get from your classes to be able to do that?

KAY: I had half time off from teaching.

LABERGE: Half time, but still that’s a lot of work.

KAY: One course a semester. When I was chair of the committee, I believe I’d — no, I think it was still half time. We had just started this as I was going off the committee. Now the committee does in fact review the budgetary allocations among the departments across the campus, so it’s a much larger job now than it was at that point. So now if you’re to chair the Budget Committee, you do get full-time teaching relief for doing that.

LABERGE: But that must have taken how much time?

KAY: It took an enormous amount of time because you'd have to go over to California Hall to do it. You couldn't work on it — I mean you couldn't take the files out of the office, so you'd have to go over there and sit in that office, work on it and everything. That's when I came to know and love Cam Rutter.

LABERGE: Someone in the chancellor's office?

KAY: No, she was staff to the Budget Committee. She's actually working at the law school now on a volunteer basis. She retired in 2001. She's utterly wonderful. The Budget Committee had one chief staff person, called a manager, then I think one or possibly two others to deal with the paperwork. Valorie Dawson was the top person when I came on, but she retired. Neil Bartlett, who was the chair the year Val retired, and I hired Cam to take over as manager, and she did a terrific job. She's really, really nice, a nice person. So I appreciated her. One of the first things that I did — this was so funny because nobody had ever thought to do this before.

When I became chair of the Budget Committee in 1982–1983, I realized that the staff people who worked on the files didn't know each other. We would write the report [called a "minute"] and it would go to the chancellor's office. The chancellor had a whole set of people who were the academic personnel people who did all these cases for him and sent them down to us, and the staff of the Budget Committee and the staff in the chancellor's office had never met each other. They talked on the phone, they saw each other's names, but they had never met. So I had a lunch for all of them at the Faculty Club. [laughs] It was ludicrous, I mean the notion that they were only separated by a floor in the same building, but they had never seen each other. I think, after I started it, they kept up doing the lunch, but it was just so funny that it never happened before.

LABERGE: We could never tell, but the fact that you were on the committee at that year — this may not have ever happened if you hadn't been on that committee as a woman who had an interest and said, "I'll do it," when everybody said, "Oh, no one could possibly do that."

KAY: Oh, well. It's very likely. But, you see, because I had been on the policy committee before and we had done that report on the status of women, I had the sense that there was something that ought to be done. Because nobody can look at the Budget Committee's records except the Budget

Committee members, so it had to be done internally — there was no other way it could be done. Now, the chancellor had records in his office, but I don't think even the chancellor keeps duplicate records of everything that's in the Budget Committee files.

LABERGE: Yes. How were you appointed to the Budget Committee? Do you know?

KAY: By the Committee on Committees.

LABERGE: But did you apply or say you were interested?

KAY: I never applied for anything. I never volunteered for anything. [laughs]

LABERGE: But whenever you were asked, you . . .

KAY: Well, yes, but I mean there were so few women. You have to understand the context. [laughs]

LABERGE: How much did you feel a responsibility because of that?

KAY: Well, it was also my field. I mean, in the seventies Title VII [of the Civil Rights Act of 1964] was being implemented and I was working on the sex discrimination casebook, so I had a keen sense of what needed to be done. I think I felt that I was in the right place at the right time and so I should do what I could.

Okay, so that's the Budget Committee. Then, after I got off the Budget Committee, I chaired the Academic Senate Committee on Teaching, and that's where I came across this utterly wonderful woman, Barbara Davis. Barbara was, at the time, the chief staff person of the Committee on Teaching. She is an utter wiz and wonder. She has since, of course, become high in the administration, the nonacademic administration. She is utterly fabulous.

LABERGE: So all of these committees have a staff, which I think people don't know how much . . .

KAY: Oh yes, they all do — absolutely they all have staffs. So then, after that, I spent a year as a member of the Academic Senate Committee on Privilege and Tenure, then one year as chair of that committee.

LABERGE: How is that different from the Budget Committee's recommendations?

KAY: Privilege and Tenure is a committee that's there to see to it — well, it's really there to hear grievances by faculty members. So a faculty member who feels that he isn't being treated properly in terms of teaching or scholarship or perks or whatever will complain to Privilege and Tenure. Privilege and Tenure is empowered to hold hearings, which we did several times, and the chancellor's office usually is represented at those hearings by somebody from the general counsel's office who is assigned to the Berkeley campus to do these things. Frequently, in cases in which there has been a denial of tenure, the faculty member may file a complaint with the Committee on Privilege and Tenure.

Privilege and Tenure is empowered only to look at the procedural aspects of the case, not the merits of the case. We did several of those cases, those tenure problems that were around the campus in those days, and we made recommendations sometimes that the department ought to take it back and look at it again because certain evidence had not been properly assessed or hadn't been put in, and evidence that was referred to shouldn't have been — things of that kind. Eleanor Swift's case, although that happened after I had left the committee, went that route. She filed a grievance with the Committee on Privilege and Tenure, and that committee made a finding that she had made out a *prima facie* case of discrimination. The chancellor then appointed, at the committee's recommendation, an external committee to look at her case, and it was that committee that recommended that she be given tenure, and the chancellor gave her tenure. So that's what that committee does.

LABERGE: Any women's cases while you were on it?

KAY: Oh yes, several of them. Some of them in which, at least one of them in which — one of the early stages in which the woman ultimately prevailed. That was really the last standing Academic Senate committee I served on before I became dean of the law school. There were several search committees that I was on. Then, of course, I became dean in '92, and the last committee I served on before that was the search committee for the Berkeley chancellor. That was in '89-'90.

LABERGE: Choosing Chancellor Tien.

KAY: Choosing Tien, that's right. Then I became dean. I didn't serve, of course, on any Academic Senate committees while I was dean, and then

I've just recently — I just put this in today as I was updating my résumé, I've just been appointed to be on the Committee on Academic Freedom beginning this year. That's one of the few committees I've never served on.

Now, the other thing I wanted to point out to you is this university-wide Academic Planning and Program Review Board. That, I think, came and went. Who was the president who preceded David Saxon — was that Hitch?

LABERGE: Hitch, it was Hitch.

KAY: Yes. So maybe Hitch knew me from the Academic Council. He had taken to having budget hearings with chancellors from all the campuses, and they would last for a full day. The chancellors would make presentations as to the funding that they needed. A lot of it went by formula, had to do with the number of faculty positions they had, and so on, but some of it was discretionary. What Hitch had done was to create this Academic Planning and Program Review Board, which was composed primarily of middle management folks from the Office of the President, and I was the only faculty member on it. I served on that from 1975 to 1977, and it was an absolutely eye-opening experience. Among the other things that I learned was that the San Diego campus had the thirteenth largest navy in the world because of the La Jolla [Laboratory] and the Scripps Institut[ion of Oceanography]. [laughs] David Saxon was the chancellor, I guess it must have been in San Diego . . .

LABERGE: He was at UCLA.

KAY: Oh, that's right, UCLA.

LABERGE: He may have been vice chancellor, I'm not sure. Who was it at San Diego?

KAY: No, the one who's at San Diego who then became president was [Richard C.] Atkinson. Well, now [David P.] Gardner was what . . .

LABERGE: He was a vice president here and then went to be president at Utah.

KAY: He was never chancellor?

LABERGE: No.

KAY: Really? Where am I remembering Gardner from?

LABERGE: Maybe he was vice president when you were there. He was vice president for the extended university or some such thing.

KAY: I think I met him.

LABERGE: He may have well been — had something to do with this.

KAY: Yes, I think he might have had something to do with this because I seem to remember him from that context. But Saxon I remember as — I think he must have done the presentations for UCLA.

LABERGE: He may have, as vice chancellor or something.

KAY: Yes, I think he probably did. Because I don't remember seeing Chuck Young appear in person, or at least not doing much of the actual presentation. But you did get a sense of how the university operated at the Office of the President's level and how the interaction went with the chancellors. Now, whether they had at that point or not, they must've — I can't believe there was a time when they did not have a Council of Chancellors, but I don't remember how, if they had a group like that, how, if at all, that interacted with this group. I think this group no longer exists, but we can check that, obviously.

LABERGE: Is it the group that works on the Academic Personnel manual?

KAY: No. This really did have to do with money — almost nothing else except money.

LABERGE: Who did you work with? Well, you were the only faculty person.

KAY: I was the only faculty member on it.

LABERGE: Do you remember some of the people you worked with?

KAY: I remember David Saxon. I remember, obviously, President Hitch. And Gardner, I seem to recall.

LABERGE: Kleingartner? Archie Kleingartner?

KAY: He was more with the Legislature. I ran across him when I was a dean and we were all trying to figure out what to do with the Governor Wilson's sudden decision that he wanted to privatize one of the law schools. [laughs] That's a different story.

LABERGE: Okay. [laughs]

KAY: But that's when I met him. I'm trying to remember who I first met. The man who was the general counsel for the regents, who represented the university in the *Bakke* case, and who was very helpful to Boalt when the regents' resolution and Proposition 209 was in the mill.

LABERGE: Not Jim Holst?

KAY: No, Jim was prior to the man I'm thinking of.

LABERGE: Rom Portwood?

KAY: No. We'll find him, because I believe he was the general counsel for the regents for a while. I know he's retired, but he was really very helpful. I somehow seem to recall that he had something to do with this board. He may have been there as a resource for any legal issues that might've come up, I'm just not sure about that. [Gary Morrison]

Okay, so let's see — are there any committees here we haven't — we talked about the Teaching, we talked about the Senate Policy, Committee on Committees, Budget, Academic Senate . . .

LABERGE: How is the law school viewed vis-à-vis the Academic Senate? Do law faculty still get as involved as in the beginning when Frank Newman and Mike Heyman were involved, or is it more separate?

KAY: I don't think we've had a chair of the Academic Senate, maybe not even since me. I followed [Richard] Jennings, and we'd have to just look at a list of who the later chairs were . . .

LABERGE: Yes, isn't that interesting?

KAY: We've pretty consistently had members of the law faculty on the Budget Committee and frequently they've chaired the Budget Committee. Robert Post chaired the Budget Committee after me. John Dwyer chaired the Budget Committee after Post. Pam Samuelson either has just chaired it or is about to chair it. Steve Sugarman was on it — I don't think he chaired it. Paul Mishkin was on it — I don't think he chaired it. My impression is that we haven't really been pushing people the way that Frank did to really get involved at the campus-wide level. There's a lot of committee work now has to be done internally [at the law school]. I mean, the Appointments Committee is a huge time-consuming job. As I say, I don't show that on my résumé but I chaired the Appointments Committee here and served on

it for many years. I'm actually on it again — I was on it last year and I'll be on it again this year.

LABERGE: And that entails hiring?

KAY: Yes.

LABERGE: So it comes before, then it goes to the Budget Committee.

KAY: That's right, it goes from the Appointments Committee to the law faculty to the Budget Committee to the provost and chancellor. That's how that works. But faculty were involved when we were redoing the building — and then, of course, we've had so much more in the way of fundraising. But that does not involve that many members of the faculty except when they come and join the dean at some of the alumni luncheons and events and dinners, and so on. But the faculty itself, I think, has really done more of its committee work internally at the law school rather than externally for the university. Steve Sugarman has done a fair amount of it, but I think there have not been a lot of other people who have done much more of it recently. A lot of our faculty, of course — as I was, myself — are involved in serving on governing boards of the national organizations, and so that is another level of committee service that we get involved in pretty frequently. Although I don't think — we haven't had a chairperson of the Association of American Law Schools [AALS] since I was chair, from this law school.

LABERGE: Do you have any reflections just from all of this — both on the campus and university-wide — on shared governance? The University of California versus any other place?

KAY: It's really ludicrous. I remember explaining the Berkeley system to somebody who was about to become a dean at a very elite private law school in the East. He said, "I can't imagine being a dean in a place like that." [laughs] He said he wouldn't be able to do anything. It certainly became clear to me after I became the dean — I think the law school has a little more autonomy than a lot of other campus units because we have a fairly decent fundraising record, so we've got some degree of independence.

Although the business school has just been — to hear them tell it, they've been killed by it, because — unlike us — they try to compete with industry for their professors, particularly for people in finance and accounting. And you can't persuade a professor of humanities that anybody has ever written

anything creative in accounting or finance. [laughs] So, there's always been a negative attitude towards paying those folks huge amounts of money. That idea has never been very popular. The school has really suffered from that and they have had to undertake a lot of fundraising to try and compensate for it. But, you know, you could raise all the money in the world but you can't pay people three times as much as anybody else is paid without the permission of the Budget Committee. And the Budget Committee isn't going to let you do that, so it gets to be very frustrating, I'm sure, for them. We've never had that problem at the law school because we've never tried to compete with people who make millions of dollars in the world of legal practice. We've really set our marks of comparison more towards people in government service or people in the judiciary, not people in law firms, because there's just no way you can do that.

So I really do think that shared governance is better than the alternative, which is to have the administration run the place without any kind of faculty oversight or input. As I said in the end of that article about Richard Jennings, as long as you have people of his caliber who are willing to serve, then it works. If you don't [laughs], then it doesn't.

LABERGE: Yes. You're a good advertisement to anybody to serve. They should have you up there giving a little talk to all the new faculty.

KAY: [laughs] Well, they used to do that.

LABERGE: Did they?

KAY: Oh yes, they did. Every year they would have a meeting of the new faculty and also the new department chairs and it would be a daylong meeting. It was a retreat, and it was held in the fall. The Budget Committee would come and would talk to the new department chairs, the chairman of the division would come and talk to the new chairs, and there'd be a reception for the new faculty. It was an effort to try and inculcate the ethos of the place. I'm sure that still goes on.

LABERGE: What about, even though we don't have them written down, some of your other committees for the law school besides the Appointments Committee?

KAY: The first committee I ever served on was the Committee on Faculty-Student Cooperation. [laughs]

LABERGE: So this was in the sixties?

KAY: Yes. It was the first law school committee to have students on it. Now all the committees have students on them except the Appointments Committee, and there is a student liaison committee for that. There's been a total change in the law school culture about student participation in governance. A lot of it had to do with what I did as dean. I was very much in favor of bringing students into the consultative loop. Yes, there was a period there where the elected chair of the Boalt Hall Students Association was really somebody who had a political axe to grind. And most of the faculty thought that — because few of the students actually vote in the BHSA elections — they thought Boalt Hall Students Association was just a political front for some of the left-wing students, and shouldn't be taken seriously.

My view is that the BHSA president is the elected counterpart from the student body to the dean, and the dean ought to meet with the student leadership, and so I met with them. I set a time for a meeting every week with the BHSA president. Either he or I, or she or I didn't always make it, but there was a set-aside time for us to meet and see what was going on and try to figure out what was coming up. I think by and large that was a help. But in the beginning, the students were the students and the faculty were the faculty and never the twain should meet, [laughs] except in class. This Faculty-Student Cooperation Committee was there to make recommendations and to give the students a kind of avenue to have whatever they found not to their liking transmitted to the faculty. We did that. Then after that, I don't remember what . . .

LABERGE: Is there a curriculum committee?

KAY: There isn't really a curriculum committee. People in various subject matter areas get together and talk to each other. But the law school is not subject to the Committee on Courses.

LABERGE: So that's a difference too.

KAY: Oh, a big difference, yes. That's written into the Standing Orders of the Regents that the schools that offer instruction at the graduate level only are not subject to the Committee on Courses. I think that may have applied only to law schools. There used to be a first-year curriculum committee, and there was a lot of discussion about that. We really never had required

courses at the law school. The first-year curriculum was required but the upper-level curriculum was not required. Students took whatever was on the bar exam and whatever else they needed to fill out their schedules. Those were the big enrollment courses, and then after Watergate the ABA mandated that all law schools had to offer a course on professional responsibility — which everybody hates, both to take and to teach, as far as I can tell. [laughs] But other than that we have no required courses, and so there's always this issue of, "Well, what's going to be in the first-year curriculum?" We've revised the first-year curriculum more times than I care to remember. We've also revised the grading scale more times than I care to remember. I think I was on ad hoc committees on the grading scale at several points.

LABERGE: And that would be separate from the rest of the campus also?

KAY: Yes. I was on the Admissions Committee. I served on the Admissions Committee several times. That's a very time-consuming committee, and it's obviously getting more time-consuming as the applications increase. Applications rise and fall for people to go to law schools, but I don't think we've — last year, I think we had something like 7,000 applications for the 270 places in our first-year class. The year I became dean, I think we had over 5,000. Then there was a period when it began slipping a little as people stopped coming to law schools, but I don't think we ever went lower than 4,000. We always read all the files, so that takes a lot of time.

LABERGE: Weren't you on the review of CEB [Continuing Education of the Bar]? And I believe it's when the recommendation was to sell it. Tell me about that.

KAY: Yes, that was the Cheit Committee. That's right. Well, they had appointed Budd [Earl F.] Cheit to chair this committee and it was at a time when the place was losing money hand over fist. The question put to the committee was, what is the university doing participating in running CEB and should the university stay in this, and how does it relate to the State Bar, how does it relate to the law schools, and all that. Budd conducted the committee in the most wonderfully efficient way possible, and so we did some research and we met with some people. We talked to various and sundry folks, and we decided that there was no reason for the university to be doing this and that if it was possible to sell it we should sell it. The two

people who were there as interim directors, Pam Jester and a man whose name I forget, were named co-directors — I think it was not possible to find somebody right away. This all happened after the committee disbanded so I'm not clear on it exactly, but the notion was that they would try to see what they could do about getting out of the red and into the black. And that, they did. They did quite a good job at that, so that the place — at least in the last year or so — has not been losing money. It has not been making a lot of money but it hasn't been losing money.

So then I was asked by [Provost and Senior Vice President Judson] Jud King to serve on the search committee for the new director, and we just finished doing that. They have named Pam Jester, who was the former interim director and who's been there I think for quite a long while. So she's taking it over and it remains to be seen whether she'll be able to give it any sort of secure position. But the university has abandoned, I think, any talk of selling it now.

LABERGE: What connection, if any, to any of the law schools?

KAY: None.

LABERGE: None. Not even advising on faculty or . . .

KAY: Well, no. Rex Perschbacher, who's a graduate of ours and who is the current dean of the Davis law school, is currently on their board. I don't think Susan Prager was ever on their board. I certainly wasn't. I don't think anybody else from here was on their board.

LABERGE: And did you ever teach any classes?

KAY: No, I mean, that's part of the problem. The books that they published are service-oriented books, they're how-to-do-it manuals for the bar. You don't get points for publishing work like that at a school like the law schools of the University of California, and so it doesn't advantage the faculty to write those books. They don't pay anybody. They really would be in the red if they had to pay anybody. They depend entirely on volunteers, both for teaching their courses and for preparing their materials. A lot of the more successful ones are done by judges, right? There's just nothing there that would attract a member of a law faculty either to teach or to write for them. In addition to that, the books that they prepare are not books that teach law students what they need to know. And when they get out into practice,

the question is how does CEB market its books to the law students — the new graduates? Obviously, Bernie [Bernard] Witkin succeeded; [laughs] but how well, how successfully they're going to be able to carry on the Witkin books after his death is going to be interesting to see. I get the sense that they haven't kept up with the competition very well, which is of course one of the problems. But Pam thinks she can turn that around, and if she can that would be great. I wish her every success.

LABERGE: What about any of the other search committees? Is there something that stands out either in looking for a new chancellor or . . .

KAY: The search committee for the dean of the Haas School of Business was kind of a kick. I mean, coming up with [former U.S. Congressman] Tom Campbell — that man is amazing. I certainly hope he's able to put that school where it ought to be.

LABERGE: How much time do you spend on something like that?

KAY: Not a lot. The committees at that stage all have staff. I've never been on, I don't think, a search committee for the law school dean, even though up until this search we always had internal searches. Obviously, I chose not to take any part in the one that chose my successor. Obviously I wasn't on the committee that chose me. The one before that I was considered a rival candidate to Jesse Choper, and the one before that I was, I guess too junior — that was for Sandy Kadish. Those are huge jobs, those search committees for law school deans, because you have to do all the work. You have no staff essentially; you could use a secretary to help out a little bit. But this business about the search committee for the chancellor, again that was — you really just reviewed applications and nominations. I don't remember if we had a search firm for that. We did have a search firm for the Haas school, so they did a lot of the paperwork. There was also a search firm for the CEB director.

LABERGE: Okay.

KAY: In terms of the law school committees, as I said earlier, I did serve on the Admissions Committee for several years and also on the Faculty Appointments Committee. Those are the two major committees that I remember having served on internally.

LABERGE: And the Admissions was all before affirmative action?

KAY: No, it was with affirmative action. It was before the regents' resolution, because I was dean when that happened. No, we were very much using affirmative action when I was on the committee, and a good thing, too. We would never have achieved as much diversity in the class without it.

LABERGE: Yes. Well, do you think we've covered that enough?

KAY: Yes, I think so.

[The following material was added by Herma Hill Kay during the editing process:

In January 2004, I was appointed to the Committee to Advise the President on the selection of the chancellor of the Berkeley campus. I was named chairperson of the Faculty Subcommittee. The Faculty Subcommittee was composed of five faculty members — three from the Berkeley campus (Catherine Gallagher, of the English Department; William A. Lester, Jr., of the Department of Chemistry and LBL [Lawrence Berkeley Laboratory]; and myself); one from UC Davis, Alexandra Navrotsky of Chemical Engineering and Materials Science; and Dr. Lawrence Pitts of UCSF, who is the current chair of the Academic Council.

President Robert Dynes was the chair of the full committee, which had six regents and representatives from the staff, the students, the alumni, and the Foundation.

The full committee held an open meeting on January 28, 2004, and then the Faculty Subcommittee — which acted as a screening committee — met several times with the search firm executive, Mr. Albert Pimentel, of A.J. Kearney. The full committee interviewed the final candidates on May 21, and the new chancellor — President Robert Birgeneau of the University of Toronto — was announced on July 27, 2004.]

## INTERVIEW 6: AUGUST 4, 2003

LABERGE: This is August 4, 2003, and this is interview number six with Herma Hill Kay. You have some things to add from our last interview.

KAY: As we left each other, I walked down the hall and happened to notice that Sandy Kadish's door was open. Since he had been chair of that Senate Policy Committee that sponsored the women's equity study that you had a copy of, I just stopped in and said, "Do you remember exactly when I joined

that committee when you were chair?” He couldn’t quite remember the exact date, but he did say about the report — and this is what I wanted to tell you — he credits this with having been my idea because he remembers quite clearly that I said, “Why don’t you guys do something about women faculty?” Sandy said that this was the first time he had ever thought of discrimination against women as being an important civil right, like discrimination against minorities and religious minorities, too. So I thought that was a revealing statement that we ought to include.

LABERGE: Yes. This was 1970?

KAY: Yes, right.

LABERGE: Right after the Civil Rights Act.

KAY: Yes. The Civil Rights Act had passed in 1964, but it was not until 1972 that it was extended to university employees, so that may be what he was thinking of, because he was speaking in the context of discrimination against academic women.

LABERGE: That’s a great little addition, so if you have others — you’ll probably think of things through the year as you meet people. Today we were going to talk about the deanship. I was thinking maybe we could set it in context so that we talk about what the law school looked like when you became dean. What changes did you see from the time you came till the time you became dean — for instance, in relationships among the faculty, growth of the school? I know a couple of people said there used to be quite a social aspect in the law faculty that went by the wayside as either issues flared up because of affirmative action or because of the Free Speech Movement or civil rights — who knows what. Some of that ended.

KAY: I think it had nothing to do with substance. [laughs] And I think it wasn’t limited to Berkeley. In my interviews around the country about early women law professors, particularly the men will all say the same thing, that we used to entertain each other in our homes and that stopped because the younger faculty had working spouses. There were men with working wives, or women, obviously, with working husbands and nobody had time to entertain anymore at home. When we went out together we went to restaurants or we had school events and so on, and that kind of visiting-around aspect of the social life really sort of ended. That’s certainly true of Boalt.

When I joined the faculty in 1960, the faculty used to entertain exclusively in their homes and the dean's wife always had parties. Sandy Kadish and June Kadish did this even though she was working in her antique shop that she still runs, I guess. I think she's still there a few days a week. Jan Halbach had Christmas parties and beginning-of-school parties. We had this big barbecue picnic that some members of the faculty put together and that was always held — well, first it was held in a winery, it used to be a wine picnic and it was at the opening of school. Then it was moved when the wineries needed the customers less so they didn't give us free wine anymore. We now have this annual event up at Tilden Park and we're still holding that. It takes place just after classes start. We now also have an end-of-term party that faculty come to. [Robert H.] Bob Cole started this during the years he was my associate dean. At first I paid for that and then we decided that probably wasn't essential, and so the faculty were then billed for it. When I was dean, I had several open houses. I used to have one a year at my home in San Francisco, but the dinner parties at each other's houses, I think, is what fell away over the years. [Occasionally, I had catered parties in Berkeley. I had one each August for the law school staff at the Berkeley City Club — it was a luncheon on the Terrace.]

LABERGE: What's interesting to hear from your perspective too is that some of it has to do with women's roles changing.

KAY: I think it definitely does, and as I say, I've heard this from other people at other law schools as well.

LABERGE: Before you became dean you were candidate for dean one other time, so what do you remember about that?

KAY: It was really kind of — I thought it was kind of informal. I had been approached by some members of the faculty and some students who said that they thought there ought to be a choice between [Jesse] Choper and somebody else. Now, I didn't really think there was much chance that anybody but Choper was going to be dean, but I said, "Oh, all right. I'm willing to be considered." Clearly enough, Choper became dean and, as I said, there was that little comment that he made. In fact he may even have — no, I think it was in his — the first year he became dean, there's a little something in the Boalt *Transcript* from him about my deanship as well. But he

said one of the things he was proudest of was that he beat me out for the deanship.

LABERGE: Yes.

KAY: So, the reason I was trying to get a copy of this *Boalt Hall Transcript* (Summer 1992) that came out after I became dean, was that in there is the article that I had delivered first as a talk to the faculty about my aspirations for being dean. It's in there, and it says what I was hoping to accomplish and it points out some of the things that I thought that the school needed to work on over the next several years in order to maintain its excellence and to expand into new opportunities. I don't know whether you want to get into that right away or whether you want to talk more about context before we do that.

LABERGE: That was one of the questions that I had. As part of that, what did you find when you came in as dean? Including what kind of an orientation did you get, either in the law school or from the university, as to what a dean does?

KAY: Oh, there was utterly nothing of that sort at all.

LABERGE: Nothing — not even from the university, new department chairs/new dean things?

KAY: Oh, they have — let's see, did they have it when I came in? If they didn't have it when I came in, they certainly started doing it later. Carol Christ, I know, began it. I don't remember whether anybody had it before her or not, but there was like a weekend retreat for new department chairs. The dean of the law school is also the chair of the department of law, so I went to that. But that really was more to acquaint people to university processes and procedures.

Law school deans and medical school deans, I think, really are a different category than department chairs. There's a wider constituency that one is responsible for, in terms of holding that kind of position. But I think that everybody assumes that when you have been a legal academic, you have some idea of what the job is about. If you look back at the opening paragraph in that piece I just published on women law school deans, you'll see that it's my impression that across the country almost none of the new law school deans — deans who come from the law faculties — almost none

of them has any notion of what the day-to-day operation of the job is going to be like. The ones who have been associate deans probably have a better idea than the others, but I had never been an associate dean. Neither had Jesse, nor Sandy. John Dwyer had been my associate dean — he was my first associate dean. But other than that you are expected to understand what this is all about. So, no, I never had any orientation.

LABERGE: Okay. And before you even had your aspirations, why does someone want to be dean?

KAY: That's a very good question. [laughs]

LABERGE: Because Karl Pister said that when he said yes to his deanship [of engineering], George Maslach got on the ground and genuflected to him, like, "Oh, thank you, thank you" for somebody taking this job.

KAY: [laughs] Again, I think that people in the law school world think that there is more control in the operation than there really is, and I think thirty years ago, certainly prewar, there was. I mean, you had deans like Erwin Griswold at Harvard who really — I mean, he *was* the institution. He repeats in his memoirs a wonderful story that he was fond of telling. He said that the Harvard Board of Overseers had offered him a five-year term as dean and he had turned it down. When they said, "Why?" he said, "If I have a five-year term I will be nothing except a messenger boy for the faculty." So they then offered him an unlimited term as dean, which he accepted. I think he was there for nearly twenty-five years.



NEWLY APPOINTED DEAN HERMA HILL KAY, ON THE COVER OF THE *BOALT HALL TRANSCRIPT*, SUMMER 1992

Bill Prosser also had a long term. He was dean from 1948–1961 at Berkeley. You had a tradition of people who really *ran* the institution, and it wasn't really until two things happened — one, the faculty movement for shared governance and, second, the obligation to raise money became critical — that the dean really had the organizational control weakened in the face of those competing demands. The student demand for participation came later but it also was a powerful influence. So I think that law school deans are now getting to be more like department chairs than they were before. I think medical school deans by and large still have more of a kind of exalted position; at least, they're seen that way by faculty and medical schools.

LABERGE: Are you saying, then, one might want to become dean because it looks like you might have some control and can put forth an agenda and do it?

KAY: It looks like that — yes, that's right, exactly. Now, I think you need to understand that this is a shared enterprise. The school is a place — I said this in my remarks — a place that's made up of faculty, staff, students, alumni, and nobody can do anything alone. You have to have a vision; you have to enlist everybody in the community in working with you to achieve that vision. If you lose that cooperation, you may be able to face down one element of the mix if they're being unreasonable and you have support from the others, but if nobody is supporting you then you have to quit [laughs] because you have no further legitimacy.

LABERGE: What did you find when you came in, and what were your aspirations?

KAY: I found a really first-class public law school which I thought should be maintained and nurtured. The capacity to have a law school of this caliber in a public university is very rare, and given what's happening to the budget now it is going to be much harder to sustain than it ever has been before. We certainly had a wonderful faculty. We had the most diverse student body in the country. We had a proven record in attracting young faculty. We had innovative programs. The two things that I focused on most in that talk I gave were the need for — what I saw as the need for — a clinical program and, secondly, the need to build a new building. Although I didn't spend much time in the speech talking about that, it certainly occupied a lot of my waking moments after I took over the job.

LABERGE: How much did you realize about the fundraising?

KAY: I knew intellectually that it had to be done. I don't think that I had any idea of the scale that was going to be necessary and, of course, the scale became greater as time passed. The years of my deanship were critical ones in terms of what was happening to the state Legislature and to the state budget. As I think I said to you last time, I'm kind of amused that everybody is saying, "Oh, how terrible! Here it is August and we didn't have a budget until the governor signed it." We didn't have a budget in 1992 until the end of September. As those days wore on, and as I became aware that there was no such thing anywhere in the building as a set of financial account books saying what came in or what went out or how they'd match together, I realized that it was going to be utterly necessary to have as large a private endowment as you could raise, to protect the school against the Legislature's vicissitudes. So I set about trying to do that.

We continued to work on the endowment. We had already a fair amount of endowed chairs. Endowed chairs, of course, at a public university are nothing like the magnitude of endowed chairs at private universities. Because, in public universities — at least I think they're all this way; certainly California is — they don't pay the salary of the holder, they only pay for extra support, summer support, and so on. So you can have a chair — I think at that moment you could have chairs endowed with \$300,000, whereas in a private school it would be closer to three million in order to produce the income to support the holder, and then pay, in addition, for support and travel and research and secretarial assistance and all that. So I made efforts to raise the level of endowed chairs for us to \$500,000. And then we created, along with the campus, the distinguished professorship — which was a million dollars — of which we've got now several in the law school. So that was one aspect.

In addition to endowment, what we needed was money coming in to pay the expenses. The university has a formula arrangement of how much you get for general support per faculty member, but it was nowhere close enough to pay for the operation — certainly not to pay for the secretarial support, probably not even enough to pay for the paper and pencils. It was really, really meager. So we worked very hard on the general fund and that began to respond. And we made a great effort to try and attract younger donors, new donors, people who had not realized that the university was



DEAN HERMA HILL KAY,  
WITH HARDHAT IN HAND, ON  
THE COVER OF THE *BOALT HALL*  
*TRANSCRIPT*, FALL 1995

not being supported by the Legislature and didn't understand what the level of need was. All of that took a great deal of time. The development staff expanded accordingly and I had some very good people there; we still do. The woman that I hired as development director is still here.

LABERGE: Is this Louise Epstein?

KAY: This is Louise, yes. She's now the assistant dean for development. That was just a major, major effort to get that redone. And then the other thing that I hadn't really anticipated need-

ing to do was this whole business of getting a handle on the financial operations of the school. Sue Ann Schiff, who was my assistant dean for budget and institutional planning, worked with a group of people in the organization just to try and identify what the sources of money were, and how you could track them, and how you knew when they were here, and how you determined what they were spent for, and what kind of control the dean could assert over spending. It took about three or four years before we had anything remotely approaching something that you could show the faculty and the alumni and say this is what the overall operation looks like financially.

LABERGE: How did you get a handle on it? What did you do?

KAY: We just went around and tried to collect information from the various units. The school is so dispersed. The library was a realm unto itself, in

part because of the Robbins Collection, which funded the Canon and Civil Law Collection, and also — to the extent possible — funded the general library operation to the extent that it housed the Robbins Collection and they catalogued it, and so on. Nobody knew what that was, really. Also, nobody quite knew how the various organized research units, of which we had two, were really run. The Jurisprudence and Social Policy Program [JSP] is yet another separate program.

LABERGE: What are the other organized research units?

KAY: The organized research units are the Earl Warren Legal Institute and the Center for Law and Society which is housed in the JSP. We now have a great many research projects that are called “centers” that are not formal organized research units. The organized research units report to the Graduate Division. The projects report to the dean, and are just called centers. [laughs]

LABERGE: You brought in Louise. Did you also bring in Sue Ann?

KAY: No, Sue Ann was already here. Sue Ann and Leslie Oster, both graduates of the school, had been hired when Jesse was dean and they both stayed. Sue Ann left just about a couple years before I left, Leslie left earlier and that’s when we hired Viki Ortiz to become dean of students, who’s still here and is doing a fantastic job. She’s also a lawyer.

LABERGE: Tell me a little bit more about the staff. The staff is huge. You have a dean of students, you have a development director . . .

KAY: Actually, we have fewer assistant deans than a lot of other major law schools. Harvard has a zillion assistant deans. We had, let’s see — I believe I had two associate deans and three assistant deans. The two associate deans were both faculty, and they are what are called “academic deans” at other places. They are — one for the professional JD law program, the other for the JSP program, and those were essentially half-time jobs, by which I meant you got teaching release time for half of your teaching load to do those jobs. My policy was that I didn’t want anybody to serve in those positions more than two years because, first, I wanted to rotate it and, secondly, I didn’t want to burden anybody unduly. For the first couple of years that worked fine. John Dwyer stayed for two years, then Steve Bundy took over. His period was interrupted by a visit to Stanford and then when he

came back he really took over as the point person for the building, which was then in full swing. So then Eric Rakowski came in and spent only a year. Jim Crawford spent only a year, and then Bob Cole spent a year. Then Eleanor Swift spent two years, so it sort of came and went like that.

Then the assistant deans were the assistant dean for students, which was Leslie Oster; the assistant dean for budget and institutional planning, which was Sue Ann; and the assistant dean for publicity and public relations, which was Lujuana Treadwell.

LABERGE: For admissions? Or isn't that an assistant dean?

KAY: No, that was a director's position. And the development director was also a director's position, and the director of the law library was a member of the faculty. Let me just take a look at this list over here. John Dwyer made the development director's position an assistant dean position.

LABERGE: Okay.

KAY: All three of my assistant deans were graduates of Boalt and all were women. I had worked with Lujuana when she was a student. She'd taken several classes from me, and then, when I was president of the Association of American Law Schools, Lujuana was the executive director for the National Association of Law Placement, a position that she held for some years. When I became dean she was about ready to give up the NALP job, and I asked her to come back as my assistant dean for publicity and public relations and she agreed to do that. She left shortly before I did. I'm not sure that that position is still an assistant dean position. Let's see — [looking at notes] — this is just the telephone book that I'm looking at, this is not an organizational chart, but I don't believe that that position is any longer an assistant dean position. No, it isn't — they have a director now in that position. So they still have three assistant deans but one of them is now in charge of alumni and development.

LABERGE: As far as directors, you had an admissions director . . .

KAY: There was a director of admissions, there was a director of development, a director of career placement. I think those were the only three.

LABERGE: And for the most part, you kept three?

KAY: Sue Ann was there and Leslie was there, and I brought in Lujuana. My two associate deans, I named, but the positions had been there.

LABERGE: Okay. How much did you look for women in particular?

KAY: All the assistant deans are women. I think I asked practically every woman faculty member in the building to be my associate dean at one time or another and until Eleanor Swift accepted they all turned me down. [laughs] I don't think they had any problem, but at any given moment everybody always has something more important to do than being associate dean. It's very hard to get people to do that job.

LABERGE: Shall we talk about, then, your aspirations and then what you accomplished? For instance, the clinical program. How did you get that going?

KAY: I got Eleanor Swift, who had been very interested in having a clinical program to study the possibilities. I should say as background, by the time I became dean, every other major law school in the country had a clinical program that was more organized and prominent as part of the school's curriculum than we did. I think probably Harvard may have been the last holdout. There had been a kind of — let's see, I have to look at this little footnote here to be accurate about this because I did check this out. The clinical legal education movement, I think, grew out of the War on Poverty. That's my recollection of this.

LABERGE: Which was [President Lyndon B.] Johnson's.

KAY: "The beginning of clinical legal education is commonly dated to 1967. With the creation of the Council on Legal Education for Professional Responsibility, otherwise known as CLEPR." Now, CLEPR was a Ford Foundation-funded clinical education program. So schools were able to apply to Ford for help to do that. UCLA was the first of the UC law schools, and one of the first nationally, to grant clinical faculty full faculty status. This was always the bone of contention — who was going to teach these programs? Were they going to be regular members of the faculty? If so, they wouldn't have had much practice experience, in the normal situation. Would they be practitioners? If so, were they going to be full time or part time? This was all the kind of argument that was carried on here.

The programs were really begun in the late sixties and early seventies, and while this was all going on we didn't have an in-house clinical program. We had programs where people did externships. Our students

actually founded what was called the Berkeley Community Law Clinic; it's now called the East Bay Community Law Clinic. That was an off-site location in east Oakland, and they had raised the money to hire their own full-time director. We had never looked for in-house hands-on live client clinical education. Northwestern was one of the schools that really pioneered it and really did the most. They were one of the leading examples of doing that.

I talked to a few people and was convinced that live client clinical education is what you really wanted, because it was the contact between the student and a client whose case the student was responsible for that, I thought, was going to create the spark of interest in professionalism and also make the theoretical learning that was going on in the classroom come home to the student, so the student would know what it meant to fulfill the role of the lawyer. While you could do some of that with simulation and skills training, my view was that it was not the same thing. It didn't have the same emotional impact. Eleanor Swift shared that view; I gave her, again, half-release teaching time. She spent a couple of years going around visiting other law schools talking to people who ran these programs, and putting together a report that was circulated to the faculty that said this is what other schools are doing and this is what we think Boalt ought to consider doing.

Now, the other part of this is that as all this was happening, the clinicians and their allies were also importuning the ABA Section on Legal Education, of which I was a member — which accredits law schools — to require that the law schools offer at least some live client experience and that faculty members be directly responsible for the education that students were getting if they were being given external clinics. This effort had begun before I became dean, and Berkeley was on probation with the ABA for years and years because we did not have a regular member of the faculty who was in charge of our clinical program. It was not until the faculty finally adopted the clinical program that I proposed, that we were able to get the law school removed from that probation status.

There was also pressure from the students. There was pressure from the ABA Section on Legal Education, the organization that accredits law schools, which was looking over our shoulder. Besides, I thought it was the right thing to do, and there was a lot of support from the alumni. We

got some money from some of the law firms who wanted to fulfill their pro bono responsibilities by investing in our clinical program and working with our students. That turned out to be a great idea; it worked quite well. Then we finally managed to hire a regular member of the faculty, who was brought here to implement and to develop from scratch an in-house live client clinical program. This was Charles Weisselberg, who had been running the program at USC, and had worked there with Denny Curtis, who was one of the people that I talked to when I was first thinking about this. Denny and his wife, Professor Judith Resnik, went off to Yale and Chuck was about to replace Denny as the director when we lured him to Berkeley. I think he was really attracted by the fact that here was one of the nation's best law schools, a public law school and a place where he could really start with a blank slate, and create this program. It was just wonderful that we were able to get him to come, because he's just been absolutely fabulous and has put this program together in ways that now everybody thinks is just terrific.

LABERGE: What kind of opposition did you have to overcome?

KAY: Mostly tradition. Before I became dean, the clinical program was not a high priority. It was not seen as sufficiently intellectual for a major law school to do. The time that a student's going to law school is limited to three years. Most of the faculty thought that this shouldn't be one of the school's priorities. They thought the students could pick up skills training after graduation. Well, our students had to do that because they didn't get it anywhere else; but that, to my mind, was not the ideal way to train professionals.

LABERGE: Is that how you answered that objection from them or anybody else?

KAY: Yes. It seemed to me that our classroom courses would benefit from the experience students had in the clinics. For example, we have several clinics that are part of this clinical program. One of them is an Immigration Clinic and the related asylum practice that they have undertaken. These students really go around the world looking at cases and working with people in other countries. The Human Rights Clinic, which has taken over that part of the practice now, has had some smashing victories in terms of achieving cutting-edge decisions. The Death Penalty Clinic is

something that's not only very important, but also really teaches students how to deal with the issues that are literally life and death issues.

The other kinds of projects that we've begun are the Intellectual Property Clinic, which was funded by our faculty member Pam Samuelson and her husband. It deals with issues of access to information policy. Mark Lemley, a faculty member, wrote an amicus brief in the Intel case that the California Supreme Court just decided. In fact, that opinion was authored by our graduate Justice [Kathryn] Werdegar. It has a fascinating section dealing with the academic debate over whether you should or shouldn't control what was going on in that case. She cites Mark Lemley from our school, she cites a professor from Stanford, she disagrees with Richard Epstein of Chicago. [laughs] So I disagree with the notion that this isn't intellectual. Of course, somebody on the other side could say, "Well, yeah, but the fact that all of those people were associated with clinics isn't what made it vitally important intellectually. It was the debate among these three professors, which they could have, and in fact did, carry out in law reviews." Well, yes. That's true, but I think the debate is also informed by the involvement with the cases these faculty have as they are being developed. The students allowed to participate in that get a much more hands-on and inspiring sense of what the law is and what it can accomplish.

LABERGE: What about outside the legal community, for instance on campus, how is that looked at intellectually as far as scholarship and tenure cases, and things like that?

KAY: We brought Chuck Weisselberg here as a tenured member of the faculty. He had tenure at USC. He is so far the only member of that program who has regular tenure. In this footnote in the article there that I was referring to, I talk about the other appointment options. The ABA now has this status for clinicians that can be satisfied by saying they're given positions that are similar to tenure but they don't have to actually be tenure. We have created a clinical professorship track here at Berkeley that's been approved by the campus administration and the people who have been brought in to act as directors of these new clinics reporting to Weisselberg have that clinical faculty status. That's been done at several of the other law schools. UCLA, as I started to read from that footnote, has now given all of its clinicians full faculty status, so they have to satisfy both the writing and the

teaching and service aspects. The other UC schools have variations on that theme.

LABERGE: Was there resistance in the rest of the campus? For instance, last week we were talking about the Budget Committee and Privilege and Tenure Committee — is there resistance to that because it's a professional school or because that's not looked on as scholarship by them?

KAY: In a way, I guess, we haven't seen the test of that yet because we haven't proposed anybody as a regular member of the faculty after Weisselberg, and we've used this clinical faculty status. I don't think there's been any move to extend that more generally. But the people who are appointed as clinical faculty members are required to write. They're not required to write as much or as frequently as the regular members of the faculty are, but they're reviewed internally and recommendations are passed on to the Budget Committee and they're reviewed there, but they're reviewed in a different context.

LABERGE: Going back to the fundraising, how did you learn how to fundraise, and what did you do? Because you hadn't done that before.

KAY: I don't think I learned. I think I just did it. [laughs]

LABERGE: For instance, what would have been one of the first functions you went to or who did you go speak to?

KAY: When I started working on this clinical program, I went to see Bernie Witkin. He had for years tried to persuade the school to have what he considered a clinical program. He was not interested in a live client program. He was interested in more skills training kinds of things, but I took my then director of development — this is before Louise, this was Davida Hartman — Davida and I had an afternoon meeting with Bernie and Alba and I told them what I wanted to do. By then he had seen my mission statement in the *Transcript*, and I said, "I'd like your help." He said, "Well, what do you want?" And I said, "A couple of hundred thousand dollars." He said, "Fine." [laughs] That was my first attempt at fundraising.

LABERGE: Quite a success! [laughs]

KAY: They weren't *all* that easy. [laughs] But I really spent a lot of time, as practically everybody does, going around the country and having luncheons and receptions and dinners with Boalt's alums in various parts of

the country. The message at first — because I was then trying to get the annual fund revived — was “consistent giving.” I remember this wonderful conversation that I had with Kathleen Tuttle from southern California, at her fifteenth class reunion in 1993. I gave a speech in which I said, “You understand that our graduates think that the law school is supported by the Legislature. Well, I have to tell you that’s not quite true — we really need your help. So I’m offering this course on remedial legal writing and here’s how it goes: you take out your checkbook and on the top line you write ‘The Boalt Hall Fund’ and in the middle line you write ‘one hundred dollars,’ and you sign your name. And you send me your check and then you do it again and again and again.” [laughs] So after this was all over, Kathleen came up to me and said, “You really want a hundred dollars, Herma?” I said, “Yes, I really want a hundred dollars.” She not only gave me a hundred dollars herself, she called a dozen or so of her classmates, all of whom wrote checks for a hundred dollars and Kathleen presented it to me in a little gift box. [laughs] It was just delightful. It was just starting at that kind of level to get people to think in their minds, “Yes!” I still have the box.

The context is so important. I made that speech also to a reunion of the class of, I don’t know, ’34 or ’36 — one of the older classes — and I was sitting next to this very nice man who loved the school, went to all the events, had never given us a dime. I gave him this pitch. He looks at me and says, “You really want a hundred dollars?” I said, “Sure.” So he sent me a check for a hundred dollars. I thought, jeppers maybe I should . . . [laughs]

LABERGE: Maybe you should have asked him for more.

KAY: I should have asked him for more, yes. It was really almost a personal thing because, at one point, we started sending out holiday cards. I didn’t like the idea of sending Christmas cards, because not everybody celebrates Christmas, so we started sending Thanksgiving cards. I had to attend a couple of professional organization meetings in New York just around the time when you would want to get these things in the mail. So I used to get on the nonstop flight carrying a huge stack of cards, which I would sign on the airplane since I didn’t eat breakfast or lunch. [laughs] I’d just sign these cards, and the stewardesses thought this was the funniest thing. They thought they were Christmas cards and I was just being very disciplined

and organized and getting them done early. But, oh no, they were Thanksgiving cards. Then when I got to New York, I would ship them back here by overnight mail and they would put them in the envelopes and get them out.

One of the meetings that I went to was a meeting of the Foundation Press editorial board, of which Bob Clark, the dean at Harvard, was also a member. Bob saw me carrying these big bags, because I had another batch waiting in New York to sign on the way back. He said, "Herma, what are you carrying?" I said, "Bob, let me ask you a question. How many cards do you send out to your alums that you write personal notes on and sign your name to?" "Oh, Herma," he said, "maybe half a dozen or so." I said, "At what level of donors do you do that?" "Oh," he said, "usually people who give about five million dollars." I thought, there's a different scale [laughs] to his operation. But that's what I started doing.

Then, of course, as Louise began to get involved in the major fundraising, she worked with an advisory committee at which we ranked people as to their ability to give and we made one-on-one calls and tried to get larger contributions. Jesse was also enormously helpful because he was extremely popular with the alums. He had raised fourteen million for the building; it turned out, of course, that we needed more money for the building and so he went back to some of his major donors and got more money from them for the building. So, you know, between us we sort of got it done.

LABERGE: How much of your time would you say you spent on the fundraising aspect?

KAY: Oh, easily a third.

LABERGE: A third, wow. And you are very successful at it.

KAY: I raised forty million dollars. That's the rough number that Louise added up. We're going to need to raise more than that. Harvard's campaign — while I was raising forty million over eight years, Harvard raised, I think, \$1.25 billion in five years, the largest amount ever raised by a law school, and they are now starting another campaign. I saw the notice in the paper that Harvard's first woman dean is going to take office in October and she's going to be heading a new fundraiser drive.

LABERGE: To get the clinical program off the ground too, you needed to get enough funding for that?

KAY: I did, yes, because one of the promises I made to the faculty is that this would not be paid for out of the operating budget of the school. And we were able to do that.

LABERGE: Who, besides Bernie Witkin?

KAY: The International Human Rights Law Clinic opened in 1998. It was funded by the Sandler Family Foundation. They had funded the Human Rights Center on campus as well. The Death Penalty Clinic was funded in large part by Nick McKeown and Peter Davies. They gave a little over one million in December 2000–January 2001. And, as I said, Pam Samuelson and her husband funded the Law, Technology and Public Policy Clinic. People have been given opportunities as to what they wanted to give their money for. You see all these signs around the building with the names of people who made donations to the building fund — and people had also made donations for the clinical program and for endowed chairs and things like that. [Start-up funding for the Center for Clinical Education came from the Koret Foundation and the law firm of Brobeck, Phleger and Harrison.]

LABERGE: Do you have any more anecdotes, like your meeting the Harvard dean, or about some unusual donor?

KAY: One of the things that Louise wanted to do was to create the Herma Hill Kay distinguished professorship, which would take one million dollars. We had decided that we ought to ask Elizabeth Cabraser to make the lead gift for that. Elizabeth is a graduate of ours who's one of the country's leading class action plaintiffs lawyers. She represented plaintiffs in the breast implant cases and in the tobacco cases, and has done remarkably well at it. Louise said, "Herma, I think *you* have to ask her for this money." So I said, "Fine!" The people who were advising us on this said, "Are you hesitant to do that?" I said, "Well, it's not for me. I'm not going to hold the Herma Hill Kay chair." [laughs] Elizabeth came to the meeting because she was on this advisory group, and I asked her to stay afterwards and she did. She said, "What do you want to see me about?" I said, "I want a million dollars." And she said, "Okay. What for?" I nearly fell out of my chair. [laughs]

LABERGE: Oh, my!

KAY: So I told her — after I picked myself up — what I wanted it for. She said she'd be delighted. And she said, "How soon would you like the check?"

LABERGE: Isn't that amazing? I have heard from other people that sometimes people just need to be asked.

KAY: Yes, I think that's right. Then what Louise decided to do was to use her gift as a matching gift to try and get yet more money — to see if other people would donate to this Herma Hill Kay Distinguished Professorship. If so, that would free up part of Elizabeth's million dollars to be used for other things that I was interested in. But I think that people, once they knew that she had actually committed that kind of money, were willing to do other things. But the matching part, I'm not sure even now how much they actually got on the matching part. We did get the chair. Kathryn Abrams now holds the Herma Hill Kay [Distinguished Professor of Law] chair. She works in feminist jurisprudence and is just a great addition to this faculty.

LABERGE: And you got her from the outside?

KAY: We did, yes. We got her from Cornell Law School. Elizabeth, by the way, is a partner in Lief Cabraser Heimann and Bernstein in San Francisco.

LABERGE: One of the things I was reading about being a dean is that you both have your internal group you are working with and then you've got your outside group. What about the faculty? How did you go about leading the faculty, and what does that entail as dean?

KAY: I think it entails trying to keep the lines of communication open to all segments of the faculty. We had a salary problem that I think a lot of other departments on this campus have had — and partly, I think, it was due to Chancellor Tien's view that he did not want to lose Berkeley's faculty to raiding attempts by other schools. It became clear that the chancellor would respond to external offers by trying to match those offers. Now, this creates an enormous morale problem at a place like Berkeley since your best faculty can generate offers by lifting their eyebrows and looking interested, and the people who are not your best faculty can't do that but they may still be working quite productively and are great assets to the school. Some people who fall into the first category don't really want to put their

friends at other places to the effort of trying to generate an offer which they are going to turn down once it's matched. So that created problems.

The other problem that was created was the lack of competitive salaries to be used to attract the best entry-level faculty. This is particularly true when you are competing with schools that have a great deal of money and are trying to build their reputations very quickly, by which I mean NYU. We had real problems in trying to work with the existing salary scale, which had not been increased for some years. So one of my major efforts was to increase the faculty salary scale — which I saw as a solution to both of those problems. We finally did manage to do that, although it did not really become effective until the year I stepped down, but it did become effective in 2000. It was implemented by John Dwyer when he came in. But it was a major, major victory in trying to help both raise the morale of the faculty, and, secondly, to enable us to be successful in our competition, to attract new faculty from other schools.

LABERGE: You needed money in order to do that. Was it from the chancellor or was it from some of this fundraising?

KAY: No. The Legislature provides the salary money. We had been handicapped before, and this was a deal that the chancellor tried offering — I shouldn't say the chancellor, I think it was the vice chancellor who was in charge of working out these programs, I'm sure with the chancellor's approval. The deal was, if we get the salary scale raised, the people who were on scale will be paid by the Legislature, but the people who were off scale and the people who were above scale ought to be paid by private funds. That was a deal that we had trouble doing because we had enough difficulty getting private money to pay for our summer stipends, which came entirely from private money, without also trying to pay the increased salary — particularly because we've got a large number of faculty at above scale rates. Our salary scale is higher than any other salary scale on the campus since we don't have a medical school. I want to tell you there were nights when I prayed that we had a medical school. [laughs]

LABERGE: So that you wouldn't be the bad guys?

KAY: You're right. But that was not given to us. So we had to try and raise private money to do this. The chairs helped and the chairs could — to the extent they produced sufficient income, which helped if they were bigger in

their endowments — produce funds to pay for the above scale part of the salary. But that, I think, has still not been adequately resolved, and it probably is going to be even worse now with the budgetary cuts. I don't know where the cuts are going to be, but it would be my guess that the cuts are in areas where the campus hopes that the various schools are going to be able to get private funding.

One of the things that we were able to do, again with the support of the campus and the university-wide system generally, was to impose the professional degree fee, which came in while I was dean. It was first imposed on law students, medical students, and engineering students and then it was spread to some of the other professional schools as well. It was designed initially to be a sum of money that would come exclusively to the school. It would not go to the central administration and be re-delegated. It was to come entirely to us, and it was because of that element that we supported it. The students at first were not keen on it but we had the good sense not to make it effective until after they'd all graduated. [laughs] It really saved our lives in the early years when it became effective. We set aside, as the university requires of all costs charged to students, a third for scholarships. At the law school we initially used our one third for people who wanted to go into public interest law to support their plans.

But then I learned — I guess, this fall actually, when Bob Berring became interim dean and was having some informal consultations with the former deans who were still in the building, and he was talking about this. He said something, just in the course of another question, that led me to wonder what was happening with the professional degree fee. It turns out that the university has now seized the professional degree fee and it's now going to be allocated to them, not to us. It's not any longer going to come — I mean, the original increment of the fee which was imposed when I was dean still comes to the schools but any increment above that, including the one that was just imposed, is not going to come directly to us anymore. So the whole contractual basis on which that fund was imposed has now been destroyed by this assertion of central authority.

LABERGE: Yes. [laughs]

KAY: So the competitive edge that we at one point had over our private school local competition — like Stanford primarily but also USC to some

extent — where we had lower fees for in-state residents, is still true but it's getting closer. The margin's getting closer, and for nonresidents there's almost no margin at all by the time they pay a nonresident fee — which we don't get, the university gets — and then they pay this professional degree fee over and above that. It's getting harder and harder for deans of Boalt Hall to say to their young graduates, "Ask the Stanford person sitting next to you at your fancy law firm how much educational loans he or she is paying off."

LABERGE: What about university-wide? Did you have some agreement with, for instance, UCLA or Davis? Or was there some law school deans' group where you would meet with the university administration and all have the same plan as far as the salary scale, or something like that?

KAY: This was uniform throughout. Some of us would have been happy not to have it uniform throughout but it was uniform throughout.

LABERGE: And did it have to be?

KAY: Yes, the president's office really insists on that. They are unwilling to let Berkeley and UCLA and UCSF do things differently than at the other campuses. All the law deans were supportive of this even though — what happened was that you were authorized to charge up to a maximum. You didn't have to charge that much if you didn't want to, or you could give more of it back in scholarships than you otherwise would, but you could charge to the maximum. You were authorized to. UCLA and we were as one on this, and Hastings was not really within the UC system anyway, so they could do what they liked. The dean at Davis was a graduate of ours and was very supportive of what we were trying to do.

LABERGE: What other ways did you use to keep communications open?

KAY: In terms of committee service, I met on a regular basis with the chairs of the standing committees to talk to them about policy issues that were coming up before the school. I met once a month with the staff supervisors and heard what problems they were having and talked to them about issues that were coming down the road. I met every Monday morning with my own staff in the dean's office — the associate deans, the assistant deans, the directors — to map out what was going to happen during that week. I had scheduled meetings with the president of the student body, and I had

appointments with people who wanted to see me. Of course, my interaction with alumni was in the hands of the alumni and development director who planned all the travel schedules and events, and things like that.

LABERGE: Planned it for you, and would give you a schedule?

KAY: Right, yes. They consulted with me first. [laughs] But they were the ones who did it.

LABERGE: Right. And was any of this an innovation — for instance, the meeting with the student body president or meetings with students?

KAY: Yes, I was the first dean who did all that.

LABERGE: It hadn't happened before.

KAY: It did not happen before. And I don't think the meetings with the staff have happened before or since. Maybe Bob Berring has started doing it again, but I understand that John Dwyer discontinued the practice immediately.

LABERGE: I had a chance to see the review of the law school that came just when you were a new dean in 1993, both from the outside group — and one of the things they talked about was that you came in and immediately there was a different attitude among the students, that morale went up. You must have realized this as you walked in, that something needed to be done.

KAY: The students had literally hounded Jesse out of office by pounding on him about the diversity themes, and they saw me as being supportive of their goals, which I was. I took care to try and meet with them on a regular basis and to be as responsive as I could be to their requests, many of which I thought were legitimate. And also, as I think I mentioned to you last time, I appointed students to virtually all the faculty committees, which also gave them a sense of participation in the process.

LABERGE: And what about the faculty committees, how else did people get involved in the committees? Did you appoint all of them or did people volunteer?

KAY: Some of them volunteered and, obviously, before I made anybody a chair of a committee I went around to see that that was okay with them. And I did this with my two associate deans. We all sat down, sometime usually in late July, and went over the list of committees and who was going to be in the building and not on leave or something. And we went down and put together

a draft list, and then we talked to people and got their approval, and then had that circulated at the beginning of the school year so everybody knew. Now, the students took a while longer to get all that done, but usually by the time they got back in late August and they got themselves organized — they used to post a list of committees and they would interview students who wanted to volunteer for the committees. Then they would propose a list of names to us. Sometimes this didn't happen until practically Thanksgiving and I kept saying to them, "Look, you guys! [laughs] The faculty is not going to wait for you to get these committees appointed." So they finally began to hold some of these interviews in the spring. Then the first-year students who wanted to serve on committees would have a special opportunity to add themselves in, but at least they could get a little bit of a head start on it.

LABERGE: What are some of the most important or powerful committees, or influential?

KAY: The Faculty Appointments Committee, on which the students do not sit.

LABERGE: That's right, and you were on that before.

KAY: Yes. And the Curriculum Committee is important. The students do have a voice in that. They were not on salary committees. There aren't really any salary committees any longer, anyway. But I mean that was not a question on which you needed much advice. On questions of promotion and advancement, students were involved only to the extent that the teaching evaluations were a part of the process and, of course, those came from students. Sometimes students would write letters if they thought there was a problem. We had a couple of them. The major tenure fights we had were before I became dean so we didn't have that kind of a polarizing situation.

LABERGE: Should we launch into the affirmative action issues? I think that's a whole other issue.

KAY: Yes, let's save that till next week.

LABERGE: Some of the things you've already talked about — issues that the review brought up. One was clinical education and one was keeping bright young faculty, both attracting them and . . .

KAY: Yes, right, retaining them.

LABERGE: What are other ways you did that? Were you one of the ones who went out and talked to people or met with young faculty to lure them here, or how does that happen?

KAY: No. The Faculty Appointments Committee does that. Once they come here for interviews, obviously, and once the faculty approves an offer, then the dean makes the contact and carries on all the negotiations as to salary and teaching loads — not teaching loads, everybody has the same teaching load — but subject matter assignments, and so on. I did all that with both new faculty and senior faculty that we were trying to attract from other law schools. Of course, a senior person already has well-established fields. It's the younger people who are more pliable in terms of that aspect. The dean does all that.

The other thing — there's just an oblique reference to it, that you'll see in my *Transcript* article — is the relations between the law school and the central campus. The law school had not been as punctual as it should have been in terms of complying with the deadlines the campus set, both for submitting personnel actions and also for participating in the planning process. I remember that, shortly after the announcement that I had become dean had been made, Provost [Jud] King, who was then the provost of professional schools and colleges, invited me to lunch. We were talking about various things and towards the end of the lunch he said to me, "You know, you might want to check and see — I don't believe I've seen the law school's five-year academic plan." "Oh," I said, never having heard of a five-year academic plan, "when is it due?" He looked at me and said, "Aujourd'hui."

LABERGE: [laughs]

KAY: I said, "Oh, all right." [laughs] "Well, I'll get back to you on that." So I came back over to Boalt and made some inquiries, and found out that it had not been done. So I telephoned Provost King's office and I said, "Well yes, you're right, it has not been prepared. Can I have an extension?" "Of course," he said, "what would you like?" I said, "A couple of weeks." He said, "Fine." So I did it myself.

LABERGE: In a couple of weeks?

KAY: In a couple of weeks, yes. After that it became clear to me that the law school had some fence-mending to do with the campus. After all, I had chaired the Budget Committee and I knew the importance of deadlines. So I saw to it that the memos were done on time. There was a wonderful compliment that I got from Vice Chancellor John Heilbrun. After I had been dean for a couple of years he saw me at some gathering at the chancellor's office and he said, "I was wondering whether you would like to be the dean of the School of Architecture." I said, "What do you mean? You're joking surely." He said, "Well, after you became dean of the law school the red lights went out on my board of trouble spots on the campus, and the red lights are still flashing in architecture. I thought maybe you might like to take that on." [laughs] Of course he was joking, but it was quite a nice compliment.

LABERGE: Yes, that you got things done. On that note, there was something about the law school didn't have a mission statement. It needed to have one, so what did you do about that?

KAY: That came from the ABA accreditation process. The AALS and the ABA both put great store by mission statements, which are supposed to detail your school's distinctive aspirations. The mission statement of the Harvard law school is to be the best law school in any English-speaking country. In my view, if that's good enough for Harvard, that's good enough for us. [laughs] I think we finally managed to do something to satisfy the site evaluation team. To this day, if we have a mission statement, I couldn't tell you where it is. [laughs] But that's not on the same level as complying with the campus administration's and the Budget Committee's deadlines, in my view.

LABERGE: Anything else about relationships with the central campus or how they view the law school?

KAY: Going back to that lunch with Provost King, I learned that he rarely met with his deans. He had one formal meeting with all the deans in his office in the fall and another formal meeting in the spring, and other than that he had nothing, so I started inviting him to lunch once a month.

LABERGE: So you do have lunch sometimes.

KAY: I didn't eat lunch.

LABERGE: You went to lunch.



DEAN HERMA HILL KAY  
AT A BOALT HALL GRADUATION, 1990S

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KAY: I went to lunch. In fact, that became a great joke between us. After the first time — because I'd invited him I paid; that was fine. The next time he said, "Okay, now it's my turn." "Fine." So then he noticed that I hadn't eaten anything — I think he hadn't noticed it the first time. Then he said, "You know, this isn't quite reciprocal!" And I said, "Well, we can split it [laughs] — you pay yours, I'll pay mine." "All right," he said, so we did that.

I grew quite fond of him as an administrator and he and I, I thought, worked quite well together. After he went to the Office of the President and when Carol Christ came in, she started having twice-a-month deans' meetings in the afternoon from one-thirty to three-thirty on Tuesdays. She had become both the provost and the vice chancellor so there was no longer two provosts. Tien did away with the dual provost system. There were a lot of people around the table who didn't know each other, and she had to work really hard to try and get us to look at things from a campus perspective. I think she was extraordinarily effective, and I think she's just

a very talented administrator. She and I, I think, understood each other. I felt able to work very effectively with her, and she was extremely helpful to the law school on many, many issues. Not that Jud was unhelpful — on the contrary, he was also extremely helpful, I just was able to relate to Carol more easily. I never had to take her to lunch. [laughs]

LABERGE: [laughs] Before that, before your time, and just sort of in this transition time between the sixties and the nineties, wasn't there some clash, a view of the law school as being arrogant? Arrogant is too strong of a word . . .

KAY: Oh, no no no.

LABERGE: I assume that's what you did, is to dispel that a little.

KAY: I think that my lengthy experience in working with campus committees helped enormously. I had, after all, chaired the Budget Committee and been the chair of the Academic Senate, and people knew me around the campus.

LABERGE: So they weren't known quantities to people?

KAY: They weren't — that's right. And I'd been on — well, you saw that list, I'd been on fifty zillion other committees. So I think they viewed me as not being one of those awful arrogant law school people, [laughs] which helped — it did help. Jud King came to that ballgame [where I threw out the first pitch at the Oakland A's game.] It was "Boalt Night at the A's," and it was shortly after I became dean. That's the picture of the pitch there on my wall.

LABERGE: Oh, he did?

KAY: He did — I invited him to come. He and his wife Jean both came and were sitting in the stands with my husband and all the Boalt alums and students.

LABERGE: Oh, that is great. Well, shall we call that a day?

KAY: Sounds good.

LABERGE: And do affirmative action next time, along with — if we get past that. We might not get past that.

KAY: Okay.

## INTERVIEW 7: AUGUST 7, 2003

LABERGE: Today is August 7, 2003, and this is interview number seven with Herma Hill Kay. We're going to continue the deanship but before we switch subjects, do you have other reflections?

KAY: No, I don't think so.

LABERGE: Okay, all right. We talked about doing affirmative action today, and I thought maybe we could start earlier than your deanship with the first time maybe you ever even heard that term and what your involvement was, from the sixties on.

KAY: All right. Of course, since I was working on this casebook on sex discrimination, I had occasion to look at the origins of the term in the executive orders where it dealt with race discrimination, and then where it was expanded to discrimination based on sex in the [President Lyndon B.] Johnson administration. So I had some sense about the requirements and the attacks on it. At the beginning, it applied almost exclusively to government contractors since it was done by executive order of the president. It was not until much later, after Title VII had been enacted in 1964, that there was a suggestion that you could have voluntary affirmative action that would be consistent with Title VII. That didn't get definitely settled until *United Steelworkers of America, AFL-CIO-CLC v. Weber* [443 U.S. 193 (1979)], where the court did say that voluntary affirmative action would be permissible — it would not be a violation of Title VII.

We really started doing outreach in admissions at that period right after Martin Luther King, Jr., was assassinated. I think I said some of that in that article that you have a copy of on the challenge to affirmative action in legal education.<sup>13</sup> We were acting at about the same time as a lot of law schools of our standing were, because almost none of us had very significant percentages of minority students and we all decided that we needed to have a legal profession that was more representative of the country at the large. It wasn't until after Justice Powell decided the *Bakke*<sup>14</sup> case that we realized we couldn't do it for that reason.

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<sup>13</sup> Herma Hill Kay, "The Challenge to Diversity in Legal Education," 34 *Indiana Law Review*. 59 (2000).

<sup>14</sup> *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978).

LABERGE: Even before the *Bakke* case, something that I read — either '68 or maybe '70 — it said that Boalt started their affirmative action in admissions.

KAY: I said that in my article, I think, because we started it right after Martin Luther King, Jr., was assassinated.

LABERGE: Which was 1968. Yes, I think it was 1968. When you say “we” decided, was there a group . . . ?

KAY: The faculty decided, yes.

LABERGE: The faculty as a whole?

KAY: Yes, the faculty discussed this. First, we tried to find out how many — we started, of course, with African-American students. We tried to find out how many African-American students we graduated and we didn't know, because we hadn't kept records. We got several of our African-American graduates — I remember Henry Ramsey, who later joined our faculty, was one of them — to try and go back and just identify by his recollection and recollections of his friends that he knew who graduated from Boalt. We finally put together a fairly decent list, and we tried then also to look for people who were Hispanic and Asian — there were very few of either of those categories. So we decided that what we would do would be to give special consideration to minority applicants.

By special consideration we meant that they would not be required to meet the same grade point and LSAT score but that we would look at their entire background and try and see whether they would be successful as law students and as lawyers. We did that quite successfully. I think I've got the numbers in that article that I published. The number of minority students increased very quickly at Boalt, and then *Bakke* was decided and *Bakke* made it clear that the only viable basis for doing this was educational diversity. So we restructured our program to meet the requirements of the *Bakke* case. We had been doing that pretty consistently as had almost all the other — I could say *all* the other — law schools in the country.

LABERGE: Did you have anything to do with writing any briefs for the *Bakke* case?

KAY: I didn't. No, it was Paul Mishkin and Jan Vetter from our faculty who worked with Gary Morrison, who was representing the university on filing those briefs. David Feller, I think, also was involved.

LABERGE: After that, you had to change a little bit of how you did that?

KAY: We did, after the decision came out.

LABERGE: Not just a little bit, you had to change — and were you ever on the admissions committee?

KAY: Yes, I was on the admissions committee but that was after this.

LABERGE: Okay. Anything else significant, in the eighties? When we're talking about affirmative action we're also talking about women . . .

KAY: No, we never had an affirmative action program for women. It was always for racial minorities. Of course, women of color were included.

LABERGE: Okay. When you became dean was there already the Office of Civil Rights investigation going on?

KAY: Yes.

LABERGE: Do you want to talk about that a little bit?

KAY: Yes, that had started under Jesse's deanship. They were investigating our procedural implementation of this program — they weren't questioning our right to use the *Bakke* case. The investigation was assigned — nobody quite understands why — to the Seattle office rather than the San Francisco office, which would have been closer.

Anyhow, it got assigned to the Seattle office and I remember vaguely their coming out and talking to people, and so on, but I had no specific involvement with it at that point. The investigation had been poking along for, I think, several years, and it was not until the summer that I became dean — which would have been the first of July [1992] — that we got a letter from them saying that they had finished their investigation and they wanted to come down and meet with us to talk about how we should proceed from here. So it was at that point that Gary Morrison and I became fast friends. Gary came and met with us. Jesse was away for the summer on sabbatical, his one-year sabbatical after being dean. Jan Vetter, who had been Jesse's associate dean and who was quite knowledgeable about the program — he had been one of its strong supporters all along — was there.

And then, of course, the people who were in my administration — the associate dean, John Dwyer; Lujana Treadwell, who dealt with the media and public relations; and the director of admissions, Edward Tom. They were the core group from Boalt.

We had a series of meetings with the OCR people from Seattle and it became clear that what they were concerned about were the practices that had grown up in the admissions office. Let me back up a minute. We have an admissions process that's composed of faculty and student members who read the applications. I think I said to you before that at that point we were getting about 5,000 applications a year for the first-year class of 270 people. The admissions director and his staff read all of them. We didn't leave any of them out; we read all of them. We didn't have a cutoff score, as some schools did. Then he would automatically admit the people who had the highest numbers, and he would send a certain number of files to the admissions committee. He would deny the ones with the lowest numbers. Then he would send all the median group of files, which was a large number, to the admissions committee. The admissions committee was composed of reading teams with one faculty member and one student member. I forget how many teams there were — three or four or five, something like that. Edward Tom would send them instructions saying, "Here's a box of files." Say there's 200 files in the box. "You are to admit twenty, and to deny twenty, and you are to put the rest in the waiting list and then rank them."

The practice had grown up that, instead of having the file boxes randomly filled from among the applicants who were in the pool, they would be sorted by race. You'd have boxes of white applicants, and other boxes of African-American, Hispanic, Chicano, Native American, and Asian applicants. The OCR folks said that doesn't comply with what Justice Powell said in *Bakke*, because everybody is not competing for all the seats. Some people are competing only for a certain number of seats. Our policy said that we would give special consideration to a certain percentage of people in order to maintain educational diversity.

We had actually specified target numbers for various groups in our program. They were public. This was not something that we were doing on the sly. The applicants who were selected from the Asian box, say, would be put on an Asian waitlist, and as the open spaces came up, we would admit sufficient numbers in order to get the percentage we wanted. That was

one thing they wanted us to change. They wanted us to abolish the special waitlists. They wanted to have only one merged waitlist. They wanted us to stop separating the files; they wanted all the files to be randomly assigned to each box. And they wanted us to rethink our rationale for having an affirmative action plan.

LABERGE: Anything about the percentage?

KAY: They were not upset about the percentages, because everyone thought goals and timetables were fine. They didn't see our target percentages as a quota, they only saw that there was not sufficient competition for all seats in the class. They also thought that, although we said we had an educational diversity rationale for this, the way we were administering it made it look dangerously close to being a quota, and so they thought we might want to reevaluate our rationale.

They did not file a formal charge. What they had proposed was that we enter into a consent agreement whereby we would agree to make these procedural changes immediately effective with the new class that was going to be applying in February [1993], and that we would think about coming up with a different rationale. It was about this time of year, it was in August, and our students were about to return for Fall 1992 classes. It was not quite this late in August but it was pretty close. Students were about to show up, and OCR wanted us to sign this agreement immediately. I said to Gary, "There's no way I'm going to sign this agreement at a time when classes haven't started because the students will all think that we're sabotaging the program behind their backs, and this is certainly not what we're doing. I want to wait until I can consult with the students." Well, OCR didn't like that but I was adamant and so they said, "Okay, all right." The second the students got back — and, I think, even before that, because I knew who the president of the student body was, he'd been elected the spring before. I got in touch with the president of the student body right away and said, "Look, this is coming up. I'm going to want to be able to consult with some people from student organizations." This goes back to what you mentioned earlier about this feeling of good will towards me. At least initially, they didn't think I was trying to screw them.

LABERGE: Yes. They didn't walk in, this had been signed and you just said, here I am and look what I just did.

KAY: Exactly, yes. So they had this sense that I was really trying to work this out as best we could.

LABERGE: Now, how did you know to do that? I mean, did somebody else advise you or did Gary say, “Now listen, you better not sign this, you’re going to have trouble.”

KAY: No, no.

LABERGE: You just knew it? [laughs]

KAY: Wouldn’t you have known it if you had been in my place? [laughs]

LABERGE: I think — some people wouldn’t.

KAY: It was perfectly clear to me that you didn’t do this sort of thing when the students were not there. Anyhow, they came back and we got it all worked out. I was going to be in Seattle delivering a lecture. I think it was on September 25 or 26 that I was up there, and I went to the OCR office and I signed the agreement. The chancellor signed it, and we did it. What we did was agree to make the procedural changes immediately, which I didn’t think were a problem, and then we agreed to rethink the rationale. They, for their part, were going to monitor our program and processes for three years. So we had to report back to OCR for three years.

LABERGE: What did the students have to say?

KAY: As long as they were clear that we hadn’t lost our commitment to the program, they were not unduly upset by it. So then, as soon as it was signed, I appointed a task force, which Professor Rachel Moran chaired, and it had faculty, students, and alumni members. It was a very nicely balanced committee from the perspective of different points of view and also of different racial and ethnic background. They went to work, and Rachel worked them very hard. They came out with this really nice report in which they recommended that we needed to have a critical mass of minority students in order to achieve our pedagogical objective of training academically excellent, diverse student bodies — that we couldn’t do it just by numbers alone and we had to create a community of students here who were going to be able to learn from each other. The faculty approved it. Now, it was not until, I think, sometime in early April or it was close to the end of classes when we finally got this done . . .

LABERGE: Nineteen ninety-three?

KAY: Yes. I think I spell all this out in detail in this little piece on diversity in legal education that I gave you. Let's see. [looking] Okay. "Task force on admissions policy chaired by Rachel Moran. Task force appointed as a part of conciliation agreement entered into September 25, 1992, resulting from a compliance review that began in 1989." Yes, the policy task force reported in 1993 and the faculty adopted it on May 6, 1993. "Pedagogical theory of critical mass." Okay, so that was — I mean everybody was cool with that. The students liked it and they liked the process in the faculty. Anyhow, the next thing that happened was unrelated to the law school. The Board of Regents began hearing from the parents whose son was denied admission to the San Diego medical school. That was when they began holding hearings on the admissions process in the entire university, and that led up to the regents' resolution of 1995 [SP1 and SP2]. As part of their hearing process, I was invited to testify before the regents on the law school's admissions practices, and Gary again was very helpful. Gary had been holding my hand through this whole thing. He was just utterly wonderful. So I put together this speech that I have a copy of somewhere if you want.

LABERGE: And there's some quotes from other places, too.

KAY: Yes, there's some quotes from it. I, in effect, said that law schools are different. We're not just training undergraduates, we're not even just training engineers or doctors — we're training people who are going to administer the system of justice in the United States. You can't do that unless you have at least some reflection of the kind of society that you're trying to administer justice for and with. But the regents, of course, were not willing to listen to advice, certainly not from me, considering . . .

LABERGE: And not from anybody, really.

KAY: And not from anybody, considering they weren't willing to follow the advice from all the chancellors and the president on this matter. So they passed this 1995 resolution.

LABERGE: When you were testifying before them, what kinds of questions did you get or what kind of reception did you feel?

KAY: Almost none . . .

LABERGE: They just listened?

KAY: Yes. There were, of course, demonstrations by the students. They had it over at the UC Medical Center down there on the Laurel Heights campus. I had the sense that they were just running the mechanism. I think they knew what the votes were. I think the ones who were behind it knew they had the votes and knew who the opponents were. They'd listen to the testimony that they had requested and then they — not the day I testified, but later — in July, I guess — is when they passed it.

LABERGE: Tell me what was going on here. I know that there were a couple of . . .

KAY: We were away on vacation in southern California when they had that vote, but, oh yeah, there were big demonstrations all over. The students at various campuses staged demonstrations and everybody was protesting at what had happened. Then there was, that fall — because it wasn't to be effective for two years, it was to be effective on January 1, 1997, which would have affected the entering class of '97. There were all these efforts on the campus to galvanize faculty opposition, to try and get the regents to change their minds. Of course, none of that ever happened but at least there was some level of credibility built up between the faculty and the students in general. This was not centered at the law school — it was across the whole campus.

LABERGE: What about the flyers that students put up? There was some restlessness here with hate-based flyers. Did that happen right after that or before? Actually, it doesn't really matter — I just wondered how you handled it.

KAY: I don't remember. I think it was in the fall of '95 or '96, it was before the . . .

LABERGE: Proposition 209?

KAY: No, Proposition 209 had almost nothing to do with this. This was *all* related to the regents' resolution.

LABERGE: Okay.

KAY: Yes, there was hate mail that was put in student mailboxes — actually, now that you've mentioned it, it happened after or just before the week of final exams in '95.

LABERGE: Maybe after you'd given your testimony?

KAY: No, no, no. My testimony was in May. I did distribute the testimony to the whole school so that they would know what I said. But, no, this happened during the final exams after the fall semester of '95, which were given in December, 1995. The resolution had been passed in July. It was just really hateful stuff put into the mailboxes of 1Ls [first-year law students] who were minority students. Sort of, "We don't have to have you here anymore, you're just here because of this program, blah blah blah." We tried to figure out who'd done it. Of course, we had no way because the student mailboxes were right there in the hall — anybody could walk in off the street, they weren't closed in or anything. We were also in the process of rebuilding the building, so everything was just in total chaos. We had town meetings, I met with students, and we tried to make clear that we were trying to find these people, we've reported it, we asked for everybody's help in investigating it. There were also a few hate messages about Jews that came trickling in in the wake of all this stuff. I guess that once you stir up this cauldron, everything comes boiling up. So that was quite difficult.

Through it all, I worried about the minority students — I kept thinking, how are they going to survive? How many of them would there be? What would happen to their student organizations? What would happen to their student journals that were ethnically oriented, and how would they manage to maintain a viable community here? I had appointed another committee — a student, faculty, and alumni committee — to figure how we had to modify the committee report that Rachel Moran had done, because obviously we couldn't continue with that any more after the regents' resolution. Then there was a group of Boalt students and graduates who put together their own report in which they said, "This is what can be done, Dean Kay is being much too timid, and here's what the school ought to do." They had a press conference here releasing their report and then, over the summer, I appointed yet another committee — this one under the leadership of Bob [Robert H.] Cole, who was then my associate dean — to try and say what we were going to be able to do with our program to take account of the regents' resolution. By that time there was a sit-in by the students in the fall. They occupied — first they tried to occupy my office but we had locked my office. I went down and sat out there in the grassy courtyard and sent Lujana Treadwell up to say, "Hey, if you want to talk

to Dean Kay, she's outside and she's happy to talk to you." Of course, they wouldn't come to see me and I wasn't going to come back to my office while they were sitting outside my door, so we had this hour or couple hour-long standoff. Finally, a student who later published a book called *Silence at Boalt Hall*, Andrea Guerrero, came down and talked to me.

LABERGE: And she was a student then.

KAY: She was a student then, and she was very active in the Students for a Diversified Student Body. She came down and talked to me and we sort of tried to talk about what we were going to be able to do. She was at least willing — by that time, the Cole committee report hadn't been released yet. They were sort of just about to finish it but then all the sit-ins and everything disrupted them and so it was delayed by a little while. But finally I think they got the idea, when I refused to resign and when they were not able to get any more out of us, then they started going over and picketing the regents' office in Oakland. There they were met with the Oakland police who were not nearly as friendly to them as the campus police, so I think they stopped doing that. They then formed coalitions that went down to Sacramento and petitioned the Legislature for relief. While all this was going on, the class of 1997 was being admitted, and it became very clear as the summer drew to its end that we were only going to have one African-American student in that class, and he was one who had been admitted in '96 under the old program and had deferred his admission to '97.

LABERGE: What was your reaction? Had you anticipated that?

KAY: No, I hadn't. We had admitted, I think, fifteen African-American students and all of them went somewhere else, and we figured out where they all went. [laughs] They all went to some very good law schools when they decided not to come here. I guess, in hindsight, I should have anticipated it but I didn't. We had never had any trouble attracting the minority students that we admitted. What I hadn't realized was that the minority students in prior years who had the kind of credentials that this group of fifteen had, never came to Boalt anyway. We never were very successful in attracting them.

So we then started trying to figure out what we could do in terms of recruitment, and it was at that point that Proposition 209 became effective. It

had been passed in 1996, but it had been immediately enjoined and it didn't really become effective until after Judge [Thelton] Henderson's opinion got reversed by the Ninth Circuit and the Supreme Court refused to hear it. Then it became effective on August 28, 1997 — ten days after our fall semester had begun. By that time, we already had seen what the result would be. Proposition 209 went beyond the regents' resolution in that it affected scholarship funds and it affected outreach. So we were very worried about what we might be able to do and what kind of support we could accept from outside groups. Our alumni really rallied around the school. They wanted to help us in any way they could. The Alumni Association Board was having a meeting on the Monday when that student group was occupying the registrar's office, so they saw what was going on. I think that was certainly no coincidence, because the registrar's office was directly across the courtyard from the board meeting. Anyhow, they wanted to raise money as an alumni association to be used for scholarships to recruit minority students. I told them I didn't think we could do it, because anybody who gave money to the alumni association was in effect giving money to the school. The alumni association was so closely connected to the school, that I thought we would be a sitting duck for a complaint under Proposition 209 — and there were people watching us quite closely. So, again, I got complaints from some of the students that I was being too timid. But we finally were able to work with BASF, the Bar Association of San Francisco, and also the Wiley Manuel Law Foundation. They raised their own money — they didn't give it to us, they gave it directly to students who had been admitted to all the Bay Area law schools. They were able to do this because they weren't bound by Proposition 209 or the regents' resolution, and that was a terrific help.

LABERGE: Was it found out that your alumni were bound by Prop. 209?

KAY: Well, they accepted direction from me. Obviously they weren't going to do it if I told them I thought it would get us in trouble. I did tell them that, and so plenty of them gave money to these other organizations, so that was quite helpful to the students and, indirectly, to us.

LABERGE: And all during this, was Gary Morrison still advising you?

KAY: Oh yes, I tell you! [laughs]

LABERGE: Day and night.

KAY: Day and night, that's right. Yes, he was extremely helpful. But I was going to back up to the opening day of classes of fall '97. I had telephoned the African-American student. I said to Ed Tom, "Tell me who he is, I'm going to call him and tell him what the situation is because he may not realize it." I called him . . .

LABERGE: Oh, the one admitted student?

KAY: The one admitted student. He was in Indiana. So I called him and said, "This is the dean of your law school." [laughs] I think he was a little surprised. And I said, "You are going to be the only African-American student in the first-year class. We have not told anybody your name, and we're not going to tell anybody your name, but we're expecting a big demonstration at the law school on the day classes open, and you're not going to be hard to identify. So I just wanted you to know that when you come" — because he and his wife were going to come a little early to try and find a place to live, and so on. So I said, "When you get here, come and talk to us and we'll try and see what we can do to protect you from the press as much as possible." So he came and he spent a lot of time with Lujana. She worked closely with him that whole first year. She helped him write what was essentially a press statement.

We scheduled a press conference on the first day of classes, and he and I walked down the hall together to attend it. There were reporters and newspapers and TV cameras from all over the world. I mean, it was just unbelievable. He and I walked down the hall to one of the classrooms; he read his statement, which was about two or three minutes long. Then he left and I took questions, and I refused to make him available. He refused to be available. He just tried his best to keep as low a profile as possible. He did not participate in any of the demonstrations. He did participate in a walk that Reverend Jesse Jackson had organized — I think they walked across the Golden Gate Bridge or something, and he was there. He was on the podium with Reverend Jackson, who introduced him as the only African American in the first-year class at Boalt Hall, which of course he was. He actually mentioned the fact that I called him in an interview that he gave to the *California Lawyer*, a legal monthly, in which he said that he hadn't

realized this until Dean Kay called him. He is now practicing, I believe, at Morrison and Foerster.

But that fall, I literally did almost nothing except answer the telephone and talk to the press. I mean, people from everywhere wanted to come here. At one point I said to them, “You know, all of the University of California law schools are involved in this, why don’t you go talk to some people in Davis or UCLA?” But, oh no, they all had to come to Berkeley! [laughs]

LABERGE: Is it because it was Berkeley?

KAY: Oh, I think so.

LABERGE: What was happening throughout the nation at . . .

KAY: Nothing, nothing. This was totally a California phenomenon. Texas had been hit by the *Hopwood* decision, which affected the law schools in the Fifth Circuit. So it was the Texas schools and us. The other schools in the Fifth Circuit, for one reason or another, were under already some kind of court order so nothing much changed for them. So it was really UC and [the University of] Texas who were the two major schools that were affected by this. The dean at Texas, Michael M. Sharlot, and I at one point did an op-ed piece for — I forget what newspaper published it, maybe the *Times*. Anyway, we did that together to try and make clear how the challenge to affirmative action was affecting our schools.

The thing that was the hardest to deal with was to try and dispel the notion that minority students had out there in the great world, that they were not welcome in California. It was just very hard to overcome. Our director of admissions went around and recruited students from many more schools than he had ever been to before. One of our African-American graduates, Warren Widener, who had been the mayor of Berkeley, was an enormous help to the school.

LABERGE: Widener?

KAY: Yes. Warren Widener entertained the minority students we had admitted at his home, and talked to them about how the local alumni group were there to support them and help them and encourage them. I didn’t go to any of those events. They wanted their own space, and Warren was just wonderful. He just really went all out to try and make these kids feel at home. And it began to turn around. We had one African-American

student in '97. We had, I think, seven or eight in '98. In '99 we had about that same number. And in 2000, when I stepped down as dean, we were getting close to ten. When John Dwyer came in I think we had fourteen. I don't remember how far these numbers went, but I have the numbers in the back of my article going through the fall of '99, and they were beginning to slowly come back. We enrolled eight in '98 and seven in '99 — African Americans — and twenty-three Hispanics in '98, sixteen in '99. Two Native Americans both years. The numbers that were going up were the Asian numbers, there were forty-eight in '98, thirty-five in '99. Then applicants suddenly declined to state what race or ethnicity they were so we couldn't really put together those statistics.

We also got a great deal of help, in terms of recruitment and scholarship, from the president's office. I think [President Richard] Dick Atkinson did a really courageous thing. He said, "Okay, we can't use scholarship money to persuade people to come here, we can't use it for recruitment purposes, but if they come here we then have got a lot of scholarship money that was given to support students of particular backgrounds. So if we have somebody that we have said is a worthy scholarship recipient and we have money that was targeted for that purpose, then we can have a student-to-fund matching process, in which the student will be able to use the money that had been designated for that purpose." He could have been challenged for doing that under 209 but he wasn't, and it was quite helpful. Later, just as I was going out as dean, the president's office also was able to get some money to help bring people here — again, after we had admitted them — to bring them here to show them the campus, to pay their travel expenses, and so on. That was also enormously helpful.

LABERGE: And was this a part when he instituted an outreach director himself at the president's office?

KAY: Yes, yes.

LABERGE: Okay. But also you did also?

KAY: We did, yes. We hired a director for admissions outreach who is still here.

LABERGE: And who is that?

KAY: His name is Eric Abrams. He's a Stanford graduate, not a lawyer, and an African American. Chancellor Berdahl gave us the money to hire him.

LABERGE: And what about just on the rest of the campus, were you getting help from the chancellor's office?

KAY: No. They were about a year behind us. They've made some of the same mistakes we made, I think, because they didn't really learn from our experience. They also were not prepared for this backlash of "You don't want us, so why should we come?" kind of thing.

Meanwhile, behind the scenes at the regents, there was our alumnus Bill Bagley who had opposed this resolution to begin with, and who — the minute Proposition 209 passed — started hammering at the board saying, "Our resolution is now meaningless except for symbolic purposes. It still makes people think that the university is not receptive to them and doesn't want them to come, and what we ought to do is repeal this." And he finally got them to repeal it, which they did — it was a great thing. So now the only thing that's there is Proposition 209, and there's been some discussion in the wake of the Supreme Court's decision in the [University of] Michigan cases [2003] of trying to launch another initiative to repeal Proposition 209, which would be great if it could be done.

LABERGE: Tell me about the Cole report and which recommendations were accepted and how that was debated in the faculty.

KAY: I do spell this out in my article. The UC schools approached the problem from different perspectives. UCLA tried a race-neutral admissions process that placed great weight on socioeconomic factors, on the theory that you really could do this in a race-neutral way that would still give you a diverse class. Because they gave weight to things like language spoken in the home, the location of the family and how recently they had arrived, and so on, they got a fairly large number of Russian immigrants. They didn't get very many minority students. As part of our faculty discussion of the Cole report, we sent out a letter to all applicants who had been put on the waiting list and people whose applications we had not yet read, saying, "We're going to try a pilot program and you can be part of it. We're sending you this questionnaire and could you fill it out and send it back to us. It won't hurt you — it might help you." So a lot of people did. One member of the faculty read all of those applications that came back with

the new questionnaire. The same thing happened to us that happened at UCLA. We picked up almost no minorities; we picked up a large number of poverty-stricken whites.

It was fairly clear to the faculty, as it had been clear to UCLA, that a race-neutral plan was not going to work, so we continued with our notion of a critical mass to produce a diverse mix. We did eliminate the percentages, even as goals. In the beginning, we had a very low percentage of minority students, but as the years have gone by we've built that up again. I think, last year we were back to 40 percent minority students, which is where we were before the regents' resolution was originally passed, but the mix is different. There are fewer African Americans and more Asians in the current mix.

LABERGE: Are Asians still considered a minority?

KAY: Yes. Except for the Japanese Americans.

LABERGE: I totally lost my question in here.

KAY: [laughs]

LABERGE: Across the UC system, Berkeley's numbers dropped the most. Because we were the highest to start with?

KAY: No. Berkeley is the most selective of all the UC campuses, and in fact our law school at Boalt is the most selective of any public university law school in the country. So that's why we were hit the hardest.

LABERGE: Okay. Tell me your thoughts and feelings about the LSAT [Law School Admission Test], the weight of that and the weight of grade point averages [GPA], and how — in your ideal world what would you do?

KAY: You have to have some kind of comparison. Thousands of people apply to law school every year and they come from all sorts of college backgrounds, and you need some kind of uniform measure. The ABA standards for accreditation require schools to use some standardized test. They do not require the LSAT; they require some kind of standardized test.

One of the things that I did, maybe even as early as '98, was to appoint a committee chaired by Professor Marge Shultz to seek a redefinition of merit and to try and develop some kind of testing device that could be an alternative to the LSAT. The Law School Admissions Council gave us some

money for this purpose. Obviously, they were anxious to improve the LSAT itself and they wanted to see what else might be possible. That committee has continued to work all this time and has just gotten a second grant from the law school admissions people. They've done focus groups, they've done surveys, they've talked to lots of people about what are the qualities of good lawyering that you can identify, and then they tried to work backwards from that. How do you test for those qualities when you're looking at people that you're admitting to law school? They think that they're going to be able to develop a standardized testing instrument that could be used in law schools to predict success in the profession rather than predict success in the first year of law school, which is all the LSAT predicts. That may be the single most important thing I ever did.

LABERGE: To appoint that committee.

KAY: To appoint that committee, yes.

LABERGE: But right now it's still weighted?

KAY: This is one of the things that we had done, even before our conciliation agreement with OCR. Most law schools weight the LSAT 70 percent and the GPA 30 percent. We early on started weighting them equally, GPA and LSAT. One of the things that the Cole committee proposed, that the faculty adopted, was that we stop identifying — we stop weighting schools as to whether we thought they had grade inflation or not. We let the people on the committee decide for themselves how they would rank a Stanford GPA against a Podunk U. GPA. We also started reporting the LSAT scores in bundles of three, because the Law School Admissions Council said the difference between an LSAT of 155 and 158 is not significant, so we started spreading them out a little bit more. We did a lot of cosmetic stuff that may or may not have made any difference but that overall suggested that we were placing less weight on the numerical factors and more weight on the holistic factors.

This is essentially what the Michigan Law School did. We and Michigan did almost exactly the same thing after those committee reports were adopted by the faculty, with the single exception that Michigan still gave specific weight to race and we did not give specific weight to race. Michigan got more minority students than we did, and I think you have to understand that you're always going to get more minority students if you

can give express weight to race as a factor, which is why everybody was defending the Michigan program. As I said in an interview that I gave for a roundtable discussion on the Michigan cases that has just come out in a magazine called *Trusteeship*, which goes to university presidents and administrators around the world, we and [University of] Washington are the only two law schools in the country that can't use race anymore. That's because of Proposition 209 in California and Initiative 200 in Washington, which prohibit the use of affirmative action.

LABERGE: Tell me about the part the students played in getting this turn-around, because I had read that many of them did a lot of outreach and other things.

KAY: Yes. At first they were shell-shocked. I think we all were. At first I think they tried to say, "Well, let's just boycott Berkeley, let's just tell everybody not to come here." And then I think they realized — and I do think this set of essays that was published called *The Diversity Hoax*, which Andrea [Guerrero] was responding to in her book *Silence at Boalt Hall* — I do think that that convinced many of them that it would not be either to their own advantage or to the school's advantage to just try to wipe Berkeley out, because Berkeley could then be taken over by what they saw as the right-wing enemy. [laughs] As the number of minority students began dwindling in the class, there came a moment when you could teach classes with no African Americans or Hispanics. It was really kind of scary. So I think the minority students began to realize that they needed to bring in people of their own group to sustain them and to make the place livable for those few people who were going to be there.

Rachel Moran's committee identified an absolutely valid point when they talked about critical mass. It really does make an enormous difference in people's comfort level. So the students then began working with the admissions office, and they entertained students who were coming here to see the campus, they brought them to their homes, they talked to them. The one thing that made a huge difference was my creating the Center for Social Justice. We were in danger of losing our minority faculty. The two tenured minority women faculty, Rachel Moran and Angela Harris, both had offers from other schools. They were both, I think, feeling quite disheartened by the dwindling number of African American and Chicano

students. The Center for Social Justice enabled them to put on programs to attract students and visiting scholars, and talk about diversity issues and talk about what kinds of work these students could do and how you could actually practice law without ever representing a corporate plaintiff or defendant — mainly corporate defendants, I guess. That has really just been wonderful, and we've had very enthusiastic women who've been directors of that program working with the social justice faculty, which now includes all the minorities and a fair number of Caucasians. They really have just been very active in outreach and recruitment and encouraging people to come. I think that they have just done a terrific job in changing the attitudes of admitted students about accepting our offer and coming here. That's just been a big difference.

LABERGE: While all this was going on and what you were doing was answering phones and questions — how did the business of the law school keep going?

KAY: Oh, it kept going quite well. In describing my management style, I emphasized the word “delegation.”

LABERGE: Yes.

KAY: I had some very good staff people who really stepped up to the plate and assumed a lot of responsibility. Also, I was spending a fair amount of time going around the state and the country, talking to the alumni groups and telling them what was happening and saying this is what we're trying to do. They were very supportive of the school. They really were there when we needed them. I was very, very pleased with their cooperation.

LABERGE: You were getting criticism from both sides.

KAY: It's true, I was. Nobody liked me. [laughs]

LABERGE: Yes, so how did you personally deal with that and how did you answer, particularly when people were criticizing you for not doing enough when really that was what your goal was, too?

KAY: It was really cute. One of our graduates, Kathleen Morris, was working up in Seattle at a public interest law firm — the year after she graduated she was clerking up there — and they had conferred an award upon me. I was to come up and make a speech and accept the award in January. She introduced me and she said, “You know, the students were really outraged

and the students felt the school ought to be doing more and we were going to do what students always do, we were going to sit in the dean's office and make our demands. Then," she said, "it occurred to us: Herma Hill Kay is in the dean's office — how could you say she's not devoted to the rights of women and minorities? Her whole life has been spent doing that." When I got up to speak, I said, "I'm not sure whether it's better or worse to have somebody who really knows you introduce you." [laughs] But I was really pleased.

LABERGE: That can't have been easy, when you were going through — I mean, now you're just talking about it . . .

KAY: Well, yes, but there were these wonderful little things along the way. Before the students all trooped off down to the Sproul steps to denounce me because I wouldn't resign, one of them came back and said, "You know, Dean Kay, I hope you're not taking this personally." I said, "Oh no, no. Why would I take it personally?" [laughs] You have to see it structurally. You have to protest against the dean if you were a radical student — I mean, what else are you going to do? So we managed to get through that, and through it all there were students, even minority students, who were willing to serve on my committees, and they were told by their more radical friends, "Oh, she's just co-opting you." I think they could see that we really wanted their support, their input, and we were listening. So I think that helped.

After 209 was upheld by the Ninth Circuit Court of Appeals and it became clear that this was not just the university, this was the whole state — there was a group of our students who tried to get enough signatures to repeal Proposition 209. They were never able to do that. I think they realized then that it was over, here — which is still the case. That no matter what the U.S. Supreme Court did, it wouldn't help us. The Texas case hadn't gone up and the Michigan case was sort of working its way along. The students were very involved in supporting the students in Michigan who had intervened in the proceedings and all that. I think they realized that California and Washington were dead letters. I mean, at least in Texas, *Hopwood* would be overruled if the Michigan case came out right, which of course is what happened. They realized that nothing was going to happen here *suddenly*, right — there was no quick fix. When John Dwyer came

in as dean, he continued the programs of outreach and recruitment, and continued the appointment of the associate director for outreach. Eric is still here, still doing a terrific job, and they really got the numbers up in a way that was, I think, quite heartening. We're going to have to continue to do that because, unless 209 is ultimately repealed, nothing is going to change for us.

LABERGE: What about faculty? How many faculty did you need to convince or debate?

KAY: Oh no, the faculty were fine with this. I mean the faculty had adopted our program. The faculty had supported it all along. They did want to try and see whether there was a race-neutral way we could produce a diverse mix of students. Once we tried it and they saw it wasn't going to work, then they realized that we had to do what we could do legally, and they were supportive of doing that. I don't know what will happen if Marge's group comes up with a proposed alternative to the LSAT. Because then the question is going to be, "Well, nobody needs it except us and Washington, and what's that going to do in terms of affecting people who are competitively applying here and several other schools too, is it going to help us or hurt us?" We'll cross that bridge when we come to it.

LABERGE: And as far as faculty helping — besides the associate deans — how did they get involved in the response to 209?

KAY: Well, the Academic Senate had groups of faculty who were trying to get signatures for letters to the regents and petitions to the regents and all that. A lot of people signed those. They worked on reforming the undergraduate admissions process. They did almost identically the same thing we had done a year earlier with the Boalt admissions process. They had to try and figure out how to do it in a way that would involve reading more applications. Of course, they have many more applications than we do so it's a bigger job for them, but they did it. The figures, I think, have been inching up on the campus as well.

LABERGE: Boalt faculty in particular, did they do any kind of outreach or talking to people?

KAY: They would talk with students as they were put on the waiting list or when they were accepted. Admissions people, the Center for Social

Justice faculty, and individual members of the admissions committee frequently would call them and say, “What are your interests, and let us tell you what we have here in that field.” One African-American man really was interested in intellectual property and we got the intellectual property people to call him. So it was just a way of trying to let students know that this is what we had available and we wanted them to come. We did not limit ourselves to doing that to minority students, we did that to all students.

LABERGE: Yes. I’m out of questions at this moment. Do you have anything else that — any anecdotes or anything you wanted to throw in?

KAY: Not really.

LABERGE: All right, so we’ll call this a day?

KAY: Right.

## INTERVIEW 8: SEPTEMBER 18, 2003

LABERGE: This is interview number eight with Herma Hill Kay on September 18, 2003. Today we were going to talk about your outside activities, both the committees, the governing boards. So maybe we’ll just look at your résumé and start with the American Bar Foundation. Is that one of the ones we were going to discuss?

KAY: Yes, there are four national organizations that I’ve been involved in and have spent a fair amount of time in, and the one that was first in terms of time was the Association of American Law Schools [AALS]. The Association of American Law Schools is the national professional organization for law schools. The membership is by school; it’s not by individual faculty members. That’s an organization that participates with the American Bar Association [ABA] in the accreditation process for law schools; that puts on every year an annual professional meeting; and that has, throughout the year, special meetings on professional training that have to do with subject matter areas — these are workshops. Law schools will pay for their faculty members to go to these workshops and also to the annual meeting. So it’s both a kind of networking and educational and social situation. The process of faculty hiring grew out of the association’s meetings and then

later became an activity all in itself. It happens every fall, and it's about to come up in October this year.

I had not really been very active in the association as a young faculty member. I had gone to some of the meetings but I had never been really involved in the committee structure, and so on. This sort of goes back, I guess, to the question of men mentoring women. Sandy Kadish, who you know is on our faculty and who was very active in the organization, came to me and asked whether I would be willing to accept nomination to the executive committee, which was quite unusual because people who are asked to be on the executive committee usually had been active in the organization before that.

LABERGE: I see. Was he the dean then?

KAY: Let's see, this was 1986 so Jesse Choper was the dean at that point. Sandy had been the president of the AALS in 1982. He came to see me and said that they would like to nominate me for membership on the executive committee with the hope that I would ultimately go through the chairs and become president. Now, at that point there had been only two women who were presidents of the AALS, Soia Mentschikoff was the first [in 1974], and Susan Prager at UCLA was the second [in 1986], so they were obviously looking to see if they could find a little diversity for this national office. [laughs] I did accept his suggestion and I was nominated to the executive committee, and Susan Prager at that point was the president of the association.

LABERGE: Right and that you were the third woman . . .

KAY: Susan Prager, I thought, did a wonderful job of dealing with that committee. That committee is the one that advises the president and works, like executive committees do, to set policy for the organization that will then be taken to be voted on by the members of the representative assembly, which is composed of deans of the member law schools. I served on that committee for two years from 1986 to 1988, and then was ex officio a member of the executive committee when I was president-elect in '88 and president in '89 and immediate past president in '90. They follow the ABA model, whereby you spend three years in the officer rank if you're going to be president even though you're only president for one year. That makes it possible for you to develop your program and to then try to do as much as you can to get it put in while you're president, and then to oversee

what's going on and be around as a kind of statesperson after you've been president.

The chief initiatives that I was trying to undertake were to increase diversity and particularly to stand behind our gay and lesbian students against the government's efforts to prevent them from being hired by military recruiters, for example. The year I was president, the association passed a resolution that said we would not cooperate with government interviewers if they were going to continue their policy of discrimination against gay and lesbian law students.

LABERGE: It was if the law students were trying to get a government job? Is that it?

KAY: This is for the Judge Advocate General's Corps, the legal arm of the military — JAG they call it. The military recruiters would come to campus and they would say, "We don't want to interview anybody who's openly gay or lesbian, because . . ."

LABERGE: They would say that right out?

KAY: Oh, yes. It's official policy. In fact, we ultimately — here at Berkeley and the other UC schools — couldn't actually abide by this policy that the AALS adopted when I was president. The UC president, David Saxon, had sent out a memo saying that it is not illegal under present federal antidiscrimination law to discriminate on the basis of sexual orientation, which it wasn't. And it still isn't as a matter of national law although it is now as a matter of state law in California and several other states. But his memo said that, since it was not illegal, because the university only prohibited employers who engaged in *illegal* discrimination from using the campus interview facilities, we couldn't refuse to let the military recruiters participate in our program. So they did participate in our program, but every year as dean I would write them a letter saying we understand that you're permitted to be here by order of the president, but this is against the AALS policy, it's against the faculty policy, and we hope you don't come. [laughs] They came, of course, but there was this kind of standoff.

So that was one thing that I felt very strongly about, and we did manage to get it done. The other was an effort to increase diversity in recruiting of candidates for the faculty and also for students. So, those were the issues that I was most associated with during my year as president. After I

stepped down as immediate past president, I served on a couple of nominating committees for the officers: usually the presidents-elect and that's something that you would normally expect to be included in if you've been through those offices. Most recently, I was a member of the *Journal of Legal Education* editorial board, to which the dean of Hastings, Mary Kay Kane, who was then the president of the association, appointed me. So yes, when I was president in '89 I was the third woman president of the association.

LABERGE: How many women are members of other committees?

KAY: It's sort of slow going but it's getting better. It was a long time coming, of course, but I think they're getting a lot better about it now than they had been.

LABERGE: And when you were dean, did you appoint somebody? Do you send members the way Sandy Kadish sent you?

KAY: Oh, no. As a member of the nominating committee I participated in that, but I didn't really send anyone from Boalt the way Sandy did me, he just nominated me. But as dean, of course, I went to all the annual meetings and represented the school there, and carried on the kind of activities that deans perform. The deans really run that outfit.

LABERGE: How were women accepted? How did you feel in the group? Were you comfortable?

KAY: Oh yes. By that time — Susan did a great job, I think, and everybody thought Susan was a spectacular president. So she had certainly smoothed the way for other women. It was really very easy to work with her and to be there when she was there. Then there are certain, like in any other organization, there is a certain handful of people around the country who are available as elder statespeople to be called on, and all that. I'm good friends with the people who are the executive director and the staff with whom I worked when I was there as president. We've kept in touch over the years, and they call me to do things and I'm happy to do it.

LABERGE: Where is it located?

KAY: In Washington, D.C.

LABERGE: How much time did it take?

KAY: Well, a fair amount of time. You know, a lot of cross-country trips on the airplane and so on. This was before e-mail but we were able to do a lot by telephone so I didn't have to go back that often, aside from the regularly scheduled meetings. The executive committee meets, of course, during the year and at the annual meeting. Okay, so that's the Association of American Law Schools.

Then I guess in order of time, I next got involved in the American Bar Foundation. The American Bar Foundation gave me its Research Award. The Fellows of the American Bar Foundation every year give two awards. They give a Research Award to, usually, a faculty member whose research they think is exceptional, and then they give an award to a lawyer who has been in practice for fifty years or more and who exemplifies the highest ideals in the profession. They call that the Fifty-Year Award. I got the Research Award in 1990. When I got that award I was not a fellow. To be a fellow you have to be, again, nominated and elected and all that, so I was not a fellow, but they didn't waste much time inviting me to be a fellow [laughs], so I became a fellow. I was elected in May, 1991 as a Fellow of the American Bar Foundation. After I became a fellow, they invited me to serve on the Research Committee, which I was happy to do. The Research Committee is the committee that screens all the applications for financial support by the foundation to carry out socio-legal research.

The foundation really was established to carry out socio-legal research, and the people they compete with are all universities. They compete with Berkeley, for example. Members of our JSP faculty are engaged in socio-legal research. [University of] Wisconsin is another well-known center for this kind of work. Yale was one of the earlier ones. The American Bar Foundation is not housed in a university, so you would think that when you talk about Berkeley and Yale and Wisconsin, you would think that we would obviously have our pick of the best people, and by and large we do. But the foundation has just done remarkably well over the years in attracting young talent — people who are trained in law and in one of the social sciences. Typically their resident scholars will have half-time appointments at Northwestern University because the Northwestern law school building is right there next door to the American Bar Foundation offices in Chicago. But also we now have one faculty member who's at Chicago and is a resident fellow at the foundation, and a couple from Wisconsin who commute

back and forth to Chicago. I would say that the work they do is certainly on a par with, if not better than, that work that's done at universities, so they're really a top flight organization. And it's the Research Committee that makes recommendations about the people who are going to do that research, and that vets the proposals even on the in-house fellows. I served on that committee until 1995 and then they asked me to serve on the board of directors, and so I was elected to the board of directors. I've been serving on that. This is now my second term and I'll be going off that board in August '04, so this is the last year that I'll be serving on that.

LABERGE: Is it connected to the ABA?

KAY: All of these national organizations — the ABA, the AALS, the ABF — have connections. They're not controlled by the ABA. They do get funding from the ABA but they are an independent entity. The people who are fellows also are members of the ABA. You can't be elected a fellow unless you are a member of the ABA, but the fellows tend to run their own operation. They have their own meeting, they have their own activities, and they interact with the fellows in each state in a much more hands-on way than the ABA does. The ABA tends to be more national. While it has connections with the state bar associations in various states, it's not quite like the fellows, state by state, in their national organization because they're much more integrated.

I joined the American Bar Association as a member, but I had almost no time to give to it until I was invited to become a member of the Section of Legal Education and Admissions to the Bar in 1993. The ABA, I'm sure you understand, is organized into various sections and it'll have sections based on substantive law and trial lawyers have a section. There are special group sections like the [Commission] on Women in the Profession. The Section of Legal Education and Admissions to the Bar is the section that's there for academics and people who are involved in bar admissions. The council of that section is the body that is formally recognized by the accrediting agencies as the body that accredits the professional degree program in U.S. law schools. So they are the ones who supervise whether schools can become accredited, whether they can remain accredited, and they conduct site evaluations of each school every seven years. In doing the site evaluation they cooperate with the Association of American Law Schools, which

has one member of the site evaluation team. I was a member of the council from 1993 to 1999 and then I served two years as an officer, as the secretary, from '99 to 2003. During that period I chaired the section Committee on Diversity and Legal Education for 1996 to 2000.

That committee was trying to figure out — while the Michigan case was pending and in the wake of Proposition 209 in California, the *Hopwood* decision in Texas, and Initiative 200 in the state of Washington — what you would do if you were prohibited from using affirmative action and you still wanted to have a diverse student body in law schools. So we published a couple of reports that made some suggestions about how that might be accomplished. That has pretty much become moot for the rest of the country now that the Supreme Court held in the Michigan case that law schools can continue to engage in affirmative action. That decision overruled *Hopwood*, so Texas can now go back to doing it, but Berkeley and Washington are still bound by those state propositions. I gather that UC Regent Ward Connerly is trying to get a similar proposition passed in Michigan, so this is going to be an ongoing struggle.

LABERGE: Now, you were doing all of this while you were the dean?

KAY: That's right. Yes, that is correct.

LABERGE: How did you do that?

KAY: Most of the people who sit on the ABA council are deans or former deans, so it's something that you are expected to do. And it's quite useful to the school if you are holding that position while you're dean because it puts you in the inside loop and you understand what the issues are and what the emerging policies are. You have a hand in forming the new initiatives that will be sent around to the law schools for their approval or disapproval, so it's actually quite a benefit even though it does take you away from your school when you go to the meetings. After I went off the council, I was appointed to the Joint Committee on Racial and Ethnic Diversity which was set up in 2001 essentially to try and deal with the Michigan litigation and what would happen depending on how it came out. I think that committee is probably going to wither away now that the Michigan cases have come down the way they have. At least, I haven't heard anything about having another meeting for a couple of years. [laughs] I think that one may

become sort of moribund. It was co-sponsored by the ABA, the AALS, and the LSAC [the Law School Admissions Council].

The American Law Institute is outside of the ABA umbrella. It is one of the two major law reform organizations that operate at a national level in the United States. The earliest one to be formed was the National Conference of Commissioners on Uniform State Laws, and that is composed of people who are appointed in each state by the governor. They are lawyers, academics, and judges and their whole purpose is to draft laws that can be promulgated as uniform laws to be adopted in each individual state, to try and make the laws uniform as an alternative to having that done federally by Congress. It's an effort to keep the states involved in proposing and enacting uniform legislation.

LABERGE: And you did this with — for the divorce law or not?

KAY: No. The Uniform Marriage and Divorce Act was a project of the commissioners. I have never myself been a commissioner, but I worked with the commissioners as a co-reporter on the Uniform Marriage and Divorce Act. I was simply telling you what that body does to compare it with the American Law Institute, which is the one in which I am a member.

LABERGE: Okay.

KAY: Now, the American Law Institute was formed later and its purpose is to clarify and improve the law. What they do still as one of their major efforts is to produce these volumes that are called restatements of the law. So you would have the Restatement of Contracts, the Restatement of Torts, the Restatement of Property, the Restatement of Trusts. I mean, name practically any legal subject and there is a restatement of it, particularly when it covers a common law subject. The reporters read all the decisions of the courts and states around the country and you try to see what the majority view is, what the minority view is, and what the emerging trends are. That becomes the content of the book called a restatement. That book then is cited by common law judges in the various states and adopted in certain kinds of cases. The restatements every year will have an appendix showing in what states they have been adopted and will cite opinions that rely on the restatement. In Europe, lawyers treat the restatements as being a compendium of United States law — which is, of course, a myth because

it's United States law only insofar as any individual state has adopted it — but they take it to be a good exemplar of what U.S. law is.

I have never worked as a reporter for any of the ALI projects. My only reporting was done with NCCUSL's Uniform Marriage and Divorce Act. I was invited to join the ALI as a member in 1975. Once again, you have to be elected to membership. There are 3,000 people. Later on, I was elected to the governing body of the organization, which is the council, in 1985. Council is composed of roughly twenty-five to thirty people — judges, lawyers, and academics. Again, at the beginning they had no women and then very few women. Shirley Hufstедler, I believe, was the first woman who was elected to the council. Later, Ruth Ginsburg was a member of the council. She resigned when she was appointed to the U.S. Supreme Court. The council adopts the program for what subjects will be studied, what restatements will be done, and also, in recent years — even before I became a member — they began doing model codes as well as restatements. The Model Penal Code came from them, that was one of their more influential efforts. This project on Principles of the Law of Family Dissolution, which has just been finished, again is not a restatement but principles that could be adopted either by legislatures or by courts. That's a relatively new endeavor for them.

As a member of the council you go to usually three or four meetings a year in addition to the annual meeting, and those are held in Philadelphia, which is where that organization is headquartered. They have one meeting of council a year in New York and then the annual meeting, which is usually in Washington. That's a very interesting organization because it works on substantive law issues. If you serve as an advisor to one of the projects, that involves still more meetings because you then go to meetings with the reporters a couple of times a year when they were ready to submit drafts. I was an advisor to the Family Dissolution Project, and I'm now an advisor to the Employment Law Project, which is just getting off the ground. I've been elected to the executive committee the last three years. That's the committee, again, that carries on the administrative operations of the institute and is advisory to the president of the institute. So that's the ALI.

As I said, I have gone off as a formal member of the Association of American Law Schools and off the ABA's Section on Legal Education. I'm

about to go off the American Bar Foundation board. The American Law Institute is ongoing.

LABERGE: Okay. Well, you tell me what we should do next.

KAY: Maybe I should say a word about the Order of the Coif. The Order of the Coif is the national honor society for law schools, and they usually elect the top 10 percent of the students in each graduating class to be members of the Order of the Coif. My involvement was at the national level. I was, again, first a member of the executive committee, then vice president, and then president. That is a very small group. I think there are not more than five or six people, seven maybe, working with the executive director to organize and administer what the organization does. During the years that I was there we created the triennial book award, which now has become, I think, an annual book award, but then it was given every third year to the leading book published on a legal subject. I chaired the award committee for a three-year period after that was set up. The other two things I was going to talk about were my role in the private foundation world.

LABERGE: Yes.

KAY: Okay. I've been on the boards of two foundations. The first one was the Russell Sage Foundation in New York. That was a foundation that was established by Olivia Sage to improve social and living conditions in the United States, which was a very broad charge. Initially, it was interpreted by the board to include setting up of hospitals and schools in the name of her husband, Russell Sage. Then the board realized that it could spend a great deal of money on hands-on projects like hospitals and schools and that it would be better to try and look for more lasting, structural ways to improve social and living conditions in the United States. That idea took them into finding sociological and other sorts of law reform approaches that would be useful in trying to make a lasting change. It was their interest in law and socio-legal research that got me involved. I — having been at Berkeley and having been involved in working with Laura Nader, which we talked about earlier, and also with the Center for the Study of Law and Society here — was invited to become a member of the board of directors. I served on that board from '73 to '87 and I was the chair of the board for a five-year period from '80 to '84. I think I was the second woman after

Mrs. Sage herself to chair that board, but there have now been several women chairs.

LABERGE: How do you get invited? How did you get invited?

KAY: I think, when they were going to go into funding socio-legal research, they obviously looked at places around the country — Yale, Wisconsin, Berkeley — that were doing it, and I was proposed, probably by some of my colleagues here at Berkeley. They were looking for women because they had no women on their board at that point and so I imagine that I was seen to be a fairly natural candidate. The foundation is a fairly small foundation as foundations go at the national level, but it has made quite an impact in terms of the work that it has done. Since I left the board, it has shifted more into behavioral economics, a little away from sociology, and it still continues to fund research and to undertake projects proposed by people who are resident scholars at the foundation, as well as external scholars. They have an annual meeting once a year in New York to which they invite the past members of the board, and I've tried to go because I think it's important to maintain — how shall I say — I guess a connection to the foundation. So I'll be going probably in November to the meeting this year. I wasn't able to go last year because it conflicted with that wonderful award that I was being given from the faculty and I couldn't make it.

LABERGE: Budd Cheit was on that with you, right?

KAY: He was, yes. Budd was a member of the board when I was the chair, and I believe he has rejoined the board. Maybe he never went off. I'm not sure how long he has been on the board but yes, he's been on the board. Neil Smelser, from Berkeley, was on the board, and I think still is on the board. Those are the two from Berkeley who were active.

LABERGE: And have you been able to influence who has been asked to be on the board?

KAY: I made a number of suggestions when I was active on the board. I have not done so since that time. They don't usually solicit nominations from prior board members. Although I'm sure I could write a letter and make a suggestion to them, but I just haven't done that.

The second private foundation with which I am involved is the Rosenberg Foundation in San Francisco. It's devoted to improving living

conditions of children and youth in California. Ruth Chance was its executive director for many years.

LABERGE: Yes, we have an oral history with her, and I think maybe even somebody from our office talked to you about her.

KAY: Yes, somebody did.

LABERGE: And she's a graduate of Boalt Hall also?

KAY: She's a graduate of Boalt Hall, that's right. She and Barbara Armstrong, of course, were very close. Ruth was still the executive director the first time they asked me to join the board, and at that point I was heavily involved with the Rosenberg Foundation — no, that can't be right. Maybe I was involved with the AALS . . .

LABERGE: Or the Russell Sage?

KAY: Well, I'm looking at my résumé — here's "a member of the Rosenberg Foundation" — yes, that's right, '78. That's right. I was involved with the Russell Sage board and I said I can't do two foundations at once, and so they waited and gave me another invitation later on. So I did join that board and actually was a member of that board at the time that I was chairing the Russell Sage Foundation board. I'm still a member of the Rosenberg Foundation board. They have a rotation for the officers and it's done by seniority. So I was vice president from '85 to '87, president from '87 to '89. Leslie Luttgens is also on that board, and Leslie has been there longer than I have. Every time the rotation comes back to us, Leslie and I sort of tip our hats [laughs] and step aside so the younger members can come up and stay on.

LABERGE: It sounds like from the beginning this one had more women than any of the others.

KAY: It did, yes — and I think that's because of Ruth Chance, right. She certainly saw to it. Kirke Wilson succeeded her after she stepped down as executive director and Kirke is still there, so they've had wonderfully consistent leadership. Because of who Ruth was and because of her activity in the Council on Foundations generally, and also Leslie's activities in the Council on Foundations, the Rosenberg Foundation has had more of an influence in terms of the ethical role foundations ought to play in philanthropy. It has been really quite important, I think, for the way foundations

and philanthropic enterprises are understood, even as against the ones who have so much money that the little bit that we have to spend is totally dwarfed in comparison. But I think its influence has been really quite important.

That foundation has played a remarkable effort in trying to deal with improving the living conditions of immigrants who come to California, trying to get them into the mainstream of society and workplace. It has worked on efforts to try and overcome Proposition 187 (November 1994). We financed a fair amount of the legal challenge to Proposition 187. We're now helping to fund the litigation against Wal-Mart that Equal Rights Advocates is participating in, because that again goes to the question of making the workplace nondiscriminatory to people of different sexes and races and backgrounds. So it's really quite a high-profile organization that again, under Ruth's leadership, looked for cutting-edge issues where it could go in and make a kind of showing that this was important in the hopes of getting other foundations with more resources to accompany us into these fields. By and large, the foundation's been quite successful in doing that, so I'm very happy to continue on that board and think it's quite important. As a matter of fact, on Monday we're going to have a four-hour meeting in which we engage in strategic planning about the next ten years, so that'll be quite interesting to see.

LABERGE: I noticed that there's a new focus on either family law or . . .

KAY: Well, we had a project on enforcing child support. That's now been completed, and I think we all think that we did a fair amount to make some progress there. Child support enforcement is such a morass that it's very hard to get anything lasting really accomplished in that field, and I think we gave it a good try but I wouldn't count that as one of our major success stories.

LABERGE: I wondered how much you had any influence on choosing that as one of the things you looked at.

KAY: I was interested in it, but I think the idea really came — it was one of Kirke Wilson's ideas. He had met with some people in Los Angeles, which is where the real problem was because of the enormous amounts of unenforced child support orders that they have there. There has been an utter failure of the California computerized child support enforcement

efforts, which never worked properly. California is now out of compliance with the federal guidelines on this — I forget how much they're fining California. It may even be a million dollars a year, or whatever — some outrageous amount. California has just done nothing in order to try and get themselves up to snuff on this, so it's not a happy situation. [laughs]

KAY: The Foundation Press is a commercial publisher publishing legal materials, casebooks primarily. It was originally owned by the West Publishing Company and it — like practically every other legal publisher — has been taken over by the Thomson Company, which is now its owner. Foundation Press is a prestige publisher that publishes the leading casebooks written by the leading authors of — I can say that because my casebooks are all published by West [laughs], not by Foundation. It has an advisory board of law professors who advise the press on every piece of paper they publish. It has set very high standards and that's been, fortunately, commercially quite successful. So I'm paid for my service on that board; that's one of my external consultantships that I list on my annual disclosure forms. We meet once a year in New York, which is where the organization is now located, and we communicate by e-mail and we review manuscripts and make suggestions about them. Again, I was the first woman to serve on that board.

LABERGE: That's what I wondered.

KAY: We now have several women serving on the board.

LABERGE: How are the people chosen?

KAY: They're chosen by the board members.

LABERGE: Do you know who chose you?

KAY: Yes, I do know. Harold Eriv, who was at that point the president of Foundation Press, asked me to become a member of the board and I did. I'm sure the board members had recommended me to him.

LABERGE: How did you know him?

KAY: Oh, everybody knew Harold! [laughs] Harold was the one who visited law professors in their office, and made trips to law schools. He used to do it by himself and then later on they hired a stable of sales representatives



HERMA HILL KAY WITH HER HUSBAND, CARROLL BRODSKY,  
AND HER DOG ON THE TERRACE OF THEIR APARTMENT IN  
SAN FRANCISCO, CA. 1979-80

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who went around. They come in, they knock on your door, and ask, “What are you teaching this year? What books are you using? What do you need?” Harold, of course, being — among everything else — probably the best person with a native eye for nuance and gossip, acted as kind of the communications resource among all the law schools [laughs] and picked up everything. So, yes, everybody knew Harold. [laughs]

LABERGE: Well, he picked you up. [laughs]

KAY: Yes, he did. He sure did. He’s now retired and we have another person who was his replacement who’s doing very well. His name is Steve Errick. Of course, the whole operation has now become much more business-oriented than it was before, because of the Thomson Company’s insistence on a corporate hierarchy model.

LABERGE: This might be a good segue into your personal life and how you were able to do all this outside activity, how you were able to teach, be a dean, and still have some other kind of life.

KAY: Well, you understand I never have given birth to a child. [laughs]

LABERGE: That’s a major factor, yes!

KAY: It is a major factor. I’ve never had to deal with juggling care of infants and young children. My first two marriages were childless. My first husband, whom we’ve mentioned, was an artist and really had no sort of geographical demands. My second husband, Larry Kay, who is a graduate of Boalt Hall and who’s now a judge in San Francisco — he’s a Court of Appeal judge; presiding judge actually now — we had no children either, and he was of course working full time, as I was. Then my third husband, to whom I’m still married, Carroll Brodsky, was a widower when we married and he had three boys. There’s a picture of him and the three boys over on my desk. I adopted the youngest boy, who at that point was twelve. The oldest boy was leaving to go to college the year we got married so he never lived at home. The middle son and the younger son both lived with us in San Francisco, but I just didn’t have the kind of time demands that many women have with babies and young children. The boys were always very accommodating. When I went to spend that semester as a visiting professor at Harvard, Tom — the youngest boy, the one I adopted — went with me to Cambridge. So we spent a semester there together and he went to



HERMA HILL KAY'S HUSBAND, CARROLL BRODSKY  
(THIRD FROM LEFT), WITH HIS THREE SONS (LEFT TO RIGHT),  
TOM, MICHAEL, AND JOHN, 2002

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school and I went to teach at Harvard, and Carroll came to visit us a couple of times. He couldn't leave his medical practice.

LABERGE: But you took on the whole mother role.

KAY: Oh yes. But, you know, it's different being the mother of teenage boys than being the mother of teenage girls. [laughs]

LABERGE: Right, but it still can be a challenge.

KAY: Oh yeah, oh yeah. But it was an element of my life that was just really wonderful to be able to have. And we now have four grandchildren — three are children of the middle son, John, and the youngest one is the son of the oldest boy, Michael.

LABERGE: Tom, Michael, and John.

KAY: Tom, Michael, and John. So we now have four grandchildren and they are utterly wonderful. [laughs]

LABERGE: [laughs] On that note, in watching your students or other women faculty, do you see how being a parent has affected either their tenure or their professional life in what they've been able to do?

KAY: Oh, yes. This is one of the things where history sort of folds back on itself, because one of the things that I was active in trying to get done when I was chair of the Academic Senate was to create a half-time tenure position that we finally managed to get through. Arlie Hochschild was one of the first women — if not the first — to hold that position where she was half time in the Department of Sociology and was not half time anywhere else. Her family was the other half time. That was a really major breakthrough when we got it accomplished, because there was a lot of opposition to it. Then, in the last several years, when I was, as dean, serving on the Council of Deans, I started hearing all this objection by people who were saying, "Well, you can't offer half-time positions to women faculty even if they want them because that discriminates against women on the basis of sex." I said, "Hey, wait a minute! [laughs] There's a history here about creating this position for women who wanted to be able to have half time in the professional academic world and half time as mothers. And it was always available to fathers."

LABERGE: Oh, it was?

KAY: Oh, yes. It was not limited to women. In a couple of small departments there were husband and wife teams who were hired as half-time faculty members using one position, right? Of course, then we had a few problems when one of them — when they got divorced. [laughs] But that's a different issue.

LABERGE: So that happened, too?



HERMA HILL KAY AND HER HUSBAND, CARROLL BRODSKY,  
AT THE AMERICAN BAR ASSOCIATION MEETING  
IN LONDON, JULY 2000

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KAY: It did happen, too; yes, that's right. Both of them wanted full-time positions after the divorce, but only one position was available. But no, I've always thought the half-time position was a good idea. Then, of course, the question is, what happens if this half-time person wants to go full time? You then would have a question of — what other positions do you have available, do you want to expand this position? It would be like competing with another person for that position. You wouldn't have any edge in getting it, but neither would you be disqualified from getting it.

LABERGE: Yes.

KAY: But I always thought that was a great idea.

LABERGE: I'm glad we brought that up because I don't think we mentioned that when we talked about the Academic Senate.

KAY: We might not have.

LABERGE: That's still in existence, too?

KAY: That's still in existence, yes. I don't know how often it's used anymore but it's still in existence.

LABERGE: Okay. Back to your personal life. Even so, you do an amazing amount. As we were going through the list of the ALI, et cetera, and you say, "They've asked me to do such and such and I'm happy to do it." Well, being "happy to do it" means quite a bit of time.

KAY: I'm organized. [laughs]

LABERGE: You are definitely, definitely organized.

KAY: I also swim. I like to say I swim every day; actually, I swim about five times a week.

LABERGE: You fit that in before you come to campus?

KAY: No, usually it's in the afternoon.

LABERGE: You do that, and what other hobbies, what else do you juggle?

KAY: I garden. I grow roses and orchids on my balcony in San Francisco. I go for walks. I particularly like that wonderful walk along the San Francisco Bay out at Crissy Field.

LABERGE: Yes, and Land's End?

KAY: Yes, it's marvelous. And I read. I watch baseball — Barry Bonds is about to hit 660. I watch football, the 49ers are looking like they might have a chance this year. I watch all that on television. I don't go to games. I think that's about it. I don't fly anymore. I told you about that?

LABERGE: You did not tell me about that.



HERMA HILL KAY, THE  
AIRPLANE PILOT, ON  
THE WING OF THE PIPER  
CUB AT THE HAYWARD,  
CALIFORNIA, AIRPORT IN  
THE EARLY 1970S

KAY: Oh, I didn't tell you about that? Well, my second husband, Larry Kay, was a private pilot — he had an airplane. It occurred to me as I was sitting there in the right-hand seat as they call it, that if anything bad happened I probably ought to know how to land the thing. So I earned a private pilot's license and actually flew pretty consistently once a week — I had about 300 hours in flight time — until I married Carroll. Then when those two boys came to live with us [laughs] I no longer had time to go flying. That's what I gave up. But that was great fun, I enjoyed it.

LABERGE: I don't have any — I mean there are lots of things we could talk

about but I don't have anything we absolutely have to say. Anything else you want to add?

KAY: I don't think so. I do think that when you start transcribing this, if there are parts that I want to expand on I guess we could do that.

LABERGE: Yes, absolutely. Okay. I want to thank you very much for doing this for posterity and for research — other women will be using this, I'm sure.

KAY: Well, I want to thank you. You've been a wonderful person to work with.

LABERGE: [laughs] Thank you.

# HERMA HILL KAY

## CURRICULUM VITAE

### PRESENT POSITION

Barbara Nachtrieb Armstrong Professor of Law, School of Law, University of California, Berkeley.

### EDUCATION

B.A., Southern Methodist University, Dallas, Texas, 1956.

Phi Beta Kappa; Magna Cum Laude; Departmental Distinction in English.

J.D., The University of Chicago Law School, 1959.

Member, Order of the Coif; Book Review Editor, *Chicago Law Review*.

### HONORARY DEGREES

LL.D. (Honoris Causa), Southern Methodist University, 1992.

LL.D. (Honoris Causa), Mills College, 2000.

### PROFESSIONAL EXPERIENCE

University of California, Berkeley:

Barbara Nachtrieb Armstrong Professor of Law, 1996–.

Dean, 1992–2000.

Richard W. Jennings Professor of Law, 1987–1996.

Professor of Law, 1963–1987.

Associate Professor of Law, 1962–1963.

Assistant Professor of Law, 1960–1962.

Hamline University School of Law:

Bush Foundation Distinguished Visitor, September 1985.

Northwestern School of Law, Lewis & Clark College:

Distinguished Higgins Visitor, October 1984.

Harvard Law School:

Visiting Professor, Fall 1976.

University of Manchester, England:

Visiting Simon Professor, 1972.

National Conference on Uniform State Laws:

Uniform Marriage and Divorce Act, Co-Reporter, 1968–1970.

California Supreme Court:

Law Clerk to Justice Roger Traynor, 1959–1960.

## ADMITTED TO PRACTICE

U.S. Court of Appeals for the Second Circuit, 1995.

U.S. Supreme Court, 1978.

U.S. Court of Appeals for the Ninth Circuit, 1960.

U.S. District Court for the Northern District of California, 1960.

State Bar of California, 1960.

## AWARDS AND HONORS

Berkeley Faculty Service Award, 2007.

Faculty Lifetime Achievement Award, Boalt Hall Alumni Association, 2003.

Career Achievement Award, Women Lawyers of Alameda County, 2002.

Bernard Moses Memorial Lecturer, UC Berkeley, 2000–2001.

American Philosophical Society (elected Member, 2000).

Wiley Manuel Law Foundation Community Service Award, 1999.

Allies for Justice Award, National Lesbian and Gay Law Association, 1996.

Marshall–Wythe Medallion, The College of William and Mary, 1995.

Margaret Brent Women Lawyers of Achievement Award, Commission on Women in the Profession, American Bar Association, 1992.

Fellow, American Bar Foundation (elected, March 1991).

Research Award, Fellows of the American Bar Foundation, 1990.

Fellow, American Academy of Arts and Sciences (elected, May 1989).

Barbara Nachtrieb Armstrong Award, *Berkeley Women's Law Journal*, 1985.

SALT Teaching Award, Society of American Law Teachers, 1984.

Distinguished Teaching Award, University of California, Berkeley, 1962.

## GRANTS AND FELLOWSHIPS

Co-Investigator, California Divorce Law Project (financed by NIMH and NSF), 1973–1978. (Lenore Weitzman, Principal Investigator).

Director, Family Law Project (financed by the Children's Bureau, U.S. Department of Health, Education, and Welfare), 1964–1967.

Fellow, Center for Advanced Study in the Behavioral Sciences, Palo Alto, California, 1963–1964.

## MEMBERSHIP ON GOVERNING AND ADVISORY BOARDS

### American Academy of Arts and Sciences:

Member, The Western Central Executive Council, 1991–1993.

### American Bar Association:

Member, ABA/AALS/LSAC Joint Committee on Racial and Ethnic Diversity, 2001–.

Secretary, Section of Legal Education and Admissions to the Bar, 1999–2001.

Member, Council of the Section of Legal Education and Admissions to the Bar, 1993–1999.

Chair, Diversity in Legal Education Committee, 1996–2000.

Chair, Planning Committee for the 1994 Annual Meeting Program, 1993–1994.

Member, Commission to Review the Substance and Process of the ABA's Accreditation of American Law Schools, 1994–1995.

### American Bar Foundation:

Member, Executive Committee, 2000–2003.

Member, Board of Directors, 1995–2003.

Member, Research Committee, 1991–1995.

### American Law Institute:

Member of the Council, December 1985 – June 30, 2011.

Member, Executive Committee, 2000–2007.

Chair, Special Committee to Review the Rules of Council and the Bylaws, 1993–1995.

Life Member, 2003

### Association of American Law Schools:

Member, Executive Committee, 1986–1990.

President-Elect, 1988.

President, 1989.

Immediate Past President, 1990.

Chair, Nominating Committee, 1992.

Member, Nominating Committee, 1993.

Member, *Journal of Legal Education* Editorial Board, 2001–2004.

### California State Bar:

Member, Commission on the Future of the Legal Profession and the State Bar, 1993–1995.

Law School Representative, Law School Council of the Committee of Bar Examiners, 1993–1995.

Member, Family Law Committee, 1965–1969.

California Women Lawyers:

Member, Board of Governors, 1975–1977.

Equal Rights Advocates, Inc., San Francisco:

Member, Board of Directors, 1973–1999.

Chairperson, Board of Directors, 1977–1983.

Family Violence Appellate Project, Berkeley:

Member, Board of Directors, 2012–.

Foundation Press:

Member, Editorial Board, 1977–.

Order of the Coif:

Member, Executive Committee, 1977–1980.

National Vice President, 1980–1983.

National President, 1983–1985.

Chair, Triennial Book Award Committee, 1990–1993.

Rosenberg Foundation, San Francisco:

Member, Board of Directors, 1978–.

Vice-President, 1985–1987.

President, 1987–1989.

Russell Sage Foundation, New York City:

Member, Board of Directors, 1973–1987.

Chairperson, Board of Directors, 1980–1984.

San Francisco Lawyers' Committee for Urban Affairs:

Member, 1978–.

United States Secretary of State's Advisory Committee on Private International Law, Study Group on International Child Abduction by One Parent:

Member, 1978–1980.

## CALIFORNIA STATEWIDE COMMITTEES AND COMMISSIONS

Member, Lieutenant Governor Cruz M. Bustamante's Commission for One California, 1999–2003.

Member, California Commission on Campaign Financing, 1993–97.

Member, Senator Dianne Feinstein's Statewide Advisory Committee on Judicial Appointments, 1992–1996.

Member, California Coordinating Committee for International Women's Year, 1977.

Member, Governor Edmund G. "Pat" Brown's Commission on the Family, 1966.

## MEMBERSHIP IN PROFESSIONAL SOCIETIES

American Bar Association

American Law Institute

California Women Lawyers

National Association of Women Lawyers

Queen's Bench Bar Association, San Francisco

Women Lawyers of Alameda County

## SERVICE ON UNIVERSITY COMMITTEES

Member, Faculty Advisory Committee, Presidential Search Committee, 2007–2008.

Member, Dean's Advisory Council, UC Irvine Law School, 2009–.

Chairperson, Faculty Screening Subcommittee and Member, Committee to Advise the President on a Chancellor for the Berkeley Campus, Spring 2004.

Chair, Systemwide Academic Senate Committee on Academic Freedom, 2005–2006.

Vice-Chair, Systemwide Academic Senate Committee on Academic Freedom, 2004–2005.

Member, Academic Senate Committee on Academic Freedom, 2003–2004.

Member, Search Committee for Director of Continuing Education of the Bar, 2003.

Member, Coordinating Committee on the Status of Women (CCSW), 2001–2003.

Member, Search Committee for Dean of the Haas School of Business, 2001–2002.

Member, Committee to Advise the President on the Selection of a Provost and Senior Vice President – Academic Affairs, 1995–1996.

Member, Search Committee for Berkeley Chancellor, 1989–1990.

Chairperson, Academic Senate Committee on Privilege and Tenure, 1986–1987; Member, 1985–1986.

Chairperson, Academic Senate Committee on Teaching, 1984–1985; Member, 1965–1967; Chairperson, 1967–1968.

Chairperson, Academic Senate Committee on Budget and Interdepartmental Relations, 1982–1983; Member, 1979–1982.

Member, Universitywide Committee on Academic Personnel, 1982–1983.

Member, Academic Senate-Administration Committee on Faculty Retirement Policy, 1978–1979.

Member-at-Large, Berkeley Representative Assembly, 1974–1976.

Member, Universitywide Academic Planning and Program Review Board (APPRB), 1974–1977; only faculty member on APPRB Steering Committee, 1975–1977.

Member ex officio, University of California Statewide Academic Council and Representative Assembly, January 1, 1973 – September 30, 1974.

Chairperson, Berkeley Division of the Academic Senate, January 1, 1973 – September 30, 1974.

Member, Berkeley Academic Senate Committee on Committees, 1970–1972.

Chairperson, Berkeley Women's Faculty Group, 1969–1970.

Member, Senate Policy Committee, 1968–1970.

Member, Special Committee on Distinction in Teaching, 1964–1965.

## SUBJECTS TAUGHT

Conflict of Laws

Sex-Based Discrimination

Family Law

California Marital Property

Workshop on Judging (with Geraldine Sparrow)

Family Law Seminar

Law and Psychiatry (with Irving Philips)

Law and Anthropology (with Laura Nader)

Civil Procedure

## INVITED LECTURES

Panelist, AALS Workshop on Women Rethinking Equality, June 20–21, 2011, Panel on Women Advocates: Teachers and Learners Across Generations. *Topic*: “Soia Mentschikoff: The ‘Czarina’ of Legal Education.”

Lecturer, Grand Rounds, UCSF Department of Psychiatry, April 14, 2004. *Topic*: “Tailoring Family Law to Evolving Family Forms: A Forty-Year Project that Remains Unfinished.”

Lecturer, International Women’s Day Celebration, Washington University in St. Louis Law School, March 4, 2004. *Topic*: “Celebrating Early Women Law Professors.”

Lecturer, The Graveson Memorial Lecture, Kings College, London, December 11, 2003. *Topic*: “Same-Sex Divorce in the Conflict of Laws.”

Lecturer, The 2003 Sidney and Walter Siben Distinguished Professorship Lecture, Hofstra Law School, March 14, 2003. *Topic*: “‘Making Marriage and Divorce Safe for Women’ Revisited.”

Lecturer, The Frank Irvine Lecture, Cornell Law School, April 18, 2002. *Topic*: “Women Faculty at Cornell Law School and the University of California, 1900–2000.”

Lecturer, The Brigitte Bodenheimer Memorial Lecture, UC Davis Law School, February 21, 2002. *Topic*: “UC’s Women Law Faculty.”

Keynote Speaker, Twenty-Fifth Anniversary of the Marin County Women Lawyers’ Association, Sausalito Yacht Club, November 14, 2001. *Topic*: “Twenty-Five Years of the Marin County Women Lawyers’ Association.”

Lecturer, The Bernard Moses Memorial Lecture, University of California, Berkeley, November 14, 2000, Alumni House, UC Berkeley. *Topic*: “From the Second Sex to the Joint Venture: An Overview of Women’s Rights and Family Law During the Twentieth Century.”

Lecturer, Law Schools and the Legal Profession: A Conference in Celebration of Twenty-Five Years of Service by James P. White, Indianapolis, Indiana Law School, April 8, 2000. *Topic*: “The Challenge to Diversity in Legal Education.”

Lecturer, The Goldmark Lecture, Legal Foundation of Washington, Seattle, Washington, January 23, 1998. *Topic*: “The Impact of Proposition 209 and the UC Regents’ Resolutions on Legal Education in California’s Public Schools.”

Speaker, University of Chicago Law School Alumni, San Francisco, January 7, 1998. *Topic*: “Affirmative Action at the University of California Law School.”

Honoree, The Marshall–Wythe Medallion Lecture, Marshall–Wythe School of Law, November 4, 1994. *Topic*: “Women Law Professors.”

Lecturer, The Korean Judicial Training Institute, Seoul, Korea, September 15, 1993. *Topic*: “Emerging Trends in American Family Law and Conflict of Laws.”

Lecturer, The Baker–McKenzie Foundation Lecture, Loyola University School of Law, Chicago, March 22, 1990. *Topic*: “Women Lawyers vs. Lawyers Who Happen To Be Women: Is This Choice Viable?”

Hague Academy of International Law, Special Course, July 17–21, 1989. *Topic*: “A Defense of Currie’s Governmental Interest Analysis.”

Lecturer, The Henry J. Miller Distinguished Lecturer, College of Law, Georgia State University, September 28, 1989. *Topic*: “What Is Legal Education? And Should We Permit It To Continue in Its Present Form?”

Lecturer, Robert S. Marx Lectures, School of Law, University of Cincinnati, April 3–4, 1986. *Topic*: “Equality and Difference: A Perspective on No-Fault Divorce and its Aftermath.”

Lecturer, The David Baum Memorial Lecture, School of Law, The University of Illinois at Urbana–Champaign, September 17, 1984. *Topic*: “Models of Equality.”

Lecturer, The San Diego County Law Library Lecture Series, San Diego, California, April 25, 1980. *Topic*: The Aftermath of *Hisquierdo*: Military Pensions, Social Security, ERISA.”

Keynote Address, AALS Workshop on the Professional Development of the Woman Law Teacher, Cincinnati, Ohio, October 5, 1979. *Topic*: “Promotion, Retention, and Tenure.”

Six-Hour Lecture to practicing attorneys for California Continuing Education of the Bar Summer Program, August 1978. *Topic*: “Recent Developments in Family Law.”

Opening Address at Eighth National Conference on Women and the Law, Madison, Wisconsin, March 1977. *Topic*: “The Equal Rights Amendment and Family Law: Last Frontier for Change.”

Keynote Address at Women's Pre-Conference Conference, Council on Foundations Annual Meeting, Atlanta, Georgia, May 1976. *Topic*: "The Changing Legal Status of Women."

Opening Lecture, Montana State Bar Association, December 1975. *Topic*: "The Uniform Marriage and Divorce Act: What it Means in Montana."

Keynote Address at Conference on the Homemaker, sponsored by University of Wisconsin Extension and the Wisconsin Commission on the Status of Women, Madison, Wisconsin, September 1974. *Topic*: "The Legal Economics of Marriage and Divorce."

Luncheon Speaker, Honoring Wives of President and President-Elect of the American Psychiatric Association, 127th Annual Meeting of the American Psychiatric Association, Detroit, Michigan, May 1974. *Topic*: "Sex-Based Discrimination in Marriages by and between Professionals."

Graduation Address, SUNY/Buffalo Law School, Buffalo, New York, June 1973. *Topic*: "Will the Hand that Signs the Brief Change the Law?"

Lecture at Eagleton Institute Conference for Women State Legislators, Pennsylvania, May 1972. *Topic*: "How to Make Marriage and Divorce Safe for Women."

## MEMBERSHIP IN ORGANIZATIONS

National Organization for Women.

National Women's Forum.

National Women's Political Caucus.

Prytanean Alumnae, Inc.: Honorary Member, 1985-.

Women in Philanthropy.

The Metropolitan Club, San Francisco.

The Berkeley City Club.

Zonta Club of Berkeley: Member, 1967-85; President, 1980-81; Honorary Member, 1992-.

# HERMA HILL KAY

## BIBLIOGRAPHY

### BOOKS

TEXT, CASES AND MATERIALS ON SEX-BASED DISCRIMINATION (with Tristin K. Green) (7th Ed., 2012; West Group).

CONFLICT OF LAWS: CASES—COMMENTS—QUESTIONS (with Larry Kramer and Kermit Roosevelt, III) (9th Ed., 2013; West Group).

### BOOK CHAPTERS

“Same-Sex Marriage in the Conflict of Laws: A Critique of the Proposed ‘Defense of Marriage Act,’” in *THE CIVIL LAW IN THE 21ST CENTURY: Festschrift in Honor of Koji Ono on the Occasion of His Sixtieth Birthday* 831–843, (Hougakushoin, 1996).

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SPECIAL SECTION  
NINE SPEECHES BY  
JUSTICE  
ROGER J. TRAYNOR



JUSTICE ROGER J. TRAYNOR

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# NINE SPEECHES BY JUSTICE ROGER J. TRAYNOR

## PREFACE

HARRY N. SCHEIBER\*

In any list of the most admired and influential state judges in the nation's history, Roger Traynor stands at the very top level. Perhaps more than any other state judge of his day, Traynor sought explicitly to bring the law into line with the realities of mass (and diverse) society in the modern industrial world. Traynor did so under the banner of "judicial creativity." He believed that for courts always to defer passively and mechanically to doctrinal precedent was inconsistent with the great common law tradition, whose essence was the capacity for adaptation, change, and growth. Equally, he believed that it was inconsistent with American ideals regarding democratic governance for the courts to fail in their role as full partners in the process of legal ordering.

Where the court moved in an "activist" mode to institute change, as in the tort revolution that his decisions led — an area of the law in which "creativity" required innovation and doctrinal departures — Traynor built on the great Anglo-American judicial tradition of adaptation rather than perpetuating a mindless faithfulness to rules that no longer were responsive

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\* Chancellor's Emeritus Professor; Riesenfeld Professor of Law and History, Emeritus; Director, Institute for Legal Research; and Director, Law of the Sea Institute, School of Law, UC Berkeley.

to the realities of modern California society, or doctrines that had produced manifest unfairness. In such instances, the court's innovations could be turned back in a day by a legislature determined to follow a different course of policy. With respect to constitutional decisions, too, Traynor did fearlessly what American courts must do if they are to be effective: Perhaps more than any state judge of his day, Traynor as a scholar and Traynor as a working jurist undertook fearlessly the reconsideration of the central concepts of constitutional law and their adaptation to the realities of the modern world.

In taxation (Traynor's teaching field at Boalt Hall before he went on the bench), in land law, and in conflict of laws, he was brilliant in the ways he applied conventional legal reasoning to produce practical consequences that did not offend modern notions of efficiency, justice, and legality. In family law, race relations, and the processes of the criminal justice system, Traynor's innovations blazed the path that other courts, and ultimately the U.S. Supreme Court, would follow. In tort reform, Traynor was of truly unique importance both for his basic jurisprudential methodology and for the results. And yet, for all his contempt for "judicial lethargy," and despite the boldness with which he sought to demonstrate the obsolescence of established but unfair or outmoded (or ridiculous) rules of law, Traynor's pragmatism extended to supporting in a sympathetic way what he saw as the legitimate activities and methods of the executive branch, not least the law enforcement agencies and officers. He did not reject wholesale the conservative activism of an earlier generation of judges, nor indeed that of some of his own colleagues on the Court; like others of the best "activist" judges, whether in a conservative or liberal mode, or still other "activists" who were simply difficult to label, Traynor was willing to acknowledge explicitly his penchant for creativity. Still, he was faithful — perhaps without peer in his day — to the requirement that a judge provide a carefully reasoned and clearly crafted opinion in reaching an innovative conclusion. Moreover, he was ever mindful of the heavy responsibility for assuring fairness, for maintaining the health of the law, and for protecting the integrity of the judicial branch.

Not least important, historically, is that with able fellow justices who served with him during his long tenure, the California Supreme Court was widely recognized as the most distinguished state bench in America. It was influential in shaping the direction of the law in many other state courts, as well as pointing the way to some major U.S. Supreme Court decisions.

This raises the most interesting question of all: the question of how, why, and in what ways, a state high court has truly and accurately lived up to the “bellwether” and “great exception” titles, has produced the kind of law — and innovations — that have come forward in a particular period of its history.

There is no simple answer. Rather than taking the posture of having a full and persuasive solution to that historical puzzle, I take courage in concluding with a recollection from an early occasion in my career: It happened at a panel at a UC Davis–sponsored meeting on the subject of legal innovation and agricultural development in the history of the Far West.<sup>1</sup> I had the great honor of being introduced as speaker by Roger Traynor, recently retired as chief justice and then a professor at UC Hastings College of the Law. In light of Chief Justice Traynor’s reputation for oratory, which was no smaller than his reputation for erudition, all of us historians and others in that room were looking forward to what he would say in his assigned ten-minute slot as panel chair. We were certain he would provide an exposition offering important guidance on the approach we should be taking in analyzing the historical dynamics of legal change and innovation.

Roger Traynor did indeed give us his views — but to our amazement he took only about twenty seconds to do it. Let me quote his words. The papers in that panel, he said, “confront questions much like the one I was once called upon to unriddle: How does law evolve?” He paused . . . then continued, “Well, how does a garden grow?” Another pause, . . . and then he ended with, “How does agriculture in the West evolve?”<sup>2</sup> That was it. He sat down and graciously turned the podium over to us.

I have reflected many times on Chief Justice Traynor’s statement of the question over the years, and I am still at a loss to come up with a better description of what is involved when we give our own best efforts at “unriddling,” to use his word, the processes of legal evolution, including the dynamics of legal innovation.

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<sup>1</sup> Symposium on Agriculture in the Development of the Far West, UC Davis, June 19–21, 1974. See Harry N. Scheiber and Charles W. McCurdy, *Eminent-Domain Law and Western Agriculture, 1849–1900*, 49 *AGRICULTURAL HISTORY* 112 (1975).

<sup>2</sup> Roger J. Traynor, *Law and Government Policy for Agriculture: An Introduction*, 49 *AGRICULTURAL HISTORY* 111 (1975).

## NINE SPEECHES BY JUSTICE ROGER J. TRAYNOR

### EDITOR'S NOTE

Well known today for his legacy of legal writings, both in opinions and essays,<sup>1</sup> Justice Roger Traynor was equally well known by his contemporaries for the eloquent, yet direct and vivid, style of his oral communications. He was a frequent speaker at legal events during his years as an associate justice of the California Supreme Court (1940–1964), chief justice (1964–1970), and after his retirement from the Court. But rarely have the unmediated words of his spoken voice been transmitted to posterity. This volume of *California Legal History* is fortunate to present a group of speeches by Justice Traynor, ranging in date from 1940 to 1974. They have been graciously made available for publication by the UC Hastings College of the Law Library from the Roger J. Traynor Collection in their Special Collections. These are reproduced from the preserved manuscripts of his speeches, with minor copyediting for publication and the addition of necessary citations, footnotes and a short introduction to each group of speeches.

—SELMA MOIDEL SMITH

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<sup>1</sup> See, for example, *THE TRAYNOR READER: NOUS VERRONS: A COLLECTION OF ESSAYS BY THE HONORABLE ROGER J. TRAYNOR* (San Francisco: The Hastings Law Journal, 1987), which includes his major essays, a bibliography, and biographical appraisals.

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## TABLE OF CONTENTS

ON LAWYERS AND JUDGES . . . . .	218
I. ON LAWYERS AS GUARDIANS OF DEMOCRACY AGAINST TOTALITARIANISM (1940). . . . .	218
II. STARE DECISIS VERSUS SOCIAL CHANGE (1963). . . . .	221
III. OPENING ADDRESS, CALIFORNIA COLLEGE OF TRIAL JUDGES (1967) . . . . .	225
ON THE PUBLIC DEFENDER . . . . .	228
I. REMARKS AS MODERATOR, NATIONAL DEFENDER CONFERENCE (1969) . . . . .	228
II. ADDRESS, NATIONAL DEFENDER CONFERENCE (1969). . . . .	235
ON CONSTITUTIONAL RIGHTS . . . . .	243
I. THE RIGHT OF THE PEOPLE AGAINST UNREASONABLE SEARCH AND SEIZURE (1941) . . . . .	244
II. ON <i>MAPP v. OHIO</i> AT THE CONFERENCE OF CHIEF JUSTICES (1962) . . . . .	249
III. <i>MAPP v. OHIO</i> STILL AT LARGE IN THE FIFTY STATES (1964) . . . . .	261
IV. THE FIRST AMENDMENT'S MOBILE TRIANGLE: MEDIA, PUBLIC AND GOVERNMENT (1974). . . . .	274

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## ON LAWYERS AND JUDGES

The first of the speeches presented here was delivered in September 1940 at the Lawyers' Club of Los Angeles, one month after Justice Traynor's appointment to the California Supreme Court. The subject is the role of the American lawyer in combating the danger to American liberty posed by the successes of totalitarian regimes at the start of World War II. Of special note — at this early date — is his line of reasoning that traces the spirit of personal liberty from the American tradition of democratic lawmaking to a lawyer's duty for legal innovation: "The law is not an encyclopedia to which lawyers may rush," he claims, but rather, it thrives on "conflict and fresh interpretation." This demand for legal innovation prefigures the recurring theme of much of his later writing — his insistence on legal innovation by judges — and it is the topic of the second speech presented here, "Stare Decisis versus Social Change" of 1963. The third speech contrasts the roles of lawyers and judges, and highlights the need for specialized training of judges, at the opening session of the California College of Trial Court Judges in 1967. (S.M.S.)

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### I. ON LAWYERS AS GUARDIANS OF DEMOCRACY AGAINST TOTALITARIANISM (1940)<sup>1</sup>

I have been looking forward to this meeting, for now I can think aloud with you about one of the questions that has been haunting me since I undertook a job where one must eventually answer whatever query arises. While dive-bombers blow up the earth with a speed that leaves us with a sense of terrible impermanence, it is difficult to hold fast to values which are dancing on their foundations, and I should like to consider the question whether you and I, as lawyers, stand to gain more from that easy democratic way of life which is now everywhere on the defensive than from the rigorous submergence of individuals in a single-minded group.

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<sup>1</sup> Address to the Lawyers' Club of Los Angeles, September 23, 1940.

Nothing succeeds like success, and the totalitarian methods which have left in Europe only the bleeding remnants of democratic doctrines have engendered revulsion in our country but also a harrowing doubt that perhaps the survival of the victorious is proof of their superiority. There is a dramatic impressiveness about regiments of men marching not to the inner strains of intellectual conviction, but to the Wagnerian thunderclaps of emotional faith. The man who has always had the sweet privilege of being left alone with his thoughts and his feelings blinks at the outward forcefulness of the groups of men who think and feel as they are directed. We have so long taken for granted the refuge of an inner sanctuary that we have never visualized what its loss would mean. Freedom of thought and speech are pleasant abstractions to live with which have seldom before seemed to us so rare and precious.

The butcher, the baker, and the candlestick-maker will be affected by the outcome of the present conflict of democratic and totalitarian doctrines, but none so much as the lawyer. That regulation of human relations which is law seeks in a democratic state to maintain the freedom of citizens, and in a totalitarian state to render the citizen subservient to the group. In the first instance the lawyer is himself a free citizen engaged in that formulation, revision and interpretation of laws which constitutes a perennial challenge to the mind. In the other instance he fulfills the ritual function of a high priest whose exposition of the law serves the religion of the state.

I leave it to others to compare the economic advantages of the average man in democratic and totalitarian states. We have reflected much of late on the tightening of belts amongst regimented peoples. There is even more reason for concern, however, about the consequences of the tightening of minds of entire populations.

In this country, to which men have always fled from economic serfdom and political tyranny, and then hewed their way as free men from the east coast to the west, the law has developed against the background of a democratic tradition of the utmost individual freedom consistent with law and order. The wider a citizen's activities within the community, the more he is subject to regulation, but he remains a free spirit, who may seek the revision of whatever law he considers unjust, and invoke a judicial interpretation of whatever law appears to him ambiguous.

It is a far cry from the tradition that every man may have his day in court to the doctrine that every man must bow to laws which he dare not criticize. We speak in this country of law and order as in conjunction, for a basic condition of order in a country of free men is a democratic judicial process. Elsewhere there is a new philosophy of the state whereby order rides herd over law and commands silent men to accept a judicial system enshrined above them like a primitive idol.

Under such a system most people may still go about their work, whatever the impoverishment of their spirits. The architect may build great buildings, and the engineer great bridges. The doctor may alleviate physical suffering, even though he must keep to himself whatever scientific theories may differ from those of the group. The skilled worker may produce fine steel, and the manual laborer may haul water and hew wood. But what of the lawyer, whose only tool is an alert mind and whose work has to do not with sticks and stones nor with physical ills, but with the abstract problems of human relationships?

Most of us learned young how the law thrives on the winds of inquiry. Succeeding years of experience in the practice of the law have intensified our awareness of how infinitely complex are human relations, and how much subtlety and depth of spirit must enter into their regulation. Legal problems confront us in shadows and half-lights, and defy easy elucidation. Often they elude any final solution, and those who are wise then content themselves with finding what Justice Cardozo called the least erroneous answers to insoluble problems. Lawyers and judges have worked hard to find these least erroneous answers, and they know as few laymen do that the constant search for approximate justice has made the laws of this country operate generally to protect the uninitiated from harsh legalism. It has not been easy to develop a law that affords a day-to-day justice while preserving a long-range stability, but great lawyers have enabled it to function like a beacon light which, from its focal point of *stare decisis*, illuminates the various angles of a legal problem.

The practice of the law in our country calls not merely for disciplined minds which can take cognizance of the limits set by precedent, but for critically alert minds which can clarify whatever inner darkness exists within those limits. The law is not an encyclopedia to which lawyers may rush and, to paraphrase James Stephens, elicit legal pearls as with a pin.

It thrives on that conflict and fresh interpretation which has enabled our democratic judicial processes to grind out with amazing steadiness legal principles and justice.

A country is only as democratic as its legal processes. It is proper that the lawyers and judges who have always played so large a part in our democratic government now constitute its first line of defense. Theirs is a two-fold obligation. They must by their own work preserve the whole-hearted respect of their communities for the law, and they must of their own efforts preserve the vital force of a democratic law against any other force in their communities. When people have free access to legal redress of their wrongs, and confidence in the integrity of their lawyers and their courts, they will not easily turn away in bitterness from democratic methods. The stillness of a ruthless totalitarian order need never descend upon us if we carry on alertly that endlessly exciting search for the legal principles which may best reflect the activities and aspirations of free men.

## II. STARE DECISIS VERSUS SOCIAL CHANGE (1963)<sup>2</sup>

It is common knowledge that lawyers base their everyday advice to clients on stare decisis. It is also common knowledge that stare decisis dominates in the adjudication of the exceptional controversies that reach a court. Surprisingly enough there are pockets of resistance to the common knowledge that among the exceptional controversies that reach a court there are some so extraordinary that they cannot be laid at rest within the ordinary confines of stare decisis. Even today, some forty years after Justice Cardozo's revealing commentary on the judicial process, occasional lawyers cling to the notion that it is for judges to state, restate, and even expand established precedents, but that they go beyond the bounds of the Judicial process when they create new ones. These mystics avoid the blunt fact that all precedents had once to be created by an obscure thought process that apparently equates the creativeness of ancient judges with divination and then equates divination with antiquity. Those befogged by such double

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<sup>2</sup> Dedication of the new Law Building, Duke University, April 26–27, 1963. Portions are drawn from his article, *La Rude Vita, La Dolce Giustizia; Or Hard Cases Can Make Good Law*, 29 U. CHI. L. REV. 223 (1962).

equations are untroubled by the attendant assumptions that the judges of another time have been wise beyond the capacity of contemporary judges and that they have had foresight enough to anticipate contemporary problems, when there is evidence so overwhelmingly to the contrary that it cannot be ignored by even the most obtuse. The mystics are still not ready to concede that contemporary revision or innovation can be left to the judges of our day. They would leave such tasks instead to the legislators of our day. To the objection that arriving and departing legislators may have little awareness of the developing problems of the common law, let alone a sense of its continuity, the anti-judges respond with the ipse dixit that the legislators have a unique sensitivity to popular needs or what is sometimes called an ear to the ground.

This way of thinking has enough vogue to warrant a reminder that we certainly cannot afford now, if we ever could, to play the law by ear. There are a number of objections to such improvisation. The most obvious is that one who relies on the ear rather than the mind offers no assurance of sensitive hearing. He may be quick to pick up the bellowing of small vocal groups and incapable of noting the murmurs of many individuals, the more so in an urban society, where there may be little reality to the supposed closeness of a legislator to the needs of all his constituents.

If we are really concerned with the last of the law, we should not minimize the role of the shoemaker who knows it best. His training, his experience, and his very office combine to develop in a judge a reliable sense of responsibility for the continuity of the law that perforce develops daily. No one is more appreciative than he of the stability that proceeds from *stare decisis*, of the solid base it affords for legal transactions, of the impartial application of the law that it makes possible. An appellate judge coming upon a precedent that he might not himself have established will ordinarily feel impelled to follow it to maintain the stability in the law that has value *per se*. Better the settled precedents that have proved reasonably in tune with the times than endless re-examinations that create uncertainty without ensuring improvement.

The great strength of the common law has been its reconciliation of this stability with a continuing evolution that has enabled it to respond sooner or later to the recurring reminders that there is nothing forever as of old under the sun. Sometimes a precedent can be amplified to cover a situation

that could not have been envisaged in an earlier day. Sometimes it can be diminished, through the process of distinction, to preclude its application to a situation that it could literally but not appropriately govern.

Now and again, however, particularly in a controversy that compels a judge to weigh conflicting interests in terms of a changing social context, contemporary weights given to such interests gradually vitiate the authority of established precedents and serve to develop a new line of precedents. Professor [Robert A.] Leflar has already considered such major changes in the evaluation of conflicting interests in tort law, such as the judge-made law expanding product liability, diminishing charitable immunities and sovereign immunity, and establishing new intra-family obligations.

In the course of such development old lines of precedent tend to linger in the shadow of the new, usually as harmless anachronisms though also as unseemly and occasionally confusing clutter. There are no good reasons, even sentimental ones, against overruling them outright once their day is clearly done. It better serves stability to abandon such precedents openly than to smother them with distinctions. A fortiori courts should overrule a precedent that was never sound and that served only to breed injustice or circumvention.

A judge who undertakes such an overruling must anticipate captious objections, usually more vociferous than serious ones. He can do this first by an exposition of the injustice engendered by the discarded precedent, and then by an articulation of how the injustice resulted from the precedent's failure to mesh with accepted legal principles. When he thus speaks out, his words may serve also to quicken public respect for the law as an instrument of justice.

Now that space and time are at a premium for the storage and study of even superlative matter, it is folly to clutter and confuse work papers with materials that are either obsolete or repetitious or ridden with inept or fallacious analysis. Less than ever can we assume that all the good enough thoughts and ways of yesterday are adequate today, however superbly undated some remain. There is no place in the living law for period pieces or parrot paragraphs or ill-conceived figments of what has passed as legal imagination.

Of course a judge is mindful that an overruling, unlike a statute, is normally retroactive. He is aware of the traditional antipathy to retroactive

law that springs from its recurring association with injustice; he reckons with the possibility that a retroactive overruling could entail substantial hardship. He may nevertheless be impelled to make such an overruling if the hardships it would impose upon those who have relied upon the precedent appear not so great as the hardships that would inure to those who would remain saddled with a bad precedent under a prospective overruling only.

An immediate consideration will be that statutes of limitation, by putting an end to old causes of action, markedly cut down the number of possible hardship cases. Again, the outworn precedent may be so badly worn that whatever reliance it engendered would hardly be worthy of protection. In some areas of the law, as in torts, it may be unrealistic to assume reliance at all. A person does not ordinarily commit or suffer a tort in reliance upon a tort precedent. Reliance seems the more implausible in relation to precedents embodying such concepts as governmental immunity or charitable immunity, which are overripe for overruling. Whatever the hardship a retroactive overruling may impose on a government or a charity that has failed to anticipate the risks of litigation by precautionary measures such as insurance, it would hardly outweigh the hardship that its tort has brought to others.

A court might decide, upon weighing the relative hardships, to give prospective effect to an overruling, following the example in *Great Northern Ry. v. Sunburst Oil & Refining Co.*<sup>3</sup> An overruling that is prospective only may appear particularly appropriate in such areas of the law as contracts and property; where reliance is apt to count heavily.

Such temporary application of the rule of an overruled case may be prescribed by appropriate legislation as well as by judicial decision, for the legislature is no less competent than the court to evaluate the hardships involved and decide whether considerations of fairness and public policy warrant the granting of relief.

However timely an overruling seems, a judge may still be deterred from undertaking it if there are good reasons for leaving the task to the legislature. What considerations make it preferable to leave liquidation to the legislature? Sometimes it becomes quickly apparent that if liquidation

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<sup>3</sup> 287 U.S. 358 (1932).

is to do more good than harm, there must also be construction of new rules of such scope that only the legislature with its freedom and resources for wholesale inquiry can effectively formulate them. For all the widespread dissatisfaction with contributory negligence, for example, a court would be reluctant to substitute some alternative such as comparative negligence, which would involve spelling out the details of apportionment, and would also affect the structure of liability insurance. There are comparable problems, as in the field of creditors' remedies that are better left to the legislature because their solution entails extensive study or detailed regulation or administration.

In sum, *stare decisis* serves us best when we recognize that precedents are here to stay but not to overstay.

### III. OPENING ADDRESS, CALIFORNIA COLLEGE OF TRIAL JUDGES (1967)<sup>4</sup>

This is a proud and memorable occasion for the California judiciary and I am delighted to be able to share it with you. In bringing its dream of a college for trial judges to fruition the Conference of California Judges, true to our state's pioneering tradition, puts California in the vanguard of states that are trying to improve the administration of justice by providing specialized instruction for members of the bench.

When I addressed the Conference at its 1965 annual meeting I commented on the excellent job that the Conference was then doing with its seminar program and exhorted it to continue and to expand its efforts in the field of judicial education. This evening's assembly shows that my exhortation has been heeded — or perhaps it was unnecessary. At that time I stated that it is a tribute to the unselfish devotion of our judiciary that you were able to find the time in your busy lives to do this fine work. I can only repeat that tribute tonight.

The successful launching of the College of Trial Judges has required the efforts of many judges and I shall not attempt to name them. The guiding impetus, however, has been the Conference's College Committee, formerly the Education Committee, and I do pay tribute to the two men who have

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<sup>4</sup> UC Berkeley School of Law, August 20, 1967; now known as the Center for Judiciary Education and Research.

served as chairmen of that committee: Presiding Justice Hilton McCabe of the Fourth District Court of Appeal, who is now serving as president of the Conference of Judges Foundation; and Judge Donald Fretz of the Merced Superior Court, who is serving also as dean of the College. Appreciation is due to the Ford Foundation for its financial support of the program and to Mr. William Pincus, program officer in Government and Law for the Foundation, for his wise decision to recommend use of Ford Foundation funds for this purpose. And I am delighted that the College has found a home here on the Berkeley campus in the legal center named to honor our eminent chief justice of the United States [Earl Warren] who has contributed so much to the cause of justice in America.

I do not belittle the qualifications of our judiciary when I say that an orientation program of this kind for new judges is sorely needed. For all too long we have indulged in the irresponsible delusion that the making of a judge requires only the taking of an oath of office and ascending to the bench. Unlike the practice in many countries where law students and lawyers who aspire to the judiciary receive specialized courses of instruction and in-service training that prepares them for a judicial career, American judges receive no formal training or apprenticeship in the judicial function. They are generally selected from the ranks of practicing attorneys and often their practice has been limited to a few specialized areas.

The lawyer is an advocate; his art is persuasion. The judge, in contrast, must listen and weigh and ultimately decide between conflicting claims. The transition from advocate, often in a limited area of law, to impartial arbiter of cases ranging the entire spectrum of the law is not easy. This transition generally cannot take place overnight, especially when the fledgling judge has no place to turn for guidance in meeting his new and awesome responsibilities. To the extent that the program of the College of Trial Judges helps bridge this gap it will be an invaluable asset to new judges and, more importantly, it will contribute immeasurably to improving the administration of justice. Hopefully, a system can be devised before long for making this orientation program available to trial judges at the time of their appointment or election, which is, of course, the time when they are most in need of help.

The recent *Task Force Report on the Courts* of the President's Commission on Law Enforcement and Administration of Justice states that, among

the individual states, California has had perhaps the most ambitious program for the education of its judiciary. The establishment of the College of Trial Judges is another giant step forward. If a system can be established to ensure that the best qualified lawyers are appointed to the bench and if programs of this nature can speed their adjustment to the role of judge, then indeed luster will be added to California's already illustrious judiciary.

Parenthetically, I am most hopeful that the creation of a merit plan for selecting judges is in the offing. The governor has stated his support for it and the State Bar and Judicial Council are actively supporting such a change. If we can reach agreement on details I believe the matter can be put before the voters within the next several years.

In wholeheartedly endorsing this educational program, I do not overlook the substantial amount of judicial time that it entails. With approximately 110 judges in attendance, either as students or instructors, some 220 weeks or about five years of judicial time is being devoted to study rather than to the disposition of court cases. I am especially conscious of this investment of time because of my duty to assign judges to courts that need help. It has not been an easy task, I assure you, to find enough judges available for assignment to keep the courts adequately staffed during this two weeks' period, especially since it falls at a time when many judges are having their annual vacation. The expense and the slight inconvenience to the public will, however, be a small price to pay for the benefits that can be expected to accrue.

In concluding, I wish to express my personal appreciation to those of you who have undertaken to serve as faculty members, and to congratulate those who are here as students for your zeal and interest in becoming better judges. The success of this initial effort — and I am confident that it will be successful — will not only ensure that funds will be forthcoming for its continuation in future years but undoubtedly will also inspire other states to initiate similar programs.

You have my best wishes for a pleasant and productive session.

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## ON THE PUBLIC DEFENDER

A lesser-known interest of Justice Traynor's was his concern for provision of effective counsel to indigent defendants, particularly in state appellate proceedings. Two speeches delivered at the 1969 National Defender Conference in Washington, D.C., offer his perspective as the state's chief judicial officer. In the first, as moderator, he contrasts conditions in California with those discussed by speakers from other states. In the second, his own address focusing on California, he traces the origins and history of the public defender movement (at a time shortly before the widespread rediscovery of Clara Shortridge Foltz's role as inventor of the public defender). The second speech concludes with his arguments for creation of a state public defender's office to serve state appellate defendants, an office created by the state legislature in 1976. (S.M.S.)

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### I. REMARKS AS MODERATOR, NATIONAL DEFENDER CONFERENCE (1969)<sup>5</sup>

President Marden,<sup>6</sup> General Decker,<sup>7</sup> and friends of the National Defender Project:

When I left San Francisco, I thought I would briefly review the public defender development in California, but we've had such splendid representation from California, beginning with President Toll,<sup>8</sup> and then the remarkably fine talks yesterday by Mr. Portman, Mr. Steward, and Judge Chapman,<sup>9</sup> that I decided to spend the few minutes that I'm going to steal

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<sup>5</sup> International Conference Room, Department of State, Friday, May 16, 1969.

<sup>6</sup> Orison S. Marden, president, National Defender Project of the National Legal Aid and Defender Association, and past president, American Bar Association.

<sup>7</sup> General Charles Lowman Decker, director, National Defender Project, and former judge advocate general, U.S. Army.

<sup>8</sup> Maynard J. Toll, president, National Legal Aid and Defender Association.

<sup>9</sup> Donald Chapman, Merced Superior Court; Sheldon Portman, public defender, Santa Clara County; and Harry Steward, founding executive director, Federal Defenders, Inc.

from the panel on some of the sensitive problems as I've seen them in California.

The most serious problem we face now, and I think this leads directly into the main subject of our discussion at this time, the state public defender, is the obtaining of counsel on appeal. We have, as you know from our discussion yesterday, excellent representation in the trial court, but on appeal, we use the assigned counsel system.

In talking to various presiding justices of intermediate appellate courts, I find that they are beating the bushes for counsel and that counsel are beginning to complain of the small fees that we've been paying them. I noticed that in the Supreme Court of California the average fee is around \$300 to \$500. Even so, the total state budget for assigned counsel on appeal amounts to about \$580,000, and I've had the Judicial Council staff make a study of the possibility of a state public defender in California. We find that for that \$580,000, we could have a state public defender. To my great delight, I think the State Bar of the state is going to support us. I don't mean to imply that the representation on appeal of — I don't like to use the word indigents — the people who couldn't otherwise get adequate counsel — has been inadequate. On the whole it has been excellent, largely because we've been relying on recent law school graduates. I think their law school training aptly fits them for appellate court work, probably more so than for the trial of cases.

As you sit on the appellate bench and hear these young fellows, not graduated long from law school, you can't help but be proud of the modern American law school and the product it is turning out.

I think we've been relying too much on some old standbys who are willing to undertake these assignments. In the long run, I think it would be much more effective to have a statewide public defender who can be the spokesman for the defender system throughout the state and who can represent the defender system before the Legislature and before the county boards of supervisors.

As you know, the county boards of supervisors have been very generous — like the County Board of Supervisors of Los Angeles where, as you recall, they have about 250 attorneys in the Public Defender's Office with a budget — up until now — of four and a half million dollars a year. I was told yesterday that the contemplated budget for next year is six million.

I was speaking to one of the staff members of the Conference here who noted that the annual amount spent throughout the country is about thirty million, and I mentioned that to President Marden. He said, “No, it’s about forty-two million.” A \$6,000,000 budget for one county shows that there is a great popular support for the public defender system. In Santa Clara County, the budget runs about \$350,000. We have more difficulty in getting funds from the state legislature, apparently, than we do from the county boards of supervisors.

In the course of our discussions, some basic problems have been raised. I think the one that Judge Oliver<sup>10</sup> talked about just a few minutes ago is one of the most pressing, and that’s the representation of the people in prison. In California, we have expanded the writ of habeas corpus to take care of what might be incorporated in post-conviction statutes, which are certainly needed in states where the writ of habeas corpus is not as liberally applied as it is in California. We don’t assign counsel, however, until the court has decided that an order to show cause should issue. We use the order to show cause device to avoid the necessity of bringing the prisoner into court. After we’ve decided that there has been a prima facie case, we issue an order to show cause and then appoint counsel. Counsel are not appointed to help the person in prison to make his prima facie case. In the light of *Johnson v. Avery*<sup>11</sup> that Judge Oliver mentioned, something is going to have to be done about that problem. We’ve taken a little step in that direction in death penalty cases by making counsel available to all prison inmates under sentence of death to seek any legal remedy that may be available.

We had an extremely important case in California recently — Anderson [and] Saterfield<sup>12</sup> — which raised the question as to the constitutionality of the death penalty — the main ground of attack on it being that the jury had the absolute discretion to return a verdict of death or life imprisonment. In almost everything else that you can think of in the legal system, there are guides and standards. For example, you don’t take a fox terrier away from a wife or a husband in a division of property on divorce

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<sup>10</sup> John W. Oliver, United States District Court, Western District of Missouri.

<sup>11</sup> 393 U.S. 483 (1969).

<sup>12</sup> *In re Anderson*, 69 Cal.2d 613 (1968), upholding the constitutionality of the death penalty in the appeals of Robert Page Anderson and Frederick Saterfield (Traynor, J., dissenting).

without such guides or standards. For the licensing of dogs or of lawyers or chiropractors, for the revoking of licenses for wrestling matches, boxing matches, and so forth, there's some guide and standard. For the death penalty, there's no guide or standard whatever. That was the issue on which our court divided, which reminded me of a point that was made by Dean Meador<sup>13</sup> yesterday — maybe there's too much instinctive desire for revenge in the minds and hearts of people. Maybe that desire for revenge is the real basis for the death penalty. I don't know what you think of the merits of the death penalty, but aside from the merits, I am convinced that if we were rid of the death penalty, the burden on courts would be decreased by at least 20 percent.

I also noted two or three other things that we probably have too much of. I was impressed by the remarks of the attorney general [John Mitchell] the other night that we put too much of a burden on the criminal law, that too many things are made criminal, that maybe the criminal law should be relieved of such burdens as those of alcoholism, traffic accidents, and so forth.

Dean Meador's remarks indicated that maybe the solution to crime is not in imposing more and more penalties, such as the provision we have in California that one twice convicted of the possession of marijuana is sentenced to fifteen years in the state prison without opportunity for parole.

Another sensitive problem also ties in with what Judge Oliver mentioned — that we have too much review, and this point was also brought out yesterday in that very stimulating talk by President [William] Gossett of the American Bar Association. Judge Oliver's discussion of habeas corpus also suggests that perhaps repeated review by this route can be better managed.

The application of the federal Habeas Corpus Act of 1867 has long been a puzzle to me. That act provides that habeas corpus lies in any case in which a person is in custody in violation of the statutes and laws of the United States. If a state court bases its decision on an adequate and an independent state ground, the United States Supreme Court is bound to deny certiorari. If, however, the petitioner chooses the habeas corpus route, even though there was an adequate and independent state ground for the state court decision, he can get relief by habeas corpus. It is still an unanswered question in my mind as to how a person can be held to be in custody in

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<sup>13</sup> Daniel John Meador, dean, University of Alabama School of Law.

violation of the laws and Constitution of the United States when, if he went up on certiorari, the United States Supreme Court would be bound to deny his petition. Otherwise it would be writing an advisory opinion on the federal questions, for if it sent the case back to the state court, the state court would again decide on its adequate and independent state ground.

I think that every rational lawyer will agree with most of the categorical imperatives in *Townsend against Sain*,<sup>14</sup> particularly, that a person is entitled to a full, fair, and complete opportunity to present his federal question; that he's entitled to a full, fair, and complete hearing on the federal question; and that he's entitled to a full, fair, and complete application of federal law on the federal question. When these imperatives have been fully complied with, it would seem that one review ought to be enough. Maybe the solution is along the lines that President Gossett suggested.

Another very sensitive question in this area — I have not talked to our panelists as to whether it is going to be covered — is the right to counsel on the revocation of parole and the right to counsel on the revocation of probation. One of the most sensitive problems of all is the representation of people who don't qualify as indigents and yet are of modest means. Maybe some system can be worked out whereby people who need representation, who don't qualify on the grounds of indigence can make modest contributions to — say a state public defender. Those problems, I will leave to the panelists and will not steal any more time from them.

Our first speaker is Chief Justice [Oscar] Knutson of the Supreme Court of Minnesota. Chief Justice Knutson has been a judge for thirty-nine years — twenty-one years as a chief justice of the Supreme Court of Minnesota and eighteen years as a trial judge. He's the chairman-elect of the Conference of Chief Justices of the fifty states — a wise, excellent judge. It's a pleasure to present Chief Justice Knutson.

(JUSTICE KNUTSON SPEAKS)

Thank you, Chief Justice Knutson. I'd like to talk to you later, in the hope that you will reveal the secret by which you charmed that senator who is chairman of the Finance Committee in the Minnesota Legislature who telephones to ask what you want for your courts and then gets it for you. The chief justice has amply demonstrated the soundness of General Decker's

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<sup>14</sup> 372 U.S. 293 (1963).

comment that the Minnesota public defender system is the best we have in the country.

My ears pricked up particularly at the reference to post-conviction proceedings. As I noted earlier, I think that is one of the most sensitive problems that we have. In California, we have about 1,500 petitions for habeas corpus a year, and those are carefully processed in our court. Over 95 per cent of them are denied, but once in a while, you find the needle in this haystack — and to find that needle is the grand objective of justice.

Just recently, for example, we issued an order to show cause in a case that was uncovered by our careful processing of petitions for habeas corpus. A prisoner was in the Los Angeles County Jail six months longer than he should have been. As soon as we issued our order to show cause, the attorney general's return came in promptly conceding that the petitioner should be released.

As Judge Oliver said with reference to post-conviction proceedings, we have only seen the tip of the iceberg. I am hopeful that the fine example set in Minnesota will establish a standard to be followed throughout the country. I am not too hopeful that we'll soon get the integrated system that they have in Minnesota, but it's a splendid start.

Thank you very much, Chief Justice Knutson.

Our next speaker is Wally Schaefer; I call him Wally because I have been a close friend of his for many years and one of his many admirers. Walter Schaefer is one of the most beloved and respected judges in the country. He is so deeply concerned with improving the administration of justice in this country that he always responds, if he possibly can, to a call of this kind. It's wonderful for us that he has accepted our invitation to be with us today. Justice Walter Schaefer of the Illinois Supreme Court.

(JUDGE SCHAEFER SPEAKS)

Thank you, Walter, very much. Your remarks suggested many problems that we could spend the whole day on. Maybe we can go into them in further detail in our workshops this afternoon. Your reference to the adversary system suggests that it's not a game and that the proper definition of a district attorney is not one who always convicts the guilty and makes it tough for the innocent, but one who cooperates with the opposing

counsel to make as sure as they both can that the objective of finding the truth is attained.

Your references to criminal discovery raise a number of interesting possibilities. We've made great progress in my state in the area of criminal discovery. Walter has mentioned it's not yet being a two-way street — that you don't get discovery from the defendant. Maybe something can be done along those lines. We had an interesting case in California in which we held that the defendant could be required, say in a case of an alibi, to let the prosecution know what witnesses he was going to call. One of the big questions is whether such a practice violates the Fifth Amendment.

Another sensitive point that you raised, Walter, is one that's of great concern to all of us, and a tough one for appellate courts, namely, the adequacy of counsel. Many people think that any lawyer can try a criminal case; that's a great mistake. The criminal law calls for a great deal of specialization, and there are cases an adequate and competent counsel ought to know about. Once in a while, we run across cases in our appellate review in which counsel just didn't know about a very important case. We've had one case in which we reversed, and I'm sad to say, I think the defendant's counsel was a public defender. You public defenders are doing a wonderful job but you still don't hit 100 percent all of the time. One of the embarrassing things about reversal for inadequacy of counsel is that it might lead to a trial on appeal, not on the merits of the case, but of appellant's counsel.

The point, which was also brought out yesterday, is a good one, namely, the interchange of people who've worked for the prosecution with those who've worked for the defense. The English system has always impressed me. They don't have professional prosecutors in England. As Walter mentioned, a barrister may appear one day for the crown and the next day for a defendant. With the development of discovery, with the taking of gameship out of this business, with emphasis on the search for truth, and with emphasis on getting competent counsel on both sides, I think, we will make progress.

It is now my pleasure to call on Mr. Justice McAllister, former chief justice of the Oregon Supreme Court. Some states, like Oregon and Illinois, rotate their chief justices once in a while. I'd known Bill for a long time while he was chief justice. He is a former chairman of the Conference of Chief Justices of the fifty states. At the present time, he is the chairman

of that very powerful and important committee of the American Bar Association — the Committee on the Administration of Justice.

It's a pleasure to present to you Justice William McAllister of the Oregon Supreme Court.

(HON. WILLIAM M. MCALLISTER SPEAKS)

Thank you very much, Bill, for your very stimulating account of the developments in Oregon.

It must be most encouraging and heartening to you, President Marden and General Decker, to hear these reports of the progress that has been made as a result of your devoted efforts. Your accomplishments have been tremendous, and we have only begun to reap the benefits of the great contributions you have made to the administration of criminal justice throughout this country. We deeply appreciate all that you have done and are most grateful to you for the splendid success of the National Defender Project.

## II. ADDRESS, NATIONAL DEFENDER CONFERENCE (1969)<sup>15</sup>

As we approach the close of the National Defender Project I am delighted to join with you in this conference designed to take our present bearings and to set our future course. For years many of us on the appellate bench have been concerned about the adequacy of legal representation being afforded to the poor who are charged with crime. In extreme cases we have reversed judgments and returned the matters for new trials. Our action, however, could not guarantee effective representation — that could come only from the other side of the bench, and unfortunately in many areas neither the bar nor the public shared our concern.

The National Defender Project, by focusing attention on this problem and by utilizing the resources and talent at its disposal in pressing for a solution, has rendered a service of tremendous social significance. Hopefully, the termination of the Project will not result in a cessation of our interest because, although we have established some substantial beachheads, the major battle remains to be won.

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<sup>15</sup> Washington, D.C., May 16, 1969.

This conference has already heard from four Californians — including Chief Justice Warren, whom we are about to reclaim — and you may be wondering what more has California to offer.

Judge Donald Chapman<sup>16</sup> and Messrs. Sheldon Portman<sup>17</sup> and Harry Steward,<sup>18</sup> my fellow Californians, have given us a look at county defender offices from the operating level, with answers to such questions as: “How does such an office originate and how should it be organized and structured?” and “How can it be made to operate effectively and economically?” These are very practical problems and I am sure that their observations will be helpful to all who may be contemplating the establishment of a public defender system.

I propose to view the California scene statewide from the vantage point of the office of chief justice. My inquiry is: How close are we to the goal of providing equal justice to all defendants accused of crime, and what plans are underway to attain that goal?

The plight of indigents charged with criminal offenses evoked a sympathetic response in many Californians at a comparatively early date. Counsel were being assigned to represent these unfortunates, to be sure, but the quality of representation provided by these uncompensated attorneys frequently fell far short of the goal of equal justice. The assigned counsel system of providing representation which had worked with reasonable satisfaction in rural areas and small towns proved unequal to the challenge presented by the growing metropolis. As population and crime increased and as the practice of law became specialized, more and more assignments had to be made to a decreasing proportion of the bar with experience or interest in criminal practice. All too often assignments fell to young and inexperienced attorneys who happened to be present in court when the need for assigned counsel arose.

The residents of Los Angeles County decided that there must be a better way to meet this problem and in 1913 they established the first public defender office in the United States organized to offer counsel to all indigents. The City of Los Angeles followed suit in 1915, and the offices in Los Angeles proved so successful that there was agitation to establish public

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<sup>16</sup> Merced Superior Court.

<sup>17</sup> Public defender, Santa Clara County, 1968–1986.

<sup>18</sup> Founding executive director, Federal Defenders, Inc., 1964–1969.

defender offices in other areas of the state. A bill introduced in the California Legislature in 1915 would have made public defender offices mandatory in the ten largest counties. However, the defender system met serious opposition from some members of the bar who viewed it as “socialistic” and argued that it was improper for the state to undertake both the prosecution and defense of defendants.

In 1921 the California Legislature passed an act permitting all counties to set up a defender system by ordinance, which could provide for either the election or appointment of the defender. San Francisco established an elective public defender that same year, and Alameda County set up an appointive defender office in 1927. I would note that to this day San Francisco remains the only county to have an elected public defender, and that fortunately the office of public defender is essentially nonpolitical in all counties where it has been established.

World War II gave renewed impetus to the establishment of defender offices in California. The scarcity of lawyers during the war led to adoption of the public defender system in other metropolitan areas, and also in some smaller counties. The organized bar of one county instituted an informal practice of paying one attorney to handle all assigned criminal cases, and this action created an atmosphere favorable to the defender system. Attorneys felt increased dissatisfaction with the assigned counsel system also because unequal burdens were placed on some members of the bar who were being repeatedly assigned. Nor was the burden of unequal caseloads effectively remedied by the passage of a statute in 1941 enabling the counties to give courts discretion to compensate counsel for their services.

An amendment to the compensation statute in 1951, that made reasonable fees and reimbursement for expenses mandatory for assigned counsel, was designed to improve the quality of representation by attracting capable attorneys and to save both counties and the state the expense of unnecessary trials forced by inexperienced attorneys. Paradoxically the amendment spurred the adoption of a public defender system in some counties because the boards of supervisors found it less expensive, and led to the retention of assigned counsel in others because the bar associations continued to oppose the defender system and regarded the statutory fees as rightfully theirs.

By 1959, when the Association of the Bar of the City of New York and the National Legal Aid and Defender Association published the results of their monumental study of the defense of indigents in their report entitled *Equal Justice for the Accused*, California had a public defender in 20 of its 58 counties. In the last decade, and especially with the impetus provided by the National Defender Project, the rate of growth has been speeded. Today I am in the fortunate position of being able to report that we now have excellent public defender offices operating in about 60 percent of the counties of California and that these counties contain nearly 90 percent of the California population. This record is one of which we are justifiably proud, but I hasten to say, we are not about to rest upon our laurels. A number of formidable problems still confront us.

Before discussing the problems that remain, I will take a moment to note recent developments in two of our counties, San Diego and San Mateo, which are of interest and which, I believe, may demonstrate the strength of the county option system that we have in California, namely, the opportunity for any county to experiment in developing a plan best suited to its needs.

In most of our counties the public defender is appointed to represent all indigent defendants who need the assistance of counsel. In San Diego County, however, under the plan recently adopted there, as Mr. Steward, the executive director of Defenders, Incorporated, explained yesterday morning, the staff attorneys actually represent only a small proportion of the indigent defendants. The major thrust of the program is to make the assigned counsel system work effectively by [providing] educational and intern programs in criminal practice for law students and young attorneys and by providing both legal and investigative services to attorneys who are assigned to represent indigents. Some promising benefits of this approach, it seems to me, are the substantial involvement of a large part of the county bar in the program and the emphasis on developing a large cadre of lawyers who will be able to give effective representation in criminal cases.

San Mateo County has within recent months embarked on a program which is essentially a coordinated assigned counsel plan and is of interest because it seems to be the first instance, at least in California, where a county has entered into a contract with the county bar association to provide legal services for indigents charged with crimes. The bar association has

appointed a program administrator who works with the courts in assigning counsel when needed and aids the attorneys in carrying out their assignments. Nearly 25 percent of the county bar has volunteered to participate in the program. The plan is apparently the organized bar's alternative to establishment of a public defender system. On a cost basis, it is interesting to note that the fee per case that the county will pay the bar association is nearly double the cost per case of operating the public defender office in neighboring Santa Clara County. It is, of course, too early to say whether the San Mateo plan is a feasible alternative to a public defender system. However, even if experimental programs like those in San Mateo and San Diego do not prove to be feasible alternatives, I cannot help feeling that the defender program will have been enriched by the experience they provide.

The first problem I would note in operating an effective public defender office, and one that is not at all limited to California, is that of providing adequate financial support. In my state the major share of the cost of providing counsel for indigents falls upon county government which, in turn, is largely dependent upon the real property tax for its support. In general, the county boards of supervisors have shown a reasonable understanding of the needs of public defenders. For example, Los Angeles County in providing a staff of 250 attorneys in the defender's office can hardly be said to have shown a penurious attitude. In a number of instances, however, the defenders feel that they are understaffed.

A California statute provides that the state shall reimburse the counties for up to 10 percent of the cost of legal services for indigent defendants. The statute, however, does not include any reimbursement for the cost of services rendered by the public defender in probation hearings or in representing juveniles and mentally ill persons. Last year the state appropriated funds sufficient to make only about a 7½ percent reimbursement and the pending budget bill calls for an appropriation of only 6½ percent. When we consider the mobility of many criminals today, I think it would be timely to examine whether the state, and possibly the federal government, should not bear more responsibility for the cost of prosecuting and defending persons accused of crime.

A recent instance in California illustrates the financial hardship that can befall a small county under the existing system. Two young men from the state of Washington, without any prior connection with California,

drove to California where they were charged with having kidnapped a youth in one county and carrying him into an adjoining rural county and murdering him. Because of the deep emotions aroused by the crime it was necessary to transfer the case to a metropolitan county for trial. The trial took six weeks and, I understand, the fees ordered to be paid the two defense attorneys were in excess of the total annual budget for the public defender's office in many of our smaller counties. In fact, this one trial cost the county where the murder occurred more than one dollar for every man, woman and child residing in the county. This situation, in my opinion, needs a careful study designed to effect a more equitable distribution of such costs.

Various proposals have been advanced to permit recoument of the cost of some of the services rendered by public defenders from the persons receiving such services. To the extent that such costs can be recouped, the counties would be enabled to provide more support for the defender's office. Although our Legislature has not yet been able to agree upon a plan, I anticipate that a suitable measure will soon be enacted.

Another problem that concerns me, and one that may be aggravated by establishment of a public defender system unless precautionary measures are taken, is that of assuring adequate representation for persons of modest means who are ineligible for the defender's services. When a public defender is appointed there can be a tendency for the bar to assume that criminal representation is now taken care of and can be forgotten. A few high-priced specialists will remain for those with substantial means, but a person of ordinary means may find that he is unable to obtain competent counsel. To guard against this situation developing I think it is necessary for the local bar to be involved and remain interested in the operation of the defender's office and for that office to conduct a continuing educational program for lawyers, especially for the young attorneys and law students. I am delighted that many of our California defender offices have established this type of program. In this way, I think it will be possible to generate an interest in criminal practice among the younger lawyers and that this interest will insure a sufficient number of competent lawyers to represent defendants who are not eligible for public defender representation.

The number one problem in the representation of indigents in California, however, is that of providing adequate representation on appeals. Although we have made tremendous strides in providing excellent legal

services through our public defenders at the trial court level, we have had no comparable development at the appellate court level. The existing statutes provide that the county public defenders shall take an appeal in meritorious cases, but in a number of counties the press of trial work has precluded the defenders from prosecuting any appeals. As a result, in our appellate courts we still rely upon appointed counsel. Although some compensation is provided such counsel, it is generally little more than a token payment.

With the constant growth in the number of appeals, the assigned counsel system is becoming increasingly difficult to administer. Last year, for example, there were more than 2,000 appeals in felony cases, and about 90 percent of the appellants were indigent. The Courts of Appeal have literally had to “beat the bushes” to find counsel for these appeals. Generally, they have had to rely upon volunteers, many of whom are young attorneys interested in handling a few cases for the experience. Their inexperience may handicap the cause of their clients and certainly places an added burden on our already overburdened appellate courts in making sure that a just result is achieved.

The inadequacies of the existing appellate counsel system have created substantial interest in establishing an office of State Defender. The California Judicial Council, on which I serve as chairman, has had this subject under consideration for several years, and its Appellate Court Committee has recommended that the Council support the creation of such an office. We have asked the State Bar to study the proposal and are awaiting its report. The California Public Defenders Association is already on record in support of such an office. In addition, a legislative committee recommended the creation of a State Defender office several years ago, but at that time the various interested groups were unable to agree upon the nature of the office and the duties to be performed.

I think the time has come when California must move forward in establishing a State Defender. The appropriations for payment of counsel assigned to handle appeals, although insufficient to provide adequate compensation for the assigned attorneys, are nevertheless approaching a sum that would support a State Defender. Since the need is so evident and the added cost would not be burdensome, I am confident that very shortly California will have a State Defender.

The primary responsibility of the State Defender will be, of course, to handle appeals. A skilled staff of experts under his direction would provide better representation for appellants and also lighten the work of the appellate courts. He may also assist the county defenders in cases when there are conflicts of interest.

In addition, the State Defender would serve in other necessary and useful roles. He can be the spokesman statewide for the local defenders and defense interests generally and represent those interests before the Legislature and in dealings with the executive department. He can coordinate the activities of the local defenders and by developing statewide standards assist them with their boards of supervisors in securing needed personnel and support. Through his review of trial transcripts he can detect errors made by local defenders and suggest methods of improving trial practices. These are only some of the functions that could be performed by a State Defender and I am sure each of you could add to the list. Needless to say, they are important functions, and unfortunately there is now no office in California with responsibility for their performance. I believe this deficiency will soon be corrected.

In concluding, I want, as chief justice of California, to express our state's gratitude for the help that the National Defender Project has given various defender projects in California. I am confident that time will prove that its efforts were helpful in achieving equal justice for all accused.

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## ON CONSTITUTIONAL RIGHTS

A topic that appears with special prominence in Justice Traynor's speeches — more so perhaps than in his essays — is the Fourth Amendment's protection against unreasonable search and seizure. An early instance is his radio address of November 1941 in which he presents the history of abuses in England and colonial America that led to the Fourth Amendment. This address was delivered as part of the patriotic effort then in progress (often supported by the American Bar Association) to mobilize public opinion for the Bill of Rights as a symbol of democratic ideals in the period leading to America's entry into World War II. But, at this early stage of his judicial career, Justice Traynor stopped short of providing a judge's perspective of the Fourth Amendment.

Such a perspective would come twenty years later, in two speeches from 1962 and 1964, that discuss the evolution of his own thinking that came to favor the exclusionary rule. The prohibition on the use of evidence discovered or taken in contravention of the Fourth Amendment was adopted by the California Supreme Court in an opinion by Justice Traynor in 1955, seven years before the U.S. Supreme Court's decision in *People v. Mapp* extended the federal exclusionary rule to the states. The consequences of the *Mapp* decision for state court judges are the center point of these two speeches. The first of the two provides a revealing view of the discussions between chief justices of other states and Justice Traynor following his remarks. The second was delivered immediately after the announcement of his appointment to serve as chief justice.

The last, and latest, of the speeches to be presented here is one delivered in 1974 (after Justice Traynor's retirement as chief justice in 1970), in which he turns to the subject of the First Amendment and its guarantee of freedom of the press. His topic is the attempt by the State of Florida to enforce a statute providing for a right of reply to negative political newspaper coverage. Of particular interest is Justice Traynor's presentation of arguments from both sides of the case in a speech delivered during its appeal to the U.S. Supreme Court. (S.M.S.)

## I. THE RIGHT OF THE PEOPLE AGAINST UNREASONABLE SEARCH AND SEIZURE (1941)<sup>19</sup>

A sesquicentennial marks the passing of one hundred and fifty years and of five generations of men. It marks this year the one hundred and fiftieth anniversary of the American Bill of Rights, immortalized in the Constitution as the first ten amendments. It is easy to forget their dramatic beginnings. The Oakland Post No. 5 of the American Legion under the able leadership of Commander Homer W. Buckley<sup>20</sup> has appropriately undertaken this radio series on a Bill of Rights that should never be taken for granted.

I speak to you tonight of the Fourth Amendment which might well be called the guardian of our private lives. In simple forceful language it declares:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Here is the law at its best — deep-rooted in human experience, precise in language, clear in purpose. The Fourth Amendment sprang from a long history of arbitrary invasions of privacy through the device of the general warrant, which subjected all persons and property to search and seizure by specifying none. Long before the Revolution, there were notable abuses of the power symbolized by the general warrant. During the reign of Charles the First, in 1629, the Privy Council issued warrants for the search and seizure of the private papers of such men as John Selden and Sir John Elliot, outstanding members of Parliament, because of their speeches against taxation without the consent of Parliament. Even Sir Edward Coke, the great authority on the common law, witnessed the invasion of his home in 1634 as he lay on his deathbed. Angered by his forceful opposition to the crown, the Privy Council sent a messenger to search for his so-called “seditious

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<sup>19</sup> Radio station KXL, Oakland, California, November 14, 1941.

<sup>20</sup> At that time, assistant city attorney of Oakland; later, presiding judge of the Oakland Municipal Court.

and dangerous papers.”<sup>21</sup> Both his home and his chambers at the Inner Temple were searched, and all of his writings seized, along with his jewelry, his money and his will.

Despite political upheavals, the use of general warrants continued throughout the next century under such statutes as the Press Licensing Act, authorizing search and seizure of the private papers of persons suspected of publishing seditious attacks on the government. In 1728 John Wilkes, a member of Parliament, undertook to publish anonymously a series of pamphlets, called the “North Briton,” highly critical of the government. By the following year, the secretary of state issued a warrant to four messengers ordering them “to make strict and diligent search for the authors [,] printers and publishers of a seditious and treasonable paper entitled the *North Briton*, No[.] XLV,”<sup>22</sup> with the object of arresting them and seizing their papers. Armed with this roving commission the messengers arrested forty-nine persons on suspicion in three days, and when they finally apprehended the actual printer, they learned from him that Wilkes wrote the pamphlets. Thereafter, they searched Wilkes’ house and seized all his private papers, including his pocketbook and his will. When he successfully brought suit against the government for damages, the phrase “Wilkes and Liberty” echoed throughout the country.

In a series of opinions that are landmarks in English constitutional law, the English courts held illegal general warrants that failed to state the name of the person to be apprehended or describe the place to be searched and the thing to be seized. In a famous judgment awarding damages to another journalist, John Entick, Lord Camden declared that such general warrants violated the basic Anglo-Saxon right to security of person and property; that if suspicion were tolerated as a ground of search it would threaten the security of every man’s home. He held that an extraordinary power such as the power to rifle a person’s house and seize his most valuable papers must not be exercised without specific justification. “[T]he law to warrant it should be clear in proportion as the power is exorbitant.”<sup>23</sup>

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<sup>21</sup> Roger Coke, *A Detection of the Court and State of England during the Four Last Reigns, and the Inter-regnum*, 3rd ed. (London: 1697), p. 253.

<sup>22</sup> As published in *The Annual Register, or a View of the History, Politicks, and Literature for the Year 1763* (London: 1764), p. 135.

<sup>23</sup> *Entick v. Carrington*, 19 Sp. Tr. 1030 (1765).

In 1766 the House of Commons held general warrants illegal in libel cases. William Pitt thereafter fought successfully to have the House declare all general warrants invalid, unless specifically provided for by Act of Parliament. He expressed dramatically the right of every man to privacy:

The poorest man may in his cottage bid defiance to all the forces of the Crown. It may be frail — its roof may shake — the wind may blow through it — the storm may enter — the rain may enter — but the King of England cannot enter! — all his force dares not cross the threshold of the ruined tenement!<sup>24</sup>

In the colonies, the use of general warrants for search and seizure became one of the chief causes of friction with the mother country. Revenue officers, carrying general warrants, searched private premises merely on suspicion that they harbored property imported in violation of the navigation laws aimed at colonial commerce. Orders came from England to the collector of customs in Boston to apply for general warrants, euphemistically called “writs of assistance” because they enabled the customs officers to command all officers and subjects of the crown to assist in breaking open houses, shops, ships, and personal possessions in a search for the goods imported despite parliamentary prohibition or without payment of the tax imposed by the revenue laws. In 1761 James Otis, the advocate general of the colony of Massachusetts, resigned his post in protest against the legality of such writs. In a series of stirring speeches he described how they enabled officers or their servants to enter, break locks, bars and everything in their way “and whether they break through malice or revenge, no man, no court, can inquire. . . . Every man, prompted by revenge, ill humor, or wantonness, to inspect the inside of his neighbor’s house” could get one of these writs.<sup>25</sup> He dramatically characterized the general warrant as “the worst instrument of arbitrary power, the most destructive of English liberty . . . that ever was found in an English law-book.”<sup>26</sup> In the Council Chamber in Boston, where he addressed himself to the five colonial judges

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<sup>24</sup> As quoted in Henry Lord Brougham, *Historical Sketches of Statesmen who Flourished in the Time of George III* (London: Charles Knight & Co., 1838), pp. 41–42.

<sup>25</sup> As cited in Charles Francis Adams, ed., *The Works of John Adams, Second President of the United States: with a Life of the Author*, vol. 2 (Boston: Charles C. Little and James Brown, 1850) p. 524–525.

<sup>26</sup> *Ibid.*, p. 523.

arrayed in scarlet robes, his words bore effect on the audience, which included a young lawyer, John Adams. Years later Adams wrote, "Every man of that crowded audience appeared to go away, as I did, ready to take arms against Writs of Assistance . . . Then and there . . . independence was born."<sup>27</sup>

Nevertheless, the writs continued, deeply resented by the colonists. Following the Stamp Act Riot of 1765, however, most of the colonial courts refused even to grant them, and popular opposition made their execution increasingly difficult. They became perhaps the most important single cause of the American Revolution.

Actually, the first protection against search and seizure appeared in the state constitutions. Over a decade elapsed between the Declaration of Independence and the establishment of the Constitution, and the Virginia Bill of Rights of 1776, subsequently copied in other states, was the earliest precedent for the first ten amendments to the federal constitution. Now, nearly every state constitution has a bill of rights containing almost verbatim the wording of the Fourth Amendment on searches and seizures. When the Constitutional Convention met in 1787, it set forth constitutional proposals for a strong, federal government, but failed to submit a bill of rights as a counterweight. The omission of a bill of rights became the leading issue in the succeeding debates on state ratification, and so controversial an issue as to threaten the existence of the new nation. Many believed that the check upon federal power afforded by the states rendered unnecessary any additional checks; others feared that the Bill of Rights would interfere with the effective exercise of the federal powers. Jefferson considered these objections in a letter to James Madison, who eventually sponsored the first ten amendments successfully through Congress. From Paris in 1789, Jefferson wrote:

There is a remarkable difference between the characters of the inconveniences which attend a declaration of rights, and those which attend the want of it. The inconveniences of the declaration are, that it may cramp government in its useful exertions. But the

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<sup>27</sup> As cited in Charles Francis Adams, ed., *The Works of John Adams, Second President of the United States: with a Life of the Author*, vol. 10 (Boston: Little, Brown and Company, 1856) pp. 247–248.

evil of this is short-lived, moderate and reparable. The inconveniences of the want of a declaration are permanent, afflicting, and irreparable.<sup>28</sup>

There have been periodic echoes of Jefferson's thought in more recent times. Thus Cooley in his book on constitutional liberties writes that

it is better oftentimes that crime should go unpunished than that the citizen should be liable to have his premises invaded, his desks broken open, his private books, letters, and papers exposed to prying curiosity, and to the misconstructions of ignorant and suspicious persons, . . .<sup>29</sup>

Whether a man's home is literally a castle or a hut, no officer of the government now has the right to break into it or search it without a legal warrant, authorized by law and issued only after a showing made before a judicial officer, under oath, that a crime has been committed, and that the party complaining has reasonable cause to suspect that the specified property is the subject or instrument of the crime, and is concealed in a specified house or place. It must state the place to be searched, and the thing to be seized and if a person is to be seized, it must state his name. In the words of Justice Brandeis:

The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness . . . . They conferred, as against the Government, the right to be let alone — the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment.<sup>30</sup>

The right to security of persons and property takes on new meaning in times of crisis. The more disorderly the world we live in, the more must be cherished the orderly legal processes by which human beings govern

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<sup>28</sup> Thomas Jefferson Randolph, ed., *Memoir, correspondence, and miscellanies : from the papers of Thomas Jefferson* (Charlottesville : F. Carr, 1829), p. 443.

<sup>29</sup> Thomas McIntyre Cooley (Victor H. Land, ed.), *A Treatise on the Constitutional Limitations which Rest upon the Legislative Power of the States of the American Union*. 7th ed. (Boston: Little Brown, 1903), p. 432.

<sup>30</sup> *Olmstead v. United States*, 277 U.S. 438 (1928) (Brandeis, J., dissenting), p. 478.

themselves in a democratic country. The individual voluntarily subordinates himself to his country in critical times, but he remains a free citizen in a democratic state as he could not in a totalitarian one, by virtue of such privileges as those set forth in the Bill of Rights. In the stronghold of his own home he is secure, knowing that his threshold cannot be crossed without specific warrant. In that security men are bound together in a community not by fear of one another and the government above them but by respect for one another and the government that is a part of them.

## II. ON *MAPP V. OHIO* AT THE CONFERENCE OF CHIEF JUSTICES (1962)<sup>31</sup>

CHIEF JUSTICE WILKINS:<sup>32</sup> The chair recognizes Justice Traynor.

JUSTICE TRAYNOR:<sup>33</sup> I will talk first about Professor Packer's presentation because it was the last one.<sup>34</sup> On this problem of retroactivity, I am a little puzzled by all the "to do" on whether *Mapp*<sup>35</sup> was retroactive. It applied retroactively to *Mapp* itself, and it would apply retroactively to any other case on appeal.

The questions are different as to cases on appeal tried before *Mapp* and those where the judgments have become final. We had those problems in California after we decided the *Cahan*<sup>36</sup> case. It would be silly to require the defendant to have objected to the admission of evidence before he could raise the question when it was futile to do so, since the law was that the evidence was admissible. We handled that problem this way: If the record showed a prima facie case of illegal seizure of the evidence, he was permitted to raise the question even though he had not objected before. If a scrutiny of the record gave no indication of illegal search and seizure, we presumed it lawful, and he couldn't raise it. That may be rough justice, but it worked out well. You couldn't expect the defendant to object to evidence

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<sup>31</sup> August 4, 1962, Hotel Mark Hopkins, San Francisco, during the Annual Meeting of the American Bar Association.

<sup>32</sup> Raymond Sanger Wilkins, Massachusetts.

<sup>33</sup> At that time, associate justice, California Supreme Court.

<sup>34</sup> Herbert L. Packer, Stanford University School of Law.

<sup>35</sup> *Mapp v. Ohio*, 367 U.S. 643 (1961).

<sup>36</sup> *People v. Cahan*, 44 Cal.2d 434 (1955).

in view of the prior rule; you couldn't expect the prosecution to muster the evidence to demonstrate that the search and seizure was reasonable. In *People v. Kitchens*,<sup>37</sup> we held the question could be raised. Where there was no indication of illegal search — *People v. Farrara*<sup>38</sup> — it couldn't. There can be some carping about our solution but it was the expedient way to weather the intermediate storm.

Then there is the question as to people already convicted, where the judgments are final and the appellate process completed. Should the exclusionary rule apply? We considered it a rule of evidence and saw no ground for habeas corpus. That “out” is no longer available to us, for better or worse. It is now part of the Constitution of the United States that illegally obtained evidence cannot be admitted.

In one type of case we have a prisoner convicted long before the *Mapp* case. Should we allow habeas corpus? I take the position we should not. The argument is that you look at the basic reason why we got the *Mapp* case. I think a convincing argument can be made for the proposition that *Mapp* came about solely to deter illegal police activity. You can find that purpose in the reasoning of Justice Frankfurter in the *Wolf* case,<sup>39</sup> in which it was first announced that you have a constitutional right not to have arbitrary intrusion by the police on your privacy. The core of the Fourth Amendment was incorporated into the Fourteenth.

Then came the *Irvine*<sup>40</sup> case, which really put the whole problem to the acid test. The United States Supreme Court, in an opinion by Justice Jackson, urged the state courts to reconsider the exclusionary rule. Finally came *Mapp*, after the failure by the states to do what the Supreme Court suggested in the *Irvine* case — the failure by the states to do anything whatever to curb violations of the Fourth Amendment, as incorporated in the Fourteenth by the *Wolf* case. I am convinced that the whole reason that we have the *Mapp* case is that it had been demonstrated that other expedients had failed, and that the only way to curb police activities is to exclude the evidence. Unlike the other cases where habeas corpus is available, it was not necessary to protect the fairness of the trial. There was no unfairness.

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<sup>37</sup> 46 Cal.2d 260 (1956).

<sup>38</sup> 46 Cal.2d 265 (1956).

<sup>39</sup> *Wolf v. Colorado*, 338 U.S. 25 (1949).

<sup>40</sup> *Irvine v. California*, 347 U.S. 128 (1954).

The defendant had notice, representation by counsel, and the evidence was good, relevant, material, and devastatingly demonstrated the guilt of the defendant. We must remember that the expansion of habeas corpus, beginning with *Moore v. Dempsey*,<sup>41</sup> *Mooney v. Holohan*,<sup>42</sup> and other cases, was to guarantee fair trials and to make sure that innocent people were not convicted. It is easy to make a verbal argument that *Mapp* makes habeas corpus available: constitutional rights can be vindicated on habeas corpus. It is mechanical reasoning, and it overlooks the purpose of the exclusionary rule. What social good are we attempting to accomplish? Why do we have this rule? If you grant my major premise that we have this rule because it is necessary to deter illegal police activity, and if you follow that premise all the way through, then I think you will agree that it would be a mistake to allow collateral attack on final judgments, even those that become final after *Mapp* — as Professor Packer stated, that it is my position — it would apply in the future also.

The main objective and purpose of *Mapp* to deter illegal police activity can be accomplished through the normal processes of the trial and appeal. Illegal activity will be deterred little more and at terrific cost by making final judgments subject to collateral attack.

There is another argument of expediency, if the Supreme Court expands or contracts the scope of the Fourth Amendment itself — as in the *Elkins* case,<sup>43</sup> where the “silver platter doctrine” was overruled, or in the *Jones* case,<sup>44</sup> where it expanded the concept of who has standing to raise it. Each time the court liberalizes or contracts the rule, people who have long since been convicted will raise the problem on habeas corpus. It seemed to me that the policy underlying the *Mapp* case to deter illegal police activity is outweighed by the policy of the finality of judgments. It seems too mechanical to me to say that since some constitutional rights are vindicated by habeas corpus, this one must be. There has been too much of magic words without examining why we have a rule. What is the purpose we are attempting to accomplish: does that purpose require this particular remedy?

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<sup>41</sup> 267 U.S. 86 (1923).

<sup>42</sup> 294 U.S. 103 (1931).

<sup>43</sup> *Elkins v. United States*, 364 U.S. 206 (1960).

<sup>44</sup> *Jones v. United States*, 362 U.S. 257 (1960).

I shall take a few minutes for my reactions to Professor Collings' speech.<sup>45</sup> He put his finger on one of the most sensitive problems in this area, the scope of the search incident to lawful arrest. What is lawful arrest, and the relationship between the warrant requirements of the Fourth Amendment and the scope of search and arrest? All these years elapsed after the *Wolf* case before we had the *Mapp* case. Had *Wolf* incorporated the *Mapp* doctrine we might have had some workable rules from the Supreme Court. We don't have any articulation as to just what the Fourth Amendment is designed to protect. How wide and how narrow is the right to privacy? What we have is a number of ad hoc decisions full of uncertainty. You can't tell whether the evidence was excluded because of a violation of the Fourth Amendment, a violation of a federal statute, or a violation of a state statute. When there is no federal statute controlling federal officers, they must abide by state statutes governing arrest. There is no indication whether the evidence excluded in certain cases was excluded because of the Supreme Court's supervision of the administration of criminal justice. So I agree with Professor Collings heartily that to follow federal rules blindly would be a complete giving up. It would be easy and simple, and it would relieve our burden tremendously if we could stop thinking and mechanically follow federal rules, but I don't think there is any justification for doing so. Some federal rules are beyond my understanding, like the one stated in *Gouled v. United States*,<sup>46</sup> that you cannot have a search simply to get evidence. You can have a search warrant or a search incident to a lawful arrest if the goods are contraband, or stolen, or if they are the fruits of a crime, but otherwise you can't. Professor Collings' story about arson investigations illustrates how absurd the rule is.

That suggests another problem we have not had light on — the relationship of the Fifth to the Fourth Amendment. The *Mapp* case became a majority decision by virtue of Justice Black's concurring opinion invoking the Fifth Amendment. I do not think that amendment is apposite. In the *Silverthorne* case,<sup>47</sup> it was held that corporations are protected by the Fourth Amendment from illegal searches and seizures but not from self-incrimination. When the police go in under a warrant to take books and

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<sup>45</sup> Rex A. Collings Jr., UC Berkeley School of Law.

<sup>46</sup> 255 U.S. 298 (1921).

<sup>47</sup> *Silverthorne Lumber Co. v. United States*, 251 U.S. 385 (1920).

papers, there is no implied admission by the defendant that they are his. If the police take books and papers under a warrant, there cannot be a violation of the Fifth Amendment.

One other sensitive area is the scope of search and seizure under administrative arrests. You may recall *Frank v. Maryland*,<sup>48</sup> where the health inspector found indications of rat infestation in a particular house and called on the householder for permission to make an inspection; and she wouldn't let him. An ordinance imposed a fine of \$25 for each refusal to allow the inspector in. In what is, to me, a difficult opinion to follow, it was held that the Fourth Amendment does not operate in these cases; it is designed to protect people accused of crime — implying that people suspected of crime have the benefit of the Fourth Amendment, but people not suspected of crime do not. Justice Frankfurter, I think, was afraid that accepting more liberal standards for warrants in an administrative case like health inspection would imperil the standards for search and seizure in criminal cases, but, as Justice Brennan says, to require no warrant at all is like burning the house down to roast the pig.

I might conclude by saying that we desperately need an articulation from the Supreme Court as to just what it is the Fourth Amendment protects. We need articulation of the relationship between its two clauses. Was the relationship what the *Trupiano* case<sup>49</sup> held? Does the *Chapman* case<sup>50</sup> indicate a return to *Trupiano*? Does *Rabinowitz*<sup>51</sup> still control as to what is reasonable?

You can read through our hundred or more opinions in this area and you will find an inarticulate [unarticulated] premise. If you were the Chief of Police, and an officer didn't make a search or seizure, would you consider him so incompetent that you ought to fire him? I think there has to be some common sense.

I admit that the problem of collateral attack is a sensitive one. It would be easy to be mechanical about it and say a constitutional right is violated, therefore habeas corpus lies. That would reflect a failure to examine into

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<sup>48</sup> 359 U.S. 360 (1959).

<sup>49</sup> *Trupiano v. United States*, 334 U.S. 669 (1948).

<sup>50</sup> *Chapman v. United States*, 365 U.S. 610 (1961).

<sup>51</sup> *United States v. Rabinowitz*, 339 U.S. 50 (1950).

the basic objectives and purposes back of the exclusionary rule. I don't know whether my position will prevail. I hope it does.

CHIEF JUSTICE WILKINS: Thank you, Justice Traynor. I feel compelled to make a statement myself at this point. I feel one shouldn't try to follow a Supreme Court decision unless he knows what it is. I have found much fault in some of these subjects. You can bring them out only by making a statement at some point that the Supreme Court has not said it isn't so. If they see that, they may take the case on certiorari or some other means. I had a case about some gentleman who had been in our prison for thirty years. He claimed his auto had been searched and they shouldn't have, but he hadn't raised that point. The federal courts in my area do not allow objection to the exclusion of evidence. You have to make a motion in advance of the trial, which he had not done; but I don't know whether the *Mapp* ruling is prospective in the minds of the authors. Are there any questions?

CHIEF JUSTICE WEINTRAUB:<sup>52</sup> Gentlemen, since reference was made to *State v. Valentin*,<sup>53</sup> I will bring it down to date. This June, the case *State v. Smith*<sup>54</sup> wrestled with a lot of the problems. Judge Traynor, we are much in your corner. We just had an avalanche of motions and did not want them running after any federal case they could find. The purpose was to lay out the problem. We made it plain we would not recognize a collateral attack.

The thesis stated by Professor [Paul] Bender is that the thesis of *Mapp v. Ohio* is to prevent violations of the constitutional provision against search and seizure.<sup>55</sup> The purpose of the Fourth Amendment is not violated by the use of the evidence. Original invasion of privacy is involved, and since the only purpose of exclusion is to prevent future similar violation rather than to repair a violation permitted, there is no need to make it prospective. It is enough to impose sanction for the future. To impose it for the past is unnecessary emphasis. The difficulty I had with *Mapp* was what was the thesis of Justice Clark's opinion. In *Elkins*, the court flatly used this preventive thesis. In *Mapp*, most of Justice Clark's opinion is in the same

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<sup>52</sup> Joseph Weintraub, New Jersey.

<sup>53</sup> 36 N.J. 41 (1961) (mistakenly spelled "Ballantine" in the transcript of the meeting).

<sup>54</sup> 181 A.2d 761 (N.J. 1962).

<sup>55</sup> See Paul Bender, *The Retroactive Effect of an Overruling Constitutional Decision*, 110 U. PA. L. REV. 650 (1962).

vein, and he quotes from *Elkins* the passage saying the exclusionary rule is intended to deter violations rather than to repair.

Justice Black, as has been pointed out, filed a separate opinion. Going back to the *Boyd* case,<sup>56</sup> he held that the Fourth and Fifth Amendments are companions. I think they are almost antithetical, but he said the Fourth and Fifth ran together and that it was the use of the evidence which constitutes the violation.

Justice Clark very carefully avoided any statement that self-incrimination was involved. He did, however, use two expressions which made me wonder. He said [in essence], “If it is unconstitutional to use an involuntary confession, why then isn’t it equally bad to use the product of illegal search?” If you compare this with illegal confession, you immediately run into the Fifth, and the difference between the Fourth and the Fifth is that the Fourth contemplates that force can be used but not the Fifth. I can get a warrant and use force to convict a man with it. If you want to say the Fourth and Fifth Amendments have the same role to prevent self-incrimination, you will have to say that, while you may raid under a warrant, you can’t use the contraband as evidence. Once you start using what you seize, it seems to me you are going contrary to the Fifth Amendment. I hope they will settle the problem of why evidence may not be used. I would like to know how you can exclude a search for the purpose of evidence while permitting the use for contraband or instrument of crime. I would like to know what to do with a lot of recent cases.

If Justice Clark meant to stay strictly with the notion that the exclusionary rule is wholly as to the future and not to repair injury, and the use of evidence is not per se a violation of a right, then I think there is great substance to the notion that it should not be made retroactive.

We did say, Judge Desmond,<sup>57</sup> that where on direct appeal there appears evidence of illegality, we will accept the issue even though no objection was made, and we could not expect an objection if we had followed the rule of admissibility. Two years ago, we suggested that we might modify our rule and adopt the exclusionary rule if it were perfectly plain that police officials were acting arrogantly and with the purpose to violate

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<sup>56</sup> *Boyd v. United States*, 116 U.S. 616 (1886).

<sup>57</sup> Charles S. Desmond, chief judge, New York Court of Appeals.

the constitutional right of privacy. We will accept the issue if the records suggest that evidence of illegality and demand that the state be permitted to complete its proof. In pre-*Mapp* cases, the state, being aware of our old admissibility rule, did not bother to bring out all that it might have. We have not passed on this question. We have left that door open.

The real question is, is it unfair to use the conspicuous fact that the evidence seized illegally was evidence that could have been seized legally, that heroin is heroin; that invasion of privacy does not question truth or integrity of the verdict, unlike where a confession has been obtained by force. There is that residual question whether the situation is true, or where counsel is not furnished, or where no one can eliminate the possibility that judgments are unfair for want of help.

Another question we have left open is whether we are bound by federal consent of search and seizure. The dictum is simply to warn the trial courts to go easy, and we have left open the question of whether it will satisfy the U.S. Supreme Court if we confine the rule of exclusion to those situations where there is this defiance and insolence as distinguished from cases where good faith and the attempt to comply with constitutional rights existed but there was mistaken judgment. For example, in a case cited in *Elkins* in the Missouri opinion, we have a situation where the state trooper went to the wrong magistrate. Well a magistrate's judgment did intervene, although he had no jurisdiction of that area, but none of us could say there was insolence in office. We are hopeful that when it is all over, we can confine the rule of exclusion to those situations where it is evident that police officers did not care about constitutional rights.

CHIEF JUSTICE DETHMERS:<sup>58</sup> On this business of disinterring dead dogs that ought to stay buried, I would welcome with open arms what I think is Chief Justice Weintraub's and Justice Traynor's way out, but the difficulty is in understanding why the Supreme Court of the United States has the authority to make rules of evidence for state courts. It seems to me it can only be on one basis, and they have planted it on due process. You and Justice Traynor have insisted on that business of constitutional rules. If that is so, it seems to me the Supreme Court of the United States is without competence to make such a rule for state courts. I think it is

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<sup>58</sup> John R. Dethmers, Michigan.

an inescapable conclusion that it is a constitutional matter. Saying the exclusionary rule is a deterrent on police officers is a poor answer and is just like saying to the boys in prison, “Your rights don’t count anymore.” That is what bothers me.

JUSTICE TRAYNOR: I don’t think the solution Chief Justice Weintraub and I have reached is easy. I think it would be easier to follow the federal rules.

As to the wisdom of the Supreme Court’s doing what it did, there is a lot to be said in its favor. It reminds me of the evolution of my thinking on this problem. In 1942, I wrote an opinion holding that illegally obtained evidence was admissible. It had nothing to do with the fairness of the trial. The evidence of guilt was devastating. We shouldn’t adjust the rules of evidence as an expedient to enforce the Fourth Amendment. I lived with this position from 1942 to 1955, and cases like the *Rochin* case<sup>59</sup> came along. That case didn’t bother me for the reason it bothered Justice Frankfurter. I didn’t think it was brutal. What offended me was the breaking into the bedroom without probable cause and without a warrant. With all these petitions coming up after the 1942 case, I did a great deal of squirming. Justice Jackson was so shocked that he urged the federal government to bring an action against the Los Angeles police for putting microphones in bedrooms. When the question was put, “how did you make your entry, and where did you put the mike?” it was brazenly objected that the information was privileged for the protection of the public. We hoped, as I am sure the Supreme Court had hoped, that the state would do something about it by way of bringing an action against the police, or by affording some civil remedy, but the state did nothing. Here is a right that was declared in *Wolf v. Colorado*<sup>60</sup> to be necessary to order and liberty. You can’t say anything better about a right than that. To have that great right absolutely without any remedy is ironic. The Supreme Court was driven to the exclusionary rule for the same reason we were driven to it in this state. I think the *Mapp* decision was a good decision. I think it unfortunate that there was no better remedy, but I insist (and I am happy to have the support of Chief Justice Weintraub on this) that when you look at the history of the exclusionary

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<sup>59</sup> *Rochin v. California*, 342 U.S. 165 (1952).

<sup>60</sup> 338 U.S. 25 (1949).

rule from *Weeks*<sup>61</sup> through *Elkins*, it is evident that the *Mapp* rule is the only way to enforce this kingly right. I am convinced it is the only way. It was necessary to prevent flagrant violations of the Constitution. In working out the rules on collateral attack, reasonable investigations, arrest, and so forth, the big objective to keep in mind is the purpose of the rule and to avoid formula thinking — magic words thinking — and to avoid what I think would be the unfortunate result of allowing convictions to be upset on collateral attack. I am afraid, however, that the Supreme Court cannot handle a procession of cases from the fifty states and may deny certiorari and turn them over to the district courts to reconsider on habeas corpus. I predict a mess if it does that.

CHIEF JUSTICE WEINTRAUB: I had the feeling that he too was recognizing, in that opinion, that their concern was this insolence in office, and that may very well mark the outer limits to which they will go on the exclusionary rule.

CHIEF JUSTICE DETHMERS: My problem is a lot simpler than I have made plain. I can't understand how any provision of the Constitution can be made the solid base for the Supreme Court of the United States to make a policy announcement calculated to deter officers from doing what they should not do.

JUSTICE TRAYNOR: Once having adopted *Wolf*, it could not be left in the abstract with no implementation.

CHIEF JUSTICE DETHMERS: Whose constitutional rights are involved?

CHIEF JUSTICE WEINTRAUB: Yours and mine. We are not so much concerned with *Mapp* as that a right was violated. I think of that rule as to prevent further infractions.

PROFESSOR PACKER: Whatever else it may have been doing, it seems to me clear that the Supreme Court was granting a constitutionally conferred remedy to Miss Mapp for infringement of her rights. This bears directly on the question of availability and collateral attack. I have great sympathy with the policy reasons that Justices Traynor and Weintraub have been advancing for not opening the flood gates, however big or small they may

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<sup>61</sup> *Weeks v. United States*, 232 U.S. 283 (1914).

be. The Supreme Court has committed itself to the position that this is a constitutional right and it therefore carries with it the doctrine that it has been evolving concerning federal habeas corpus. It is not impossible for the Court to be so taken with these policy arguments that it will qualify what it has done and view habeas corpus as a discretionary remedy to be granted or withheld within the judgment of whoever is doing the granting or withholding, but that will be a departure not only from what the Court has held but what it says. It seems to me that there is a very clear analogy between the use of this exclusionary rule and the rule the courts developed with respect to involuntary confessions. The Court has held unmistakably that this rule is not limited to those states where the guilt of the petitioner turns on the confession. It is perfectly clear that in cases where there is no question at all about guilt or any question about the reliability of the confession itself, nonetheless due process requires the conviction to be reversed. Perhaps I am getting simple-minded about this, but it seems clear that we want to deter this kind of police conduct. However that may be, they are reversing convictions where there is no question about the petitioner's guilt, and no question about fairness of the trial aside from admission into evidence of an unconstitutionally obtained confession. It takes more subtle a mind, I am afraid, to see a distinction that can be thrown on habeas corpus.

CHIEF JUSTICE WEINTRAUB: Where you are dealing with an involuntary confession, you run squarely into the Fifth Amendment.

PROFESSOR PACKER: The reliability of the confession has nothing to do with it.

JUSTICE TRAYNOR: Isn't one of the grounds for exclusion that it is untrustworthy? Then you would have the problem that it would be awkward to have a rule that habeas corpus will lie only in those cases where the court is convinced that the confession was untrustworthy. It is common in the law to have a rule that for convenience applies more broadly than is necessary. Habeas corpus should lie in the involuntary confession cases, for such confessions may go to the issue of guilt, just as does denial of counsel, mob domination or a refusal to allow a defendant to put in a defense. Habeas corpus is designed to protect the innocent and to guarantee fair

trials and I don't agree with your suggestion that I would make this thing discretionary. Absolutely not. There is nothing discretionary about it.

CHIEF JUSTICE DETHMERS: Assuming that authority resides in the Supreme Court of the United States to make a policy decision on the exclusionary rule for the purpose of deterring officers, doesn't its authority for so doing in federal cases and its authority for so doing in state courts have to rest on different grounds?

CHIEF JUSTICE DAY:<sup>62</sup> We have to come to grips with two words not heard thus far — what if the conviction is erroneous or void? If it is merely erroneous, that is one thing, but if the conviction obtained is void then it has no stature at all and habeas corpus has to be the remedy. So now we come to the question of, is this conviction erroneous, reverse and retry, and see if we can get the conviction, or was the conviction void? If so, you can't escape habeas corpus.

CHIEF JUSTICE WEINTRAUB: To think in terms of void as against erroneous will not help because both words are labels of the end result. Before we call it void or merely erroneous, we must start to arrive at either conclusion. I think the constitutional wrong is not in the use of the evidence but in the original invasion of privacy which is done. That is the whole preventive thesis, and if Justice Clark's opinion stays with it — and there are some passages that make one wonder — this is a different animal. It is not denial of counsel or use of confession gotten by force which you couldn't get under any legal warrant. You are dealing with evidence that could have been obtained by a warrant, and hence I agree with Judge Traynor in what you are trying to accomplish. So far as the man convicted is concerned, it is wholly fortuitous to him that the officer didn't have a warrant.

CHIEF JUSTICE PARKER:<sup>63</sup> We rely sometimes almost wholly on evidence presented by an applicant for habeas corpus which is long since dissipated and not available. If we take the position that *Mapp* is retroactive, this is the only evidence.

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<sup>62</sup> Edward C. Day, Colorado.

<sup>63</sup> Jay S. Parker, Kansas.

CHIEF JUSTICE ARTEBURN:<sup>64</sup> We have a condition resulting from a radical change of precedent, and now we have the right to collaterally attack judgments when those judgments at some time should become final.

CHIEF JUSTICE WILKINS: I want to acknowledge our debt of gratitude to Judge Traynor. I now declare this matter adjourned but not finished.

### III. *MAPP V. OHIO* STILL AT LARGE IN THE FIFTY STATES (1964)<sup>65</sup>

Mr. Chairman,<sup>66</sup> Mr. Justice Brennan, ladies and gentlemen: Of all the two-faced problems in the law, there is none more tormenting than the admissibility of illegally obtained evidence. Whichever face one turns to the wall remains a haunting one because there is always that haunting fear that the court has impinged too far on one or the other of the two great interests involved: first, effective law enforcement, without which there can be no liberty; and second, security of one's privacy against arbitrary intrusion by the police, which Justice Frankfurter stated in *Wolf v. Colorado*,<sup>67</sup> is implicit in the concept of ordered liberty.

This concern has always been present in the development of the law on search and seizure, but since James Otis made his impassioned plea against the writs of assistance, I don't think there has been so much sensitivity in this area as there is today. The holding in *Mapp v. Ohio*,<sup>68</sup> which is still at large in the fifty states — and some fear, possibly, that *Escobedo v. Illinois*<sup>69</sup> will also go on a rampage — leaves the courts with the high responsibility of

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<sup>64</sup> Apparently Judge Norman F. Arterburn of the Indiana Supreme Court, later chief justice.

<sup>65</sup> Transcription of the speech delivered at the inaugural meeting of the Appellate Judges' Conference, during the Annual Meeting of the American Bar Association, August 9, 1964, Waldorf-Astoria Hotel, New York City. The title refers to the speech delivered two years earlier by Justice Traynor at Duke University Law School, published as "Mapp v. Ohio at Large in the Fifty States," 1962 DUKE L.J. 319. Apart from the opening sentences, the latter talk does not duplicate the former, but offers a further development of his thinking on the subject of illegal searches.

<sup>66</sup> Gerald A. Flood of the Superior Court of Pennsylvania.

<sup>67</sup> 338 U.S. 25 (1949).

<sup>68</sup> 367 U.S. 643 (1961).

<sup>69</sup> 378 U.S. 478 (1964).

finding the kindly course between these two great interests and of adjusting and adapting rules so that one interest is not so far advanced as seriously to impair the other.

I don't think there are any here who would disagree with the basic constitutional guarantee in the Fourth Amendment, which as I recall provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

It is difficult, however, for courts to get the message over to the people as to how important it is that this right be enforced. Normally, the usual law-abiding person is preoccupied with private lawlessness and doesn't envisage himself as a likely candidate for arbitrary police intrusion upon his privacy, and he views with dismay the release of the guilty when there has been a violation of the Fourth Amendment, not realizing that it is important for his own protection that there be effective enforcement of that amendment even if the guilty go free when the evidence obtained against them was illegally obtained. Some of the arguments made against the exclusionary rule, I think, are utterly foolish; arguments that I have read were made by district attorneys and by chiefs of police, particularly the argument that the admission of illegally obtained evidence is essential to effective law enforcement. That argument was lost when the Fourth Amendment was adopted. The question does not arise if it is not violated. I think it is a large assumption that law enforcement requires violation of the Fourth Amendment. I believe there are great opportunities for effective law enforcement that abides by the Constitution. There is, however, in my opinion, reasonable grounds for differences of opinion as to the means of enforcing the Fourth Amendment.

One cause for my thinking that there can be reasonable differences of opinion on the subject is that I have differed upon it myself. I will take only a few minutes to relate that experience.

In 1942, I was one of those who urged the other members of the Supreme Court of California to grant a petition for hearing in a case

involving an illegal search and seizure.<sup>70</sup> One of the reasons why I urged them to grant the hearing was that I thought at that time that the exclusionary rule should be adopted in California. After the case was assigned to me, however, I changed my mind. I have always believed that the trier of the facts needs all the good, relevant, material evidence he can get and that in case of doubt, we should lean toward admission of evidence rather than exclusion, and that privileges and any other exclusionary rules should be invoked with great caution. Here was a situation where the evidence was relevant, material, even devastating. The problem was, should the court adjust the rules of evidence, adopt new rules of evidence and depart from basic concepts of admissibility simply as an expedient to enforce the Fourth Amendment? I have long believed that courts should not take upon themselves all the responsibilities of making a better world and concluded that we should not attempt to do so in this area; that the responsibility lies with law enforcement officers and other agencies of the government; that enforcement of the Fourth Amendment should be by prosecution, fines, imprisonment and so forth, and that there was nothing unfair about a trial in which illegally obtained evidence was admitted. There was no denial of due process of law. The defendant had counsel, fundamental rules of evidence and other rules necessary for a fair trial were properly applied, and it was a matter of complete indifference to the court where the evidence came from. If the Fourth Amendment was not being enforced, that was not the responsibility of the courts; that was the responsibility of the law enforcement officers, the governor, and the state legislature.

Well, I lived with that decision from 1942 until 1955 and saw case after case come before the court where illegally obtained evidence was being obtained and used as a mere routine. It became abundantly clear that it was one thing to condone an occasional constable's blunder but another thing to condone deliberate and systematic routine invasions of the Fourth Amendment.

I was alarmed by such cases as *Irvine v. California*,<sup>71</sup> where microphones were put in bedrooms and took note of the message of the United

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<sup>70</sup> *People v. Gonzales*, 20 Cal.2d 165 (1942).

<sup>71</sup> 347 U.S. 128 (1954).

States Supreme Court, in an opinion written by Justice Jackson, urging state courts to reconsider their rules admitting evidence so obtained.

In *Rochin v. California*,<sup>72</sup> the United States Supreme Court held that at least evidence that was obtained by brutality, or in a manner that shocked the conscience or violated one's sense of decency must be excluded.

I was not shocked by the forcible taking of the narcotic that that defendant swallowed in *Rochin*. That didn't shock me nearly so much as the breaking into the defendant's bedroom without probable cause. By the time *People against Cahan*<sup>73</sup> came to the court in 1955, it had been demonstrated that illegal search and seizure was an ordinary police routine, that the courts were part of this dirty business because it was owing to our approval that the police were making these illegal searches and seizures. When the petition for hearing in *People against Cahan* reached us, I talked to our chief justice [Phil S. Gibson] and said, "I have had enough of this," and he said he had, too. We were successful in getting the petition granted. I then had the great pleasure and privilege of writing the opinion overruling my earlier decision and adopting the exclusionary rule in California. It was like going to confession or taking a shower. It left a clean feeling and a sense of great relief. But only then did the problems begin.

We adopted the exclusionary rule as an ordinary judicially declared rule of evidence. Since *Mapp v. Ohio*, however, it is no longer a judicially declared rule of evidence; it is part of the Constitution. Our problem therefore shifted from trying to find flexible, workable rules to trying to determine what rules we could properly adopt that differed from the rules that the federal courts had laid down. Until *Mapp v. Ohio*, the United States Supreme Court did not have occasion to articulate with specificity for the guidance of state courts when an arrest or a search was without probable cause within the meaning of the Fourth Amendment.

Until *Mapp v. Ohio*, there was no need for the United States Supreme Court to articulate the distinction between a rule of exclusion that was based on a federal statute only or on the United States Supreme Court's supervision of the administration of criminal justice, and a rule that was based on the Fourth Amendment. I became convinced and am still convinced that

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<sup>72</sup> 342 U.S. 165 (1952).

<sup>73</sup> 44 Cal. 2d 434 (1955).

state courts are not bound by all the pre-*Mapp* federal rules. Some of those rules, I think, are confusing. I am not alone in stating that. The United States Supreme Court justices have often stated it themselves and in vigorous and colorful language. Some of the rules are over-refined; some are underdeveloped, and there had been no clear articulation as to their being based on the Fourth Amendment or as to what they were based on.

You will now find in the recent decisions of the United States Supreme Court great pains being taken to point out when a rule is based on the Fourth Amendment, and I think most of the recent decisions expressly state when an exclusionary rule is based on that amendment.

It would be easy for state judges just to follow automatically the pre-*Mapp* federal rules. In doing so, I don't think they do the law any service, and I am sure they do not do the United States Supreme Court any service. It seems to me that it is incumbent on state judges, when they are convinced that a federal rule is not based on the Fourth Amendment and that it is unsound, to articulate as best they can for the benefit of the United States Supreme Court why the state is departing from a federal rule that hasn't been specifically declared to be based on the Fourth Amendment.

Some state rules do not go so far as the federal rules and some go farther. For example, in one of the cases we had, *People against Martin*,<sup>74</sup> I wrote an opinion based on the conviction that the only reason we got the exclusionary rule was to deter illegal police activity. I am still convinced of that for I don't think the rule is part of the Fourth Amendment, as if it were written expressly in that amendment that any evidence obtained in violation of it shall not be admitted. I think the only reason we got *Mapp v. Ohio*, and its exclusionary rule, like the only reason we got *People v. Cahan*<sup>75</sup> in California, was that it had been demonstrated that it was the only way that illegal searches and seizures could be deterred. Such deterrence is the heart and soul of the reason for the exclusionary rule. Now, if I am right on that major premise, it seems to me to follow that it makes no difference whose right to privacy has been violated. If there was illegal police activity, arrest or a search without probable cause, exclusion of the illegally obtained evidence shouldn't depend on whether it was A's property

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<sup>74</sup> 46 Cal.2d 106 (1956).

<sup>75</sup> 44 Cal. 2d 434 (1955).

that was searched when the evidence was introduced against B, and we so held in *People against Martin*. I was somewhat dismayed in reading in an otherwise splendid opinion by Mr. Justice Brennan, *Wong Sung against the United States*,<sup>76</sup> a holding without so much as a nod to the theory underlying *People v. Martin* that one whose own right to privacy had not been violated had no standing to object to illegally obtained evidence.

I can only hope that someday there may be a return to the basic concept of deterrence in this respect. If I am right that deterrence is at the heart of the rule, and that any illegal police activity that results in illegally obtained evidence should be excluded, anyone against whom such evidence is offered has standing to object to its admission. We should get away from too much preoccupation with tort concepts and property concepts. The purpose of excluding the evidence is not to make amends to the defendant but to deter illegal police activity. What difference does it make whether it was A's home that was illegally invaded or the defendant's home?

I have the impression that in the earlier formulation of the federal rules there has been altogether too much preoccupation with property concepts and with tort concepts. I also think that what we desperately need at the outset is a clear articulation of just what it is the Fourth Amendment protects. It seems to me that there has been too much emphasis on the man's castle, too much emphasis on the law of trespass. I think it was emphasis on property concepts that led to that unfortunate *Olmstead* decision<sup>77</sup> that evidence obtained by wiretapping was admissible because there was no trespass to the defendant's property. I think that a case like the *Goldman* case<sup>78</sup> was wrong, where a detectograph was put up against a wall and conversations that went on in a bedroom were overheard by the police. I was grateful for the United States Supreme Court's opinion in the *Silverman* case,<sup>79</sup> where Justice Stewart wrote, if I recall correctly, that the Court declined to go beyond *Goldman* by even a fraction of an inch.

In *Silverman* you will recall there was a spike put into a wall. There was a trespass, however, though slight. Then there is a recent case of the United States Supreme Court that also encourages me. I think it is *Clinton against*

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<sup>76</sup> 371 U.S. 471 (1963).

<sup>77</sup> 277 U.S. 438 (1928).

<sup>78</sup> 316 U.S. 129 (1942).

<sup>79</sup> 365 U.S. 505 (1961).

*Virginia*,<sup>80</sup> where a spike microphone was put into a party wall. Apparently, under the law of Virginia each owner owned half the wall. In this case the spike didn't go beyond the middle, so I suppose there was no trespass. The United States Supreme Court nevertheless held that the evidence so obtained was inadmissible. In the dissenting opinion in *Lopez against the United States*,<sup>81</sup> Justice Brennan speaks at great length, I think, somewhat along these lines as to the danger to the right to privacy by all these electronic devices and so forth that we now have. The witty diversities of the law of trespass should not impede protecting that right from such danger.

I hope you will bear with me, for there are a number of other sensitive areas I should like to cover. The first such area involves a federal rule with which I am in complete disagreement. This is the rule that the police cannot search, even with a search warrant, no matter how much probable cause there is, simply to obtain evidence; they cannot seize merely evidentiary matters. So, the crucial question is what is an evidentiary matter? The leading case on that question is *Gouled against the United States*,<sup>82</sup> a 1921 case written by Chief Justice Hughes.

The defendant there was charged with using the mails to defraud. There was a search warrant and in the course of the search the officers found a receipted bill for legal services, an executed contract, and an unexecuted contract. The United States Supreme Court held that the seizure of the bill for legal services and the unexecuted contract and the executed contract violated the Fourth Amendment and that the introduction of those materials into evidence violated the Fifth Amendment. I might put in a parenthetical remark at this point. For the life of me, I cannot see how the Fifth Amendment is involved. You will recall, however, that it was only because of Justice Black's concurring vote in *Mapp v. Ohio* that you had a court for *Mapp v. Ohio*, and Justice Black based his concurrence on the Fifth Amendment. I have tried my best to understand how the Fifth Amendment has anything to do with the question, but so far without success.

It has been held that contraband can be seized and admitted into evidence if there was probable cause for the search because the defendant has no right to own it. Stolen goods can be introduced into evidence because the

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<sup>80</sup> 377 U.S. 158 (1964).

<sup>81</sup> 373 U.S. 427 (1963).

<sup>82</sup> 255 U.S. 298 (1921).

defendant doesn't own them. You begin to think that maybe property concepts are going to dominate but no; you go on and you find that the fruits of a crime are admissible, even though the defendant owns them and the instruments of a crime are admissible even though the defendant owns them. Moreover, a record that the defendant is required by law to keep is admissible. Now, why doesn't the Fifth Amendment control, if it has any application at all? What difference does it make so far as the Fifth Amendment is concerned whether the property is or is not contraband, stolen goods, or the fruits or instruments of a crime, or a record one is required to keep?

When you look at the decisions in the various federal courts and try to interpret *Gouled* as to what is a fruit and what is an instrument, you find that in some cases account books are, in some cases registers are, in some cases intangibles are, and when you try to find out why, to find the basic guiding principle, I think you can't help but be confused, which prompted me to ask on another occasion, perhaps impishly yet somewhat seriously, why should any state court in its right mind risk losing it in the pursuit of learning what the total message is of a federal rule of such elaborate obfuscation?

I hope that since *Mapp v. Ohio*, which puts the high responsibility on the United States Supreme Court to articulate with care what rules of exclusion are based on the Fourth Amendment and what are based on its supervision of justice in the federal courts, or on statutes, that we might get a departure from the *Gouled* case or at least for my own personal intellectual satisfaction a good plausible explanation that a reasonable open mind can accept, as to what on earth the Fifth Amendment has to do in this area. It might well be that when the message comes I will agree with it quickly. Of course I will abide by it faithfully even if I don't agree with it.

There are two or three other sensitive points where the law desperately needs clarification. The first is on the problem of the right of the police to investigate short of arrest. What we need, in the first place, is a good, workable definition of probable cause. We need a good, acceptable definition of when an arrest occurs, and I hope that it will be liberal enough that it will not preclude stopping and even frisking when there have been suspicious circumstances short of probable cause for arrest, that would at least prompt any law enforcement officer properly doing his job to investigate or

that would impel you, if you were the chief of police, to fire the officer if he didn't investigate.

Let me tell you about a case that presents the problem. The case is *People v. Michelson*<sup>83</sup> in California. There was a robbery at a supermarket and an employee of the supermarket described the robbers as two tall men, as I recall, one of them wearing a red sweater or a red jacket. So, the police were on the lookout for such men when, lo and behold, within a few minutes coming toward the supermarket was an automobile with two men, one of whom was wearing a red sweater. So the police followed the car and it went up one block, turned around and went up another, then turned around and went up another. This erratic behavior together with the description they had of the robbers prompted the police to stop the car. The two men got out and when the police asked them what they were doing, they responded that they were looking for the Hollywood Freeway. I had a great deal of sympathy with that response for I have had identically the same experience. It's not only hard enough to find an entrance to these freeways but once on them, it is sometimes an awful job to get off them. After the officers got this explanation, they nevertheless went some distance from where these two men were standing and rummaged through the car. Underneath the seat of the automobile they found a sock full of coins. There had been robberies of telephone booths recently, and through further questioning it was disclosed that these men were returning from the robbery of a telephone booth.

In the opinion I wrote we held that the suspicious circumstances, the strange driving and the fact that one of the men was wearing a red jacket (there may be thousands of people in Los Angeles that wear red jackets; I haven't seen many in San Francisco), justified the stopping and the questioning and I think would have justified frisking them for firearms to protect the lives of the officers, but that the further search went beyond permissible limits.

Now, whether the United States Supreme Court would hold we were right or wrong in view of the *Henry* case,<sup>84</sup> I'm not sure. This is a very difficult area. In any event, I am of the tentative opinion that the Uniform Arrest Act goes too far. I don't think the police can take people they have

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<sup>83</sup> 59 Cal. 2d. 448 (1963).

<sup>84</sup> 361 U.S. 98 (1959).

no probable cause to arrest to the police station for questioning. I don't think the police can take too long in stopping and questioning. If we had an hour or two, I should like to explore this subject with you further. The most I can say very briefly is that I hope the Supreme Court doesn't seize on the law of torts, the law of false imprisonment, and write the law of torts into the Constitution. I think we need a little more flexibility in this area.

As you can gather from these remarks, I do not like too much preoccupation with the law of torts and with the law of property in working out solutions to search and seizure problems. I think the right to privacy that we are trying to protect should not be confined in some situations within such narrow limits and in other situations it should be confined more than it would be confined under tort and property law.

Now, two more sensitive subjects that I really must get off my chest because I think they are extremely important. The first is the effect of the harmless error rule and the second is the retroactivity of *Mapp v. Ohio*.

With respect to the harmless error rule, a very sensitive question is: when is the admissibility of illegally obtained evidence prejudicial? You will recall that it has been definitely settled that admission of an involuntary confession, no matter how much evidence is developed that it was true, how much other evidence of guilt there is, is automatically prejudicial. Should the same rule prevail with respect to illegally obtained evidence? The United States Supreme Court has had one recent case in which it did not have to decide that question for it found that the admission of the evidence was prejudicial. Let me tell you about a case of my own where we were faced squarely with the question. The case is *People v. Parham*,<sup>85</sup> which involved a bank robbery. There was ample evidence of probable cause for the arrest and search of the defendant, and the particular item of evidence that was obtained illegally was completely unnecessary to the prosecution's case, and we thought it did not contribute at all to the conviction. It was obtained in this way: The bank robber's modus operandi was to present a check or a piece of paper that looked like a check to be cashed. Then he would bring out a gun and rob the bank. Well, after the police officers, with what we thought was abundant evidence of probable cause that I will not take the time to detail to you, had captured the bank robber, he

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<sup>85</sup> 60 Cal.2d 378 (1963).

then at the time of his arrest put what looked like a check into his mouth and started chewing it. The officers tried to remove it from his mouth, but he wouldn't disgorge, so they took their billy clubs and hit him over the head and then got the masticated piece of paper. At the trial all this evidence was introduced, including the masticated piece of paper, which was really unimportant to the prosecution's case. The conduct of the officers is of course not to be condoned, but the real blunder so far as the exclusionary rule is concerned was that the district attorney, with an otherwise strong case, put in this completely unnecessary item of evidence and embarrassed the court with an unnecessary problem that . . . [Laughter]

I toyed with the idea of saying the error was automatically prejudicial but concluded that the facts of that case were just too strong for such a holding. You might say, "Well, if the object of the exclusionary rule is to deter, that would deter." It is true that it would deter illegal police activities, if the exclusionary rule does deter, but my notion of the deterrence concept is that the police should not profit by their wrongs and we didn't believe they were profiting here by the introduction of this small item of evidence in view of all the other evidence in the case that convinced us that it was most improbable that this item influenced the verdict in any way.

Now, if you will permit me a little parenthetical remark, I sometimes wonder — or let me put it this way — as I have emphasized and cannot emphasize too much because it is the basis of so many of my views on these problems, deterrence of illegal police activity is the heart and soul of the exclusionary rule. Now, the thing that gives me pause is that I wonder sometimes if it really does deter or deters as much as it should. I have been very much interested in the development of Justice Jackson's views on the exclusionary rule. He started out in his early opinions by enforcing strictly the exclusionary rule. I think he wrote the opinion in *Johnson v. United States*,<sup>86</sup> which I never agreed with. In that case an officer smelled opium smoke coming out of the edges of a hotel door and the court held that it was not probable cause for entry and arrest. It made me wonder how much you really need.

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<sup>86</sup> 333 U.S. 10 (1948).

Then there was the case of *Brinegar v. United States*<sup>87</sup> during prohibition days. Justice Rutledge wrote what I thought was an excellent opinion finding probable cause. Jackson, however, dissented.

Then I notice that as the years went by Justice Jackson became less and less an ardent advocate of the exclusionary rule and in one opinion questioned whether it really does deter. It might make a good project for some research scholar with a Ford Foundation grant to really find out — which leads me to this: Maybe it doesn't deter; maybe the police will say, "We are going to do our job as best we can. Our responsibility is effective law enforcement; we are going to catch these crooks, these rapists, these murderers, these narcotics addicts, these people who insist on bookmaking and other things that are antisocial — that is our responsibility. What the courts do with them is up to the courts." I earnestly hope we never come to such a defiance of law by those entrusted to enforce it. Another parenthesis: I think maybe it might be wise for legislatures to reconsider some statutes that regulate conduct that may not really be so antisocial that it should be made criminal and yet which put so much pressure on the exclusionary rule. Close parenthesis.

We now come to the last subject and that is whether there should be collateral attack in a case where there has been a violation of the Fourth Amendment, violation of a federal rule clearly based on the Fourth Amendment.

My argument is this, and I might say in passing that I was delighted to find support from one of the strong courts of this country, the Court of Appeals of the Fifth Circuit, in *Linkletter v. Walker*,<sup>88</sup> an excellent opinion somewhat along the lines I had set forth in a concurring opinion, which I like to believe was of some help to that court. I welcome all the support I can get. The Ninth Circuit went the other way and I believe also the Third Circuit. In any event, the problem is now before the United States Supreme Court, and Justice Brennan may close his ears, but I think he is aware of these arguments, anyway, and moreover he is a strong-minded fellow. A good verbal argument can be made for the proposition that habeas corpus should lie when there has been a conviction based on illegally obtained evidence even though the judgment of conviction has become final. The

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<sup>87</sup> 338 U.S. 160 (1949).

<sup>88</sup> See 381 U.S. 618 (1965).

argument is that, now that it has been determined by *Mapp v. Ohio* that the exclusionary rule is based on the Constitution, there is a constitutional right to have illegally obtained evidence excluded. It has been settled for generations that constitutional rights can be vindicated on habeas corpus; ergo, this constitutional right can be vindicated on habeas corpus. Now, my answer to that, for what it is worth, is this: That argument is verbal, it is logical in a fashion, if you accept the premise, but it doesn't get to the heart of the exclusionary rule. Why do you have the exclusionary rule? What brought it on? The whole object of it is to deter illegal police activity. That objective can be adequately attained, I believe, by allowing the defendant to raise the question, say on a motion to suppress the evidence, or as we do in California, by allowing him to object to the introduction of the evidence and to present his case on appeal and that I think is enough. The heroic remedy of upsetting final judgments is just too heavy a price to pay in the interest of deterrence. I think the objective of deterrence can be accomplished by allowing the question to be raised at the trial and on appeal and that the importance of sustaining final judgments outweighs the slight deterrent effect of upsetting such judgments. Moreover, if final judgments are to be upset every time the exclusionary rule is expanded, police activity that would otherwise be condemned may be condoned, and needed expansion of the exclusionary rule foreclosed. It remains to be seen whether the Fifth Circuit and I will be vindicated in that respect.

We speak so much of illegal police activity and of the lawlessness of the police. I should like to put in a plea for understanding the tough job that the police have and the great risk to their lives that they go through daily. I am convinced that effective law enforcement is important to liberty. Without effective law enforcement we would not have this ordered liberty of which the Fourth Amendment is such an essential part. We must have skilled and intelligent police officers and, above all, we need respect for the police and we need wholehearted cooperation with them, and I think we need many more of them. I am still of the opinion, however, that the Fourth Amendment is a vital bulwark against a police state, not because of police officers, but because of their superiors and I mean those who may get in control of the government. It is the Fourth Amendment as much as any other constitutional guarantee that will keep us from a Hitler system or worse.

Nevertheless, I think that we must have intelligent, effective police officers; we must have respect for them; we must pay them adequately, and we must have more of them. Thank you.

#### IV. THE FIRST AMENDMENT'S MOBILE TRIANGLE: MEDIA, PUBLIC AND GOVERNMENT (1974)<sup>89</sup>

Lawyers have been jolted by the news that in many a household the first ten Amendments are not household words. Though the Bill of Rights is doing reasonably well for its age, despite recurring assaults from right and left, it continues to suffer from lack of public understanding. Even lawyers need continuing education in the expanding context of such seemingly simple texts as the First Amendment. Plain words, like plain people, may be ridden with complications.

One of the most complicated problems now besetting the First Amendment is that of access to the news media. Getting down to cases, we find in them less than a clear reading of the meaning and portent of access. Much depends upon who demands access to the media and why. Something may depend on how tightly a journal or broadcasting station controls access to the public and how significant that public is. Something may also depend on who the beggar for access is. Can the beggar address a plea only to some metropolitan megaphone, or also to some provincial journal or some trade publication or scholarly bulletin? Does he seek vindication in consequence of an attack upon him, or does he seek equal time on some controversial issue, or does he simply demand an exclusive easement for some crusade of his own? Does it matter whether the beggar outside publication gates is in public or private life, a leading citizen or an obscure one, a well-tempered spokesman or a zealot with the gleam of half-truth in his eye? On an issue such as women's liberation would it matter whether

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<sup>89</sup> Remarks before The Association of the Bar of the City of New York, January 29, 1974 (as former chief justice of California and chairman of the National News Council). The same or similar address was delivered to the New England Society of Newspapers Editors in Worcester, Massachusetts, November 9, 1973, and an expanded and annotated version was published as *Speech Impediments & Hurricane Flo: The implications of a right-of-reply to newspapers*, 43 U. CIN. L. REV. 247 (1974).

the would-be spokesperson were an adult male, an adult female, or a child under or over thirty?

With so many questions unanswered, a storm was bound to come. It came in the form of a decision that rolled out of Florida shortly after the Fourth of July, headed in all directions. We might well call it Hurricane Flo, given the wails from the news media. A taciturn down-easter might be moved to observe that henceforth, “As Flo goes, so goes the nation.” That depends, of course, on how appealing Flo will look upon final appeal. The Supreme Court of Florida held that the Miami Herald Publishing Company is bound by Florida’s right-of-reply statute to publish the reply of a candidate for public office to two editorials allegedly attacking his personal character.<sup>90</sup>

An editor of the *Wall Street Journal*, Michael Gartner, thereafter quoted Yale Professor Thomas Emerson: “It means the government can tell the newspapers that the newspapers can be forced to print material they don’t want to print. This is the very opposite of freedom of the press.” Editor Gartner’s own comment on the decision is that “the government is our new managing editor.”

Certainly the new religion of Open Up prescribed for editors is shoving hard against editorial freedom, the old-time religion of Shut Out. Whoever cries Wolf or Censor, however, had better first make sure that others will trust his message that the danger is indeed at the door. The Florida case has no such open-and-shut simplicity. It is in fact a classic hard case, and no one can predict whether it will finally lead to bad law or good.

Consider, for example, the sweet reasonableness attending the plea that a publisher who dominates or perhaps even monopolizes access to a large audience should leave some access road open to others for response to whatever attack he publishes against them. His very power delineates his freedom, so goes the argument; he cannot be equated with legendary Tom Paine, who had no dominant access to large audiences and whose own freedom would have been destroyed by any compulsion to share access with others. There was no need for every Tom, Dick, and Harry to go down Paine’s alley when they had equal opportunity to open up alleys of their own. The situation is quite otherwise, said the Florida court, when one or

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<sup>90</sup> *Tornillo v. Miami Herald Publishing Co.*, 287 So.2d 78 (1973). *Reversed*, 418 U.S. 241 (1974) (unanimous opinion by Burger, C.J.).

two publishers dominate the main avenues of communication. The fewer they are, the more powerful they become as they edit the news and voice their editorial opinions thereon. When they use their power to attack anyone without comparable access to their audience, they have a corresponding responsibility to observe Florida's right-of-reply statute.

Newspeople may view such legal workings as the work of the devil, but it is sound practice to give the devil his due. It may be particularly appropriate for a Californian to assume the role of devil's advocate for Florida.

Many have revolted against what Florida has wrought, on the usual hearsay of not necessarily unimpeachable sources. It would be wiser to examine the original source, the opinion itself of the Florida Supreme Court. There is plausibility to that opinion. The language is cool, not florid. The Court believes that Florida's right-of-reply statute "enhances rather than abridges freedom of speech protected by the First Amendment . . ." and it explains why. Consider the reasoning straight from the Florida opinion:

The right of the public to know all sides of a controversy and from such information to be able to make an enlightened choice is being jeopardized by the growing concentration of the ownership of the mass media into fewer and fewer hands, resulting ultimately in a form of private censorship. Through consolidation, syndication, acquisition of radio and television stations and the demise of vast numbers of newspapers, competition is rapidly vanishing and news corporations are acquiring monopolistic influence over huge areas of the country. . . .

Freedom of expression was retained by the people through the First Amendment *for all the people and not merely for a select few*. The First Amendment *did not create a privileged class* which through a monopoly of instruments of the newspaper industry would be able to *deny to the people the freedom of expression* which the First Amendment guarantees.<sup>91</sup>

The Florida Supreme Court reasoned that access at least for reply to an attack is particularly necessary in the case of a political candidate, since the very integrity of democratic elections depends upon an informed public.

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<sup>91</sup> *Id.* at 80.

The Florida Court is beaming a twofold message. First, those who rule the fine or gross print, like those who rule the airwaves, have a constitutional obligation to fulfill the public's need to know. Second, they are accordingly obliged to give reply space to whomever they have attacked. The outcry of the print media at this twofold message carries undertones of injured amour-propre. Suddenly the scribblers, far from being the untouchable loners of the communications industry, find themselves charged with social obligations like any ordinary licensee of broadcasting. No longer can they be sure of breathing a headier freedom than the poor licensees, whose rich livelihood depends on their pleasing as many people as possible, with better programs or worse, for richer ratings or richest, in news as in entertainment, in sick comedies as in health messages, always with eyes at the back of their heads to see whether Granny Government also looks pleased enough to let them live another few years. It has come as a shock to proud earthlings that their freedom may not be much loftier than the pedestrian freedom of those who tiptoe on air.

A devil's advocate is bound to remind the shaken freemen that the Florida Supreme Court spoke the language of freedom, not repression. It leaned heavily on the 1964 decision of the United States Supreme Court in *New York Times v. Sullivan*<sup>92</sup> and its 1971 decision in *Rosenbloom v. Metro-media*.<sup>93</sup> These two cases were landmarks of freedom for the press. Are they also landing fields for Hurricane Flo as the Florida opinion suggests?

*New York Times v. Sullivan* holds that a government official cannot recover damages from a publisher for a defamatory falsehood relating to his official conduct if he fails to prove "actual malice," namely, that the defendant made the statement with knowledge that it was false or with reckless disregard for its truth or falsity. The United States Supreme Court thus declared the First Amendment to be the safeguard of a right to speak on public issues forcefully, carelessly, and even falsely, without stammering deference to other points of view.

The *Times* case involved no reporter's tall story, no columnist's small talk, no editor's slip of a paragraph, but a paid advertisement that allegedly libeled a local police commissioner. Nonetheless, the Court found that,

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<sup>92</sup> 376 U.S. 254 (1964).

<sup>93</sup> 403 U.S. 29 (1971).

unlike the usual commercial advertisement, this one “communicated information, expressed opinion, recited grievances, protested claimed abuses, and sought financial support on behalf of a movement whose existence and objectives are matters of the highest public interest and concern.”<sup>94</sup>

In the area of public issues the *Times* case thus marks a new tolerance for misstatements, cracker-barrel views, and freewheeling language. Better the smog of error or eccentricity or zealotry that others are free to deplore or dissipate than a pall of black-letter law whose immutable and oppressive presence would impel people not only to watch for fatal flaws in the words of others but also to keep uneasy watch on their own words. Self-censorship, in the view of the Court, is as deadly as any other censorship to freedom.

The Florida opinion is also forcefully linked to the language of the more recent decision in *Rosenbloom v. Metromedia*, which not only accorded *Times* freedom to a broadcaster, thus narrowing the gap between print media and government-stamped broadcasters, but also extended *Times* freedom to speech about a private citizen, on the ground that it concerned primarily a matter of public interest, namely, the peddling of allegedly obscene materials.

By clothing the distribution of nudist magazines as an issue of public interest, the United States Supreme Court in the *Metromedia* case went beyond the *Times* case to enlarge not only the chorus but the score of freedom. Now the rising voices of mere licensees could join with those of venerable *Times* publishers, and the newly aggrandized chorus could sound out lustily on new great social issues of the day, such as girlie magazines. On high constitutional ground an aggrieved peddler, charging libel in vain, bit the dust as had an aggrieved police commissioner before him.

Given the heady freedom of the *Times* and *Metromedia* cases, the old boys and girls of the print media may have failed to take note of all the sobering implications of their new links with the lads and lassies of broadcasting. It took the Florida connection in the *Miami Herald* case to bring them to a day of reckoning with the most sobering implication of all. If *Times* and *Metromedia* are kissing cousins in a family chorus of freedom, they may then likewise be linked in an obligation to accord to an importunate outsider a right of access to their professional chorus, at least when they have been singing away about his failings in matters of public interest.

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<sup>94</sup> 376 U.S. 254, 266 (1964).

When a government itself has little right to make a newspaper shut up, why should a newspaper that has freely criticized a political candidate shut out his right of reply in its pages? If a candidate cannot shout back to the same audience the newspaper reached, has he encountered an insurmountable obstacle to speech more serious than the restraining threat of official sanctions would be? If he is cut off from even whispering to the only audience he wants, is he any less bereft because he can shout at the moon from the rooftops?

The growing clamor now for a right of access should hardly come as a surprise. A complainant carrying the heavy burden of proving actual malice feels doubly aggrieved if his already meager chance of proving such malice is cut down at the very time the press has gained new constitutional freedom to publish falsehoods without liability. It is no longer enough for a complainant to catch the publisher in a lie; he must catch him in a malicious lie, while sinking under a crushing burden of proof. If a publisher fails to distinguish true from false and then fails to retract the falsehood and still remains immune from liability, it does not seem so unreasonable to grant the target of the falsehood at least a chance to bring the facts into line. It was grievance upon grievance that drove complainants to demand a right of reply. Hurricane Flo might not be blowing so hard without the opinion of the United States Supreme Court in *Red Lion Broadcasting Co. v. FCC* in 1969,<sup>95</sup> five years after the *Times* case. The Court let no one forget that FCC was the den mother of Red Lion. It upheld the authority of the FCC to implement the established Fairness Doctrine on coverage of public issues by spelling out mandatory procedures in the event of a broadcasting of a personal attack or political editorial. The opinion recognized that “broadcasting is clearly a medium affected by a First Amendment interest,”<sup>96</sup> but also clearly viewed broadcasters such as Red Lion as a special breed of cat because their capacity to roar can drown out other voices.

The Court was concerned not only with how raucously a Red Lion could roar, but also how it could dominate the air to the exclusion of others, given the shortage of frequencies. In its view, “it is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish.”<sup>97</sup>

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<sup>95</sup> 395 U.S. 367 (1969).

<sup>96</sup> *Id.* at 386.

<sup>97</sup> *Id.* at 388.

It is significant that, in the four years between the *Red Lion* case of 1969 and the *Miami Herald* case of 1973, technology has advanced by leaps and bounds to give promise of many more frequencies for broadcasting and hence many more possibilities for making inroads into the current domination of the airwaves. The more frequencies there are, the fewer may be the problems of short supply, or of oft-mentioned chaos and cacophony, still invoked as a basis for regulating broadcasters and not print media. At the same time, there has been a growing domination of major print media by fewer publishers, as well as recent severe shortages of timber for newsprint. The fewer major print media there are, the more their domination of major audiences will come to resemble the current domination of the airwaves. Hence it is a good deal more plausible in 1974 than it would have been earlier for the public to view broadcasters and print publishers as Tweedledee and Tweedledum rather than as Red Lion and Tom Paine.

It took Hurricane Flo to bring that news home to us. The Florida court desegregated the broadcasters. The newly integrated print publishers learned from the court's opinion that Florida's reply-of-reply statute, applied against a newspaper, is consistent with the First Amendment by virtue of such cases as *Metromedia*. The *Metromedia* case, like the *Times* case before it, had won new freedom to comment without liability on "social issues." Nonetheless there were signs that the United States Supreme Court was increasingly troubled by the problem of access. The times were ringing changes.

In sum, the *Times* case let freedom ring for the newspaper publishers, and the *Metromedia* case let freedom tinkle for the broadcasters, but there were outsiders who felt correspondingly stifled. Given the concentrated power of the media, the *Red Lion* case found justification for an outsider's right of access to the broadcasting stations, in the context of the Fairness Doctrine. The *Miami Herald* case found comparable justification for access to newspapers. Let freedom ring for everyone, said the Florida court in effect, across airwaves and the rivers of ink.

With such words a devil's advocate for Hurricane Flo might close his case. For the good sake of an open hearing, however, I now likewise present the other side.

The Florida Court has attempted a soft landing for Hurricane Flo on constitutional grounds. The right of access was presented narrowly in the *Miami Herald* case as a right of reply in the event of a newspaper's attack on

a political candidate. Is such access of a piece with the theme of “uninhibited, robust and wide-open speech”<sup>98</sup> that runs through the opinions of the United States Supreme Court on First Amendment freedom? To answer this question, we must first answer another. When a newspaper dominates an audience, is it then constitutionally obliged to fulfill what has been vaguely called the people’s right to know? Just what is this right to know?

The people’s right to know means everyone’s freedom to seek out information from others and to receive whatever information others wish to dispense. The right carries no power, however, to compel others to dispense information to the public at large. No thirster after knowledge can compel even his own government to dispense information. A fortiori, he cannot demand access to the government printing office to publicize a rejected request for information, let alone to publicize his own arguments against government secrecy. Whatever limited access he can gain results not from any First Amendment mandate, but from such statutes as the Freedom of Information Act, wherein the government voluntarily grants a measure of access to official information. Such access for the passive receipt of information is a far cry from access for the active distribution of one’s own views.

If the right to know, in the light of the First Amendment, does not empower an outsider to compel even his own government to print and distribute his copy, how can he compel a newspaper to do so? Moreover, the First Amendment mandate against abridging the freedom of the press is closely attuned to the editorial freedom of large publishers as well as small, the corporation as well as Tom Paine. The complex task of putting together a large daily newspaper could be disrupted by volunteer composers in the composing room.

An adherent of this thesis may have been nearly blown out of his mind by Hurricane Flo in July. He may find some reassurance, however, in recalling the merrier month of May when the United States Supreme Court held the line against access even to electronic media. The Democratic National Committee and the Business Executives’ Move for Vietnam Peace had demanded access to broadcasting facilities for paid editorial advertisements. The Court upheld the FCC ruling that a broadcaster had discretion to deny such access, in light of its record of full and fair coverage of

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<sup>98</sup> *Citizens Communications Center v. FCC*, 447 F.2d 1201, 1214 (D.C. Cir. 1971).

the controverted issues. The Court squared such discretion with the FCC's statutory authority to command access, as in the *Red Lion* case. Once the FCC determined that a broadcaster met the obligations of the Fairness Doctrine incumbent upon him, would-be advertisers could not invoke the First Amendment to plead access. The right of the public to be informed did not endow a private individual or group with "a right to command the use of broadcast facilities."

These various opinions combine to remind the public that the First Amendment continues to stand guard against access to newspapers. Nonetheless the case narrowed the gap between newspapers and broadcasters, not by reducing the First Amendment freedom of the press, but by augmenting the freedom of broadcasters via an outward push against the flexible boundaries of statutory regulation. Any Tom Paine remained the darling of the First Amendment, even when he had grown to monstrous size. The new twist in the case was the Court's concern over Red Lions, which had been kept in captivity since infancy, because of their own monstrous size, and now bleeped more than they roared. There were intimations that maybe even a firmly regulated old Red Lion should be trusted to exercise a little more freedom to make it a little more robust. Too many bleeps in the bellows and a lion loses its tone.

There are many straws in this case that go counter to Hurricane Flo. It would be premature, however, to rest easy that the hurricane has spent its force. There are other straws to indicate that it may still blow strong.

In the decade since the *Times* case made waves in the flow of communication, the United States Supreme Court has been of various minds on what amateurs, if any, can crash onto the established routes of publishers. The rationale of amateur hours is that they counteract the concentrated power of publishers. The dilemma remains, however, that every amateur entry is by grace of an official ruling, and each ruling strengthens the power of government over the press. Whatever the grievance of an amateur shut out by a powerful broadcaster or publisher, there is still the risk that he may lose more than he gains when he gains access with the help of a government more powerful than the press. Is he not then in turn subject to government control in a rulemaking process without end? As against the government is his First Amendment freedom now worth any more than that of the one ordered to

yield him time or space? Will he not also feel the king's chilling presence at the microphone or typewriter?

Oppressive supervision is apt to begin with incidents too small for general notice. Few take alarm if an official referee appears on the bank of a tributary to the main flow of communication to gain access to someone else's facilities for a would-be sender of messages or a would-be editor of other people's messages. The scene may even appear to illustrate our democratic way of life. Nonetheless, as Justice Brandeis has warned, "Experience should teach us to be most on our guard to protect liberty when the government's purposes are beneficent. . . . The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding."<sup>99</sup>

The one who secures government sanction for an indefinite sit-in may bode more impediment to speech than a raging oncomer armed only with a temporary right of reply. Consider the recent case of *Pittsburgh Press Company v. The Pittsburgh Commission on Human Relations*.<sup>100</sup> The Commission was no wounded victim of bad publicity rearing for a right of reply. It was merely a small government agency entrusted to be a great leveler. It was a constant reader of want ads, and it cried "Whoa" at certain sex-designated jobs at odds with the Commission's own list. The United States Supreme Court also cried "Whoa," by a vote of five to four. The *Pittsburgh Press* failed in its plea that its placement of ads came within First Amendment protection.

The effect of the majority opinion was to render the publishers half slave and half free in the advertising domain. They were now bound by the Commission's order not to publish commercial ads at odds with a local ordinance against discrimination in job advertising. The rationale was that such commercial advertising involved virtually no editorial judgment and hence could be consigned to the limbo outside the First Amendment.

A speech impediment is never a minor ailment, even when it affects only the commercial tract, only the tone of a want ad. Orders for fairness go to the heart of editorial judgment, which is by definition partisan. An editor cannot also be a carrier of sandwich signs, his head lost between neatly balanced sides of Pros and Cons. A speech impediment becomes incurable

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<sup>99</sup> *Olmstead v. United States*, 277 U.S. 438, 479 (1928) (Brandeis, J. dissenting).

<sup>100</sup> 413 U.S. 376 (1973).

when official observers take a permanent stand to make an editor watch his words. An editor's freedom may be vitiated when he's ordered to distribute the occasional compositions of others; but it risks total destruction when he must take orders on the writing of his own compositions. Only by dehumanizing his own mind can he assemble his words as a commissioner of human relations or community relations or foreign relations dictates in the name of justice or fairness or Regulation X.

The case for an editor's freedom might be summed up as a case for everyman's freedom. If First Amendment freedom once ceased to ring, we would know from deadly drumbeats the dominant force of our new commanders on the front lines of communication.

This presentation of both sides of the access problem is the merest introduction to its defiant complexity. The times may be a-changing, but the morrow is not yet clear. Will Hurricane Flo be stopped dead in its tracks at some ivied temple of Fair Comment or some more recent shrine of Fair Falsehood? Will it gain instead enough momentum to carry along Red Lion still up in the air, and deposit it as a graven image of the Fairness Doctrine for a new cloverleaf of intertwining access routes to land, sea, and air? Or will the hurricane wind down in the gray lands between the temples and shrines and a distant cloverleaf site?

We need to know much more about those gray lands, if we are to deal with storms more rationally than by adding wings at random to the sanctums of wise or wanton editors or by embarking on random sorties of road construction with wise or wanton Populists. As a step toward rational exploration and development, the recently established National News Council has begun work on its first major project, the question of access to news media, under the direction of Professor Benno Schmidt, Jr. of the Columbia Law School.

Whatever the measures taken to contain a hurricane, however random or rational, they are bound to have repercussions on the interaction of government, the press, and the people — on what access each should have to the others. It is time to keep a weather eye out on that basic question of freedom, for more storms are on the way.

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JUSTIN M. EDGAR, TRAVIS L. EMICK,  
AND MARLENE BUBRICK\*

Had it not been for a minor section in the California legislative act that created and funded the UC Hastings College of the Law,<sup>1</sup> this first legal academy west of the Missouri River might have been located in present-day Berkeley, rather than neighboring San Francisco. Founded out of need for a law school in the rapidly maturing American West — the then-nearest law school being nearly 2,000 miles away in Des Moines, Iowa — the school was a brand-new endeavor. As the newly created University of California did not have a research collection capable of supporting a law school, section 12 of the founding act compelled the Law Library Association of the City of San Francisco to provide UC Hastings students access to their library. Even though the college outgrew this library quickly, it cemented the close relationship that Hastings would share with the institutions in the Civic Center, leading to the 1901 residence of the college in the magnificent new City Hall of San Francisco. Five years later, after the great earthquake

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\* Travis L. Emick is the Digital Projects Librarian, Justin M. Edgar is the Special Collections and Documents Manager, and Marlene Bubrick is the Technical Services and Special Collections Librarian at UC Hastings College of the Law.

<sup>1</sup> “An Act to create ‘Hastings’ College of the Law’ in the University of the State of California” (Stats. 1878, ch. CCCLI, at p. 533), adopted March 26, 1878.

and resulting conflagration, the college, and nearly all documents and records of the first twenty-eight years would be ashes under the ruined dome of City Hall. In a fortunate twist of fate, one document survived.

The following years were characterized by recovery and rebuilding, with Special Collections at UC Hastings College of the Law Library being developed under the care of various librarians. Currently, portions of the collections are being added to our new Digital Repository. This article highlights some of the items that constitute our “buried treasures.”

## 1. THE UC HASTINGS ORIGINAL MINUTE BOOK

Removed from City Hall shortly before the earthquake, this book of minutes of the Board of Directors, the aforementioned sole document to survive the destruction of City Hall, reveals much about the administrative requirements of founding, staffing, and running a law school. Early entries deal with the appointments of deans and professors, the setting of salaries (\$300 for the first professor to be hired), establishment of curricula, and the number of lecture hours required of each professor. On January 10, 1879, the Board unanimously voted not to admit women to the college after considering the application of Clara Shortridge Foltz — who would promptly sue and gain admission with a ruling by the California Supreme Court.<sup>2</sup> The hiring of John Norton Pomeroy, who would later develop the “Pomeroy System” of instruction that was used at the college, is described.<sup>3</sup> In 1878 Pomeroy accepted the position of professor of municipal law at Hastings College of the Law and was responsible for teaching most, if not all, of the students who studied at the college during its first four years. During this time Professor Pomeroy not only wrote a significant treatise on equity jurisprudence, he edited (with one of his sons) the West Coast Reporter, and contributed a number of essays and book reviews to this publication.

The minute book proved to be an important source of information for Thomas G. Barnes in the research and writing of his history of the college, *Hastings College of the Law: The First Century*.<sup>4</sup>

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<sup>2</sup> Foltz v. Hoge, 54 Cal. 28 (1879).

<sup>3</sup> Thomas Garden Barnes, *Hastings College of the Law: The First Century* (University of California, Hastings College of the Law Press, 1978), pp. 104–105.

<sup>4</sup> Barnes, op. cit.

## 2. THE 65 CLUB COLLECTION

The 65 Club at UC Hastings was created out of crisis.<sup>5</sup> On July 25, 1940, Dean William M. Simmons died unexpectedly from complications of surgery. Dean Simmons was not only the dean of the college, but he also taught three courses that were to begin in August of 1940. Acting Dean David E. Snodgrass, who subsequently served as dean from 1940 to 1963, did not have time to vet younger instructors and the college did not have a pension plan with which to attract them. At this time across the country, many colleges and universities had mandatory retirement at the age of 65. Not all prospective retirees were ready to retire.

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A. M. CATHCART  
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CRITICAL EMERGENCY RESULTING FROM DEAN SIMMONS DEATH NECESSITATES IMMEDIATE EMPLOYMENT PROFESSOR OF CONSTITUTIONAL LAW FOR PERIOD COMMENCING AUGUST TWENTY SEVENTH AND ENDING MAY TENTH. WOULD APPRECIATE YOUR WIRING CARNEGIE FOUNDATION FULL PARTICULARS OUR EXPENSE AND ADVISING MINIMUM BASIS ON WHICH YOU WOULD ACCEPT POSITION. OUR BOARD VERY ANXIOUS TO OBTAIN YOUR SERVICES.

DAVID E. SNODGRASS  
 ACTING DEAN HASTINGS COLLEGE OF L

**TELEGRAM FROM ACTING DEAN DAVID E. SNODGRASS OF HASTINGS COLLEGE OF THE LAW TO A. M. CATHCART, RECENTLY RETIRED FROM STANFORD LAW SCHOOL, THEN VACATIONING AT FALLEN LEAF LODGE, LAKE TAHOE, AUGUST 7, 1940 —**

“CRITICAL EMERGENCY RESULTING FROM DEAN SIMMONS DEATH NECESSITATES IMMEDIATE EMPLOYMENT PROFESSOR OF CONSTITUTIONAL LAW FOR PERIOD COMMENCING AUGUST TWENTY SEVENTH AND ENDING MAY TENTH. WOULD APPRECIATE YOUR WIRING CARNEGIE FOUNDATION FULL PARTICULARS OUR EXPENSE AND ADVISING MINIMUM BASIS ON WHICH YOU WOULD ACCEPT POSITION. OUR BOARD VERY ANXIOUS TO OBTAIN YOUR SERVICES.”

<sup>5</sup> See “The 65 Club” at <http://library.uchastings.edu/research/special-collections/65-club.php> (accessed November 26, 2013).

In the course of one week during August 1940, letters and telegrams were exchanged nearly daily, sometimes crossing each other en route, between Dean Snodgrass and two other men: Orrin Kip McMurray and Arthur M. Cathcart. Orrin Kip McMurray had been professor and dean of the School of Jurisprudence at UC Berkeley. Arthur M. Cathcart was a professor at Stanford University. Both men faced mandatory retirement. Although they were willing to continue to teach, the records show the concern both professors had that taking a position at UC Hastings would jeopardize the pensions they were receiving from their previous employers. It was quickly determined that as long as the hours worked and the resultant compensation were less than half of what they had been at their last place of employment, the professors could keep their pensions. With two weeks until classes began, the crisis had been resolved.

World War II brought a dramatic drop in enrollment. In the 1940–41 school year, there were 272 students; by 1943–44 there were 37. The end of the war saw an equally dramatic increase in the number of students. In the first semester of 1945–46 there were 72 students; in the second semester of the same year there were 211, and by 1949–50 there were over 900 students at UC Hastings. The increase in law students required the services of more professors, and the supply could not meet the demand as law schools across the country saw increased enrollments. Dean Snodgrass, however, had his pick of deans and law professors, many with decades of experience yet forced into retirement. The records indicate that the biggest obstacles Dean Snodgrass faced were difficulty in finding housing in the city and reluctance on the part of prospective faculty to face a foggy San Francisco summer.

Beginning in 1948, UC Hastings instituted a policy of hiring distinguished law professors and deans who had been forced into retirement at other institutions. Each new member of the 65 Club brought decades of experience and knowledge to the classroom. Such was the caliber of the 65 Club that Roscoe Pound, dean emeritus of Harvard Law School, declared UC Hastings to have “the strongest law faculty in the country.”<sup>6</sup> In 1994, the federal Age Discrimination in Employment Act was passed prohibiting mandatory retirement. Without needing to move for work after reaching the age of 65, law professors remained at their institutions. In 1995, the 65

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<sup>6</sup> “For Ageless Wisdom,” *Newsweek*, April 15, 1957.

Club was brought to a close. The last member of the 65 Club was William Ray Forrester who, after many years as professor and dean at Tulane, Vanderbilt, and Cornell, spent twenty-five years teaching at UC Hastings until 2001. For a complete list of 65 Club members, please see the Appendix.

The 65 Club Collection contains archival materials for nearly every member. Over the years various library staff members have researched 65 Club members and compiled bibliographies, biographical information, and other materials to supplement the archival materials. There is a collection of books authored or owned by 65 Club members, many of which are annotated. The smaller 65 Club archival collections are often composed of correspondence and other writings from the professors' time at UC Hastings. There are a number of larger collections from 65 Club members that extend beyond their time at UC Hastings. For these collections, finding aids are in development.

### *Selected Contents of the 65 Club Collection*

A few representative samples from the collection are described below. The dates indicate the years in which the professor was a member of the 65 Club. These professors, and a number of others, are profiled more fully in the article, "Sixty-five Club Members' Biographical Summaries," which appeared in 1978 in the *Hastings Law Journal*.<sup>7</sup>

BENJAMIN F. BOYER (1969–1975), who came to Hastings on retiring as dean of Temple University School of Law. He was considered a pioneer in the fields of legal aid and in establishing clinical programs for law students, and he was a founder of the *American Journal of Legal History*. His collection includes photographs and personal memorabilia.

MIGUEL DE CAPRILES (1974–1981), who had served as dean of New York University School of Law and executive vice president and general counsel of NYU. He published widely in the field of Corporate Law. He was also well known as a medal-winning member of the U.S. Olympic fencing team from 1932 to 1951. His collection includes awards, articles, and news clippings.

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<sup>7</sup> "Sixty-five Club Members' Biographical Summaries," 29 *Hastings Law Journal* 1041 (1977–1978).

LAURENCE H. ELDREDGE (1971–1979), who had been a private practitioner and also a professor at the University of Pennsylvania. He was recognized as an authority in the field of Torts, in which he published the casebooks, *Modern Tort Problems*. His autobiography, *Trials of a Philadelphia Lawyer*, appeared in 1968. His collection includes casebooks on Torts with annotations.

JEROME HALL (1970–1989), who came to Hastings after thirty years at Indiana University where he retired as Distinguished Service Professor of the University. He served simultaneously as president of the American Society for Political and Legal Philosophy and the American Section of the International Association for Philosophy of Law and Social Philosophy. He was also a director of the American Society for Legal History.

Hall's collection contains correspondence from 1930 to 1980 with James L. Adams, Jerome Frank, Lon Fuller, John H. Wigmore, the German Symposium on the New German Penal Code, the U.S. State Department, and the California Department of Justice regarding the Caryl Chessman case in 1960. His collection also holds class lecture notes, photographs, scrapbooks, awards, and honors.

RALPH A. NEWMAN (1957–1974), who had held professorships at St. John's University and American University, and served two terms as president of the American Society for Legal History. His prior areas of expertise were Legal History, Labor Law, Law in Society, and Trusts and Equity. At Hastings, he turned to Comparative Law, in which he developed a new specialty, and delivered lectures in Luxembourg, Liege, Frankfurt, London, Paris, Jerusalem, and Brazil.

Materials in Newman's collection include general correspondence from 1950 to 1970, writing and correspondence on Legal History (including the Pacific Coast Society of Legal Education (1960s), and the American Society for Legal History), correspondence with John S. Bradway (1966–1970), correspondence with Ben Goldstein (1960s) and with Giorgio Del Vecchio, notes and drafts for "Freedom of Government," unpublished writings, notes for lectures given in Paris, Luxembourg, and Israel (1960s), Comparative Law course materials, and materials on Equity, Legal Process, and Legal History.

ROLLIN M. PERKINS (1957–1975), who came to Hastings from Vanderbilt and UCLA. He published at least two dozen casebooks on criminal law and procedure until his death in 1993 at the age of 104, with new editions carrying his name as recently as 2007. His collection includes the 1951 typescript of “Cases on Criminal Law and Procedure” with many edits and annotations.

RICHARD R.B. POWELL (1963–1973), who served on the faculty of Columbia Law School for thirty-eight years before coming to Hastings. His specialty was Real Property, and he became well known for succeeding volumes of “Powell on Real Property.” Of particular interest to the field of California legal history is his last major work, *Compromise of Conflicting Claims: A Century of California Law 1760–1860*, published in 1977. His collection provides a comprehensive archive of his professional papers, as follows:

Teaching materials in his collection range from his course notes on “Elements of the Law” (ca. 1940) to later course notes and lectures on Agency, Estate and Gift Tax, Fiduciary Administration, Future Interests and Trusts, Property, Trusts and Estates, Wills, and Legal Method.

The earliest of Powell’s works in the collection is his master’s thesis, “The Doctrine of Fraud in the Roman and English Laws” (ca. 1912). His *Restatement of Property Law*, on which he commenced work in the late 1920s, is represented by memoranda, correspondence, and drafts of the restatement. From his 1955 trip to the Soviet Union, one finds his manuscript and typescript for “Reflections from Behind the Iron Curtain” and other papers related to the trip. For his 1977 history of law in California, there are research notes and manuscripts, as well as the notation that the material “includes interesting info on California History Research Project abandoned in progress.” There are also notes for a work in progress on “Drafting of Trusts.”

Texts of Powell’s speeches from 1920 to 1980 have been preserved in the collection. These include an unpublished address to the Allegheny County Bar regarding Act 550 which temporarily established community property in Pennsylvania in 1947, and research and manuscript notes for speeches on Race and Property from 1963 and 1964.

His involvement in current affairs is indicated by a letter and supplementary materials regarding Angela Davis and the controversial donation to her legal defense fund by the Presbyterian Church. Also found are the

typescript and correspondence related to Powell's 1967 Report to the California Law Revision Commission on Powers of Appointment.

Powell's wife, Alice Thompson Powell, is represented by the outline and manuscript of a talk given by her to the Hastings Law Wives in 1969 on "The Role of Law and Other Social Factors in Influencing the Content and Availability of Children's Books." And, finally, the collection includes Powell's own scrapbooks.

### *Oral Histories*

In 1985, Dorothy Mackay-Collins, curator and archivist for the college, began recording 65 Club oral histories. Recordings and transcripts have been completed for the following members of the 65 Club:

Paul E. Bayse

Kent Britton and John Britton (sons) on behalf of William E. Britton

William Ray Forrester

Geraldine K. Green (wife) on behalf of Milton D. Green

Jerome Hall

William B. Lockhart

Russell D. Niles

Alice Thompson Powell (wife) on behalf of Richard R.B. Powell (who recorded his own memoirs, and they are also transcribed)

Stefan A. Riesenfeld

Marvin J. Anderson (former dean of UC Hastings)

### 3. ROGER J. TRAYNOR COLLECTION

The Hastings Law Library is honored to act as the repository of the papers and memorabilia of the late Chief Justice Roger J. Traynor of the California Supreme Court, who served as a justice of that court from 1940 to 1970.

Roger John Traynor was born in Park City, Utah, in 1900, and in 1927 he received simultaneous doctorates in Political Science and Law from the University of California, Berkeley. The following year he commenced teaching full time in both departments, becoming a full professor at Boalt Hall School of Law in 1936. He was a consulting tax counsel for the California

State Board of Equalization (1932–1940) and the U.S. Department of the Treasury (1937–1940), and a deputy attorney general of California (January to July, 1940) under Attorney General Earl Warren. In 1940 he was appointed to the California Supreme Court by Governor Culbert Olson. He served as chief justice of California from 1964 until his retirement in 1970.

Traynor was responsible for several notable decisions, among which are *Perez v. Sharp*,<sup>1</sup> which made California the first state in the country to strike down its law prohibiting interracial marriage, and *People v. Cahan*,<sup>2</sup> which banned the use of evidence obtained in violation of the Fourth Amendment. He is also credited with creating the area of law now known as Product Liability. Following his retirement, Traynor returned to teaching, accepting several visiting positions in the United States and abroad. In 1971 he joined the 65 Club faculty of UC Hastings College of the Law. During this time, he also served as the chairman of the American Bar Association Special Committee on Standards of Judicial Conduct, responsible for the development of the Code of Judicial Conduct. In addition, he served as chairman of the National News Council. Chief Justice Traynor died on May 14, 1983.

Of interest in this collection are various papers, books, photographs, reprints of law review articles, all of his more than 900 opinions, and scrapbooks and memorabilia belonging to Traynor and his wife, Madeleine Lackmann Traynor. This collection was assembled by Mrs. Traynor with the assistance of then–archivist/curator Dorothy Mackay-Collins after his death. Also included are oral histories from those who knew and worked with him.

### *Traynor Oral Histories*

Donald P. Barrett: senior attorney at the California Supreme Court during Traynor's tenure

Mrs. Roscoe Barrow (Ruth): friend of the Traynor family

Sister Jacqueline Graham, PBVM: daughter of a friend of Mrs. Traynor's mother

Professor Kurt Lipstein: teaching colleague of Chief Justice Traynor's at Cambridge University

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<sup>1</sup> 32 Cal. 2d 711 (1948).

<sup>2</sup> 44 Cal. 2d 434 (1955).

Suzanne L. Marr: student at UC Berkeley, who visited the Traynor family (niece of Sister Jacqueline Graham)

Dean and Mrs. Robert McKay (Kate): New York University colleague and personal friend

Professor Jeffrey B. Russell: Department of History, UC Santa Barbara, childhood friend of Michael Traynor and personal friend of the Traynor family

Mrs. George Scheer (Ruth Weston): officer in the National League of Women Voters and personal friend of the Traynor family

Justice Raymond L. Sullivan: fellow justice on the California Supreme Court and faculty colleague at UC Hastings

Professor Samuel D. Thurman: colleague at UC Hastings and personal friend

Eleanor van Horn: UC Berkeley Political Science Department secretary when Traynor was a doctoral student and instructor

Kristian D. Whitten, Esq.: UC Hastings student of Traynor's

#### 4. JUSTICE A. FRANK BRAY RADIO TRANSCRIPTS

Justice Absalom Frank Bray, UC Hastings Class of 1910, was a dedicated public servant of the state of California for nearly six decades. He served first as assistant district attorney in Contra Costa County, then as city attorney of Martinez, Pinole and Concord, all while maintaining a private practice. He was appointed to the Superior Court of Contra Costa County in 1935. Twelve years later he was appointed an associate justice of Division One of the First District Court of Appeal, and after another twelve years became the presiding justice of Division One. He was an active supporter of UC Hastings, serving on the Board of Directors for nearly thirty years, as well as president of the Hastings Alumni Association.

The Bray Personal Papers consists of a collection of 182 scripts of a radio series about early California legal history broadcast over radio station KLX of Oakland, California, between May 1936 and February 1945. The series was titled "Human Aspects of Early California Supreme Court Cases." These cases came from all over the state of California, and spanned

the years 1850 through 1929. Topics include cattle running in Santa Clara, city water systems, feeding of prisoners in county jails, a husband's responsibility in his wife's buggy accident, and lying in bed with one's clothes on in a hotel. Justice Bray's analysis and commentary give glimpses into the lives and issues of early Californians, and are told in a light and entertaining yet informative style.

## 5. HASTINGS COMMUNITY PUBLICATIONS

### *Hastings Alumni Bulletin*

The *Hastings Alumni Bulletin* began in 1951 as a publication of the Alumni Association of Hastings College of the Law. The college was in the process of constructing its first permanent home and the *Bulletin* was another means of creating a distinct community after seventy-eight years of nomadic existence and a complicated relationship with the University of California, Berkeley. The *Bulletin* kept alumni aware of the activities of their former college and classmates. Over the years, the magazine has had several names as it shifted from a publication of the Alumni Association to one of the college. Today, the magazine is known as *Hastings* and is published by the college for all of the Hastings community — alumni, faculty, staff, students, donors, and friends. This publication was selected to be the first collection for digitization with the intent of making it accessible in 2013 to the public via the UC Hastings Institutional Repository.

### *Voir Dire*

*Voir Dire* was a publication of the Associated Students of Hastings College of the Law that ran from 1962 to 1970. In 1961, a group of Hastings students were suspended for cutting classes. A Hastings student passed the story on to local newspapers that ran the item. The resulting perceived bad publicity from the story was seen as damaging to the reputation of the school and, hence, damaging to the reputations and prospects of all Hastings students. In the first issue, editors Norse N. Blazzard and Steven Guralnick proclaimed, "*Voir Dire* has as its chief purpose the reflection of the professional student. More specifically, it will act as a sounding board for the students in this school who have something to say and who deserve to

America's Most Comprehensive Law School Newspaper

"To deprive a man of his opinion is to rob poverty and the existing generation. If it be right, then they are deprived of enlightening error for truth. If it be wrong, they are deprived of illuminating the impression of truth as it collides with error."  
—JUSTICE BRANDEIS

# Voir Dire



Hastings College of the Law

San Francisco, California

November 15, 1966

Volume 6, No. 3

## 'JAKE' IMPANELS JURY—MORE TO FOLLOW

By PAUL ROGERS

Last Friday, November 11th, San Francisco's own colorful trial lawyer and legal author Mr. J. W. "Jake" Ehrlich demonstrated to a capacity audience how to impanel a jury. At his own suggestion, and in an effort to more fully explore his subject, Mr. Ehrlich will return to Hastings to complete his labors. I believe his whole audience affectionately anticipates this soon to be announced return engagement.

### THE SPEAKER

Since Mr. Ehrlich was admitted to the Bar in San Francisco in 1922, he has become one of the country's most celebrated trial lawyers. Although his reputation as a colorful criminal lawyer is widely known, he is nonthe-

less noted for his varied practice in the field of civil litigation. During this time he has also authored at least eleven books devoted to the historical as well as the philosophical analysis of the law.

### WRITINGS

His Ehrlich's Blackstone, Ehrlich's Criminal Law, and Ehrlich's Criminal Evidence are standard scholarly legal works that are frequently

used by judges and lawyers as courtroom guides. Such works as What Is Wrong With The Jury System, The Lost Art Of Cross-Examination, The Educated Lawyer, and The Contested Divorce Case give evidence of his practical mindness and of his attempt to help raise the effectiveness of the legal profession.

Mr. Ehrlich's competence as a scholar is exhibited in The Holy Bible And The Law, and in a series of his essays with the apt title of A Reasonable Doubt. He has written an autobiography A Life In My Hands, and he has been the subject of NBC's television series Sam Benedict, which has depicted some of his civil and criminal litigation experience. He is also the subject of the biography Never Plead Guilty.

Mr. Ehrlich continues to write for the University of California's Continuing Education of the Bar series, as well as for the American Jurisprudence Trial Series. He is much in demand throughout the U. S. as a speaker before Bar Associations as well as law schools. He is well known for his civic-mindedness, and just this November he was honored as the City of Hope Man of the Year.

### THE DEMONSTRATION

Working with fourteen

—Continued on Page 2



California Justice Mosk

## LAW FORUM SCHEDULE

Friday, December 2nd, in classroom B at 11:30 a.m.: Jack F. Wolfson, a retired Vice President of General Motors and general manager of its Oldsmobile Division, will speak on the newly developed science of "Communology."

Friday, December 9th, in classroom B at 11:30 a.m.: Mr. Norman Macleod, Esq., a noted British collector, will speak on "The Judicial System and Legal Professions in England."

# LAW FORUM PRESENTS MOSK AND EHRlich

## MOSK LOOKS AT CRIMINAL ADMINISTRATION

By PAUL ROGERS

Justice Stanley Mosk of the California Supreme Court addressed the Hastings Law Forum on Friday, November 4th, on the topic of "Court Decisions: Effect on the Administration of Criminal Law."

Justice Mosk is a graduate of the University of Chicago School of Law, and he was admitted to the California Bar in 1933. From 1929 to 1942 he served as executive secretary and legal adviser to Governor Olsen. In 1942 he was appointed to the Bench as a Judge of the Superior Court in Los Angeles where he served until 1959. In 1964 he was elected Attorney General of California with a 74 to 26 plurality, and was re-elected in 1962.

### AUTHOR ATTESTATION

An Attorney General he issued nearly 2,000 written opinions, appeared before the U.S. Supreme Court in the Arizona v. California water case, and argued other landmark matters before the California Supreme Court. He also was the author of some of California's most progressive legislative proposals in the field of criminal law. Senator Ernie North Carolina, on the floor of the Senate, referred to Mr. Mosk as "one of the finest constitutional lawyers in the United States." (Cong. Rec., Aug. 5, 1964, p. 17823.)

### REMARKS

Mr. Mosk, after serving five

matters as judicial problems— not mere or political problems. He spoke that "judicial decisions are not dictated by the will of the majority but by the law, and they are decided not by popularity but by constitutionality." He exhorted the legal community to explain the judicial process to the populace so that they will have some basis for a rational understanding of this "current hysteria."

Justice Mosk also addressed himself to the current criticism "that courts are handicapping the administration of justice by their recent criminal case decisions," with reference to the recent U.S. Supreme Court's Escobedo and Gideon decisions. He felt that law enforcement has not broken down, but in fact has been considerably helped by these decisions. Justice Mosk stated that this criticism is not borne out by the facts, and he cited statistics to support his contention.

Over the period of 1959 to 1965 the number of defendants charged with crimes in California has considerably risen; yet the percentage of court convictions has remained at a constant 84 to 86 percent level. He opined that "the administration of justice has become more efficient and effective in conviction and administration as a

years and nine months as California's Attorney-General was appointed to the California Supreme Court on September 1st, 1964; and he has authored many of the Court's important decisions since that date, as well as frequent contributions to law journals.

### THE ADDRESS

Before a capacity crowd, he addressed the Hastings Law Forum on two main themes: the current hysterical rightwing attacks on the Justices of the California Supreme Court; and the supposed "inefficiency" of the courts on criminal matters.

Justice Mosk assailed the current movement afoot to rebuke the California Supreme Court Justices by a no vote in this November's election. He labeled it as a "plot by the right-wingers, and Birchers who are upset by the Court's recent unconstitutional ruling on Proposition 13" (thus nullifying the 1964 referendum on the fair-housing act which was approved by over a 2 to 1 majority in the voters). He declared that "constitutional



San Francisco Attorney "Jake" Ehrlich

—Continued on Page 14

THE UC HASTINGS LAW STUDENT PERIODICAL, VOIR DIRE, ISSUE OF NOVEMBER 15, 1966. THE TOP LINE OF THE MASTHEAD READS, "AMERICA'S MOST COMPREHENSIVE LAW SCHOOL NEWSPAPER."

be heard.”<sup>3</sup> Dean Snodgrass welcomed the new student publication stating, “There always has been a need for a ‘Safety Valve,’ for a medium through which student opinion can express itself, and (on occasion) for a member of the faculty to respond.”<sup>4</sup>

Over the years, the paper mostly covered events and activities of UC Hastings students, faculty, and administration, but also covered more broadly legal issues around the state of California. The 1960s were a transformative decade for the country, and *Voir Dire* reported on events from the perspective of a law student. The paper ended in 1970, but the independent voice of the Hastings student soon found a new outlet in the *Hastings Law News* publication that ran until 2002.

*Voir Dire* was the second collection to be digitized for the UC Hastings Digital Repository. It is intended that *Hastings Law News* be digitized and added to the repository soon.

## 6. CALIFORNIA INITIATIVES AND PROPOSITIONS

Advocates for the legalization of marijuana went door to door seeking signatures on twenty-two occasions from 1966 to 1995 until voters approved use of the substance for medical purposes with Proposition 215. Chiropractic regulation and vivisection prohibition were hotly debated during the 1920s. Efforts to reduce the salaries of government officials, determine appropriate punishments for firearm felonies, and set policies for forest management and many other concerns have regularly made their way through the system of California voter initiatives.

Since its inception 102 years ago, 1,800 initiatives have circulated throughout the state. Of these, about 70 percent failed to qualify for the ballot, with only 30 percent of those qualified receiving approval by voters. From 1911 to the end of 2013, only about 100 initiatives have ended up as California law — a 5 percent success rate.<sup>5</sup> However, much important legislation has derived from this process. In 1914, voters successfully amended section 12 of article

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<sup>3</sup> “Editorial Viewpoint,” *Voir Dire* (February 17, 1962), p. 2.

<sup>4</sup> “From the Dean’s Office,” *Voir Dire* (February 17, 1962), p. 1.

<sup>5</sup> Kevin Shelley, *A History of California Initiatives* ([Sacramento: State of California], 2002) pp. 10–13.

XIII of the California Constitution so that the state could never levy or collect a poll tax. After many failed starts, the observation of daylight saving time took hold in 1949, and vast areas of California's coasts, mountains and woodlands have been set aside for conservation, all through voter initiatives.

Voter initiative is but one way for a statewide ballot measure (or proposition) to come before the voters. The California Legislature has four types of measures that it may place on the ballot: a legislative bond act, a legislative constitutional amendment, a legislative initiative amendment, and a legislative statute amendment. The Legislature may also propose a question to the voters, asking approval or denial of an action. Voter initiatives are likewise divided by measure type — bond acts, constitutional amendments, statutes and referendums — used to amend or defeat a proposed legislative statute that has not yet been made law.<sup>6</sup>

Librarians at UC Hastings compiled a database with nearly all of California's initiatives and ballot measures, beginning in 1999, with funding assistance from a federal Library Services and Technology Act (LSTA) grant. In December of 2011 an unfortunate series of server crashes wiped out most of the collected data.<sup>7</sup> After two years of reconstruction, Hastings is ready to re-launch the database as part of our newly created Digital Repository. Contained in the database are both voter initiatives and ballot measures, dating from 1911. The text of many initiatives has been lost, and further searching through the archives will be required to make the collection more complete.

Research of ballot measures and initiatives presents a challenge because of inconsistent numbering conventions and inexact titling of measures. The ability to search by keyword, as digitizing the collection will enable, will make it easier for the researcher to locate the measure being sought.

With the roll-out of our Digital Repository, located at <https://repository.uchastings.edu>, we are just beginning to make publicly available the riches in our Archives and Special Collections. This has given us an excellent opportunity to delve deeply into our formerly "buried treasures."

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<sup>6</sup> Tony Miller, *A Study of California Ballot Measures* ([Sacramento: State of California], 1994).

<sup>7</sup> Chuck Marcus and Peter Gigante, "Beyond the Shelves: Researching California Ballot Measures," *The Recorder*, Friday, April 05, 2013.

## APPENDIX:

## MEMBERS OF THE 65 CLUB FACULTY

(Dates indicate the years in which each professor was associated with Hastings after reaching the age of 65. An asterisk indicates “visiting professor.”)

Ralph Aigler, 1955–1956	Everett Fraser, 1949–1964
Edward S. Bade, 1962–1963	George W. Goble, 1956–1963
Paul E. Basye, 1966–1985	Arthur J. Goldberg, 1974–1975
William W. Blume, 1963–1971	Leon Green, 1958–1959
George G. Bogert, 1949–1959	Milton D. Green, 1966–1978
Benjamin F. Boyer, 1969–1975	William G. Hale, 1949–1952
John S. Bradway, 1960–1965	Jerome Hall, 1970–1989
Millard S. Breckenridge, 1963–1965	Moffatt Hancock, 1976–1979
William E. Britton, 1954–1963	Albert J. Harno, 1958–1965
John U. Calkins, 1957–1959	Dan Fenno Henderson, 1992–2000
Richard V. Carpenter, 1967–1975	John B. Hurlbut, 1970–1975
Arthur M. Cathcart, 1940–1949	Adrian A. Kragen, 1974–1983
Elliot E. Cheatham, 1959–1960	Norman D. Lattin, 1963–1973
Albert Brooks Cox, 1951–1972	Julian H. Levi, 1980–1996
Judson A. Crane, 1954–1964	William B. Lockhart, 1977–1994
Stephen R. Curtis, 1964–1971	Ernest G. Lorenzen, 1948–1951
Miguel De Capriles, 1974–1981	James P. McBaine, 1952–1957
Augustin Derby, 1947–1952	Oliver L. McCaskill, 1946–1953
Edwin D. Dickinson, 1957–1959	Dudley O. McGovney, 1948–1949
Allison Dunham, 1979*	Orrin Kip McMurray, 1940–1941
Laurence H. Eldredge, 1971–1979	James A. MacLachlan, 1960–1963
Judson F. Falknor, 1966–1972	Joseph Warren Madden, 1961–1971
Merton L. Ferson, 1956–1961	Calvert Magruder, 1959–1960
William Ray Forrester, 1975–2001	Frederick J. Moreau, 1964–1973

Ralph A. Newman, 1964–1973	Lewis M. Simes, 1959–1972
Russell D. Niles, 1972–1985	Theodore A. Smedley, 1980–1984
Rudolph H. Nottelmann, 1961–1967	David E. Snodgrass, 1959–1963
Charles B. Nutting, 1974–1977	Roscoe T. Steffen, 1961–1973
George E. Osborne, 1958–1973	Julius Stone, 1974–1980
William B. Owens, 1953–1956	Frank R. Strong, 1973–1974*
Rollin M. Perkins, 1957–1973	Raymond Sullivan, 1977–1994
Harold G. Pickering, 1954–1963	Russell N. Sullivan, 1967–1978
Richard R. B. Powell, 1963–1973	Joseph M. Sweeney, 1988–1996
William L. Prosser, 1963–1972	Sheldon Tefft, 1969–1978
Max Radin, 1948–1949	Samuel D. Thurman, 1986–1992
John W. Richards, 1966–1968	Edward S. Thurston, 1943–1948
Stefan A. Riesenfeld, 1975–1999	Roger J. Traynor, 1971–1983
Rudolf B. Schlesinger, 1975–1994	Clarence M. Updegraff, 1964–1972
Louis B. Schwartz, 1984–1996	Chester G. Vernier, 1946–1949
Warren A. Seavey, 1961–1962	Harold E. Verrall, 1970–1978
Warren A. Shattuck, 1974–1995	Lawrence Vold, 1948–1965
Arthur H. Sherry, 1975–1985	John B. Waite, 1952–1955

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# PERSONAL REMINISCENCES OF THREE STATE BAR LEADERS

## EDITOR'S NOTE

In 1989 the former State Bar Committee on the History of Law in California recorded the reminiscences of twenty-three past presidents of the State Bar, spanning the years 1937 to 1988. They appeared in a limited-circulation booklet titled, *The Story of the State Bar of California*, prepared under the chairmanship of John K. Hanft. Three of these have been selected for presentation here. They appear with the permission of the State Bar of California and have received light copyediting for publication. The first discusses a special occasion in State Bar history, the second highlights the founding of the California Appellate Project, and the third offers a first-hand account of the Bar's origins and early years.

— SELMA MOIDEL SMITH

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## TABLE OF CONTENTS

WILLIAM P. GRAY

*President of the State Bar, 1962–1963* . . . . . 304

ANTHONY MURRAY

*President of the State Bar, 1982–1983* . . . . . 307

GILFORD G. ROWLAND

*President of the State Bar, 1937–1938* . . . . . 309

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### WILLIAM P. GRAY<sup>1</sup>

#### *President of the State Bar, 1962–1963*

The highlight of 1963 was the annual meeting in San Francisco when we had the members of the Supreme Court of the United States in attendance as our guests.

As we began to plan for the meeting, in the spring of 1963, we became aware that the meeting would occur at just about the tenth anniversary of Earl Warren's becoming chief justice of the United States. With the approval of the board, I wrote to the chief justice and invited him and Mrs. Warren to come to the annual meeting and join with us in celebrating this anniversary. We were delighted to receive his prompt acceptance, and we set about to plan the program.

In the previous summer, the American Bar Association had its annual convention in San Francisco. At one of the general sessions, the president of the ABA, John Satterfield of Mississippi, had two members of the Supreme Court on the stage and took that occasion to excoriate the Supreme Court for some of its recent decisions in the field of civil rights and desegregation.

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<sup>1</sup> Born, Los Angeles, 1912; B.A., UCLA, 1934; LL.B., Harvard; President, Los Angeles County Bar Association, 1956; U.S. District Judge 1966–1991; died, Los Angeles 1992.

All of us felt that this was an insulting performance and we determined that the theme of our convention would be to do honor to the Supreme Court of the United States and the Supreme Court of California and to the other members of the federal and state judiciary. We visualized this as an opportunity to give a response by the members of the State Bar to the “impeach Earl Warren” campaign that was then at its height through the efforts of the John Birch Society.

The Board of Governors concluded that the lawyers of California would be delighted to contribute the money that would make it possible for us to invite all of the members of the Supreme Court, with their wives, to come to San Francisco, enjoy the facilities of the Fairmont Hotel during the week of the convention, and participate in all of the activities of the convention as the guests of the members of the bar. Arthur Connolly, one of our third-year members from San Francisco, was designated chairman of the Arrangements Committee for the convention, and he and I were sent by the board to Washington to meet with the chief justice, describe our plans to him, obtain his approval, and ascertain his own desires with respect to the meeting. On March 26, 1963, Art and I found ourselves in the Supreme Court Building. In the morning, we went through the memorable ceremony of being sworn in as members of the bar of the Supreme Court, and in the early afternoon we had our meeting with the chief justice. He readily agreed to the program that we presented, which included his making a major address at a general session. He embraced our plan to invite his colleagues to attend, and he also agreed to share honors with Chief Justice Gibson and the members of the California Supreme Court. That afternoon, Art and I went to the nearby Senate Office Building where we met with Senators [Thomas] Kuchel and [Clair] Engel and invited them to participate in the anticipated celebration. They readily agreed to come.

Upon my return to Los Angeles, I set about to prepare letters to the associate justices of the Supreme Court which would tell them of our plan and invite their participation. I worked rather hard on the letter, going into some detail as to what would occur on each of the days, in order that the justices would know what to expect and be attracted accordingly. Inasmuch as I had been acquainted previously with Justice Brennan, I directed the first letter to him and then simply told my secretary to prepare similar letters to each of the other justices. The letters were prepared and signed

and mailed. The next day, I looked over the office copies and almost fell out of my chair. One of the letters was addressed to Honorable John M. Harlan, Supreme Court of the United States. And then in about the second paragraph it read, "and we of the State Bar of California would very much like to have you and Mrs. Brennan come to San Francisco and spend a week at the Fairmont Hotel."!! I telephoned Justice Harlan's chambers and asked his secretary if she had heard from me in the morning's mail. I told her that she would receive a letter shortly and advised her as to what it contained. She laughed and asked if I wanted her to destroy it. I said, "No, tell the justice that we would like to have him bring his own wife and that Mrs. Brennan would otherwise be taken care of."

When the time for the annual meeting came, all of the justices and their wives came to San Francisco, with the exception of Justice Harlan, who expressed his sincere regrets but was obliged to attend a meeting of the Judicial Conference of the Second Circuit. A member of the Board of Governors had previously been assigned as individual host to each of the justices, and specially picked members of the San Francisco bar were given similar assignments as local hosts. Rule number one that we imposed upon the justices was that they were to do whatever they wanted to do and were not to do anything that they would prefer not to do. With that qualification they were invited to, and did, sit in on the meetings of the Conference of Delegates, were present throughout the general session of the bar on Wednesday [September 24], attended the various law school luncheons, went shopping, played golf and tennis, attended Kelly's (Justices Brennan and Stewart proved to be very good assistant bartenders), and had a good time in general.

On Thursday evening there was a general session to which the public was invited. It began with several musical renditions by the Men's Glee Club of the University of California at Berkeley. As they left the stage, they disclosed, seated behind them, Chief Justice Warren, seven of his active colleagues (and retired Justices Reed and Whitaker), Chief Justice Gibson and each of his six colleagues of the California Supreme Court, and the five officers of the State Bar. Each of the justices was introduced, along with his wife who was sitting in the audience with the local host. Welcoming remarks were made by Governor Pat Brown and formal speeches were presented by Chief Justices Warren and Gibson.

At the end of the meeting, my wife and I walked back to the Fairmont Hotel with Chief Justice and Mrs. Warren. As we emerged from the auditorium, members of the John Birch Society were marching up and down the sidewalk carrying “impeach Earl Warren” signs. The chief justice approached one of the women and said, “Why do you want to impeach me; what do you have against me?” The woman got a rather puzzled look on her face and finally responded, “Well, if you don’t know, I’m not going to tell you!”

On Thursday evening there was a black-tie dinner attended by the justices and their wives, Governor and Mrs. Brown, and the members of the Board of Governors and the local hosts and their respective wives. This was followed by a formal reception in the ballroom of the Fairmont Hotel, where each of the justices and his wife were presented at an individual receiving line, which was followed by dancing. On Friday evening the justices and wives were taken by their hosts to a performance by the San Francisco Opera in which Leontyne Price sang the leading role.

We believe that the entire affair was worthwhile because it caused the justices to realize that the members of the State Bar of California had great respect for the institution of the Supreme Court and had regard for the individual members as warm human beings.

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## ANTHONY MURRAY<sup>2</sup>

### *President of the State Bar, 1982–1983*

#### PRESIDENTIAL OUTREACH

Throughout the year, I made approximately one hundred speeches up and down California on a variety of subjects, principally judicial independence and legal services for the poor. I spoke to as many local bar associations as I could reach. Many speeches were made to small county bar associations where a State Bar president had never spoken. In addition to bar associations, I spoke in numerous public forums such as Town Hall in

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<sup>2</sup> Partner, Loeb & Loeb LLP; President, California Appellate Project (1983 to present); Fellow, American College of Trial Lawyers; Life Fellow, American Bar Foundation.

Los Angeles, the World Affairs Council in Los Angeles, and service groups such as Rotary clubs. Coupled with speaking engagements were dozens of press conferences and radio and television appearances to maximize the effectiveness of the outreach program.

## CALIFORNIA APPELLATE PROJECT

In 1983, the governor [George Deukmejian], over opposition of the State Bar, the Supreme Court and most Courts of Appeal in California, reduced by 50 percent the budget of the State Public Defender. The reduction threatened to create a crisis in the representation of indigents in capital appeals before the Supreme Court. The Supreme Court asked the State Bar for help. The president's committee, consisting of the members of the third-year class on the board, convened and discussed a solution.

The result was formation of the California Appellate Project (CAP), a nonprofit corporation designed to recruit and train competent lawyers to handle capital appeals. CAP has been an outstanding success. It has been heralded in California and other states as an innovative and effective model that can be emulated across the nation. In 1984, CAP received the Harrison Tweed Award from the National Legal Aid and Defender Association and the Standing Committee on Legal Aid and Indigent Defendants of the American Bar Association. The award recognized and commended CAP for its public service in providing competent legal representation to indigent persons accused of capital crimes.

Today [1988], CAP operates an eight-lawyer office in San Francisco and an eight-lawyer office in Los Angeles that will soon expand to thirteen or fourteen lawyers. The lawyers in both offices recruit and assist lawyers from the private bar in representing indigents. The work of the San Francisco office is limited to handling cases before the Supreme Court. The Los Angeles office works with cases in the Second District Court of Appeal; in 1988, it will handle approximately 75 percent of the Second District appeals, some 1300–1400 cases.

I am the president of CAP. The other members of the board of directors are the other four members of my class on the Board of Governors and Herbert Rosenthal, executive director of the State Bar.

## PRIVATE CLUBS

In May of 1983, the board adopted a resolution to sponsor federal legislation prohibiting discrimination based on race, religion, color or national origin in private clubs which derive substantial income from business sources. The board's position has since been vindicated by decisions of the United States Supreme Court.

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## GILFORD G. ROWLAND<sup>3</sup>

*President of the State Bar, 1937–1938*

### ADMISSION TO THE BAR

Prior to 1927, the qualifications for admission were minimal. Anyone who was a citizen of the United States, a resident of California, twenty-one years of age, of good moral character, and had studied law for at least three years in the manner and subjects prescribed by the Supreme Court could be admitted. Until 1919, the examination was oral by the justices of a district court of appeal. Attorneys who were admitted under that system have told me that the examination by the justices was brief and quite inadequate to ascertain the legal ability of the applicant. One attorney who had been examined by the justices of the third district court of appeal told me that there were twelve or fifteen in the group, lined up before the justices. He was fourth or fifth in the line. Justice Hart asked the applicant next to him "What is a negative pregnant?" The applicant did not know and the question was repeated down the line and back to my friend who was able to answer the question because he had accidentally stumbled upon it when he had opened his Blackstone the night before. This was the only question asked of him. In 1919, the Legislature authorized the Supreme Court to appoint a board of bar examiners consisting of three attorneys who were directed to conduct the examination, which could be wholly or in part

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<sup>3</sup> Born, Sheraton, Iowa, 1899; A.B. Stanford 1923; J.D. Stanford Law School, 1925; admitted August, 1925; private practice (retired 1985); dean, McGeorge College of Law (1933–1937); died, Sacramento, 1989.

written. By 1925 when I took the examination, there was a brief oral interview followed by two days of written examination.

## CREATION OF AN INTEGRATED BAR

Prior to the State Bar, about the only time that an attorney was ever disbarred or suspended followed a conviction of a crime. By statute, an attorney could be removed or suspended after conviction of a crime involving moral turpitude, for willfully disobeying an order of court involving his duties as an attorney or willfully and without authority appearing as an attorney for a party or lending his name to be used as an attorney by a person not admitted, and for the commission of any act involving moral turpitude, dishonesty or corruption. The procedure for enforcement of these rules required a verified accusation held by a trial in and conviction by a court.

The inadequacy of existing laws and procedures to enable the bar to meet the problems facing the profession led the leaders of the legal profession in California to rally behind the movement for the establishment of an integrated bar, and the State Bar Act was enacted in 1927. The tasks facing the first Boards of Governors were monumental but they wasted no time. The Committee of Bar Examiners was appointed and directed to conduct the bar examinations. Rules of professional conduct were adopted and for the first time violation of these rules could lead to discipline. Local administrative committees were appointed and the procedure for discipline was publicized. And last but not least in importance, the sections and committees of the State Bar to study and promote the science of jurisprudence and the improvement of administration of justice were appointed and directed to proceed.

## DISCIPLINE

The inadequacies of the old system were demonstrated quickly after the local administrative committees were ready to receive complaints. The dedication of the bar to the weeding out of the unfit in its ranks was amply demonstrated by the many volunteers who spent untold hours in performing the unwelcome task of hearing and investigating these complaints.

Joseph J. Webb, the first president of the State Bar, declaring that a license to practice law is intended to be and should be a guarantee that

the lawyer is qualified as to learning — but of more importance — that he is an honest man, urged the disciplinary committees to weed out the dishonest practitioners. I was told by members of the earlier boards that often the calendar of disciplinary matters consumed almost all of the time of the monthly meetings. A large proportion of the complaints were without merit and were dismissed. The records will show that as many as forty-five to fifty disciplinary recommendations would be on a single board meeting calendar. By the time I went on the board the backlog had been reduced and the board had more time to consider other pressing matters.

## UNAUTHORIZED PRACTICE

In the late 1920s, the unlawful practice of law was rampant. Banks and trust companies advertised that they would prepare wills and trust instruments, would probate estates and administer trusts. Title companies and real estate companies advertised that they would prepare deeds, mortgages, deeds of trust, contracts of sale, and all other title documents. Adjusters licensed by the state to represent insurance companies in the settlement of fire and other casualty matters claimed that their license entitled them to solicit and represent personal injury and property damage claimants. Actions were filed to enjoin the unlawful practice of law, but it was soon found that the required litigation would be beyond the resources of the State Bar. Separate committees were appointed to enter into negotiations with banks and trust companies, with title companies, with the adjusters' organizations, and with other groups engaged in the unlawful practice of law. They tried to agree upon the legitimate activities of the banks, trust companies, title companies, and others, and reduce the unlawful practice of law. Before my term as president began, agreements were reached with these various groups and the unlawful practice of law was substantially eliminated.

## ATTEMPT TO ABOLISH THE INTEGRATED BAR

During the first decade, there were numerous attempts to curtail the functions of the State Bar or to destroy it. Assemblyman William Hornblower of San Francisco gutted any increase in the educational qualifications for admission to the bar by securing the passage of a bill which prohibited the

Supreme Court or the State Bar from imposing any educational qualifications. James Brennan, an assemblyman from San Francisco, was elected to the Board of Governors and worked on the board and in the Legislature to repeal the State Bar Act. He and Assemblyman Hornblower were able to induce the Assembly to create a committee to conduct a plebiscite of the attorneys on the question, "Do you favor repeal of the State Bar Act?" The plebiscite was conducted in April, 1935, and resulted in the overwhelming approval of the State Bar by the attorneys. There were 1,899 yes votes and 5,457 no votes.

The State Bar was enthusiastically supported by a vast majority of the attorneys. The Legislature sought its advice and help with legislation involving procedural matters, court reform and matters involving the administration of justice. Alfred L. Bartlett, the tenth president of the State Bar, was able to report in his last message that the State Bar and the act which formed it had weathered every kind of storm. All phases of the act had been subjected to the scrutiny of the courts. The State Bar itself has been the subject of legislative investigation. Two years ago [1986], a committee of the Legislature took a plebiscite of all lawyers of the state to determine their attitude, and the vote overwhelmingly endorsed the State Bar.

## BAR EXAMINATION

In 1933, the son of one of the justices of the Supreme Court flunked the bar examination and this triggered a full scale investigation of the bar examination procedures and content by the Supreme Court. I am happy to report that the Committee of Bar Examiners came through this investigation with flying colors. I wish that I could adequately express my admiration for the giants of the legal profession who preceded me and for the diligence and intelligence which they devoted to the solution of the problems which confronted them.

## CONFERENCE OF DELEGATES

The first meeting of the. Conference of Delegates was in 1934. It gained popularity as attorneys and local associations recognized that it provided the means by which they could secure consideration of their ideas and

programs. When it created the conference, the board feared that as time went on, the conference would seek to make its action on resolutions binding on the board. During its brief existence, these fears had begun to be realized and the board, during my regime, felt compelled to remind the conference officers that the board considered resolutions adopted by the conference in the nature of recommendations only.

## LAWYER EDUCATION

The Committee for Cooperation Between Law Schools and the State Bar presented to the 1937 convention at Del Monte a proposal that the State Bar assume the responsibility for referring the newly-admitted lawyers to a system of postgraduate instruction. For a number of years, the Stanford Law Society had sponsored such a program for the newly-admitted Stanford graduates. The board enthusiastically approved and authorized me to appoint a committee to work out a plan. I appointed a committee composed of representatives from the law schools and attorneys who had experience in the bar examination procedures and in legal education. This committee worked out the plan which was the forerunner of the present Continuing Education of the Bar program.

## JUDICIAL APPOINTMENTS

The election of supreme and appellate court justices became history when our present system of appointment and confirmation was adopted. The board, during my tenure and for some time afterwards, advocated the adoption of the so-called Missouri Plan, under which a committee composed of lawyers, judges, and laymen would select three qualified attorneys for each vacancy and the governor would be required to appoint one of these three candidates.

## PUBLIC RELATIONS

In an address to the Long Beach Bar Association in the fall of 1934, President Norman Bailey pointed out that public relations was a job of every lawyer. His concluding remarks were:

Let us be our own publicity agents for a while. We must sell the bar to ourselves before we can sell it to anyone else. We must live our ideals twenty-four hours a day, 365 days in the year. We must, one and all, become active parts in the civic life of our several communities. We must preach the State Bar of California and its work throughout the length and breadth of this state. When we live and do these things, we need have no worry about public relations, but until we do that, all the publicity agents in the world will do us no good.

Those who favored a State Bar public relations program continued their efforts, and resolutions demanding action by the board were adopted by the annual conventions.

President Alfred Bartlett, my immediate predecessor, appointed a committee on public relations and it recommended that the State Bar create a department of public relations. The advocates of State Bar action on this subject never presented a concrete proposal. Some wanted group advertising, some wanted radio programs explaining the role of attorneys in the administration of justice, and others wanted to promote favorable publicity in the news programs of newspapers and the radio. The board authorized me to appoint a committee to make recommendations on the subject.

Ewell D. Moore of Los Angeles was appointed chairman. The members of the committee were appointed from the principal geographical locations of the state. While this committee was deliberating, the board created a department of public relations, with the secretary of the State Bar as its administrative head. At that time, our dues were \$5 per year and our budget was about \$130,000 annually. These funds were barely enough to pay for our mandated activities. Nothing could be spared for new programs. The Moore Committee presented a resolution to the 1938 annual meeting requesting that dues be increased from \$5 to \$10 per year and \$2.50 of that be earmarked to finance a public relations department. The resolution was not adopted and the next year the board changed the name of the public relations department to the Committee on Bar Activities but, without a budget, it withered.

## LEGISLATION

In those days, the Committee on Administration of Justice determined what matters would be put on the legislative program of the State Bar, and

that committee was instructed that legislation should be confined to procedural matters and that substantive legislation, particularly that involving social or political issues, should be avoided.

By the time I was elected to the Board of Governors, the State Bar had gained the respect and confidence of the legislators, and its program was generally successful. The Legislature did not meet during my term as president. We spent a great deal of time on the consideration of the measures which would be a part of the State Bar's legislative program at the 1939 session. We were very careful to avoid involving the State Bar in political and social issues and so long as it followed that policy, it was respected and its opinion was given due consideration. However, when it became involved in such social and political issues, as evidenced by advocacy of no-fault insurance, legalization of prostitution, legalization of marijuana, and sanctions against South Africa, the bar lost respect and invited attacks by those who held opposing views.

In my opinion, the difficulties which the State Bar has encountered in the Legislature in the 1980s are almost entirely due to the fact that it has not confined its legislative program to procedural matters. Having said that, I must say that I have no regard for the attorneys in the Legislature who have attempted to change State Bar policy by holding it hostage on its dues bill.

## LOCAL BAR ACTIVITIES

During my tenure, I visited all of the local bar associations in my district and urged bar members to attend the annual meetings and become interested in State Bar affairs. During my term as president, I notified all of the local bar associations that my successor on the Board of Governors would be elected at the election in 1937 and urged them to canvass their membership to ascertain whether there was anyone interested in becoming a candidate. Sacramento has the largest lawyer population of any community in our district and there is a tendency for attorneys in the smaller communities to feel that they would have no chance against a candidate from Sacramento. Unfortunately, we have had very few governors from other cities in this district and I feel that that has lessened the interest in the State Bar in the outlying communities. It is unfortunate that there have not been more governors from such communities as Stockton, Vallejo, Napa, Santa Rosa, and Woodland.

I feel that each governor should canvass the sentiment in all communities of his district and try to get more widespread interest in State Bar affairs.

In the early days, each *State Bar Journal* reported local bar association activities. I believe it would be helpful if the *California Lawyer* would devote the required space to report local bar association activities.

## SACRAMENTO BAR ASSOCIATION

It has been suggested that I might tell about the history of my involvement with the State Bar and how I happened to become president. I will do so, not because it will reflect credit upon me, but because I believe it reveals a weakness in the method of selection of members of the Board of Governors. I have given considerable thought to possible changes but have been unable to come up with any that I thought would be satisfactory.

When I started to practice in Sacramento in 1925, the Sacramento County Bar Association was an organization in name only. The annual meeting was held in a justice's courtroom in the basement of the courthouse, and the old officers would suggest a slate of new officers and they would be elected. Nothing would happen until the next annual meeting when the process would be repeated. Shortly after I began to practice, the president refused to call a meeting to elect his successor. A small group of the younger practitioners thought they might breathe some life in the Sacramento County Bar Association and formed an organization called the Sacramento Inns of Court. This group was finally able to unearth a copy of the constitution and bylaws of the Sacramento County Bar Association and was able to call a special meeting and oust the old president. No one could understand why the old president wanted to continue. In Sacramento County, the president of the bar association is chairman of the county library committee, and when this president passed away, it was discovered that his library was made up mostly of county library publications.

## ELECTION TO THE BOARD

Arch Bailey, from Woodland, was the member of the Board of Governors from our district. He announced that he would not seek another term as he would run for judge of the Superior Court of Yolo County. The younger

attorneys in the Inns of Court thought that an attorney from Sacramento should succeed Mr. Bailey. Several of us were appointed to a committee to inquire of the older and more prominent attorneys in Sacramento whether they would be interested in running for election to the office and we made inquiries through friends in Stockton, Vallejo, Santa Rosa, and other communities, and found that no one appeared to be interested.

At a meeting of the board of directors of the Inns of Court, we reported that we had been unable to find any of the older attorneys who were interested. Finally, one of the other attorneys on the committee said, "Gil, why don't you run?" After discussing the situation with my wife and determining that we could scrimp by financially, I agreed to make the effort. I was elected to the board in the fall of 1934. At the time of my tenure on the board, rivalry between San Francisco and Los Angeles was deep-seated and the board had adopted a policy that the presidency would be alternated between the north and south. And when the election in 1937 approached, it was the north's term to have the presidency. Most all of us on the board wanted Webster Clark of San Francisco to run for president but he positively refused. Other than Webster, it developed that I was the only northern member, and I was elected president at the board meeting at Del Monte in 1937. This was the greatest honor that was ever bestowed upon me during my sixty-odd years of practice.

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# ARTICLES



# BUILDING THE NEW SUPREMACY:

## *California's "Chinese Question" and the Fate of Reconstruction*

ROMAN J. HOYOS\*

The so-called "Chinese question" was one of the most important and consequential political and constitutional issues facing California in its first half-century as a state.<sup>1</sup> The Chinese were one of the fastest growing populations in the state in the second half of the nineteenth century. Their presence and status within California drove most of the bedrock political issues of the day: capital versus labor, race and gender, citizenship and nation, and the nature of local, state, and federal power, not to mention international relations. The Chinese worked in the most important economic industries in the state, including mining, railroads, and agriculture. Their willingness to work for low wages for large, often corporate, employers was viewed as a threat to the political, economic, and cultural status of white laborers.

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\* Associate Professor, Southwestern Law School (Los Angeles). I would like to thank John Tehranian, Timothy Mulvaney, Ken Stahl, Priya Gupta, Arthur McEvoy, Annie Decker, and the participants at the 2013 Local Government Law Conference for their comments, suggestions, and discussions of an earlier draft of this article.

<sup>1</sup> I treat the "Chinese" people here as a singular people because this is how they were treated by the legal and political actors who are the focus of this paper. It is not to suggest, however, that they were in fact a singular people. Eve Armentrout-Ma, "Urban Chinese at the Sinitic Frontier: Social Organizations in United States' Chinatowns, 1849–1898," *Modern Asian Studies* 17 (1983): 107.

Ultimately, they became an “indispensable enemy” in the formation and consolidation of California’s labor movement. Their inscrutable foreignness also made them appear to be a threat to the public at large, especially their “opium dens” and brothels. Ultimately, the Chinese became an indispensable outlet for the economic frustrations of communities throughout the West. Massacres and “roundups” of Chinese people became a regular occurrence in the late nineteenth century in California and the West.<sup>2</sup>

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<sup>2</sup> There is a substantial and ever-growing literature on the Chinese experience in California and the United States in the nineteenth and early twentieth centuries. On legal history, see Lucy E. Salyer, *Laws Harsh as Tigers: Chinese Immigrants and the Shaping of Modern Immigration Law* (Chapel Hill: University of North Carolina Press, 1995); Charles J. McClain, *In Search of Equality: The Chinese Struggle Against Discrimination in Nineteenth-Century America* (Berkeley: University of California Press, 1994); David C. Frederick, *Rugged Justice: The Ninth Circuit Court of Appeals and the American West, 1891–1941* (Berkeley: University of California Press, 1994): ch. 3; Christian G. Fritz, *Federal Justice in California: The Court of Ogden Hoffman, 1851–1891* (University of Nebraska Press, 1991); Gordon Morris Bakken, “Constitutional Convention Debates in the West: Racism, Religion, and Gender,” *Western Legal History: The Journal of the Ninth Judicial Circuit Historical Society* 3 (1990): 213; Harry N. Scheiber, “Race, Radicalism, and Reform: Historical Perspective on the 1879 California Constitution,” *Hastings Constitutional Law Quarterly* 17 (1989): 35; Christian G. Fritz, “A Nineteenth Century ‘Habeas Corpus Mill’: The Chinese Before the Federal Courts in California,” *The American Journal of Legal History* 32 (1988): 347.

On labor history, see Stacey L. Smith, *Freedom’s Frontier: California and the Struggle over Unfree Labor, Emancipation, and Reconstruction* (Chapel Hill: The University of North Carolina Press, 2013); Moon-Ho Jung, *Coolies and Cane: Race, Labor, and Sugar in the Age of Emancipation* (Baltimore: Johns Hopkins University Press, 2006); Peter Kwong, *Forbidden Workers: Illegal Chinese Immigrants and American Labor* (New York: New Press: distributed by W.W. Norton, 1997); Alexander Saxton, *The Indispensable Enemy: Labor and the Anti-Chinese Movement in California* (Berkeley: University of California Press, 1995); Chris Friday, *Organizing Asian American Labor: The Pacific Coast Canned-Salmon Industry, 1870–1942* (Philadelphia: Temple University Press, 1994); Sucheng Chan, *This Bittersweet Soil: The Chinese in California Agriculture, 1860–1910* (Berkeley: University of California Press, 1986).

On local and urban history, see Benson Tong, *Unsubmissive Women: Chinese Prostitutes in Nineteenth-Century San Francisco* (Norman: University of Oklahoma Press, 1994); Natalia Molina, *Fit to be Citizens?: Public Health and Race in Los Angeles, 1879–1939* (Berkeley: University of California Press, 2006); Nayan Shah, *Contagious Divides: Epidemics and Race in San Francisco’s Chinatown* (Berkeley: University of California Press, 2001); Yong Chen, *Chinese San Francisco, 1850–1943: A Trans-Pacific Community* (Stanford: Stanford University Press, 2000). On immigration history, see Sucheng Chan, *Entry Denied: Exclusion and the Chinese Community in America, 1882–1943*

The “Chinese question” was not, however, solely a question about economic competition. It was also a discursive device through which Californians worked out their ideas about slavery, freedom, law, constitutionalism, and the state. As Moon-Ho Jung has shown, for example, the Chinese question helped Americans navigate the transition from a slave to a post-emancipation society. In California, the degraded Chinese “coolie” laborer became a symbol of slavery, and exclusion the means by which Californians could remain a “free” state. Even though Chinese laborers entered into contracts to work, the hallmark of free labor ideology, the contracts were often seen as a form of indentured servitude. “Chinese” and “coolie” were often used synonymously in political and constitutional discourse to emphasize the foreignness of the Chinese and their threat, as a race, to new American ideas about freedom and free labor.<sup>3</sup>

The Chinese were also seen as a threat to the welfare of local, state, and eventually to the national communities and governments. As a threat, they came under intense scrutiny and regulation by state and local governments. They were often blamed for the social and moral ills of the community. As Nayan Shah has explained, “The medical knowledge of Chinese deviance and danger emerged in the context of a fervent anti-Chinese political culture and escalating class confrontations generated by the social tumult of industrialization, rapid urbanization, and tremendous migration into San Francisco.”<sup>4</sup>

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(Philadelphia: Temple University Press, 1991); Grace Delgado, *Making the Chinese Mexican: Global Migration, Localism, and Exclusion in the U.S.–Mexico Borderlands* (Stanford, California: Stanford University Press, 2012); Erika Lee, *At America’s Gates: Chinese Immigration During the Exclusion Era, 1882–1943* (Chapel Hill: University of North Carolina Press, 2003); Erika Lee and Judy Yung, *Angel Island: Immigrant Gateway to America* (New York: Oxford University Press, 2010).

On race, class, and gender, see Najia Aarim-Heriot, *Chinese Immigrants, African Americans, and Racial Anxiety in the United States, 1848–82* (Urbana: University of Illinois Press, 2003); D. Michael Bottoms, *An Aristocracy of Color: Race and Reconstruction in California and the West, 1850–1890* (Norman: University of Oklahoma Press, 2013); 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 (1994): 55. See also Jean Pfaelzer, *Driven Out: The Forgotten War Against Chinese Americans* (Berkeley: University of California Press, 2008).

<sup>3</sup> Jung, *Coolies and Cane*; see also Bottoms, *An Aristocracy of Color*; Smith, *Freedom’s Frontier*.

<sup>4</sup> Shah, *Contagious Divides*, 4.

Cholera outbreaks, for instance, were often traced back to Chinatowns. Opium dens not only enervated and degraded the Chinese themselves, but lured innocent white men and women into moral turpitude. Laundry businesses, a vocation many Chinese people turned to after being forced out of other trades and industries, were perceived as threats to the public health and safety. Their seemingly baleful practices were usually attributed to their owners' status as Chinese. Indeed, the Chinese were often taxed simply for being "foreign."

Continued agitation over the Chinese question in California through the end of the nineteenth century was also instrumental in the emergence of a new phase in immigration legal history. The Chinese Exclusion Acts of 1882 marked the first time in which a specific racial group was excluded from entering the United States. The tightening of these restrictions over the subsequent decade, and the U.S. Supreme Court's plenary power doctrine which insulated the decisions of federal immigration officials from judicial review, was the culmination of this new racialized immigration.<sup>5</sup>

Implicit in these conflicts and transitions, though rarely explored, is the role that the Chinese question played in Reconstruction and the changes occurring in the American state following the Civil War.<sup>6</sup> Most of the legal history of the Chinese in California has focused on questions of individual rights and/or immigration law. But the attempts to regulate and exclude the Chinese would be the basis upon which some of the terms of constitutional Reconstruction would be worked out. The Chinese were willing litigants, and, through merchant associations known as the Chinese Six Companies and other organizations, had the means to acquire talented lawyers in California. Chinese litigants regularly prevailed once in court. Federal judges evinced a willingness to protect the rights of Chinese people even when they themselves were hostile towards the presence of Chinese in California.<sup>7</sup> But at the end of the day, Chinese were excluded from entering the United States, wiping out many

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<sup>5</sup> See, e.g., Chan, *Entry Denied*; Delgado, *Making the Chinese Mexican*; Lee, *At America's Gates*; Salyer, *Laws Harsh as Tigers*.

<sup>6</sup> Harry Scheiber has been one of the few to point out this aspect of the Chinese question. Scheiber, "Race, Radicalism, and Reform," 74–78.

<sup>7</sup> See, e.g., Fritz, *Federal Justice*. Judge Ogden Hoffman's commitment to his professional duty over his personal views seems strikingly similar to Robert Cover's notion of "judicial positivism," which he argues helps to explain why anti-slavery judges would protect slaveholders' rights to slaves. Robert M. Cover, *Justice Accused: Antislavery and the Judicial Process* (New Haven: Yale University Press, 1975).

of the successes they experienced in federal courtrooms over several decades. From the perspective of the Chinese this is the tragic result of their efforts, especially after judges seemed so willing to set aside their personal convictions, and often in the face of open hostility to their decisions.

There is, however, a different narrative. It does not require us to abandon or suppress the tragedy of the Chinese experience in the nineteenth century; in a way, it makes the story tragic from the outset. But it does require us to reframe the meaning of the Chinese question. Fundamentally, the question as it played out in the courts was about state power more than individual rights. The rights of the individual Chinese litigant were always secondary; they mattered only to the extent that they provided a context for working out a new constitutional order.

The Chinese question had triggered federalism questions before the Civil War, centering on whether the state's action interfered with the federal government's commerce and treaty powers. These issues remained after the war, but Reconstruction introduced new legal technologies that transformed the relationship between state and local, and the federal government. Clauses in the Fourteenth Amendment to the U.S. Constitution such as "due process," "privileges or immunities," and "equal protection," as well as congressional legislation enforcing these clauses, provided tools for federal courts to penetrate the state's police power in novel ways. The Burlingame Treaty, ratified the same year as the Fourteenth Amendment, extended the privileges and immunities protections to Chinese immigrants.<sup>8</sup> The anti-Chinese movement in California became tied to a states' rights ideology that persisted even after the Civil War. It was rooted in the idea that state and local governments possessed broad authority under their police power to regulate men and things.<sup>9</sup> But as state and local governments used this power to regulate the Chinese, they increasingly butted up against the powers of the federal government, and the restrictions imposed by the Fourteenth Amendment. Anti-Chinese activists would recoil at the ways in which the federal courts protected the rights of Chinese. They even used the constitutional convention, an institution with a long historical connection to popular sovereignty,

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<sup>8</sup> The privileges or immunities clause was limited to "citizens" under the Fourteenth Amendment.

<sup>9</sup> William J. Novak, *The People's Welfare: Law and Regulation in Nineteenth-Century America* (Chapel Hill: University of North Carolina Press, 1996).

to fortify the state's power to protect itself from the threats posed by Chinese immigrants. The convention's efforts, along with those of several municipalities, ultimately proved the undoing of states' rights in this field.

The procedural trigger for applying these clauses, in the Chinese cases, was the federal courts' expanded habeas corpus jurisdiction. The Habeas Corpus Act of 1867 enabled federal judges in the Ninth Circuit to expound on the Fourteenth Amendment's clauses. The Habeas Act, passed the same year as the first Reconstruction Acts, allowed federal courts to hear petitions for habeas corpus from prisoners held by state authority for the first time. Although Congress withdrew the U.S. Supreme Court's appellate jurisdiction under the act the following year, the lower federal courts' jurisdiction remained intact. The Chinese in California took full advantage of the Act's protections, turning California's federal district and circuit courts into "habeas mills" that applied the protections of the Fourteenth Amendment and the Burlingame Treaty in ways that circumscribed the powers of state and local governments.<sup>10</sup> Congress would restore the Supreme Court's appellate jurisdiction in the 1880s, and the Court would use it to consolidate federal supremacy with respect to immigration.

## THE OLD SUPREMACY

Throughout the last half of the nineteenth century state and local governments in California used their tax and police powers to regulate and exclude Chinese people. California was not unique in this regard. As William Novak has explained, "early American associationalism was a mode of governance. Membership in and exclusion from a range of differentiated self-governing associations determined one's bundle of privileges, obligations, and immunities . . ." <sup>11</sup> Illinois and Indiana, for example, had long excluded African

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<sup>10</sup> Fritz, "A Nineteenth Century 'Habeas Corpus Mill.'"

<sup>11</sup> William J. Novak, "The Legal Transformation of Citizenship in Nineteenth-Century America," in Meg Jacobs, et al., eds., *The Democratic Experiment: New Directions in American Political History* (Princeton: Princeton University Press, 2003): 85, 98; see also Laura F. Edwards, "The People's Sovereignty and the Law: Defining Gender, Race, and Class Differences in the Antebellum South," in *Beyond Black and White: Race, Ethnicity, and Gender in the United States South and Southwest* (Arlington: University of Texas Press, 2003): 3; idem, "Status Without Rights: African Americans and the Tangled History of Law and Governance in the Nineteenth Century U.S. South,"

Americans from their borders. States on the eastern seaboard imposed taxes and other obligations on migrants likely to become public charges. And all state and local governments used the police power to protect their communities from the myriad threats to the public health, safety, welfare, and morals. What distinguished California's efforts was its specific targeting of Chinese immigrants, which butted up against federal power. Before Reconstruction, the conflict centered on Congress's power over foreign commerce.

Local governments' use of the police power in the 1850s was less likely to interfere with federal power than it would after Reconstruction. For one thing, during the 1850s the bulk of the Chinese population was engaged in mining, and thus beyond the boundaries of municipal government. In the absence of formal structures of government, miners' associations appropriated the task of exclusion. These associations of white men took it upon themselves to enforce a racialized political economy that denied property ownership (at least in mines) to Chinese, and recognized the right of exit as the Chinese miners' lone right of locomotion. The miner associations drove off Chinese miners, dispossessed them of their mining claims, and used threats of violence and murder as their chief regulatory tool.<sup>12</sup>

With respect to the formal organs of government, the state legislature, rather than local governments, assumed responsibility for regulating and excluding the Chinese. California's legislature experimented with a number of measures to exclude and penalize Chinese people for migrating to and/or living and working in California. These efforts were not very successful, except in generating tension within California, and between California and the federal government. The Legislature's chief tactic in dealing with the Chinese was taxation. The Legislature imposed a variety of fees and taxes on Chinese, employers, and shippers to stem Chinese migration and labor. In May 1852, for example, the state re-enacted the Foreign Miners' License Tax, "to Provide for the Protection of Foreigners and to define their liabilities and privileges," a \$3/month tax on miners from foreign countries. Unlike its predecessor, this tax was aimed specifically at Chinese miners. It also denied those who did not pay the tax access to courts.

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*The American Historical Review* 112 (2007): 365; idem., *The People and Their Peace: Legal Culture and the Transformation of Inequality in the Post-Revolutionary South* (Chapel Hill: University of North Carolina Press, 2009).

<sup>12</sup> Pfaelzer, *Driven Out*, 8–16, 34–38.

In 1861, the state revised the statute making all foreigners ineligible for citizenship residing in a mining district liable for tax. Violence was often used in the collection of such taxes. One collector, for instance, tied two Chinese men together by their hair (or queues) while they searched the men's belongings for money to pay the tax.<sup>13</sup>

The Chinese challenged these taxes in two separate cases on *state* constitutional grounds. In *Ex parte Ah Pong*,<sup>14</sup> a Chinese laundryman, Ah Pong, refused to pay the tax, and was ordered to work on roads until the tax was paid off, not an uncommon penalty at the time. Ah Pong petitioned for a writ of habeas corpus in state court, challenging the statute's constitutionality. The California Supreme Court released Ah Pong, but avoided the constitutional issue, construing the act to apply to miners only. In the second case, *Ah Hee v. Crippen*, the Chinese plaintiff secured a temporary victory on the constitutional issue. Ah Hee sued in replevin to recover a horse that had been taken for his failure to pay the tax. Ah Hee challenged the tax on state constitutional grounds, arguing that it violated article I, section 7 of California's 1849 Constitution, which granted foreigners the same property rights as United States citizens. The district court agreed. Again, however, the California Supreme Court avoided the constitutional claim, deciding the case favorably to Ah Hee on other grounds.<sup>15</sup>

Two other taxes imposed in the mid-1850s were aimed more directly at excluding the Chinese, and triggered federal constitutional challenges. In 1852, the state imposed a "commutation tax." This tax was designed to discourage migration by requiring shipmasters to prepare a list of all foreign passengers, identify those passengers deemed mentally ill or disabled, and post a \$500 bond for each foreign passenger. The bond was usually reduced to \$5, and shippers simply added it as a surcharge to the ticket. California was not the first state to impose such a tax. States in the East, including Massachusetts and New York, required shipmasters to post bonds for passengers who were likely to become public charges.<sup>16</sup>

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<sup>13</sup> McClain, *Search for Equality*, 12, 24; Pfaelzer, *Driven Out*, 31–32.

<sup>14</sup> 19 Cal. 491 (1861).

<sup>15</sup> McClain, *Search for Equality*, 24–25

<sup>16</sup> Hidetaka Hirota, "The Moment of Transition: State Officials, the Federal Government, and the Formation of American Immigration Policy," *Journal of American History* 99 (March, 2013): 1092.

But in 1855, the state imposed another tax on shipmasters or ship owners for landing people in California who could not become citizens, i.e. the Chinese.<sup>17</sup> The difference with this tax was that the early taxes imposed by other states were at least plausibly imposed in support of the state's police power to protect the public welfare; those taxes went to support indigent immigrants. California's taxes, however, were imposed to prevent the immigration of a particular group of people. California's commissioner of immigration, Edward McGowan, quickly realized the distinction, and refused to enforce the 1855 tax because he thought it was an unconstitutional interference with the federal government's power over foreign commerce. The California Supreme Court agreed, and struck down the act in *People v. Downer* in a brief opinion.<sup>18</sup> The state legislature tried to address the constitutional problem in 1858 by trying to exclude persons thought detrimental to public welfare, but it was also struck down.<sup>19</sup>

A final tax, the "Chinese Police Tax," was directed at Chinese labor. Entitled "An Act to protect Free White Labor against competition with Chinese Coolie Labor and to Discourage the Immigration of the Chinese into the State of California," the legislature imposed a monthly tax on most Chinese laborers residing in the state. Employers could also be made liable for tax. Once again, the California Supreme Court struck down the act for interfering with the federal government's foreign commerce power. Being directed at the Chinese, the effect of the tax would be to discourage immigration at the very least.<sup>20</sup>

Aside from the taxes, the state imposed another disability on the Chinese, though it originated in the courts. In *People v. Hall*,<sup>21</sup> the California Supreme Court created a ban on Chinese testimony. Section 14 of the California Criminal Proceedings Act declared, "No black or mulatto person, or indian, shall be permitted to give evidence in favor of, or against, any white person." Through a binary conception of race that divided the races into white and non-white, the court held that this statute banned Chinese testimony, too.<sup>22</sup>

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<sup>17</sup> McClain, *Search for Equality*, 17.

<sup>18</sup> 7 Cal. 169 (1857).

<sup>19</sup> As discussed in *Lin Sing v. Washburn*, 20 Cal. 534, 438 (n. 63, 293); McClain, *Search for Equality*, 18.

<sup>20</sup> McClain, *Search for Equality*, 25–29; *Lin Sing*, 577–578.

<sup>21</sup> 4 Cal. 399 (1854).

<sup>22</sup> McClain, *Search for Equality*, 21.

Tortured as the analysis may have been, it nonetheless fit within a concept of citizenship that allocated rights and privileges on the basis of a person's status.<sup>23</sup> In fact, the denial of Chinese testimony was central to the creation of a racialized state in California in the 1850s. "Extending testimony privileges to the Chinese, for instance, also meant endowing the Chinese with the power to command white action," such as compelling the arrest of white men.<sup>24</sup> Clearly, this should be beyond the power of an "inferior" race.

The Chinese testimony cases following the Civil War illustrate the emerging line of scrimmage in Reconstruction jurisprudence on the Chinese question. *People v. Washington*<sup>25</sup> examined the ban on Chinese testimony in light of the 1866 federal Civil Rights Act. In that case, a black man, George Washington, stole some gold from a Chinese miner. Washington was prosecuted for theft, but the only testimony against him was that of Chinese witnesses. Washington's attorney moved to dismiss the case on the grounds that the Civil Rights Act entitled Washington to the same privilege of the ban on Chinese testimony as that of whites. The trial judge agreed, and the prosecutor appealed to the California Supreme Court. As Michael Bottoms has explained the dilemma, "If the court found the Civil Rights Act constitutional, *all* testimony would be admissible. . . . On the other hand, if the court rejected Congress's right to pass such legislation, then the barriers to racial minorities survived, and Washington was not equal to whites." The court ultimately upheld the Civil Rights Act, and preserved California's racial structure, by resting its decision on the Thirteenth Amendment. However, the court also recognized that the recently-ratified Fourteenth Amendment likely rendered the issue moot.<sup>26</sup>

In 1869, the year *Washington* was decided, the basic scope of the Fourteenth Amendment was still being sorted out, and many believed that it only applied to African Americans. In fact, the United States Supreme Court raised the question without deciding it in the *Slaughterhouse Cases*. This construction of the Fourteenth Amendment of course left plenty of room for unequal protection for other groups, including the Chinese. In

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<sup>23</sup> Novak, "The Legal Transformation of Citizenship"; Edwards, "Status Without Rights."

<sup>24</sup> Bottoms, *An Aristocracy of Color*, 25.

<sup>25</sup> 36 Cal. 658 (1869).

<sup>26</sup> Bottoms, *An Aristocracy of Color*, 49–51.

1871, in another Chinese testimony case, *People v. Brady*,<sup>27</sup> divisions within the California Supreme Court over the boundaries of the Fourteenth Amendment began to appear. The majority again upheld the testimony ban. In so doing, the Court held that the new amendment was not intended to interfere with “internal police” of state governments, which included the state’s control over its trial procedure. By contrast, the dissent argued that the Equal Protection Clause applied to the case, and abrogated the ban on Chinese testimony.<sup>28</sup> *Brady* raised the question at the heart of constitutional Reconstruction that would be fought out in state and federal courts through the end of the century: whether the Fourteenth Amendment imposed new limits on state and local governments’ police powers.

## RECONSTRUCTION

As this legal debate over Chinese testimony reveals, Reconstruction had changed the legal discourse by giving lawyers and judges new legal technologies to deploy. The most obvious change, and the most consequential, was the Fourteenth Amendment. The amendment’s due process and equal protection clauses gave Chinese litigants new theories by which to challenge state and local anti-Chinese laws. The privileges or immunities clause was limited to “citizens” and thus did not apply directly to the Chinese, who could not become citizens. But a similar clause in the Burlingame Treaty with China did. Ratified the same year as the Fourteenth Amendment, it granted Chinese immigrants the same “privileges, immunities, and exemptions” as those of the most favored nation.

As important as the Fourteenth Amendment was the Habeas Corpus Act of 1867. The 1789 Judiciary Act had limited federal habeas jurisdiction as to prisoners held in federal custody. The 1867 act expanded federal habeas jurisdiction to include prisoners held in state custody. It also expanded the writ from a pre-trial procedure to a post-conviction device that allowed challenges to state denials of federal rights. This change “struck directly at traditional powers of the state courts,” and of states more generally. The importance of the 1867 act has been largely overlooked because Congress withdrew the U.S. Supreme Court’s appellate jurisdiction under the act the following year, fearing

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<sup>27</sup> 40 Cal. 198 (1871).

<sup>28</sup> McClain, *Search for Equality*, 35–36.

that it might use it to strike down congressional Reconstruction legislation. But the lower federal courts retained the new habeas jurisdiction. Chinese litigants took advantage of the new procedural device to challenge discriminatory state laws, and federal judges largely supported those efforts. Thus while the U.S. Supreme Court has long been criticized for abandoning the promise of Reconstruction in general and the Fourteenth Amendment in particular, judges in the Ninth Circuit used the Habeas Corpus Act to build a robust jurisprudence around the due process, equal protection, and privileges or immunities clauses in the 1870s and 1880s that limited state power.

The impact of these measures began to emerge in California in the early 1870s, as Chinese litigants took advantage of the federal courts' new habeas jurisdiction to challenge state laws. Two cases decided within a month of each other in 1874 outline the main lines of debate. Both cases arose out of an incident involving passengers on the ship *Japan*. California's commissioner of immigration decided not to allow certain female passengers to land after determining that they were "lewd and debauched." Separate petitions for habeas relief were filed in state and federal courts challenging the California statute giving the commission power to make such determinations.

In *Ex parte Ah Fook* the petitioners argued that the statute violated both the Burlingame Treaty and the Fourteenth Amendment. The California Supreme Court disagreed on both counts. The Court relied on the traditional distinction between the commerce and police powers, and held that the Treaty's privileges, immunities, and exemptions clause could not intrude upon the state's police power. "Otherwise, we should be prohibited from excluding criminals and paupers — a power recognized by all the writers as existing in every independent State. We can but think, that to give the general language of the treaty a construction which would deprive both the States and the United States Government of this power of self-protection would be a departure from the evident meaning and purpose of the high contracting parties."<sup>29</sup>

The Court also denied that the Fourteenth Amendment's due process clause had any effect on the state's police power. In fact, the Court dismissed the significance of the Fourteenth Amendment's due process clause. "A clause substantially the same as that contained in the amendment, is found in the Constitution of California, and in the constitutions of all of the several States."

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<sup>29</sup> *Ex parte Fook*, 49 Cal. 402, 405 (1874).

The Fourteenth Amendment added nothing to the meaning, scope, or significance of such clauses. Due process had to be determined in light of the power being exercised. As the statute was a public health measure, the legislature was given the broadest discretion possible. “[H]ealth laws . . . must be prompt and summary” in order “to prevent the entrance of elements dangerous to the health and moral well-being of the community.” And the Court saw no reason to overrule the commissioner’s decision or strike down the statute.<sup>30</sup>

By contrast, while riding circuit, U.S. Supreme Court Justice Field held in *In re Ah Fong* that the statute violated the foreign commerce clause and the privileges, immunities and exemptions clause of the Burlingame Treaty, as well as the Fourteenth Amendment’s equal protection clause. Field rejected the argument that the statute was a legitimate exercise of the police power. Police involved matters of internal governance, while exclusion dealt with external relations, or foreign commerce, which was Congress’s domain. Moreover, as the statute discriminated between Chinese and people of different foreign countries, it encroached upon the federal treaty power, which in this case had been used to grant Chinese the privileges, immunities, and exemptions of the most favored nation.<sup>31</sup>

To this point, there was nothing terribly novel about Field’s holding. Conflict with Congress’s foreign commerce power had been an issue before the Civil War, and the treaty power had long been a part of the federal constitution. Field’s discussion of the Fourteenth Amendment, though, was significant because the federal commerce and treaty powers arguably settled the case. Field could have avoided the Fourteenth Amendment issue. Instead, he held, “Discriminating and partial legislation, favoring particular persons, or against particular persons of the same class, is now prohibited” by the Fourteenth Amendment’s equal protection clause.<sup>32</sup> Discriminating, or “class,” legislation was distinct from the police power, which had to be directed toward protecting the general welfare. Field would later hold, as we will see, that the Fourteenth Amendment did not limit the states’ police power. But since federal courts would have to determine what was class legislation and what was not, it was clear that federal courts would play a

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<sup>30</sup> *Ibid.*, 406–07.

<sup>31</sup> *In re Ah Fong*, 1 F. Cas. 213 (1874).

<sup>32</sup> *Ibid.*, 218.

larger role in defining what was and was not within the states' police powers. The new supremacy was becoming apparent.

*Ah Fook* and *Ah Fong* delimited the boundaries of the Reconstruction debate over the Chinese question. Reconstruction represented a potentially major shift in the structure of constitutional authority in the United States. The state court defended traditional conceptions of state governmental power, especially the police power. It defined that power broadly, and rejected the notion that Reconstruction had transformed it in any meaningful way. Federal courts, by contrast, found in the amendment and other Reconstruction legislation, a new set of limits on the power of the states. Even though the cases that came through the federal courts in the 1870s and 1880s involved individual rights, they were vehicles for asserting the supremacy of the federal government. This debate in the courts, which spilled over into popular politics, provided the context for debates that ensued in California's constitutional convention. These debates revealed a deep ambivalence about the impact of Reconstruction, as delegates simultaneously asserted and denied a new supremacy.

## AMBIVALENCE

While there were several reasons for assembling a second constitutional convention in California in the late 1870s, the Chinese question was the most proximate. The enormous growth in population and the growing complexity of the state's economy had rendered the 1849 constitution and the government organized under it largely ineffective. Reformers were especially interested in reining in the state's tax power, the power and influence of corporations, and shoring up the state's judicial and representation systems.<sup>33</sup> But it was the Chinese question that gave the desire for a new constitution its urgency. The movement for a new convention was driven largely by the Workingmen's Party whose slogan was "The Chinese Must Go!" Even though Workingmen did not muster a majority of the convention's delegates, they set the agenda and framed the debates, making clear that the Chinese were their central concern.

While the presence of the Chinese could be felt in debates ranging from corporations and railroads to legislative representation, I want to

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<sup>33</sup> Noel Sargent, "The California Constitutional Convention of 1878-9," *California Law Review* 6 (1917): 1, 1-4.

focus on two interconnected debates that help to highlight the connection between the Chinese and Reconstruction in California. The first debate concerned the state's bill of rights, and specifically two clauses, the right to alter or abolish government and the "new" supremacy clause. The debate over these clauses was a prelude to the second debate over what would become article XIX of the new Constitution, which would be titled simply "The Chinese." Article XIX was intended to challenge the Ninth Circuit's jurisprudence on Chinese rights, and reaffirm the state's ability to regulate and exclude its Chinese population. But even at its most defiant, the convention revealed an ambivalence about the impact of Reconstruction.

The broad issues raised in California's debate over the right to alter or abolish government and the new supremacy clause were not unique to California. The right to alter or abolish government had been the key right undergirding a localized conception of popular sovereignty prior to the Civil War. However, because it could legitimately be used to support the idea of state sovereignty, and hence secession, lawmakers and legal thinkers after the Civil War began to search for ways to limit and abstract the right. Convention delegates throughout the country were involved in this reconceptualization of the right.<sup>34</sup> What was unique about California's debate was the Chinese question.

The debate over these clauses began when section two of the bill of rights was reported to the convention.<sup>35</sup> San Francisco lawyer and Workingmen's Party member Clitus Barbour immediately offered an amendment declaring California's right to police itself, in addition to reserving the right to alter or abolish government. It read,

The people of the State have the inherent, sole, and exclusive right to regulate their internal government, and the police thereof. They have the right to determine what is detrimental to the well-being

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<sup>34</sup> I have written about this process elsewhere. Roman J. Hoyos, "A Province of Jurisprudence?: The Invention of a Law of Constitutional Conventions," in Markus Dirk Dubber, and Angela Fernandez, eds., *Law Books in Action: Essays on the Anglo-American Legal Treatise* (Oxford: Hart, 2012); idem, "Peaceful Revolution and Popular Sovereignty: Reassessing the Constitutionality of Secession," in Alfred L. Brophy, and Sally Hadden, eds., *Signposts: New Directions in Southern Legal History* (Athens: University of Georgia Press, 2013).

<sup>35</sup> *Debates and Proceedings of the Constitutional Convention of the State of California*, 3 vols. (Sacramento: J. D. Young, Supt. State Printing, 1880): I, 232.

of the State, and to exhaust the power of the State to prohibit and prevent it. They have the right to alter or abolish their Constitution and form of government whenever they may deem it necessary for their safety and happiness.<sup>36</sup>

At first blush, Barbour's amendment appears to be an uncontroversial restatement of the state's police power. But he made it clear that the "peculiar situation of this people" gave the clause a distinct meaning; it was designed to address the "overshadowing curse everywhere present" by reserving to the people their power to protect the public welfare.

Throughout the debates anti-Chinese delegates referred to Chinese as a "nuisance," "blight," "pestilence," "filthy," "leprous," etc. These were not simply rhetorical devices, they were intended to bring the Chinese within the regulatory powers of the state. Nuisances, particularly threats to the public health, fell squarely within the state's police power to both abate and prevent threats to the public's health, safety, welfare, and morals.<sup>37</sup> These delegates had some contemporary science on their side. Some physicians had identified the Chinese themselves, and the Chinatowns in which many lived and worked, as sources of disease.<sup>38</sup> Local governments used these connections to regulate Chinese people and their territories as a threat to the public health.<sup>39</sup> As early as 1854, a committee of San Francisco's Common Council declared the Chinese to be a "nuisance" in the wake of a cholera epidemic, which could have led to their removal or expulsion from the city. But until the late 1860s it appears that local governments "mapped" the Chinese and the spaces in which they lived, rather than regulating them directly.<sup>40</sup> This mapping made the Chinese and their patterns of behavior visible and legible to local governments. By the late 1860s, California's municipalities began regulating the Chinese and Chinatowns as "nuisances" in a serious way. To protect these efforts both to regulate and exclude the Chinese, Barbour wanted up front "an emphatic declaration in the Constitution, declaring that this State has the right to regulate her own internal government."<sup>41</sup>

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<sup>36</sup> Ibid.

<sup>37</sup> Novak, *The People's Welfare*.

<sup>38</sup> Salyer, *Laws Harsh as Tigers*, 11–12

<sup>39</sup> Shah, *Contagious Divides*, 1–157.

<sup>40</sup> Shah, *Contagious Divides*, 20–25, 51; Molina, *Fit to be Citizens?*, 26.

<sup>41</sup> *California Debates*, 233.

Charles W. Cross, a Republican elected on the Workingmen's Party ticket, made clear that Barbour's amendment was a gauntlet. "And now," he argued, "as the Government of the United States, one of the parties to this compact, has declared the relation of the several States to the General Government, so we, as a party to this compact, have a right, and it is our duty, in this the only place where we can express our views of our relations to the General Government, to give a clear statement of what we consider these relations to be." Barbour's amendment was intended to challenge both Reconstruction and the Ninth Circuit's construction of it. He continued that "if it be the sentiment of the people of the State of California that no power outside the State of California has a right to interfere in our police regulations, and prevent our taking such steps to formulate such measures as we shall think for the interest, for the protection, of the people of this State, we have a right, and it is our duty, to declare ourselves upon such propositions."<sup>42</sup>

After a brief debate, Barbour's amendment failed.<sup>43</sup> Its failure was not due to a desire to protect the Chinese, however. Delegates well understood that the real issue was about the Chinese, and preferred to discuss it at the appropriate time. Moreover, delegates saw in Barbour's amendment elements of the states' rights doctrine that had led to secession. Charges of secessionism were often used against extremists on the Chinese question. In part because of these charges, as well as charges that the Workingmen were communists or socialists,<sup>44</sup> a new clause was inserted in California's bill of rights.

The "new" supremacy clause was one of the most important innovations of the postbellum constitutional conventions. The clause recognized the federal constitution as the supreme law, and often declared that citizens owed "paramount allegiance" to the federal government. They were called "new" supremacy clauses, because there was an "old" supremacy clause contained in Article VI of the federal constitution. The first of the new supremacy clauses appeared in West Virginia's 1863 constitution, which essentially took the clause from Article VI and inserted it into its bill of rights.<sup>45</sup> But the clause could be more elaborate. Maryland's 1864 constitution held that,

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<sup>42</sup> Ibid., 233.

<sup>43</sup> Ibid., 237.

<sup>44</sup> Carl Brent Swisher, *Motivation and Political Technique in the California Constitutional Convention of 1878-79* (Claremont, CA: Pomona College, 1930), 93.

<sup>45</sup> West Virginia Constitution, Article 1, sec. 1.

“every citizen of this State owes paramount allegiance to the Constitution and the Government of the United States, and is not bound by any law or ordinance of this State in contravention or subversion thereof.”<sup>46</sup> Recognition of a citizen’s “paramount allegiance” to the federal government was an implicit rejection of the secession. The implicit connection was made explicit in Nevada’s 1864 constitution, where the supremacy clause was included in the same section that rejected the idea of secession as a constitutional right.

The obvious question, of course, was whether such clauses were even necessary. “[W]e can incorporate [a supremacy clause] into our constitution, but the Constitution of the United States is binding so why?” asked a delegate in Georgia’s convention.<sup>47</sup> “Is it not all powerful in itself?”<sup>48</sup> The answer, of course, was the Civil War. “After what has occurred in our recent national history, it appears to me that every State which has a Constitutional Convention ought to adopt a proposition of the nature that is proposed . . . , and especially in view of the fact that it seems as if the old controversy would never die, but must come up from time to time,” argued one California delegate.<sup>49</sup> The new supremacy clauses were designed to settle the secession question by specifically recognizing the federal government’s ultimate constitutional supremacy.

As initially reported to the convention, California’s supremacy clause was a far-reaching statement of the new constitutional supremacy. In addition to declaring the federal constitution the “paramount law of the land,” it also held, “We recognize the Constitution of the United States of America as the great charter of our liberties.”<sup>50</sup> Delegates debated both the “paramount law” and the “charter of our liberties” clauses. Supporters of the new supremacy urged its adoption for a couple of reasons. One was its plain obviousness. William White, an Irish farmer and Workingmen’s Party member, insisted that, “We all know that the Constitution and laws of the United States are the paramount law of this land and we should declare it so.”<sup>51</sup>

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<sup>46</sup> Maryland Declaration of Rights (1864), Article V.

<sup>47</sup> *Journal of the Proceedings of the Constitutional Convention of the People of Georgia* (Augusta, Georgia: E.H. Pughe, Book and Job Printer, 1868), 240 (remarks of Hager).

<sup>48</sup> *Ibid.*

<sup>49</sup> *California Debates*, I: 239 (remarks of McCallum).

<sup>50</sup> *Ibid.*, 232.

<sup>51</sup> *Ibid.*, 238.

But other delegates feared the novelty of California's new supremacy clause. Horace Rolfe, a Republican lawyer, moved to strike the clause as "entirely unnecessary." Rolfe stated that he did "not recognize the Constitution of the United States as the great charter of our liberties. We had State charters before there was any Constitution of the United States."<sup>52</sup> Charles Ringgold, a Workingman, also rejected entirely the notion that the federal constitution could be a charter of liberties. Recognition of the primacy of the federal constitution rearranged the entire constitutional structure. He could not "indorse this section, for it strikes at all State sovereignty. I believe in State sovereignty, and shall ever stand by it as long as I live."<sup>53</sup> The supremacy clause also undermined popular sovereignty. As Workingman Nathaniel G. Wyatt explained, "The powers of the Government of the United States are derived from the people through the government of the States, and wherever there is a reserved power it is with the people and not with the United States."<sup>54</sup>

Underlying this fear of federal supremacy was the fear that an explicit acknowledgment of federal supremacy would undermine the state's ability to deal with Chinese laborers. Barbour drew out the implications of the charter of liberties clause. It "will be construed into the doctrine of centralization." Yet, "Our purpose and duty," he argued, "is to lay down and declare the power of this State, and not the power of the Federal Government."<sup>55</sup> Surprisingly, Barbour here invoked the states' rights ideas of South Carolina's John C. Calhoun. He told the convention that he believed "that the principles and doctrines that were asserted by Calhoun were correct, and would have been maintained by the people of the United States if the element of slavery had been out of the consideration." Slavery was destroyed, "[b]ut the principle still lives." Indeed, without slavery, states' rights could now realize its full potential. "I say we ought to declare it here — as John C. Calhoun declared the doctrine of the sovereignty of the States — not for the purpose of preserving slavery, but for the purpose of destroying a slavery as bad as that of the South."<sup>56</sup>

Ultimately, the supremacy clause remained, but without the charter of our liberties clause. The final version simply stated, "The State of California

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<sup>52</sup> *Ibid.*, 238.

<sup>53</sup> *Ibid.*, 242–43.

<sup>54</sup> *Ibid.*, 242.

<sup>55</sup> *Ibid.*, 242.

<sup>56</sup> *Ibid.*

is an inseparable part of the American Union, and the Constitution of the United States is the supreme law of the land.”<sup>57</sup> But it revealed the convention’s ambivalence about the meaning of the Civil War and Reconstruction. These issues continued throughout the convention. John Miller, a Republican Non-Partisan lawyer, drew the connection between the bill of rights debate and the Chinese question. “It is evident that a long debate will be provoked here, as to the rights and powers of the States, and as to the rights and powers of the General Government. That discussion will necessarily come up in the considerations of the measures or propositions which have already been introduced here, and which are now before the Committee on Chinese.”<sup>58</sup>

And indeed it did. The Report of the Committee on Chinese sparked a lengthy debate, but it was left substantially intact in what became article XIX. The report contained six sections. Section 1 simply reiterated the state’s power to regulate aliens “dangerous or detrimental to the well-being or peace of the State. . . .” Sections 2 through 5 imposed a variety of liabilities on Chinese people and their employers. Corporations and governments were barred from employing Chinese, Chinese were barred from fishing in state waters, and were also deprived of property, contract, and residency rights. Section 6 reserved the power of the state to exclude Chinese, and to delegate that power to municipalities. It also punished companies for importing Chinese “coolie” labor, which it determined to be “a form of human slavery.”<sup>59</sup>

While all six sections seemed directed toward the same end, different constitutional theories were contained within it. John Miller, the chairman of the Committee on Chinese, explained to the convention that the committee could not agree on how to deal with the Chinese, and so presented three plans for consideration. The least constitutionally-suspect, he thought, was section 1, which simply reaffirmed the state’s police power. For Miller this was as far as the convention could go without encroaching upon the federal government’s commerce power. The second plan was exclusion, which Miller argued was pre-empted by the U.S. Supreme Court’s commerce clause jurisprudence. The third approach, which Miller referred to as “a plan of starvation by constitutional provision,” sought to “deny Chinese rights to protection of the law,” specifically the privileges and immunities clause of the

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<sup>57</sup> *Ibid.*, III: 1510.

<sup>58</sup> *Ibid.*, I: 234.

<sup>59</sup> *Ibid.*, II: 721.

Burlingame Treaty. “Because by labor all must live, and if you deprive them of their right to labor, they must starve. . . . It is indefensible, for it deprives the prohibited people of the right to life.”<sup>60</sup> Miller’s opposition to sections 2 through 6 did not mean that he was progressive toward Chinese rights. “All agreed that Chinese immigration was an evil, and that if possible the further influx of Chinese to this country should be stopped,” he argued.<sup>61</sup> But the convention could only act within its proper sphere of authority.

Other delegates, especially Workingmen, felt that the entire report fell firmly within the state’s power to police its boundaries. Jacob Freud, a Workingman from San Francisco and at 21 years of age the convention’s youngest delegate, argued that California had the power both to regulate and remove Chinese, and relied on the doctrine of dual federalism, which held that federal and state governments were sovereign within their spheres. What was at issue for Freud, then, was “the universal right of every State to regulate and control its own internal affairs, such as corporations and public works within its borders.” And it was clear to his mind that “every State has the avowed power to protect itself against foreign and well known dangerous classes, such as paupers, vagrants, criminals, and persons afflicted with contagious and infectious diseases. This power is a part of the police power of the State. Under this constitutional power of a State, New York and Massachusetts have been upheld by the Courts in turning back criminals from Europe.”<sup>62</sup> The power to police, then, included within it the power to exclude.

As Freud elaborated on exclusion as a police technique he revealed his view of the changing (or rather *unchanging*) constitutional order:

The question then arises, has the State no more reserved power? I think it has. Among the reserved rights of the State I claim that there is none so prominent, essential, and constitutional as the right of the State to receive, remove, or repel any person or any people who may be dangerous to its health, to its peace, or its prosperity. No sovereign State on earth ever yielded that right. No sovereign State on earth can exist without that power. *When did the American States then cede that power to the General Government? I challenge any man to show*

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<sup>60</sup> Ibid., 630.

<sup>61</sup> Ibid., 628.

<sup>62</sup> Ibid., 634.

*me where, or when, or in what words.* The fundamental right of every State is to maintain its own existence. Self-preservation is not only the first law of nature, but also the first law of States. California has the right not only to protect but also to preserve herself. California has the right to declare the Chinese upon her soil dangerous and detrimental to her peace, progress, and prosperity, and therefore to prohibit them hereafter from settling or residing within her borders.<sup>63</sup>

In short, the police power gave California the authority to remove or exclude individuals who posed a threat to the social order. The state also had both the right and the power to determine that the Chinese — as Chinese — posed such a threat. Clitus Barbour agreed. “I do not think that the Burlingame treaty, the Fourteenth Amendment, or the Civil Rights bill would have been considered infringed by any municipal regulation for the abatement of that nuisance.”<sup>64</sup> And the Chinese were “the crowning nuisance, which calls for the exercise of the sovereign power of the State for its abatement.”<sup>65</sup>

Freud agreed that the federal *constitution* was the “supreme law of the land,” but this did not necessarily make the federal *government* supreme; *that* was the new supremacy, and not a concept Freud could yet endorse. Federal supremacy could not vitiate the state’s police power. The power of a state “to make its own Constitution and laws,” along with its “sovereign control over its people” remained, and that meant that “[f]or self-preservation or self-protection, it may exclude any save citizens of other States.” The federal government’s commerce power was distinct, and did not include the power to impose “hordes of coolies of a degraded, servile and alien race” on a “free State.” Nevertheless, he registered his ultimate ambivalence of his position by conceding the issue to arbitration by the U.S. Supreme Court. Barbour did, too, ultimately referring to the report as a “revolutionary measure” aimed at “shocking [the] sensibilities” of Congress and the rest of the nation.<sup>66</sup>

Where Freud saw an unchanged constitutional order, Charles J. Beerstecher registered his fears about Reconstruction’s revision of that order. “I believe, sir, that in these latter days there has been a tendency to rob the States of their rights, and the time has come when persons who desire to see American

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<sup>63</sup> *Ibid.* (emphasis added).

<sup>64</sup> *Ibid.*, 660.

<sup>65</sup> *Ibid.*, 652.

<sup>66</sup> *Ibid.*, 661.

institutions perpetuated, who desire to see the spirit that actuated the founders of this country carried out in its true intent and purposes, that they should rise up and see to the centralizing efforts at Washington.”<sup>67</sup> Barbour shared Beerstecher’s fear: “There rests the keystone of the whole arch, and that is its ultimate resort. Who is to decide? In whom is the power of judgment lodged?” This, of course, had been the key to the Chinese question all along.

Critics of the Report responded in a variety of ways. Republican delegate Horace Rolfe, for instance, thought the report was “absurd,” and that if adopted would make the convention and the state a “laughing-stock of the world”: “The first Court before which our work is brought would disregard it, and treat it as unconstitutional and void — as a violation of the Constitution of the United States. So that it is a mere waste of time to pass any such provisions.”<sup>68</sup> Miller, of course, had already argued that the state could rely only upon its police power, which he distinguished from exclusion.

Charles Stuart, a Republican farmer from Sonoma, built on Miller’s argument, and drew a connection between the anti-Chinese movement and secession. “I am opposed to all these sections from number one to number eight,” he argued.

They are not proper to be placed in any Constitution of the United States, let alone ours. It is in direct conflict with the Constitution of the United States and the treaty-making power. It is a boyish action for us to admit either one or the whole of these articles to be engrafted in our organic law. It would be the laughing-stock of the world, a disgrace to the State, a movement toward secession, and a disregard of the constitutional laws of the United States.<sup>69</sup>

Stuart’s connection of exclusion and regulation of the Chinese to secessionism is revealing. He ridiculed the constitutional and jurisprudential backwardness of the Report’s supporters, especially in their reliance on opinions written by Chief Justice Roger Taney. One delegate (referring to Democratic Non-Partisan James Ayers, who had drafted section 4), he began, “quoted very lengthily from Roger Taney. I remember when Taney

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<sup>67</sup> Ibid., 646.

<sup>68</sup> Ibid., 656.

<sup>69</sup> Ibid., 642. Stuart was a major agricultural employer, and claimed to have employed thousands of Chinese and White workers.

made another decision. Do you know what became of it? I remember his Dred Scott decision. I think that was the first political case that was ever decided in the United States, and I remember what that led to, and I think you do." For Stuart, the Civil War was the new constitutional dividing line.<sup>70</sup>

Republican lawyer James Shafter made the point more explicitly. He felt that the jurisprudential arguments were beside the point. "Among all the cases cited here one important one seems to have been overlooked." The Civil War had settled the question by "the force of arms. The ultimate force of government, the inexorable will guided by the highest intelligence of the people, declared that the Constitution of the United States, and the treaties made in pursuance thereof, are the paramount law of this land from this time forth." The War itself was the foundation for the new supremacy. Thus, "we recognize our allegiance, politically, first of all, to the Federal Constitution, and next, to the Constitution of the State of our adoption." And in any conflict between the police power and federal authority, the "police power must yield."<sup>71</sup>

While opponents of the Chinese Committee Report ultimately lost, they had managed to convince its proponents that they were at the very least on shaky constitutional ground. While the bulk of the debate focused on the conflict between the Chinese Committee Report and the federal commerce and treaty powers, it also entailed a broader construction of the impact of the Civil War and Reconstruction on the constitutional order. By the end of the debate the most that the Report's proponents actually seemed to hope for was that it would spur action at the federal level. In fact, the convention would memorialize Congress to take action on the Chinese. The irony of the Report's success in placing article XIX into the new Constitution was that, in forcing the issue, proponents sealed the demise of the constitutional order they sought to protect.

## THE NEW SUPREMACY

Article XIX was challenged almost immediately after the new constitution went into effect. Over the coming decades, not only would the article

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<sup>70</sup> *Ibid.*, 642.

<sup>71</sup> *Ibid.*, 675, 672, 684.

be gutted by federal judges in California on a variety of grounds, but the constitutional authority over immigration would be centralized in the federal government. Habeas was the central legal device upon which federal supremacy over the Chinese, and immigration more generally, would be centralized. This consolidation began in what became known as the “habeas mill,” the federal district and circuit courts in California in the 1880s. District Judge Ogden Hoffman and Circuit Judge Lorenzo Sawyer were the chief cogs in the mill, and processed thousands of habeas petitions. Their willingness to discharge Chinese petitioners generated considerable criticism of their courts. Oregon’s District Judge Matthew Deady would also play a role in teasing out the jurisprudential issues. Finally, U.S. Supreme Court Justice Stephen Field was perhaps the dominant figure jurisprudentially, both on circuit and in his opinions for the Supreme Court.

The first challenge to article XIX was *In re Parrott*. Tiburcio Parrott was the son of one of the wealthiest men in the state, John Parrott. Tiburcio owned a mercury mine, and employed Chinese laborers in a variety of jobs. Section 2 of article XIX barred corporations from employing Chinese labor. In February 1880, the state legislature passed enforcement legislation. A week after the Legislature criminalized employing Chinese labor, Parrott manufactured his arrest to challenge section 2, then petitioned for a writ of habeas corpus in California’s federal circuit court, before Judges Hoffman and Sawyer.<sup>72</sup>

The state conceded that the prohibition of Chinese employment was not an exercise of the state’s police power. Rather, it based its authority on its “reserved power over corporations.” This power, though, according to the court, was designed to protect stockholders, creditors, and the general public. But the object with the enforcement statute clearly was to exclude the Chinese. Thus, Judge Hoffman held that the section was unreasonable, “irrespective of the rights secured to the Chinese by the [Burlingame] treaty.” Nevertheless, Hoffman also held that section 2 of article XIX violated the plain terms of the Burlingame Treaty, specifically the privileges, immunities, and exemptions clause of article VI. “The declaration that ‘the Chinese must

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<sup>72</sup> Andrew Johnston, “Quicksilver Landscapes, the Mercury Mining Boom, Chinese Labor, and the California Constitution of 1879,” *Journal of the West* 43 (2004): 21, 21.

go, peaceable or forcibly,” Hoffman wrote, “is an insolent contempt of national obligations and an audacious defiance of national authority.”<sup>73</sup>

Hoffman’s opinion reveals that force, as some of the California delegates had argued, lay behind the new supremacy. For example, he explained, “The attempt to effect this object [exclusion] by violence will be *crushed by the power of the [federal] government.*” While the federal government may not have yet had a monopoly on violence, it had certainly proven in the Civil War to be able to marshal superior force over the states. Hoffman appeared invigorated as a federal judge by this power:

The attempt to attain the same object indirectly by legislation will be met with equal firmness by the courts; no matter whether it assumes the guise of an exercise of the police power, or of the power to regulate corporations, or of any other power reserved by the state; and no matter whether it takes the form of a constitutional provision, legislative enactment, or municipal ordinance.<sup>74</sup>

The new constitutional supremacy grew out of, indeed could only be based upon, a clear supremacy in violence.<sup>75</sup>

Sawyer agreed with Hoffman, but took the opportunity to discuss the meaning of “privileges” and “immunities.” In contrast to modern scholars who identify the *Slaughterhouse Cases* as the death knell of the Fourteenth Amendment’s privileges or immunities clause, Sawyer found in the Court’s jurisprudence a robust conception of the clause. And he used *Slaughterhouse* to interpret the privileges, immunities, and exemptions clause of the Burlingame Treaty.<sup>76</sup> According to Sawyer, all of the opinions in *Slaughterhouse* agreed that the fundamental meaning of privileges and immunities was that it “*embraces nearly every civil right for the establishment and protection of which organized government is established. . . . There is no difference of opinion as to the significance of the terms ‘privileges and immunities.’*” Certainly included among privileges and immunities was “the right to labor for

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<sup>73</sup> *In re Parrott*, 491, 492, 493, 494.

<sup>74</sup> *In re Parrott*, 499 (emphasis added).

<sup>75</sup> Elmer Sandmeyer made a similar point years ago, but ultimately hedged. Elmer Clarence Sandmeyer, “California Anti-Chinese Legislation and the Federal Courts: A Study in Federal Relations,” *Pacific Historical Review* 5 (1936): 189, 211.

<sup>76</sup> *In re Parrott*, 505, 506 (Sawyer, J.) (quoting *Slaughterhouse*, 76) (emphasis in original).

subsistence” (a point Miller had made in the convention). To deny Parrott’s right to employ Chinese labor, then, violated the Burlingame Treaty.

But Sawyer, unlike Hoffman, continued beyond the treaty power. He also held that article XIX violated the Fourteenth Amendment’s due process and equal protection clauses, which applied to “persons,” as opposed to “citizens.” Moreover, section 16 of the 1870 Civil Rights Act protected property and contract rights (including the right to and of labor) of “all persons within the jurisdiction of the United States.” The Fourteenth Amendment and its enforcement legislation protected Chinese and their employers from discriminatory state laws, even those made by a state constitutional convention. Thomas Joo has argued that in cases protecting the Chinese right to labor we can see the origins of the economic substantive due process that would come to define the so-called “*Lochner* era” and its “laissez-faire constitutionalism.”<sup>77</sup> But the application of the Fourteenth Amendment to anti-Chinese legislation was less about laissez-faire than it was about federal supremacy.

In a series of cases dealing with Chinese laundries, federal courts continued to build out this new supremacy. While *In re Parrott* struck down section 2 of article XIX, other cases chipped away at the state’s police power. During the convention debates, this was considered the state’s narrowest and safest basis of authority. Yet Justice Field had held that even that power was subject to federal scrutiny under the Fourteenth Amendment in *Ah Fong*. In cases after the new Constitution went into effect, federal courts would continue to subject the police power to judicial scrutiny.

*In re Quong Woo*, for example, involved a frontage consent ordinance for laundries. Quong Woo had owned and operated a laundry for several years. A new city ordinance required him to obtain the consent of a certain number of neighbors to operate his laundry, which he was unable to do. The federal court found the ordinance problematic in two ways. First, laundries were not inherently “offensive” businesses. Thus to single out this business, as opposed to making all businesses subject to frontage consent, was held unreasonable. Second, the court held that the city could not delegate its police powers to property owners. Such delegation also called into question the reasonableness of the law, since it could embody the prejudices

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<sup>77</sup> Thomas Wuil Joo, “New Conspiracy Theory of the Fourteenth Amendment: Nineteenth Century Chinese Civil Rights Cases and the Development of Substantive Due Process Jurisprudence,” *University of San Francisco Law Review* 29 (Winter 1995): 353.

of one's neighbors. The precise basis of the court's opinion, though, was not entirely clear. The court seemed to be engaging in a due process analysis, but it concluded that the frontage consent requirement violated the privileges and immunities clause of the Burlingame Treaty.<sup>78</sup>

Eventually, the U.S. Supreme Court was forced to weigh in on the Chinese question. In a series of cases, the Court also moved from the commerce and treaty powers to the Fourteenth Amendment in evaluating anti-Chinese legislation. The first two cases upheld local ordinances, but nonetheless applied the equal protection clause to them. *Barbier v. Connolly* and *Soon Hing v. Crowley* dealt with San Francisco ordinances barring public laundries from operating during certain hours. These ordinances were directed at Chinese laundries that had moved into suburban areas. As the Chinese moved their laundries into more affluent neighborhoods, they found that their rent increased. To offset the increase in rent, two laundries would often operate in the same space, one during the day and one at night. The ban on operating laundries at night was designed to break up this practice and Chinese incursions into white suburbia.<sup>79</sup>

Field wrote the Court's opinion in both Supreme Court cases challenging the San Francisco ordinances, and used them to elaborate his opinion in *In re Ah Fong*. For instance, he made it clear that the Fourteenth Amendment was intended to reach only "class legislation," not the police power. The distinction lay in whether the regulation served a "public purpose" or favored or disfavored a particular class of people. In these cases, Field upheld the ordinances because he viewed them as public safety regulations, necessary to protect the public against fires in a city built of wood. Field's opinion demonstrated a commitment to filtering state governmental action through the new strictures of the Fourteenth Amendment. Indeed, this was required if the courts were to make distinctions between class legislation and the police power. In *Soon Hing*, Field introduced a new dimension to the analysis. In dicta, he suggested that legislation could be facially neutral but discriminatory in its administration.<sup>80</sup> In *Yick Wo v. Hopkins* the Court took up this question directly.

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<sup>78</sup> *In re Quong Woo*, 13 F. 229 (1882).

<sup>79</sup> Bottoms, *An Aristocracy of Color*, 136–168.

<sup>80</sup> *Barbier v. Connolly*, 113 U.S. 27, 31–32 (1884).

*Yick Wo* involved yet another San Francisco ordinance aimed at Chinese laundries. This one required laundry owners to obtain a license from the Board of Supervisors. While the ordinance applied to all public laundries, no Chinese applicant had received such a license. In separate cases filed in state court and federal courts, Chinese laundry-owners challenged the ordinance. Once again, the state and lower federal courts identified the main lines of debate. The California Supreme Court in *In re Yick Wo*, treated the case as an unproblematic police power case, giving broad deference to the board. The Court saw the ordinance as a reasonable exercise of the city's police power, rooted in a long history of licensing laws, and declared that the argument that the board's discretion is liable to abuse "cannot be held conclusive. No doubt all power is liable to abuse, wheresoever lodged."<sup>81</sup>

In the federal case, *In re Wo Lee*, Judge Sawyer was less charitable. He criticized the ordinance as vesting "arbitrary discretion" in the board. According to Sawyer, "The necessary tendency, if not the specific purpose, of this ordinance, and of enforcing it in the manner indicated in the record, is to drive out of business all the numerous small laundries, especially those owned by Chinese, and give a monopoly of the business to the large institutions established and carried on by means of large associated Caucasian capital." Such a construction of the ordinance suggested that it was "a violation of other highly important rights secured by the fourteenth amendment and the [Burlingame] treaty." Sawyer ultimately deferred to the California Supreme Court.<sup>82</sup> But on appeal the U.S. Supreme Court agreed with Sawyer, striking down the ordinance because it was "purely arbitrary, and acknowledges neither guidance nor restraint."<sup>83</sup>

Lower federal courts also used the Fourteenth Amendment's privileges or immunities clause directly (rather than indirectly through the Burlingame Treaty's clause) to attack state and local regulations. As municipalities began regulating Chinese through general rather than class legislation, they opened the door for courts to apply the privileges or immunities clause even in cases dealing with Chinese non-citizens. In cases like *In re Wo Lee*, *In re Tie Loy*, and *In re Wan Yin* the federal courts rejected

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<sup>81</sup> 9 P. 139, 142 (1885).

<sup>82</sup> *In re Wo Lee*, 26 F. 471, 474, 475 (1886).

<sup>83</sup> *Yick Wo v. Hopkins*, 118 U.S. 356, 367 (1886).

ostensibly neutral laundry ordinances directed against Chinese laundries. In *Tie Loy*, for instance, Stockton limited laundries to certain areas within or just outside of the city. Since the statute applied to all laundries, not just those owned by Chinese, Sawyer struck it down as violating the Fourteenth Amendment's privileges or immunities clause.<sup>84</sup>

The new supremacy did not just involve the application of new constitutional doctrines to state action. It also involved an enlarged role for federal courts at all levels. This was apparent in the 1870s, and crystal clear by 1885, when Oregon's federal District Judge Matthew Deady was forced to defend this role. In *In re Wan Yin*, which appeared while *Yick Wo* was on appeal, an Oregon municipality levied an onerous \$20 per year "license fee" upon "public laundries." When Wan Yin refused to pay the fee, he was imprisoned, and then petitioned the federal district court for a writ of habeas corpus. Deady released Wan Yin, holding that the license was actually a "tax," and beyond the municipality's authority. Relying on cases like *In re Parrott* and *Ah Lee*, Deady specifically reiterated the notion that federal courts could release petitioners held in violation of the due process clause of the Fourteenth Amendment.<sup>85</sup>

Deady found himself at odds with local anti-Chinese folk in Oregon, as did Sawyer and Hoffman in California, so he took the opportunity to elaborate his role as a federal judge in his opinion. He noted that the "Case of Lee Tong" had been the subject of criticism at a recent American Bar Association meeting. The chief complaint was that the 1867 Habeas Corpus Act had given "'the lowest class of federal judges'" jurisdiction in habeas cases, and by extension had conferred on them the ability to overturn judgments made by state authorities, particularly in Chinese cases. Deady responded that "however 'low' he may be" he was nevertheless conferred the power to be "a bulwark against local tyranny and oppression." Deady thus affirmed that even the lowliest federal judge still stood higher in the new constitutional hierarchy than did any state official.<sup>86</sup>

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<sup>84</sup> *In re Wan Yin* [The Laundry License Case], 22 F. 701 (D.C., D. Ore., 1885); *In re Tie Loy*, 26 F. 611 (Cir. Ct., D. Cal., 1886).

<sup>85</sup> Ralph James Mooney, "Matthew Deady and the Federal Judicial Response to Racism in the Early West," *Oregon Law Review* 63 (1984): 561, 605; *In re Wan Yin*.

<sup>86</sup> *In re Wan Yin*, 705.

## CONSOLIDATION

In 1885, Congress restored the U.S. Supreme Court's habeas appellate jurisdiction that it had taken away in 1868 during the *McCardle* litigation. The restoration was a response in part to the Ninth Circuit's jurisprudence in the Chinese civil rights litigation; Congress wanted the Supreme Court to rein in the power of the lower federal courts. At the same time, in a series of acts from 1875 to 1892 Congress gradually centralized authority over immigration, and tightened restrictions on Chinese immigration. The new restrictions did not eliminate Chinese restriction, however, and the Ninth Circuit judges continued to allow Chinese immigrants to enter, even after Judges Hoffman and Sawyer died in 1891. With their restored appellate jurisdiction, the Supreme Court began to regulate and overrule the Ninth Circuit decisions. But the Court did not devolve power back to the states. Instead, it not only upheld the new immigration acts, but determined that immigration decisions of federal officials were to be immune from judicial review. The lower federal courts had always held that the Congress's power over Chinese immigration was supreme; the U.S. Supreme Court now made this power plenary.

The Page Act of 1875 was Congress's first tentative foray into the Chinese immigration issue. It barred Chinese prostitutes from entering the United States. In 1882, Congress began to build an administrative structure for regulating immigration. In the Immigration Act of 1882, which was not concerned with Chinese exclusion, Congress divvied up authority between state and federal governments, giving states an important role in matters of immigration. That same year it passed the Chinese Exclusion Act, which forbade the immigration of Chinese laborers for ten years. Two subsequent acts tightened the restrictions on Chinese immigration. The Scott Act of 1888 prohibited the return of Chinese laborers who left the country,<sup>87</sup> and the Geary Act of 1892, also known as the "Dog Tag Law," required all Chinese laborers lawfully in the country to apply for a certificate of residence or be deported.<sup>88</sup> But it was the Immigration Act of 1891 that transformed congressional power of immigration and the Chinese question; this act also consolidated federal supremacy. The act abolished the

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<sup>87</sup> Salyer, *Laws Harsh as Tigers*, 7, 22.

<sup>88</sup> Pfaelzer, *Driven Out*, 291.

state–federal partnership created in 1882, and centralized immigration in the federal superintendent of immigration. It made all decisions of the inspection officers appealable only administratively, cutting off a major portion of judicial review in immigration cases.<sup>89</sup>

While these acts were restrictive, the Supreme Court, in an age long characterized as “laissez-faire,” tightened them even more. It did so in three ways important for the new supremacy. First, in *Chae Chan Ping*, the Court held that Congress’s power over immigration was plenary, and that it was not bound by the privileges, immunities, and exemptions clause of the Burlingame Treaty. Justice Field wrote that a treaty was simply an act of Congress, and could thus be changed by an act of Congress, even if the legislation was in direct violation of the treaty. Moreover, he continued, this type of legislation “was, of course, not a matter of judicial cognizance.”<sup>90</sup> The power to exclude foreigners was an incident of sovereignty that the federal government could exercise at will.<sup>91</sup>

Second, the plenary power, which the Court applied to both expulsions and exclusions, was not subject to traditional due process requirements like the right to trial by jury. The Court distinguished between rights and privileges, and characterized both entry and residence of non-citizens as privileges, which Congress could withdraw at will.<sup>92</sup> Congress could confer statutory due process protections. But as long as an immigration official made a deportation or exclusion decision in accordance with the statute the process was due.<sup>93</sup>

Finally, the Court rendered the administrative decisions binding and conclusive on the federal courts. The finality clause included in the 1891 Immigration Act making administrative decisions final was not unusual in nineteenth-century administrative law. Other administrative bodies like the General Land Office had been given similar power. But it was used to separate administrative from legal questions.<sup>94</sup> In the Chinese Exclusion

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<sup>89</sup> Salyer, *Laws Harsh as Tigers*, 26.

<sup>90</sup> *Chae Chan Ping v. United States*, 130 U.S. 531, 600–602 (1889).

<sup>91</sup> *Ibid.*, 603–609; see also *Nishimura Ekiu v. United States*, 142 U.S. 651 (1892); *Fong Yue Ting v. United States*, 149 U.S. 698 (1893).

<sup>92</sup> Salyer, *Laws Harsh as Tigers*, 30–31.

<sup>93</sup> *Fong Yue Ting*, 730; *Nishimura Ekiu*.

<sup>94</sup> Salyer, *Laws Harsh as Tigers*, 29.

Cases, the Court collapsed the distinction between law and administration, and made the administrative decision binding on courts, making them immune to judicial review. In *Ju Toy v. United States*, the Supreme Court held that the determination of the collector was conclusive, “whatever the ground on which the right is claimed, — as well when it is citizenship as when it is domicil, and the belonging to a class excepted from the exclusion acts.”<sup>95</sup> In other words, a Chinese person claiming to be a United States citizen by birth was subject to the pure discretion of an immigration official, and could not claim the protections afforded by the Fourteenth Amendment in a court of law.

*Ju Toy*'s decision that only the federal government could make determinations as to who was or was not a citizen (or more precisely who could rely upon the law to make claims to the protections of citizenship and who could not) was consistent with the supremacy aims of the Fourteenth Amendment. Through Sections 1 and 5, the Fourteenth Amendment made the federal government supreme regarding questions of citizenship. Section 1 defined national citizenship as a birthright, and protected those citizens' privileges and immunities. Section 5 gave to Congress specifically the power to protect U.S. citizens' privileges and immunities. These powers taken together meant that the federal government had the power to decide who is included within the body politic. This power is a mark of sovereignty. Thus, the Fourteenth Amendment's conferral of that power to the federal government was an important step in the construction of the new supremacy. The Supreme Court's decision in *Ju Toy* further entrenched this power by effectively stripping American citizens of Chinese descent of their political power, reducing them to what political theorist Giorgio Agamben has termed “bare life.” They were simply bodies used to further the aims of the state.<sup>96</sup> Here, the aim was the maintenance of a racialized state in which the federal government was supreme. The federal power to exclude even citizens marked the apex of the new supremacy.

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<sup>95</sup> *Ju Toy v. United States*, 198 U.S. 253, 262 (1905).

<sup>96</sup> Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life* (Stanford: Stanford University Press, 1998).

## CONCLUSION

Reconstruction was, of course, a critical turning point in the history of American rights, liberty, citizenship, and the state. But too often we presume that the legal and constitutional changes effected by the Civil War and Reconstruction emerged in full form in ways we are familiar with today. Reconstruction provided Americans with new legal languages, discourses, procedures, and structures that could be applied in novel ways on the ground. Whatever the “intent” behind these new technologies, their open-endedness and flexibility meant that the new structure would have to be worked. California’s experience with Chinese immigration was one of the most visible and volatile conflicts through which the new constitutional order was constructed.<sup>97</sup> And it suggests two revisions. First, while Reconstruction as a federal policy may have ended in 1877, Reconstruction as a phenomenon had a much longer life. This begs for a new periodization, as well as new themes to capture the larger project. Some historians have begun to do this by characterizing the period as an “age of emancipation.”<sup>98</sup> This leads to the second revision, which deals with the meaning of Reconstruction. Historians and other scholars have tended to focus on the rise of individual rights and their protection as the central project of Reconstruction. Thus, when the Supreme Court refused to recognize those rights in cases like *Slaughterhouse* and the *Civil Rights Cases*, we characterize it as “retreating from” or “abandoning” Reconstruction.<sup>99</sup> Adding federal supremacy as an additional element of Reconstruction complicates that thesis, especially when individual rights and federal supremacy work against each other. Recognizing that tension should help us to look for new syntheses of the legal and constitutional history of that period.

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<sup>97</sup> Michael Bottoms makes a similar point. Bottoms, *An Aristocracy of Color*, 207–08.

<sup>98</sup> See, e.g., Amy Dru Stanley, *From Bondage to Contract: Wage Labor, Marriage, and the Market in the Age of Slave Emancipation* (New York: Cambridge University Press, 1998); Jung, *Coolies and Cane*.

<sup>99</sup> Roman J. Hoyos, “Playing on a New Field: The U.S. Supreme Court in Reconstruction,” in Edward O. Frantz, ed., *A Companion to the Reconstruction Presidents, 1865–1881* (New York: Wiley-Blackwell, 2014, forthcoming).

# THE VINE VOTE:

## *Why California Went Dry*

JONATHAN MAYER\*

### TABLE OF CONTENTS

I. INTRODUCTION: VOLSTEAD, CALIFORNIA. . . . .	356
II. PROHIBITION POLITICS IN CALIFORNIA . . . . .	357
III. FEDERAL LAW AND THE GRAPE GROWERS. . . . .	369
IV. GRAPE GROWING UNDER NATIONAL PROHIBITION. . . . .	377
V. GRAPE GROWERS RECOGNIZED THE SOURCE OF THEIR WINDFALL . . . . .	382
VI. CONCLUSION: WHY CALIFORNIA WENT DRY. . . . .	384
APPENDIX. STATISTICS ON GRAPE GROWING IN CALIFORNIA UNDER PROHIBITION . . . . .	386

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\* This paper was awarded first place in the California Supreme Court Historical Society's 2013 Student Writing Competition. Jonathan Mayer received his J.D. in June, 2013 from Stanford Law School and is currently completing a Ph.D. at Stanford University's Department of Computer Science. He thanks Professor Lawrence Friedman for his invaluable research guidance and feedback.

## I. INTRODUCTION: VOLSTEAD, CALIFORNIA

Prohibition imperiled George F. Covell's livelihood. Born into an enterprising family in 1865, Covell joined his father's grape growing business at an early age.<sup>1</sup> By the 1910s he was a leader in California viticulture, earning positions of authority within trade groups<sup>2</sup> and collaborating with University of California researchers to advance farming technology.<sup>3</sup> Covell championed grape grower efforts to stave off prohibition at both the federal and state levels, including a last-minute compromise that would ban saloons throughout California.<sup>4</sup> He failed. On January 16, 1919, Nebraska provided the final vote required to ratify the Eighteenth Amendment. National prohibition under the Volstead Act began on January 17, 1920.<sup>5</sup> Grape growers were despondent; many dug up their vines, and one even committed suicide.<sup>6</sup>

But then, something unexpected happened: national prohibition proved profitable for Covell. As the 1921 harvest came to a close, he packed over 150 railcars with his wine grapes.<sup>7</sup> Covell wrote to Western Pacific, tongue-in-cheek, suggesting a name for his new and suddenly bustling cargo stop: Volstead.<sup>8</sup>

At the same time that Covell's fortunes took an unanticipated turn, California voters were deciding on prohibition as a matter of state law. Prohibition appeared as a statewide ballot measure five times between

<sup>1</sup> GEORGE H. TINKHAM, *HISTORY OF SAN JOAQUIN COUNTY 1583* (1923).

<sup>2</sup> Cal. Grape Protective Ass'n, *Grape Growers to Discuss the Wine Industry*, S.F. CHRON., July 1, 1917, at C7; *State Grape Meeting to Oppose Prohibition*, CAL. FRUIT NEWS, Sept. 7, 1918, at 13; *Exports from San Francisco for December*, CAL. FRUIT NEWS, Mar. 4, 1922, at 4–5.

<sup>3</sup> Ernest B. Babcock, *Studies in Juglans I*, 2 UNIV. CAL. PUBLICATIONS AGRIC. SCI. 1, 64–65 (1913).

<sup>4</sup> Cal. Grape Protective Ass'n, *supra* note 2.

<sup>5</sup> Wartime prohibition had gone into effect in 1919, but grape growers and wineries largely ignored the law pending resolution of constitutional challenges. *Injunction Against Dry Act Denied State Grape Men*, S.F. CHRON., Sept. 20, 1919, at 13.

<sup>6</sup> DANIEL OKRENT, *LAST CALL: THE RISE AND FALL OF PROHIBITION 1* (2011) (“Up in the Napa Valley . . . an editor wrote, ‘What was a few years ago deemed the impossible has happened.’”); GILMAN OSTRANDER, *THE PROHIBITION MOVEMENT IN CALIFORNIA, 1848–1933, 177–78* (1957).

<sup>7</sup> Eddie Boyden, *Grape Grower Puts Volstead on California Map*, S.F. CHRON., Sept. 8, 1921, at 15.

<sup>8</sup> *Id.*

1914 and 1920.<sup>9</sup> It never passed. State law remained deeply controversial even after federal prohibition: The Eighteenth Amendment contemplated concurrent state enforcement, and Congress had established initial “police arrangements” that were somewhat “superficial” owing to inadequate funding and primary responsibility located within a sub-sub-unit of the Treasury Department.<sup>10</sup> While scholars have long debated the effectiveness of prohibition enforcement,<sup>11</sup> contemporaries certainly perceived state “mini” or “baby” Volstead Acts to be critical battlegrounds between the “dries” and the “wets.” In the 1922 California election, after nearly a decade of campaigning, the dries finally won out.

This essay posits an explanation for California’s sudden flip-flop on prohibition: federal law generated windfall profits for the state’s grape growers, causing them to temper their opposition. The argument proceeds in five phases. Part II details the strategic politics of prohibition in California, especially on the part of grape growers, and how 1922 departed from prior elections. The following Part III explains how federal law under national prohibition both tolerated and subsidized home winemaking. Part IV analyzes statistics on grape growing under prohibition, which reveal a sudden surge in fruit production and price. Part V recounts how grape growers recognized prohibition as the cause of their good fortune. Finally, a Conclusion completes the argument: California went dry because prohibition was so profitable.

## II. PROHIBITION POLITICS IN CALIFORNIA

Prohibition was an incremental initiative in California. A state chapter of the Woman’s Christian Temperance Union was incorporated in 1879,<sup>12</sup>

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<sup>9</sup> See *infra* Part II.

<sup>10</sup> THOMAS PINNEY, *A HISTORY OF WINE IN AMERICA: FROM THE BEGINNINGS TO PROHIBITION* 435 (1989); see MARK THORNTON, *THE ECONOMICS OF PROHIBITION* 100 (1991) (discussing federal and state expenditures on prohibition); *Peril in Dry Repeal Shown*, L.A. DAILY TIMES, Oct. 30, 1926, at 1 (claiming that without state, municipal, or local authorities, there would only be about seventy prohibition enforcement officers in all of California).

<sup>11</sup> See THORNTON, *supra* note 10, at 100–01.

<sup>12</sup> ERNEST H. CHERRINGTON, *THE EVOLUTION OF PROHIBITION IN THE UNITED STATES OF AMERICA* 204 (1920); OSTRANDER, *supra* note 6, at 58 (“The state W.C.T.U. took its place almost at once as the most effective temperance organization in California.”).

and a statewide Anti-Saloon League was established in 1898.<sup>13</sup> Dries began with a persistent effort at the county and municipal levels, first under an 1874 local-option statute<sup>14</sup> (quickly declared unconstitutional by the state supreme court for excessive delegation<sup>15</sup>), then through land title restrictions,<sup>16</sup> then through 1883 statutes delegating general police powers to the counties and municipalities<sup>17</sup> (permissible owing to a revised 1879 state constitution<sup>18</sup>), and finally under a 1911 local option statute.<sup>19</sup> Dry achievements were slow at first, then rapidly subsumed much of the state's rural areas: 1 county in 1894,<sup>20</sup> 5 counties and 175 municipalities by 1901,<sup>21</sup> and 42% of the state's area by 1911.<sup>22</sup> Progress then stalled, owing to the large cities: by 1917, 55% of the state was dry by area, but only 26% by population.<sup>23</sup> No city with a population over 50,000 had elected to go dry; Berkeley was the largest at 40,000.<sup>24</sup> Prohibition forces in California required a new, statewide strategy that could leverage rural support against the urban areas.

Beginning in 1914, the California dries attempted a series of ambitious measures to enact statewide prohibition. They began with ballot initiatives to amend the state constitution; when those failed, they turned to statutory ballot initiatives; when those failed too, they at last turned to new allies in the state legislature. This final strategy nevertheless yielded statewide ballot measures owing to California's veto referendum procedure. The following table charts the course of prohibition ballot measures according to certified results from the California Secretary of State (save 1918).

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<sup>13</sup> CHERRINGTON, *supra* note 12, at 266; OSTRANDER, *supra* note 6, at 85, 91.

<sup>14</sup> OSTRANDER, *supra* note 6, at 42–53.

<sup>15</sup> *Ex parte Wall*, 48 Cal. 279, 313–17 (1874).

<sup>16</sup> OSTRANDER, *supra* note 6, at 69–70.

<sup>17</sup> *Id.* at 70–71.

<sup>18</sup> *Ex parte Campbell*, 74 Cal. 20, 23–24 (1887).

<sup>19</sup> *Ex parte Beck*, 162 Cal. 701, 704–11 (1912); OSTRANDER, *supra* note 6, at 71.

<sup>20</sup> OSTRANDER, *supra* note 6, at 72.

<sup>21</sup> *Id.* at 93.

<sup>22</sup> CHERRINGTON, *supra* note 12, at 304.

<sup>23</sup> ERNEST H. CHERRINGTON, *THE ANTI-SALOON LEAGUE YEAR BOOK: 1917*, 84 (1917).

<sup>24</sup> *Id.* at 83–84, 86–87.

*California ballot measures on prohibition, 1914–1932.*

Type “(C)” denotes a constitutional initiative; type “(S)” denotes a statutory initiative.

Year	Prop.	Description	Type	For	Against	Voters
1914 <sup>25</sup>	2	Prohibition (Supply)	Initiative (C)	41.06%	58.94%	890,317
1914	39	Enforcement Delay if Prohibition Passes	Initiative (C)	66.43%	33.57%	675,336
1914	47	Moratorium on Prohibition Initiatives	Initiative (C)	44.92%	55.08%	791,095
1916 <sup>26</sup>	1	Prohibition (Supply and Use, Delayed)	Initiative (C)	44.79%	55.21%	974,839
1916	2	Prohibition (Transfer in Public Accommodations)	Initiative (C)	47.69%	52.31%	966,822
1918 <sup>27</sup>	1	Liquor and Saloon Ban	Initiative (S)	43.17%	56.83%	515,425
1918	22	Prohibition (Supply)	Initiative (S)	47.02%	52.98%	559,181
1920 <sup>28</sup>	2	Prohibition (Supply)	Referendum	46.24%	53.76%	866,012
1922 <sup>28</sup>	2	Prohibition (Supply)	Referendum	51.98%	48.02%	856,209
1926 <sup>29</sup>	9	Prohibition Repeal	Initiative (S)	47.04%	52.96%	1,068,403
1932 <sup>30</sup>	1	Prohibition Repeal	Initiative (S)	68.92%	31.08%	2,118,186
1932	2	Local Option Ban	Initiative (C)	64.17%	35.83%	2,038,950

The first dry attempt was a concise, supply-side implementation of prohibition in 1914.<sup>31</sup> Much like the later federal Volstead Act, provisions

<sup>25</sup> A.P. Night Wire, *What Happened Last November*, L.A. DAILY TIMES, Dec. 8, 1914, at 7.

<sup>26</sup> Charles Morrison, *California*, BONFORT’S WINE & SPIRIT CIRCULAR, Dec. 25, 1916, at 117.

<sup>27</sup> 5529 Precincts Beat Rominger Bill by 70,000, S.F. CHRON., Nov. 13, 1918, at 6 (approximately 90% of precincts reporting); *Summary of State Vote by Counties on Prohibition*, S.F. CHRON., Nov. 16, 1918, at 8 (California Grape Protective Association results on Proposition 22). Low turnout in 1918 appears to have been due to World War I and an influenza outbreak. OSTRANDER, *supra* note 6, at 145.

<sup>28</sup> CAL. SEC’Y STATE, CALIFORNIA REFERENDA 1912 – PRESENT (2012), available at <http://www.sos.ca.gov/elections/ballot-measures/pdf/referenda.pdf>.

<sup>29</sup> *State Tally Shows Huge Vote Given G.O.P. Ticket*, L.A. DAILY TIMES, Dec. 10, 1926, at 4.

<sup>30</sup> *Here’s How California Voted on Propositions*, L.A. DAILY TIMES, Dec. 15, 1932, at 11.

<sup>31</sup> CAL. SEC’Y STATE, AMENDMENTS TO CONSTITUTION AND PROPOSED STATUTES WITH ARGUMENTS RESPECTING THE SAME 56 (1914).

targeted “[t]he manufacture, the sale, the giving away, or the transportation” of “intoxicating liquor.”<sup>32</sup> (Not coincidentally, the Anti-Saloon League played a leading role in the campaign<sup>33</sup> as well as in drafting the Volstead Act.<sup>34</sup>) Neither side of the 1914 ballot measure was particularly well organized: The dries made a drafting “oversight” in not setting an enforcement date, necessitating an additional corrective ballot measure.<sup>35</sup> The wets consolidated around preexisting beer<sup>36</sup> and liquor<sup>37</sup> groups since the grape-related trades had not yet organized themselves into an influential political institution.

Dry arguments in favor of prohibition were a scattershot of morality (“those who vote [to allow liquor are] *responsible for evil results*”), statistics (on disease, mental health, crime, and economics), and anti-immigrant sentiment (“Immigrants from Europe are generally liquor drinkers . . . turn them elsewhere.”).<sup>38</sup> Responses from the wets emphasized libertarian and enforcement concerns, as well as risk to the state’s agricultural economy.<sup>39</sup>

The wets appreciated that statewide ballot measures threatened their urban strongholds, so they proposed their own constitutional amendment with four safeguards. First, delay: state, county, and local governments could only revise their prohibition policies every eight years.<sup>40</sup> Second,

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<sup>32</sup> *Id.* at 56.

<sup>33</sup> *Id.* at 77.

<sup>34</sup> THOMAS PINNEY, *A HISTORY OF WINE IN AMERICA: FROM PROHIBITION TO THE PRESENT* 21–22 (2005).

<sup>35</sup> Without an explicit, delayed enforcement date as provided in Proposition 39, prohibition would have gone into effect mere days after enactment. The measure was intended to allow alcohol-related businesses and laborers, as well as government institutions, adequate time to prepare for prohibition “in the interest of fair dealing and to make the loss inherent in a change of state policy as light as possible.” CAL. SEC’Y STATE, *supra* note 31, at 82. The provision somewhat reflected disagreement among radical dries and the more cautious Anti-Saloon League. OSTRANDER, *supra* note 6, at 123–26.

<sup>36</sup> CAL. SEC’Y STATE, *supra* note 31, at 57 (California State Brewers Association).

<sup>37</sup> *Id.* at 77 (Grand Lodge Knights of the Royal Arch); *see also Liquor Men Hosts at Entertainment*, S.F. CALL, Feb. 6, 1906, at 9.

<sup>38</sup> CAL. SEC’Y STATE, *supra* note 31, at 57.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at 75–76.

mandatory local option: any municipality that voted against county or state prohibition (i.e. the cities) would be wet, and any that voted for would be dry.<sup>41</sup> Third, tying: a vote on statewide prohibition would trump a vote on county or municipal prohibition.<sup>42</sup> Fourth and finally, decentralized control: the state legislature would be (implicitly) divested of its authority to regulate or enforce alcohol law.<sup>43</sup>

The 1914 returns were a blow to the dries.<sup>44</sup> Not only did they fail to accomplish statewide prohibition (just 41% in favor), they also risked losing the ballot measure as a tool for reform (55% opposed). Both the dries (particularly the W.C.T.U. and Anti-Saloon League) and the wets (especially the grape growers and winemakers) began organizing early for the next vote.<sup>45</sup>

The 1916 campaign represented a professional effort on both sides and reflected the emergence of the wine and grape trades in California politics. The dries unified behind two constitutional initiatives on the ballot: a “complete” prohibition on alcohol possession, manufacture, and transfer to go into effect in 1920,<sup>46</sup> and a “partial” prohibition on alcohol transfer in public accommodations (i.e. saloons and hotels) to go into effect in 1918.<sup>47</sup>

Wets coalesced around the Grape Protective Association, a new and influential trade group representing the viticulture and wine interests.<sup>48</sup> This cohesion yielded a comprehensive political strategy, including frequent organizational meetings (both by the statewide organization and local

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<sup>41</sup> *Id.* at 76.

<sup>42</sup> *Id.* The provision was intended to target voters who opposed statewide prohibition but supported county or municipal prohibition. *Id.* at 77.

<sup>43</sup> *Id.* at 76.

<sup>44</sup> CHERRINGTON, *supra* note 12, at 338.

<sup>45</sup> OSTRANDER, *supra* note 6, at 126–32, 137.

<sup>46</sup> CAL. SEC’Y STATE, AMENDMENTS TO CONSTITUTION AND PROPOSED STATUTES WITH ARGUMENTS RESPECTING THE SAME 3 (1916).

<sup>47</sup> *Id.* at 5–6.

<sup>48</sup> John R. Meers, *The California Wine and Grape Industry and Prohibition*, 42 CALIF. HIST. SOC’Y Q. 19, 21–23 (1967); see generally CHARLES MERZ, *THE DRY DECADE* 52–53 (1932).

chapters),<sup>49</sup> fundraising efforts,<sup>50</sup> articles and advertising in newspaper,<sup>51</sup> and speaking engagements.<sup>52</sup> The Grape Protective Association even

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<sup>49</sup> A.P. Night Wire, *Grape Men Ask Compensation*, L.A. DAILY TIMES, Jan. 9, 1916 (“A vigorous campaign against the proposed constitutional prohibition amendments to be voted upon next November was opened here today by the California Grape Protective Association.”); *Blow at Prohibitionists is Planned by Grape Growers*, S.F. CHRON., Jan. 9, 1916, at 30 (“Leading grape growers wine men of the State completed preliminary plans for a widespread campaign against prohibition in California . . . under the auspices of the California Grape Protective Association.”); Charles Morrison, *California*, BONFORT’S WINE & SPIRIT CIRCULAR, Jan. 25, 1916, at 289 (“Preliminary steps have been taken by the California Grape Protective Organization, representing the grape-growers and wine-makers of the State for an energetic campaign against prohibition.”); *Life of Industry Depends on Issue, Grape Growers Tell Effects of “Dry” Amendments*, L.A. DAILY TIMES, Mar. 5, 1916, at V13 (recounting meeting of Southern California winemakers and growers); *Grape Association to Hold Meetings*, S.F. CHRON., July 21, 1916, at 2 (“The Sonoma County Grape Protective Association . . . is mapping out work to be done . . . to defeat the two proposed prohibition amendments which will be on the ballot at the November election.”).

<sup>50</sup> Charles Morrison, *California*, BONFORT’S WINE & SPIRIT CIRCULAR, Feb. 25, 1916, at 385 (“The officers of the California Grape Protective Association are busily engaged gathering the coin to carry on the campaign against prohibition, and they are meeting with encouraging success.”).

<sup>51</sup> *Id.* (“Every issue of the Sacramento *Bee* contains smashing articles against the amendments . . . and the circulation of the paper has materially increased in consequence. The arguments put forth in these articles have done incalculable good to the ‘wet’ cause . . .”); Charles Morrison, *California*, BONFORT’S WINE & SPIRIT CIRCULAR, Aug. 10, 1916, at 228 (“The campaign for and against prohibition is being carried on vigorously by each side, literature forming the chief feature . . . It is taking up considerable time of the publicity department of the California Grape Protective Association . . .”); Charles Morrison, *California*, BONFORT’S WINE & SPIRIT CIRCULAR, Oct. 25, 1916, at 379, 380 (noting the “thoroughly scientific advertising methods [used] by the California Grape Protective Association”); see, e.g., *Stands Opposed to Prohibition, Would Destroy Viticulture of the State*, L.A. DAILY TIMES, Mar. 31, 1916, at 12 (reporting endorsement by the San Francisco Chamber of Commerce); *Wineries Save Grape Growers*, L.A. DAILY TIMES, Oct. 29, 1916, at 112 (recounting speech by a California Grape Protective Association spokesperson); Cal. Grape Protective Ass’n, *Don’t Misunderstand Proposition Number 2 to be Voted on at the November Election*, S.F. CHRON., Oct. 6, 1916, at 10 (“Proposition No. 2 would wipe out practically every legitimate avenue of distribution of California wines.”); *Declares Church Dry Signs False, Organization of Grape Men Issues Statement*, L.A. DAILY TIMES, Nov. 6, 1916, at II-2 (correcting alleged misstatements in prominent dry signage).

<sup>52</sup> Charles Morrison, *California*, BONFORT’S WINE & SPIRIT CIRCULAR, Nov. 10, 1916, at 26 (“The California Grape Protective Association has now several speakers in the field, among them . . . [a former pastor,] a famous orator, . . . a vineyardist . . . [and] its secretary, and they are all doing splendid work.”).

sponsored a youth essay contest to convey its message into the state's schools and homes.<sup>53</sup> The organization's magnum opus was a widely distributed informational pamphlet that detailed, at length and with volumes of statistics, how prohibition would obliterate California's grape and wine sectors.<sup>54</sup>

Unlike in 1914, official ballot pamphlet arguments uniformly emphasized the potential impacts on California agriculture.<sup>55</sup> Wets, now represented by the grape growers, recounted the value, land, and labor bound up in winemaking.<sup>56</sup> Dries went so far as to position their anti-saloon initiative as a concession to the grape and wine interests, since exports would be unaffected.<sup>57</sup>

The results were another victory for the wets: both initiatives failed, albeit by narrower margins than in 1914.

In the 1918 round, the grape and wine trades pursued a new political strategy. As succinctly described by a leading account of prohibition in California:

Throughout the prohibition era the grape and wine industry vacillated between three disagreeable alternatives: To oppose the liquor interests was to support the prohibitionists, who refused to distinguish between the native fermented grape juice and other forms of

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<sup>53</sup> *School Children to Write on Vineyards*, S.F. CHRON., Aug. 22, 1916, at 3 ("Acting in the belief that in thousands of homes the doctrine of temperance as opposed to prohibition is taught, the California Grape Protective Association . . . has appealed to the children of the State to express their views in essay forms on the topical question. . . . [T]he topic will be, 'The Vineyards of California Must Not Be Destroyed by Prohibition.'"); see *How the Youth of California Regard Prohibition*, OVERLAND MONTHLY & OUT WEST MAG. 425, 425–27 (Nov. 1916) (published text of winning essays).

<sup>54</sup> CAL. GRAPE PROTECTIVE ASS'N, HOW PROHIBITION WOULD AFFECT GRAPE INTERESTS IN CALIFORNIA (1916); see Charles Morrison, *California*, BONFORT'S WINE & SPIRIT CIRCULAR, Apr. 25, 1916, at 555 ("The California Grape Protective Association is taking a most effective way of making the voters acquainted with the issues at stake in the forthcoming election for or against prohibition, in so far as the viticultural industry is concerned. The Association has prepared a 'Grape Manual,' illustrated, of sixty-four pages, which fully and unequivocally answers and refutes all of the arguments raised by the prohibitionists. The manual . . . will be distributed to the extent of 100,000 copies where they will do the most good.").

<sup>55</sup> CAL. SEC'Y STATE, *supra* note 46, at 3–4, 6.

<sup>56</sup> *Id.* at 4, 6.

<sup>57</sup> *Id.* at 6.

alcoholic beverage; to support the liquor interests was to associate the wine industry with the most disreputable forces in the struggle; and to attempt to stand on its own merits was to face the bitter opposition of both prohibitionists and liquor men.<sup>58</sup>

The Grape Protective Association and allies adopted the last of these options and backed a carefully drafted statute that banned spirits and saloons.<sup>59</sup> When the bill (unsurprisingly) failed in the state assembly, they took it to the voters as a statutory initiative.<sup>60</sup> The grape and wine trades had three reasons for charting a compromise course: First, they believed handing dries a partial victory would relieve political pressure for more complete prohibition.<sup>61</sup> Some dry leaders, surprisingly enough, held the opposite view — that voters would press for further restrictions, and that a weakening of liquor interests would increase the odds of future success.<sup>62</sup> Second, grape growers and winemakers aimed to avoid the political capital costs and reputational tarnish of lobbying in cooperation with the

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<sup>58</sup> OSTRANDER, *supra* note 6, at 135; *see also* NUALA MCGANN DRESCHER, *THE OPPOSITION TO PROHIBITION, 1900–1919*, 118–20 (1964).

<sup>59</sup> CAL. SEC’Y STATE, *AMENDMENTS TO CONSTITUTION AND PROPOSED STATUTES WITH ARGUMENTS RESPECTING THE SAME 2–4* (1918); OSTRANDER, *supra* note 6, at 135–41, 145.

<sup>60</sup> OSTRANDER, *supra* note 6, at 139.

<sup>61</sup> *Id.* at 134–35; *State Doesn’t Want To Be Dry, He Says*, L.A. DAILY TIMES, Apr. 13, 1918, at 10 (“If the [anti-saloon initiative] were not on the ballot, [the secretary of the California Grape Protective Association] said, ‘the dries would have initiated a bone-dry measure and the voters, in disgust, would have adopted it believing that it was the only way of rid the State of the saloons and strong drink.’”).

<sup>62</sup> OSTRANDER, *supra* note 6, at 138, 143–44 (at a statewide convention, dries chose to take no position on the measure); *Drys of State Center Effort in Legislature*, S.F. CHRON., Feb. 7, 1918, at 5 (“The [dry] federation will take no official position toward plans for a measure being initiated by the California Grape Protective Association, prohibiting saloons and the sale of ardent spirits.”). In advance of the statewide convention, there had been substantial disagreement among dry groups in how to react. “Dry” Factions in Lively Row, L.A. DAILY TIMES, Jan. 31, 1918, at 6; *To Make Plans for Campaign, Anti-Saloonists to Meet in Fresno Tuesday*, L.A. DAILY TIMES, Feb. 3, 1918. The state chapter of the W.C.T.U. disagreed with the convention’s outcome and vocally opposed the anti-saloon initiative. *Not Strict Enough, W.C.T.U. Resolves that Rominger Measure Cannot Be Supported by Organization*, L.A. DAILY TIMES, Jan. 13, 1918, at 12; *W.C.T.U. Is Opposed to Rominger Measure*, S.F. CHRON., May 11, 1918, at 14.

liquor interests.<sup>63</sup> Third and last, many in the grape-related trades were of wine-drinking European descent and earnestly believed that wine served a unique and honorable role in culture and dining.<sup>64</sup>

The wets directed their 1918 campaign toward legislative and gubernatorial elections owing to a perceived inability to pass statewide prohibition by ballot measure<sup>65</sup> and a desire to ratify the Eighteenth Amendment in California.<sup>66</sup> Radical temperance proponents nevertheless gathered sufficient signatures for a simple statutory initiative that would have prohibited all alcohol manufacture and transfer.<sup>67</sup>

The Grape Protective Association once again carried the banner for grape and wine interests, focusing efforts on the ballot measures;<sup>68</sup> a litany of prominent advertisements exhorted voters to preserve the state's valuable grape-related trades,<sup>69</sup> and the Association even offered transportation

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<sup>63</sup> OSTRANDER, *supra* note 6 at 136 ("It became apparent that in the course of the fight the wine interests were becoming dangerously involved in the protection of the saloon, in which they had virtually no interest.").

<sup>64</sup> *Id.*

<sup>65</sup> Editorial, *Proclamation Adopted by the California Grape Protective Association, Annual Meeting, San Francisco, February 9, 1918*, BONFORT'S WINE & SPIRIT CIRCULAR, Mar. 15, 1918, at 66 (quoting a dry leader's convention speech that noted "[i]t is easier to carry the Legislature than to carry a [prohibition] amendment").

<sup>66</sup> OSTRANDER, *supra* note 6, at 146–47.

<sup>67</sup> CAL. SEC'Y STATE, *supra* note 59, at 54; *Bone Dry State Drive to Start*, L.A. DAILY TIMES, May 25, 1918, at II-6 (recounting upcoming meeting to strategize proposed prohibition amendment); *Bake Barley into Bread*, L.A. DAILY TIMES, May 27, 1918, at 8 (radical prohibitionists denounce Anti-Saloon League for moderate position on anti-saloon initiative).

<sup>68</sup> *3 Liquor Bills To Go Before Voters*, S.F. CHRON., Mar. 8, 1918, at 9 (discussing Grape Protective Association initiative and ballot pamphlet arguments); A.P. Night Wire, *Grape Growers Plan to Fight "Bone Dry."*; L.A. DAILY TIMES, Sept. 15, 1918, at 5 ("A campaign against the proposed [prohibition] State constitutional amendment and in favor of the proposed [anti-saloon] measure, which would permit the sale of light wines and beer only, was planned at a meeting of the California Grape Protective Association . . .").

<sup>69</sup> Cal. Grape Protective Ass'n, *Vote "No" on Proposition No. 22*, S.F. CHRON., Oct. 29, 1918, at 6; Cal. Grape Protective Ass'n, *Grape Syrup Will Not Solve Wine Grape Problem*, L.A. DAILY TIMES, Oct. 30, 1918, at 4 (contesting University of California, Berkeley study cited by dries to demonstrate valuable nonalcoholic uses of wine grapes); Cal. Grape Protective Ass'n, *Vote "No" on Proposition No. 22*, S.F. CHRON., Oct. 31, 1918, at 8 ("We believe the people of California . . . will protest . . . against the destruction of our great grape industry which has been fostered and encouraged for more than half

to polling places in San Francisco.<sup>70</sup> The gubernatorial election was another significant target;<sup>71</sup> when it appeared both major parties would run dry candidates, the leading spokesman for the Association went so far as to launch an independent campaign.<sup>72</sup> Strangely, while the Association pledged to fight for control of the state legislature,<sup>73</sup> its efforts are not apparent from the historical record.

The grape trades were once again successful in warding off prohibition on the ballot, resorting to their reliable arguments about the economic value of grape growing and winemaking.<sup>74</sup> Their anti-saloon initiative fared poorly, however, likely owing to insufficient dry support and opposition from liquor interests.<sup>75</sup> Results in elected positions proved even more disastrous for the wets: dries claimed the Assembly, the governorship, and (barely) the Senate.<sup>76</sup>

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a century.”); Cal. Grape Protective Ass’n, *Vote “No” on Proposition No. 22*, L.A. DAILY TIMES, Nov. 2, 1918, at II-2 (same); Cal. Grape Protective Ass’n, *Our Soldiers in France Drink Wine and Are Sober, Says Randall the Prohibitionist*, S.F. CHRON., Nov. 2, 1918, at 3 (invoking the experience of American soldiers in France to justify permitting wine); Cal. Grape Protective Ass’n, *Be Fair to the Grape Growers of California*, L.A. DAILY TIMES, Nov. 4, 1918, at II-3.

<sup>70</sup> Cal. Grape Protective Ass’n, *Every Public-Spirited Citizen Should Go to the Polls Today!*, S.F. CHRON., Nov. 5, 1918, at 6 (“There are many important measures on which you must pass judgment. None is more important than Proposition No. 22, which would CONFISCATE the wine grape industry . . . . If we can aid you to get to the polls — ring up our office . . . and we will send an auto for you, take you to your voting booth and back again.”).

<sup>71</sup> *Grape Men Favor Hayes’ Dry Policy*, S.F. CHRON., May 28, 1918, at 3 (endorsement of gubernatorial candidate who favors anti-saloon initiative).

<sup>72</sup> *Bell Candidacy Indorsed*, S.F. CHRON., Oct. 5, 1918, at 3.

<sup>73</sup> *Grape Men Will Fight Prohibition, Pledge Themselves to Resist Drys’ Attempt to Capture Legislature*, S.F. CHRON., Feb. 10, 1918, at 3 (recounting the annual meeting of the Grape Protective Association, which featured speeches and a proclamation urging challenges to dry attempts to seize the state legislature); *Grape Growers Join in Legislative Pledge*, S.F. CHRON., Mar. 17, 1918, at 7 (additional grape growers join efforts).

<sup>74</sup> CAL. SEC’Y STATE, *supra* note 59, at 5 (“[T]his proposed legislation was initiated by the grape growers of California, who have an industry representing an actual investment of \$150,000,000 which they naturally desire to protect, and which they feel should not unnecessarily be destroyed . . . .”); *id.* at 55 (“Does conservation contemplate the destruction of \$150,000,000 worth of property in California . . . ?”).

<sup>75</sup> OSTRANDER, *supra* note 6, at 147.

<sup>76</sup> *Id.* at 146–47; *Five Districts May Decide on Bone-Dry Act*, S.F. CHRON., Nov. 6, 1918, at 5.

The 1920 campaign differed from its predecessors in two material respects. First, federal prohibition was in effect. The Eighteenth Amendment had been ratified, including by California, and the Volstead Act was both passed and in force. State law was a matter of amplified enforcement through state, county, and municipal police organizations. Second, dries controlled the state legislature and governorship; the wets had to rely on veto referenda to challenge statewide prohibition legislation.<sup>77</sup>

Despite these changes, the election took an entirely familiar tone. The Grape Protective Association and its allies launched another vigorous anti-prohibition campaign, organizing opposition,<sup>78</sup> placing critical coverage,<sup>79</sup> and purchasing prominent advertising<sup>80</sup> — including half-page simultaneous runs in the most widely circulated Los Angeles<sup>81</sup> and San Francisco<sup>82</sup> papers. Arguments did shift slightly, emphasizing liberty and federalism concerns. But grape industry economic protectionism remained a central message, frequently manifested through the optimistic prospect of a state or federal exception for “light” (i.e. almost all) wines.<sup>83</sup> Once again a Grape Protective Association affiliate authored the official ballot pamphlet anti-prohibition position.<sup>84</sup>

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<sup>77</sup> CAL. SEC’Y STATE, AMENDMENTS TO CONSTITUTION AND PROPOSED STATUTES WITH ARGUMENTS RESPECTING THE SAME 6–9 (1920).

<sup>78</sup> *Meeting Unites Foes of Harris Prohibition Act*, S.F. CHRON., Oct. 8, 1920, at 13.

<sup>79</sup> Theodore A. Bell, *Defeat of Harris Bill Asked on Grounds That It Will Only Add to Complications in State*, S.F. CHRON., Oct. 14, 1920, at 6.

<sup>80</sup> Cal. Grape Protective Ass’n, *Vote “No” on Proposition No. 2: Argument Against Harris State Prohibition Enforcement Act*, S.F. CHRON., Sept. 13, 1920, at 8; Cal. Grape Protective Ass’n, *Vote “No” on Proposition No. 2: Argument Against Harris State Prohibition Enforcement Act*, L.A. DAILY TIMES, Sept. 14, 1920, at 5 (same); Cal. Grape Protective Ass’n, *Californians, Do You Still Love Your Liberty?*, S.F. CHRON., Oct. 19, 1920, at 6; Cal. Grape Protective Ass’n, *Vote “No” on Proposition No. 2 (Commonly Known as the Harris State Enforcement Act)*, S.F. CHRON., Oct. 28, 1920, at 8; Cal. Grape Protective Ass’n, *Vote “No” on Proposition No. 2 (Commonly Known as the Harris State Enforcement Act)*, L.A. DAILY TIMES, Oct. 29, 1920, at II-3 (same).

<sup>81</sup> Cal. Grape Protective Ass’n, *President of California Grape Growers’ Exchange Answers Questions of Prohibition Leader*, L.A. DAILY TIMES, Oct. 30, 1920, at 5.

<sup>82</sup> Cal. Grape Protective Ass’n, *President of California Grape Growers’ Exchange Answers Questions of Prohibition Leader*, S.F. CHRON., Oct. 30, 1920, at 7.

<sup>83</sup> PINNEY, *supra* note 34, at 31 (“the efforts to get light wines (that is, unfortified dry table wines) legalized proved surprisingly difficult”); see OKRENT, *supra* note 6, at 175; OSTRANDER, *supra* note 6, at 160.

<sup>84</sup> CAL. SEC’Y STATE, *supra* note 77, at 10.

The results of the election were also familiar. Once again statewide prohibition failed, earning an even lesser share of the vote than the 1918 attempt.

Then something odd happened: in the 1922 election, organized wet opposition evaporated. The ballot featured another prohibition referendum with a simple provision to incorporate the Volstead Act into California state law.<sup>85</sup> The Grape Protective Association once again pledged to contest the measure.<sup>86</sup> But it appears to have done little: The official ballot pamphlet response was a strangely antifederal screed<sup>87</sup> penned by a Sacramento judge who had failed to secure reelection fifteen years prior.<sup>88</sup> The Association merely reprinted the piece in a few, small, poorly placed advertisements.<sup>89</sup>

Prohibition passed. The vote was close — roughly 52% to 48% — but a significant swing from prior years. Even in the large cities, tens of thousands of voters switched from wet to dry.<sup>90</sup>

The grape-related trades acquiesced in state prohibition throughout the 1920s, and no other structured wet opposition sprang up. A disorganized and last minute repeal campaign in 1926 only targeted the cities and roughly replicated the 1922 result.<sup>91</sup>

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<sup>85</sup> CAL. SEC'Y STATE, AMENDMENTS TO CONSTITUTION AND PROPOSED STATUTES WITH ARGUMENTS RESPECTING THE SAME 8 (1922).

<sup>86</sup> *Grape Men Desire Dry Law Revision*, S.F. CHRON., Feb. 19, 1922, at 11 (“The [California Grape Protective Association] went on record as opposed to the Wright state prohibition enforcement act and in favor of a modification of the national prohibition act that will permit the lawful manufacture and sale of light wines and beer under proper restrictions.”).

<sup>87</sup> CAL. SEC'Y STATE, *supra* note 85, at 9.

<sup>88</sup> Cal. Courts, *Charles Emmett McLaughlin*, available at <http://www.courts.ca.gov/2845.htm>.

<sup>89</sup> E.g. Cal. Grape Protective Ass'n, *Judge McLaughlin Opposed to the Wright Act*, S.F. CHRON., Oct. 9, 1922, at 12; Cal. Grape Protective Ass'n, *Judge McLaughlin Opposed to the Wright Act*, L.A. DAILY TIMES, Oct. 10, 1922, at II-5.

<sup>90</sup> A.P. Night Wire, *Votes Make California “Bone Dry,”* L.A. DAILY TIMES, Nov. 11, 1922 (“This year the unfavorable majority in San Francisco was decreased . . . Los Angeles increased its “dry” margin . . . San Diego switched over . . . and Santa Clara county, of which San Jose is the county seat, turned out a . . . majority for enforcement compared with a neck and neck fight over the [1920] act.”).

<sup>91</sup> See *Dry Repeal Move On*, L.A. DAILY TIMES, June 11, 1926, at 1; *Wet Petitions Being Printed*, L.A. DAILY TIMES, June 16, 1926, at 3.

### III. FEDERAL LAW AND THE GRAPE GROWERS

The general alcohol manufacture and transfer prohibitions in the Volstead Act were extraordinarily broad:

No person shall on or after the date when the eighteenth amendment to the Constitution of the United States goes into effect, manufacture, sell, barter, transport, import, export, deliver, furnish or possess any intoxicating liquor except as authorized in this Act, and all the provisions of this Act shall be liberally construed to the end that the use of intoxicating liquor as a beverage may be prevented.<sup>92</sup>

Furthermore, the Act defined “intoxicating liquor” to encompass any substance “fit for use for beverage purposes” with greater than 0.5% alcohol by volume.<sup>93</sup> In a plain reading, winemaking was a violation of federal law.

Curiously, a separate provision of the Act (Title II, Section 29) exempted certain home production:

The penalties provided in this Act against the manufacture of liquor without a permit shall not apply to a person for manufacturing nonintoxicating cider and fruit juices exclusively for use in his home, but such cider and fruit juices shall not be sold or delivered except to persons having permits to manufacture vinegar.<sup>94</sup>

The provision is perplexing.<sup>95</sup> What does “nonintoxicating” mean? If it shares the same definition as elsewhere in the Act (i.e. less than 0.5% alcohol by volume), Section 29 would be surplusage. How does a “fruit juice” differ from wine? What does it mean to “manufacture” at home?<sup>96</sup>

The origins of Section 29 were contested even during national prohibition. This much is clear: the provision was added on the Senate floor, after

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<sup>92</sup> Title II Section 3.

<sup>93</sup> Title II Section 1.

<sup>94</sup> Title II Section 29.

<sup>95</sup> See PINNEY, *supra* note 34, at 21; George Cyrus Thorpe, *Intoxicating Liquor Law*, 14 GEO. L.J. 315, 330 (1926) (describing the home manufacturing provision as “peculiar”).

<sup>96</sup> One point of clarity was that, under tax regulations, a maximum of 200 gallons could be produced annually per household. The cap persists to this day at 27 C.F.R. § 24.75. Even a large family, of course, could not consume anything approaching 200 gallons.

the Volstead Act had passed the House and reported from committee.<sup>97</sup> The *Congressional Record* furnishes only a brief colloquy where a senator from California obliquely references Italian and Greek home winemaking.<sup>98</sup> In one version, recounted at length by a contemporary viticultural leader, the exception was intended as a minor concession to the grape growers.<sup>99</sup> The leading history of prohibition in California claims this origin: “hard cider was the traditional drink of certain of the rural, Protestant, native American groups which had been chiefly responsible for the coming of prohibition.”<sup>100</sup> Wet critics offered a similar account, denouncing Section 29 as a giveaway to farming interests.<sup>101</sup> Yet another rendition suggested wine was more tolerable because it was less prone to induce social harms than other forms of alcohol.<sup>102</sup> Another version credited fears of angering the apple growers.<sup>103</sup> Contemporary legal scholarship suggested Section 29 was intended to restrain enforcement efforts.<sup>104</sup>

<sup>97</sup> 58 Cong. Rec. 4,847 (1919); see PINNEY, *supra* note 34, at 21.

<sup>98</sup> The following floor colloquy occurred after the amendment of Section 29, between Senators James Phelan (D-CA), Thomas Sterling (R-SD), and Charles Curtis (R-KS):

Mr. Phelan: Mr. President, referring to the amendment which was just agreed to, I should like to learn from the chairman of the committee the exact significance of the amendment . . . It is the practice of certain of our citizens — our Italian-American citizens and our Greek-American citizens — to make a small quantity of wine for domestic consumption in their own homes. Now, of course, wine is a fruit juice, and I suppose it is embraced within the meaning of the amendment.

58 Cong. Rec. 4,847–48 (1919).

<sup>99</sup> PINNEY, *supra* note 34, at 22; see HERBERT ASBURY, *THE GREAT ILLUSION: AN INFORMAL HISTORY OF PROHIBITION* 237 (1950).

<sup>100</sup> OSTRANDER, *supra* note 6, at 178–79; see OKRENT, *supra* note 6, at 176 (“[Section 29] was the language [the head of the Anti-Saloon League] inserted into the act ostensibly to allow farmers’ wives to ‘conserve their fruit,’ but really to mollify rural voters who wanted their hard cider.”).

<sup>101</sup> *Tydings Says Drys Put Wine in Volstead Act, Gift To Keep Rural Support, He Claims*, CHI. DAILY TRIB., Feb. 7, 1931, at 1.

<sup>102</sup> S.E. Nicholson, *The Volstead Differential, Explaining Why Apparent Partiality to Farmers is Praiseworthy*, N.Y. HERALD TRIB., Apr. 29, 1926, at 22.

<sup>103</sup> PINNEY, *supra* note 34, at 21.

<sup>104</sup> Comment, *Definition of “Intoxicating Liquors” in the National Prohibition Act*, 38 YALE L.J. 520, 525 n.32 (1929).

There remains only an anecdotal record for judging among these narratives. When drafters and supporters of the Volstead Act testified after its passage, they did little to clarify the original impetus;<sup>105</sup> leaders in the national Anti-Saloon League repeatedly strained to explain and rationalize the special exception for home production.<sup>106</sup>

Whatever the motivation for Section 29, its legal implications hinged on the definition of “intoxicating.”<sup>107</sup> Could enforcement officers and prosecutors rely on the Volstead Act’s ordinary, bright-line 0.5% alcohol by volume rule? Or would they have to satisfy a vague “intoxicating in fact” standard thrown into the jury’s discretion? If the rule interpretation governed, home winemaking was plainly unlawful. If the standard prevailed, home winemaking would be legal, or at minimum operate in a zone of case-specific ambiguity where juries were unlikely to convict, prosecutors were unlikely to pursue charges, and officers were unlikely to make arrests.

The reported Senate colloquy provided substantial support for the standard interpretation,<sup>108</sup> as did a plain reading of the statutory text. In July 1920, the Internal Revenue Bureau issued an interpretive rule that formally

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<sup>105</sup> PINNEY, *supra* note 34, at 22.

<sup>106</sup> Wayne B. Wheeler, *Wheeler Explains Testimony*, WASH. POST, May 25, 1924, at ES2 (contesting interpretation of testimony that home production of intoxicating beverages is lawful); *McBride Statement*, WASH. POST, May 15, 1930, at 1 (similar).

<sup>107</sup> See *Definition of “Intoxicating Liquors” in the National Prohibition Act*, *supra* note 104, at 524–25.

<sup>108</sup> The colloquy above continues:

Mr. Sterling: The Senator will notice that the amendment does not permit the manufacture of intoxicating wines and fruit juices. Under the constitutional amendment we could not authorize the manufacture of wines or fruit juices which would be intoxicating.

Mr. Phelan: Do I understand that the definition of intoxicating liquors in this bill applies to this particular paragraph as defining what intoxicating beverages shall be?

Mr. Sterling: I will say to the Senator from California that there may be some question about that, but I think what is meant here is as to whether or not is intoxicating in fact.

Mr. Phelan: Then that has to be determined, possibly, by a court in adjudicating the matter?

Mr. Sterling: It might be determined by a court in any given case. If the case arises under this provision, it would be determined by the court.

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endorsed the standard approach.<sup>109</sup> By 1921 the prevailing understanding was that home winemaking would be tolerated under national prohibition, if not entirely lawful.<sup>110</sup>

Representative John Philip Hill (R-MD), a vocal critic of national prohibition with a penchant for showmanship, seized upon Section 29 as an exemplary absurdity of the Volstead Act.<sup>111</sup> In 1923 and again in 1924 he prepared cider and wine at his home and notoriously dared federal agents to test the beverages.<sup>112</sup> The first year he merely received a temporary injunction.<sup>113</sup> The second year Hill hosted a party with hundreds of guests, serving 2.75% alcohol by volume cider;<sup>114</sup> he at last drew a six-count federal grand

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Mr. Curtis: Would it not be a question of fact for the jury to pass on in trying the case?

Mr. Sterling: Why, certainly. If there is a case, it will be a question of fact for a jury.

....

Mr. Phelan: I think that is more satisfactory than an arbitrary definition.

58 Cong. Rec. 4,847–48 (1919).

<sup>109</sup> *Allows Home Brew Over Half Per Cent.*, N.Y. TIMES, July 25, 1920 (explaining and providing text of opinion: “the phrase ‘non-intoxicating’ means non-intoxicating in fact, and not necessarily less than one-half of 1 per cent. of alcohol”); see PINNEY, *supra* note 34, at 22.

<sup>110</sup> *Rush for Grapes Like Street Fight*, N.Y. TIMES, Oct. 16, 1921, at 36 (explaining Internal Revenue ruling and subsequent demand for grapes).

<sup>111</sup> Editorial, *Hill’s Home Brew*, N.Y. TIMES, Nov. 13, 1924 (providing an overview of Hill’s campaign and motives); John Philip Hill, *Prohibition and the Republican Party*, 71 FORUM 810, 816 (1924) (recounting exchanges with Representative Andrew Volstead and Federal Prohibition Commissioner Roy Haynes attempting to clarify what percentage of alcohol by volume would constitute “intoxicating in fact”); *Hill Welcomes Action by Justice Department*, WASH. POST, Sept. 23, 1924 (“I am delighted . . . that after efforts of nearly four years the Federal prohibition department, in conjunction with the Department of Justice, seems to be on the verge of deciding what section 29, title 2, of the Volstead act means.”); see PINNEY, *supra* note 34, at 22–23.

<sup>112</sup> *Attorney General Expected To Act in Hill’s Cider Party*, WASH. POST, Sept. 23, 1924, at 5 (recounting Hill cider brewing, letter from Hill to Haynes, analysis from Haynes, and Haynes response); see PINNEY, *supra* note 34, at 23.

<sup>113</sup> *Hill Is Indicted Upon Six Counts*, ATL. CONST., Sept. 25, 1924, at 1.

<sup>114</sup> *Id.* (reporting 1,500 guests); Hill, *After Cider Content Challenge, Is Indicted Again*, WASH. POST., Sept. 25, 1924, at 2 (reporting hundreds of guests); Editorial, *Hill’s Home Brew*, N.Y. TIMES, Nov. 13, 1924 (reporting between 500 and 2,000 guests).

jury criminal indictment.<sup>115</sup> Hill contested the charges,<sup>116</sup> won a widely publicized district court ruling in favor of the “intoxicating in fact” standard,<sup>117</sup> and was finally acquitted by a jury despite evidence of as much as 11.68% alcohol by volume in his various homebrews.<sup>118</sup> Throughout the remainder of national prohibition the federal and state courts widely, though not uniformly, followed the *Hill* opinion.<sup>119</sup> The Justice and Treasury departments subsequently acquiesced in the *Hill* view and declined to appeal the rule interpretation of Section 29 to the Supreme Court.<sup>120</sup> Many contemporary commentators viewed Section 29 post-*Hill* as a special protection for rural practices;<sup>121</sup> by 1926, farming interests had declared their firm support for Section 29, effectively ensuring it would not be amended out of federal law.<sup>122</sup>

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<sup>115</sup> *Hill Indicted on 6 Counts for Making Wine, Cider*, N.Y. HERALD TRIB., Sept. 25, 1924, at 1 (detailing counts in indictment).

<sup>116</sup> *Hill's Plea Not Guilty in Cider Making Charge*, CHI. TRIB., Oct. 1, 1924, at 12.

<sup>117</sup> *United States v. Hill*, 1 F.2d 954 (D. Md. 1924) (adopting standard interpretation and investing jury with near-complete discretion); *Court in Hill Case Asserts Cider May Contain More Kick*, WASH. POST, Nov. 12, 1924, at 4; *For Home-Made Wine and Cider, Judge Rules 1/2 of 1 Percent Doesn't Apply to Them*, BOS. DAILY GLOBE, Nov. 11, 1924, at 16; *Wine Making in Home Given O.K. by Court*, CHI. TRIB., Nov. 12, 1924, at 2; *Home Brew Legal If Not Intoxicating, Court Rules*, N.Y. HERALD TRIB., Nov. 12, 1924, at 1; *Home Brew Legal If Not Intoxicating*, N.Y. TIMES, Nov. 12, 1924, at 1; *Hill Cider Case in Hands of Jury*, N.Y. TIMES, Nov. 13, 1924, at 1 (recounting jury charge); *Waiting Verdict in Case Testing Act of Volstead*, ATL. CONST., Nov. 13, 1924, at 1.

<sup>118</sup> *Home Brew Is Legal but the Government Will Ignore Verdict*, N.Y. TIMES, Nov. 14, 1924, at 1 (detailing scene in the courtroom, where “[a]mong the congratulatory crowd were many of the jurors,” and Hill thanked them, “[w]ell boys . . . you can make all the cider and wine you want now.”).

<sup>119</sup> *Isner v. United States*, 8 F.2d 487 (4th Cir. 1925); *People v. Sinicrope*, 109 Cal. App. Supp. 757 (App. Dep't, Sup. Ct., L.A. Cty. 1930); *but United States v. Picalas*, 27 F.2d 366 (N.D.W.Va. 1928), *rev'd*, 33 F.2d 1022 (4th Cir. 1929); *In re Baldi*, 33 F.2d 973 (E.D.N.Y. 1929).

<sup>120</sup> *Andrews Affirms Home Brew Ruling*, N.Y. TIMES, Jan. 11, 1926, at 3.

<sup>121</sup> *E.g.* Editorial, *Class Intoxication*, N.Y. TIMES, Nov. 20, 1924.

<sup>122</sup> *See, e.g., Declares Farmers Oppose a Repeal of Their Right To Make Wine and Cider*, N.Y. HERALD TRIB., Apr. 22, 1926, at 10 (transcript of Senate hearing on amending Section 29); *The Lucky Farmer*, N.Y. HERALD TRIB., Apr. 23, 1926, at 16 (recounting Senate testimony by a farming trade group representative, who “said he appeared for one million farmers, that a great number of them made cider for their own use, and that they were opposed to the repeal of Section 29 of the Volstead act”).

In 1929, grape growers tested the limits of the home winemaking exception.<sup>123</sup> A number of grape-related businesses combined in a new venture, Fruit Industries, ostensibly to stabilize prices in the fruit market.<sup>124</sup> The following year the cooperative announced its lead product: Vine-Glo, a line of home winemaking products and services.<sup>125</sup> Customers could choose among a range of varieties, originally available as a convenient grape concentrate and later as a dried brick. (Home producers had previously tended to purchase the fruit itself at a grocery or rail depot and separately have it pressed for winemaking.<sup>126</sup>) For an added fee, a Vine-Glo agent would drop off the product and a keg, start the fermentation process, and later return to bottle the wine. Do-it-yourselfers were coyly given instructions, such as “Warning. Do not place this brick in a one gallon crock, add sugar and water, cover, and let stand for seven days . . . .”<sup>127</sup> The federal

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<sup>123</sup> See generally EDWARD BEHR, PROHIBITION: THIRTEEN YEARS THAT CHANGED AMERICA 231–32 (2011); OSTRANDER, *supra* note 6, at 179–80; GARRETT PECK, THE PROHIBITION HANGOVER: ALCOHOL IN AMERICA FROM DEMON RUM TO CULT CABERNET 104 (2009); PINNEY, *supra* note 10, at 437; PINNEY, *supra* note 34, at 28–31; RUTH TEISER & CATHERINE HARROUN, WINEMAKING IN CALIFORNIA 181–82 (1982).

<sup>124</sup> *A California Plan*, L.A. DAILY TIMES, Apr. 3, 1929 (proposal to Congress for a new grape cooperative); *Fruit Sale Deal Made, Growers in Huge Corporation*, L.A. DAILY TIMES, May 8, 1929, at 1 (firm plan for new grape cooperative); *Grape Help in Offing*, L.A. DAILY TIMES, June 20, 1929, at 1 (soliciting participants for cooperative and explaining funding scheme); *State Indorses Grape Merger*, S.F. CHRON., Dec. 18, 1929, at 10 (incorporation of Fruit Industries, noting that it represents over 85% of grape byproduct revenue); *\$30,000,000 Fruit Unit, New California Company, Fruit Industries Inc., Merges Grape Growers*, WALL ST. J., Dec. 18, 1929 (similar).

<sup>125</sup> See generally BEHR, *supra* note 123, at 231–32; PECK, *supra* note 123, at 104; PINNEY, *supra* note 10, at 437; PINNEY, *supra* note 34, at 28–30; OSTRANDER, *supra* note 6, at 178–81; TEISER & HARROUN, *supra* note 123, at 181–82, 187.

<sup>126</sup> OKRENT, *supra* note 6, at 179–80 (detailing grape supply chain for home winemaking); *id.* at 179 (“In 1926 the chief investigator for the Prohibition Bureau described what he called the ‘twilight zone’ of Prohibition: in tenement neighborhoods, he wrote, ‘you will see grapes everywhere — on pushcarts, in groceries, in fruit and produce stores, on carts and wagons and trucks . . . Wine grapes in crates, by the truckload, and by the carload.”); see BEHR, *supra* note 123, at 86–87; TEISER & HARROUN, *supra* note 123, at 178–81.

<sup>127</sup> PECK, *supra* note 123, at 104; see also PINNEY, *supra* note 10, at 437 (“You take absolutely no chance when you order . . . which Section 29 of the National Prohibition Act permits you”); TEISER & HARROUN, *supra* note 123, at 182 (“This beverage should be consumed within five days; otherwise in summer temperature it might ferment and become alcoholic.”).

government was initially favorable toward Fruit Industries: the Federal Farm Board awarded sizeable loans twice, and the Bureau of Prohibition issued a Circular Letter that instructed agents not to interfere with shipments of grapes and grape products for home beverage production.<sup>128</sup> Mabel Walker Willebrandt, the chief federal prosecutor for national prohibition, even transitioned to private practice to represent Fruit Industries.<sup>129</sup>

The federal judiciary and executive finally narrowed Section 29 in response to the excesses of Vine-Glo and its competitors. In January 1931, local prohibition agents raided a Vine-Glo competitor in Kansas City, claiming a conspiracy to circumvent the Volstead Act.<sup>130</sup> National enforcement authorities elected to prosecute the case as a vehicle for testing Section 29, anticipating that Missouri courts and juries would sympathize with the dry cause.<sup>131</sup> Department of Justice officials even contemplated an eventual appeal before the Supreme Court.<sup>132</sup> The federal strategy was to establish sufficient precedent to enable prosecuting grape growers, grape-derivative producers, and home winemaking service providers,<sup>133</sup> targeting individual households would be prohibitively demanding of federal resources,<sup>134</sup> and furthermore, a provision of the Volstead Act sharply limited authority for home searches.<sup>135</sup>

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<sup>128</sup> *Id.*

<sup>129</sup> Some contemporaries speculated that Willebrandt had unethically won favors for her client before exiting government. PINNEY, *supra* note 34, at 29–30; TEISER & HARROUN, *supra* note 123, at 182, 187; see BEHR, *supra* note 123, at 232; OSTRANDER, *supra* note 6, at 180.

<sup>130</sup> *Grape Juice Firm's Heads Face Arrest*, WASH. POST., Jan. 19, 1931, at 3; *Grape Juice Men Arrested by Drys*, ATL. CONST., Jan. 18, 1931, at 1 *Hold Grape Juice Men in Kansas City Raid*, N.Y. TIMES, Jan. 18, 1931, at 7.

<sup>131</sup> *Test Fight Starts on Grape Juice Sale*, N.Y. TIMES, May 9, 1931, at 5 (detailing federal litigation strategy).

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*; see IRVING FISHER, THE “NOBLE EXPERIMENT” 454 (1930) (A contemporary economist supportive of national prohibition noted that “it is absurd to expect home production to be prevented by enforcement officers.”).

<sup>135</sup> Title II Section 25 of the Volstead Act limited home searches to offenses involving the sale of alcohol. So long as home winemaking was only for personal use or gifts, federal agents could not receive judicial preclearance to enter.

After a quick indictment and bench trial, prohibition officials secured a conviction and favorable interpretation in October.<sup>136</sup> The district court narrowed Section 29 considerably: a supplier would be liable if it intentionally facilitated “intoxicating in fact” home winemaking, and home wine-making from grape derivatives (i.e. convenient concentrates and bricks) was entirely unprotected.<sup>137</sup> In the course of his opinion, the presiding judge reflected the spirit of pervasive enforcement exasperation with Section 29:

The defendants are guilty. Nor is their guilt a technical guilt only. It is real guilt. From the very beginning of their enterprise theirs was not the spirit of the law-abiding citizen. . . .

What a hodgepodge of absurdities they have resorted to. Manufacture is not manufacture. A preparation, compound, and substance is not a substance, compound, and preparation. Wine is not wine. Grape juice is not juice of grapes.

A corporation which boasts that its assets are of the value of a million dollars and that its business is nation wide claims the protection of the cloak which Congress designed for the housewife and the home owner who make intoxicating fruit juices for their families.<sup>138</sup>

The ruling effectively empowered prohibition agents to shut down nearly any grape-derivative producer or home winemaking supplier, potentially even reaching the grape growers themselves.

Meanwhile, in April 1931, prohibition agents had raided a Vine-Glo warehouse, purportedly owing to an absent rabbinic prescription for sacramental wine.<sup>139</sup> In August, federal officers struck again, seizing the assets of a Vine-Glo competitor with the very purpose of orchestrating a national test case for

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<sup>136</sup> *United States v. Brunett*, 53 F.2d 219 (W.D. Miss. 1931).

<sup>137</sup> *Id.* at 231–35.

<sup>138</sup> *Id.* at 238–39.

<sup>139</sup> *Grape Shop Raid Made on Firm of Mrs. Willebrandt*, N.Y. TRIB., Apr. 14, 1931, at 1; *Plant of Mrs. Willebrandt's Client Is Raided, but McCampbell Denies New Fruit-Juice Policy*, N.Y. TIMES, Apr. 14, 1931, at 1.

Section 29.<sup>140</sup> Federal prosecutors secured a similarly favorable district court opinion from that effort in early 1932.<sup>141</sup>

The viticultural interests declined to litigate Section 29. In November 1931, following the Missouri decision, Fruit Industries announced it was suspending Vine-Glo home service.<sup>142</sup> The entire project collapsed in 1932.<sup>143</sup> Grape growers made initial steps toward a campaign for legislative and constitutional reform, complaining of how they had been “betrayed” by newly invigorated federal enforcement;<sup>144</sup> the issue was mooted by the Twenty-First Amendment in 1933.

#### IV. GRAPE GROWING UNDER NATIONAL PROHIBITION

Statistics on California viticulture under national prohibition are “slippery.”<sup>145</sup> Contemporary estimates from federal agencies, state agencies, railway shippers, farming cooperatives, and economists all differ (see Appendix). That said, while each dataset may exhibit its own biases and imprecisions, several general trends are consistent among measurements of grape production, pricing, and planting.

First, California grape production boomed following the start of national prohibition. All sources of data reflect a significant increase in fruit output, both in total and in each category of fruit. (In addition

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<sup>140</sup> *Grape Brick Trio Taken*, L.A. DAILY TIMES, Aug. 6, 1931, at 1; *Raid Fifth Av. Shop in ‘Wine Brick’ Test*, N.Y. TIMES, Aug. 6, 1931, at 1; *U.S. Drys Raid Store Selling Grape Bricks*, CHI. TRIB., Aug. 6, 1931, at 5; *Court Test Looms on Grape Products*, WASH. POST., Aug. 7, 1931, at 2; *Legal Test Coming on “Grape Bricks,”* DAILY BOS. GLOBE, Aug. 7, 1921, at 4.

<sup>141</sup> *In re Search Warrant Affecting No. 277 Fifth Ave. in Borough of Manhattan, City of New York*, 55 F.2d 297, 301 (S.D.N.Y. 1932).

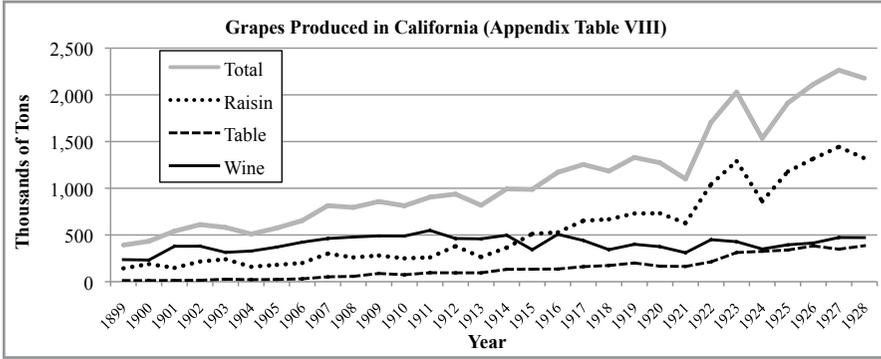
<sup>142</sup> *Will No Longer Aid Home Wine Making*, BOS. GLOBE, Nov. 6, 1931, at 17; *Wine Brick Firm Drops Home Sales*, N.Y. TIMES, Nov. 6, 1931, at 23; *Wine Essence Sale in Homes Is Discontinued*, N.Y. TRIB., Nov. 6, 1931, at 5; *Wine Plan Changed*, L.A. DAILY TIMES, Nov. 6, 1931, at 1; *Wine Products House Service Is Discontinued*, CHI. TRIB., Nov. 6, 1931, at 4.

<sup>143</sup> *Vine-Glo Fades Out*, N.Y. TRIB., Sept. 16, 1932, at 5.

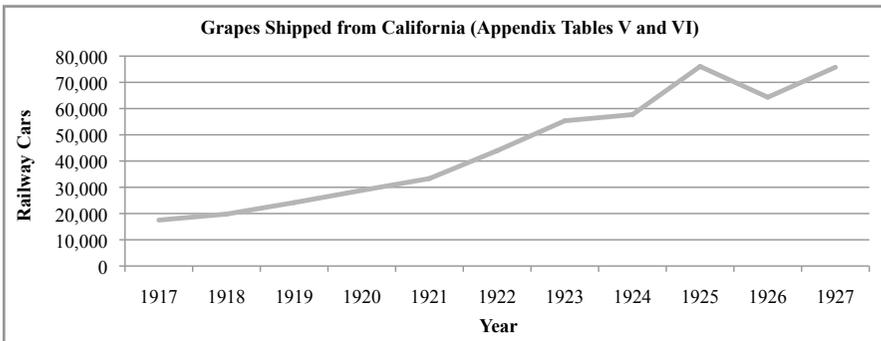
<sup>144</sup> *Wine Move Launched*, L.A. DAILY TIMES, Apr. 26, 1932, at 1; *California “Betrayed,”* N.Y. TIMES, Apr. 27, 1932, at 16.

<sup>145</sup> TEISER & HARROUN, *supra* note 123, at 144.

to wine grapes, raisins and table grapes were also commonly used in home wine production, albeit with significant dispute as to the precise proportion.<sup>146</sup>)



Measures from railway shippers confirm the expansion in production.

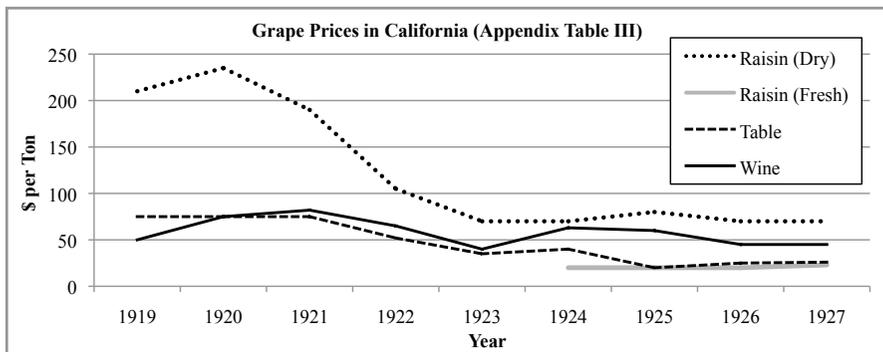


The railroads were ill prepared. Car shortages and handling delays were common in the years following the imposition of national prohibition; ultimately the railroads built new terminals in Boston, Chicago, Newark, and other hubs just to relieve the strain from grape shipments.<sup>147</sup>

<sup>146</sup> See FISHER, *supra* note 134, at 266–78 (1930), CLARK WARBURTON, THE ECONOMIC RESULTS OF PROHIBITION 24–40 (1932).

<sup>147</sup> OKRENT, *supra* note 6, at 178–79; PINNEY, *supra* note 34, at 19–20; see, e.g., I.C.C. to Seek Cars for State Grape Crop, S.F. CHRON., Sept. 22, 1922.

Second, grape prices soared during national prohibition. Pre-prohibition data on pricing is incomplete and inconsistent;<sup>148</sup> grapes appear to have hovered roughly between \$5 and \$20 per ton.<sup>149</sup> At the outset of prohibition, prices soared to record highs of five to ten times previous values.<sup>150</sup>



The market quickly dipped, and by the mid-1920s overproduction and weather conditions began to cause further drops and instability.<sup>151</sup> Nevertheless, through much of national prohibition, grape prices remained far in excess of their pre-prohibition levels.

Increased demand was undoubtedly a driver of skyrocketing grape prices: national prohibition curtailed competing products. The dynamics of the home winemaking market may also have contributed. Individual home winemakers (and intermediary wholesalers and retailers) were scattered across the country; their pricing influence was much less than the pre-prohibition winery purchasers.<sup>152</sup> Eliminating wine-related intermediaries may have allowed grape growers to capture additional value.<sup>153</sup>

<sup>148</sup> Alan L. Olmstead & Paul W. Rhode, *Quantitative Indices on the Early Growth of the California Wine Industry* 8 (Ctr. Wine Econ. Working Paper 901, May 8, 2009).

<sup>149</sup> See JAMES SIMPSON, *CREATING WINE* 209 (2011); OKRENT, *supra* note 6, at 176; PINNEY, *supra* note 34, at 19; TEISER & HARROUN, *supra* note 123, at 178.

<sup>150</sup> E.g. *Grape Growers Now Receiving Record Price*, S.F. CHRON., Jun. 1, 1919, at B12.

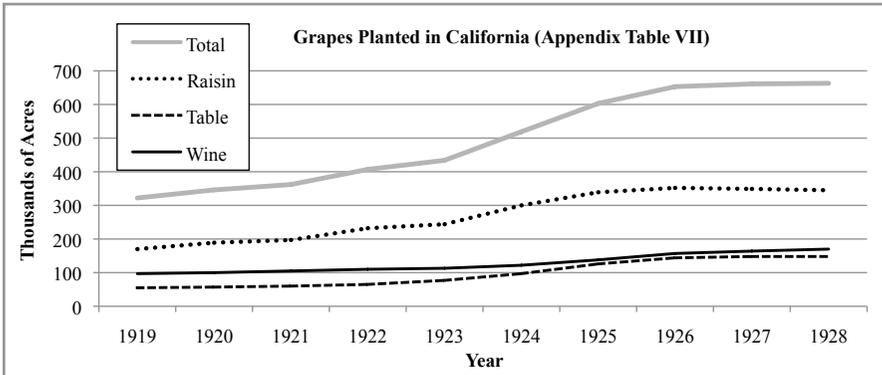
<sup>151</sup> See OSTRANDER, *supra* note 6, at 181; PINNEY, *supra* note 34, at 24–27; TEISER & HARROUN, *supra* note 123, at 179.

<sup>152</sup> See TEISER & HARROUN, *supra* note 123, at 178–79; *You Can Never Tell*, S.F. CHRON., Sept. 17, 1921 (“individuals will pay more for grapes to be made into wine at home than any winemaker would pay for the same grapes for commercial pressing”).

<sup>153</sup> Ira F. Collins, *A Marketing Lesson in the Eighteenth Amendment*, CHI. TRIB., Sept. 9, 1922, at 6.

Home wine producers may also have been more wasteful than the wineries, further increasing demand.<sup>154</sup>

A third point of consistency is that grape growers planted during national prohibition, even after the initial price bubble had burst.<sup>155</sup> Given the substantial investment required for new vines, the data suggests that grape growers expected favorable market conditions for years to come.



Estimates of national wine production and consumption during prohibition do not exhibit consensus. At one end, Yale economics professor Irving Fisher — a vocal prohibition supporter<sup>156</sup> — questionably calculated that wine consumption had dropped by roughly a third.<sup>157</sup> At the other end, Clark Warburton authored a dry-funded economics dissertation at Columbia<sup>158</sup> that estimated leaps in wine production and consumption.<sup>159</sup> The Prohibition Bureau issued figures that roughly aligned with Warburton's calculations, as did the Wickersham Commission (a presidential blue-ribbon panel on national prohibition).<sup>160</sup>

<sup>154</sup> See FISHER, *supra* note 134, at 274.

<sup>155</sup> See PECK, *supra* note 123, at 104; PINNEY, *supra* note 34, at 19.

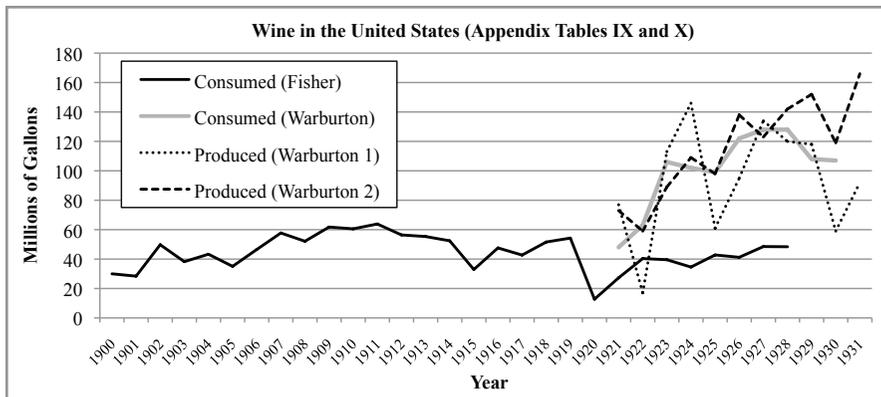
<sup>156</sup> THORNTON, *supra* note 10, at 15–23.

<sup>157</sup> FISHER, *supra* note 134, at 277.

<sup>158</sup> THORNTON, *supra* note 10, at 28.

<sup>159</sup> WARBURTON, *supra* note 146, at 37–40. Warburton used two different methodologies to estimate illegal winemaking, one based on total grape production less other uses, and the other based on particular types of grapes.

<sup>160</sup> See BEHR, *supra* note 123, at 87; PINNEY, *supra* note 34, at 19.



It bears mentioning that national prohibition was not a boon to all of California's grape-related trades. Wineries struggled to scrape by on exceptions for sacramental, medicinal, industrial, and cooking purposes.<sup>161</sup> Treasury authorities kept a close watch to ensure both prohibition and tax compliance.<sup>162</sup> Before national prohibition, California was home to over 700 wineries; by the ratification of the Twenty-First Amendment, fewer than 150 remained.<sup>163</sup>

Varietals also suffered.<sup>164</sup> Home purchasers favored grapes that shipped well and were brightly colored, sacrificing taste for convenience and appearances. Vines of delicate varietals were torn out and replanted to sate the home winemakers. The quality of California's wines took decades to recover.

<sup>161</sup> OKRENT, *supra* note 6, at 182–88. In one strange channel for illicit wine distribution, there was a rash of fake rabbis at the outset of national prohibition, and California's synagogues suddenly swelled . . . including with deceased congregants. *Id.* at 187–88.

<sup>162</sup> PINNEY, *supra* note 34, at 12; *id.* at 18 (“The licensed wineries were under close supervision; it was known precisely how much wine they had on hand and what sort of wine it was. If any discrepancy occurred between what was on the record and what the inspectors actually found on the premises, an explanation was at once demanded. Under such close surveillance, the winemaker had little chance to cheat, whatever his wishes might have been.”).

<sup>163</sup> PECK, *supra* note 123, at 104; TEISER & HARROUN, *supra* note 123, at 180–82; see PINNEY, *supra* note 34, at 10–18.

<sup>164</sup> See generally OKRENT, *supra* note 6, at 177; PINNEY, *supra* note 10, at 438; PINNEY, *supra* note 34, at 26.

## V. GRAPE GROWERS RECOGNIZED THE SOURCE OF THEIR WINDFALL

Grape growers had, to be sure, been very concerned about the nation going dry; as the Eighteenth Amendment and Volstead Act loomed, grape growers demanded government compensation<sup>165</sup> and assistance finding new outlets for their products.<sup>166</sup> Some early observers credited the grape boom to a speculative bubble or new outlets for grape-derivative products.<sup>167</sup>

Throughout 1920 and 1921 the grape growers came to recognize how Section 29 had worked a gerrymander in their favor. Early news coverage reflected confusion: In a March interview with the *Los Angeles Times*, for example, a representative of a large raisin processor pondered the sudden demand for inedible grapes on the East Coast.<sup>168</sup> In August the *San Francisco Chronicle* recounted the Prohibition Administrator's interpretative opinion on Section 29 and noted related "conversations whispered in offices, street cars and ferry boats."<sup>169</sup> Later that month, grape prices rose on account of the news.<sup>170</sup> When the 1921 crop came in, the *New York Times* declared: "Home wine making has saved the wine grape growers of California."<sup>171</sup> The *Los Angeles Times* dubbed the windfall a "prohibition miracle" and noted: "There was never any doubt who bought those grapes. They were bought by thousands of persons who made wine in their homes."<sup>172</sup> The head of the grape growers' trade group (a Grape Protective Association affiliate) finally acknowledged in September that the industry's

<sup>165</sup> E.g. *The Ruined Wine Grape Growers*, S.F. CHRON., Jan. 28, 1919, at 18.

<sup>166</sup> E.g. *Help Wine Grape Growers*, N.Y. TIMES, Dec. 16, 1920, at 16.

<sup>167</sup> E.g. *Golden Vineyards*, N.Y. TIMES, Nov. 30, 1919, at 8; *Wine Grape Vineyards Will Be Profitable*, S.F. CHRON., May 30, 1920, at W2; *Wine Grape to be Turned into Genuine Money*, S.F. CHRON., July 25, 1920, at F3; *What Prohibition Didn't Do to the Grape Industry*, L.A. DAILY TIMES, Aug. 21, 1921, at 10.

<sup>168</sup> *Grapes To Get Increased Price*, L.A. DAILY TIMES, Mar. 6, 1920, at 11 ("There never was a market until this year for dried wine grapes to speak of. It is, I suppose, a development of prohibition.").

<sup>169</sup> *Dry Act Proves No Nemesis to Grape Industry*, S.F. CHRON., Aug. 4, 1920, at 2.

<sup>170</sup> *Grape Price Up on Wine Ruling*, L.A. DAILY TIMES, Aug. 28, 1920, at II-10; see also *Price of Wine Grapes Goes to \$150 Per Ton*, S.F. CHRON., Aug. 15, 1920, at F1.

<sup>171</sup> *Home Wine Making Saves Grape Growers*, N.Y. TIMES, Oct. 30, 1921, at 38; see also *Crop Is Saved by Home Brew*, L.A. DAILY TIMES, Oct. 10, 1921, at II-11.

<sup>172</sup> *Grape Growers Are Perplexed*, L.A. DAILY TIMES, Sept. 5, 1921, at II-11; see also *Grape Sales Are Enormous*, L.A. DAILY TIMES, Nov. 1, 1921, at 14.

newfound success was “largely because of prohibition”<sup>173</sup> and proudly declared to his constituency:

One million homes throughout the United States have supplanted the 300 [sic] wineries that were operating in California before prohibition, and not only are they taking care of the California wine grape crop, but they are paying for grapes three times the price [sic] the wineries paid.<sup>174</sup>

To the extent grape growers could claim ignorance of Section 29’s effects at the very start of national prohibition, they were unambiguously apprised by the close. When the Director of the Prohibition Bureau delivered an address to grape growers in 1929, his remarks focused almost exclusively on home winemaking.<sup>175</sup> The Vine-Glo episode was national news and involved a substantial proportion of grape-related firms. A series of oral recollections from grape growers collected by University of California, Berkeley historians provides a final source of confirmation: many accounts reflect detailed knowledge of home winemaking, from fruit production to shipping to retail to fermentation.<sup>176</sup> In the words of one grape grower: “Andrew Volstead ought to be considered the patron saint of the San Joaquin Valley.”<sup>177</sup>

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<sup>173</sup> *Grape Growers Prosper*, N.Y. TIMES, Sept. 17, 1921, at 8.

<sup>174</sup> *Once Again*, S.F. CHRON., Sept. 17, 1921, at 22.

<sup>175</sup> *Grape Juice Within Law*, L.A. DAILY TIMES, Aug. 28, 1929, at 4.

<sup>176</sup> Ruth Teiser, *William V. Cruess: A Half Century in Food and Wine Technology* 22–27 (1967) (discussing grape grower relationships with government agencies to prevent enforcement against home winemaking; home winemaking sales to and practice in the Italian-American community); Ruth Teiser, *Horace O. Lanza, Harry Baccigalupi: California Grape Products and Other Wine Enterprises* 9–15 (recalling the founding of Fruit Industries); *id.* at 88–96 (1971) (recounting sale of sacramental wine; production of grape concentrate and use in home winemaking); Ruth Teiser, *Louis A. Petri: The Petri Family in the Wine Industry* 6–7 (1971) (recounting the business models of illicit organized home winemaking); Ruth Teiser, *Maynard A. Joslyn: A Technologist Views the California Wine Industry* 3–10, 35–37 (1973) (explaining the distribution and usage of various grape products for home winemaking); Carole Hicke, *Louis J. Foppiano, A Century of Winegrowing in Sonoma County, 1896–1996*, 14–18 (1996) (discussing enormous demand for grapes for home winemaking on the East Coast).

<sup>177</sup> SEAN DENNIS CASHMAN, PROHIBITION: THE LIE OF THE LAND 39 (1981).

## VI. CONCLUSION: WHY CALIFORNIA WENT DRY

The previous sections detailed how grape growers suddenly ceased their organized and strategic opposition to dry ballot measures in California, how federal law both allowed and encouraged home winemaking, how California's grape growers prospered under national prohibition, and how those viticulturists recognized the source of their windfall. This concluding section aims to complete the argument's arc: California went dry and stayed dry, in large measure, owing to Section 29 of the Volstead Act.

Direct proof of causation is, admittedly, limited. In my searching, I have found just one conclusive link: a 1921 *Los Angeles Times* dispatch on the California government in Sacramento, claiming, "Wine grape growers of California are strong for prohibition."<sup>178</sup> That said, the circumstantial case is strong — so strong that a 1926 *New York Times* article reported on a likely connection.<sup>179</sup>

Furthermore, other theories fall short in explanatory force. A review of census data does not reveal any sudden shift in California's voting base. There was not a wave of state prohibition enactments following national prohibition — in fact, larger states resisted going dry,<sup>180</sup> and New York even flipped back to being wet.<sup>181</sup> Some evidence suggests that, owing to personnel and organization shifts, the dries were marginally better prepared<sup>182</sup> and the wets were marginally worse prepared in 1922.<sup>183</sup> But was the difference so great? And if so, why would the wets (almost) entirely give up the fight following the election? A final explanation might be that state prohibition enforcement law did not matter — but the lobbies and voters

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<sup>178</sup> *King Tax Bill May Be Invalid*, L.A. DAILY TIMES, Oct. 16, 1921, at 6.

<sup>179</sup> Alfred Holman, *Strict Dry Laws Suit California*, N.Y. TIMES, June 13, 1926, at E3 ("Circumstances and conditions contributing to this change of mood on the part of a State which officially and otherwise for many years had promoted the wine and brandy industries, and which, again and again, and still again, had registered negatively in the matter of prohibition legislation, are significant").

<sup>180</sup> JACK S. BLOCKER, *RETREAT FROM REFORM 236–40* (1976) (collecting and comparing results of state prohibition votes).

<sup>181</sup> See CASHMAN, *supra* note 177, at 50; PINNEY, *supra* note 34, at 4–5.

<sup>182</sup> See OSTRANDER, *supra* note 6, at 181.

<sup>183</sup> See *Theodore A. Bell Killed in Auto Smash*, N.Y. TIMES, Sept. 5, 1922 (death of Grape Protective Association spokesman and counsel immediately before election).

appear to have earnestly believed otherwise, and news reports after 1922 reflect a string of state prohibition arrests and prosecutions.

So, why did California go dry? At least in part, it appears, because the state helped the rest of the union stay wet.

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## APPENDIX.

## STATISTICS ON GRAPE GROWING IN CALIFORNIA UNDER PROHIBITION

*Table I: California grape production, price, and value (1919–1921).*<sup>184</sup>

Year	Production (Thousands of Tons)				Price (\$ per Ton)			Total Value (\$M)
	Raisin	Table	Wine	Total	Raisin	Table	Wine	
1919	182.5	200	400	782.5	210	75	40	69.33
1920	177	190	375	742	235	75	65	80.22
1921	130	125	310	565	190	75	82	59.50

*Table II: California grape production, price, and value (1919–1921).*<sup>185</sup>

Year	Production (Thousands of Tons)				Price (\$ per Ton)			Total Value (\$M)
	Raisin	Table	Wine	Total	Raisin	Table	Wine	
1919	182.5	200	400	782.5	210	75	50	73.33
1920	177	190	375	742	235	75	75	83.97
1921	130	125	310	565	190	75	82	59.50

*Table III: California grape production, price, and value (1919–1927).*<sup>186</sup>

Year	Production (Thousands of Tons)					Price (\$ per Ton)				Total Value (\$M)
	Raisin		Table	Wine	Total	Raisin		Table	Wine	
	Dry	Fresh				Dry	Fresh			
1919	182.5	–	200	400	782.5	210	–	75	50	73.33
1920	177	–	190	375	742	235	–	75	75	83.97
1921	145	–	210	310	665	190	–	75	82	68.72
1922	237	–	308	450	995	105	–	52	65	70.15
1923	290	–	442	428	1,160	70	–	35	40	52.89
1924	170	180	325	350	1,025	70	20	40	63	50.55
1925	200	378	339	395	1,312	80	20	20	60	54.04
1926	272	229	383	414	1,298	70	20	25	45	51.83
1927	285	303	348	473	1,409	70	23	26	45	57.25

<sup>184</sup> UNITED STATES DEP'T AGRICULTURE, YEARBOOK 1921, 634 (1922).<sup>185</sup> CALI. DEP'T AGRICULTURE, THE CALIFORNIA GRAPE INDUSTRY — 1919, 749 (1920).<sup>186</sup> E.W. Stillwell & W.F. Cox, United States Dep't Agriculture, *Marketing California Grapes* 10 (Circular No. 44, Aug. 1928).

*Table IV: California wine grape planting and production (1880–1930).*<sup>187</sup>

Year	Wine Grapes	
	Acres (Thousands)	Tons (Thousands)
1880	36.00	–
1885	65.78	–
1890	90.23	–
1900	86.00	–
1910	145.00	–
1920	118.39	338
1925	172.57	442
1930	200.82	486

*Table V: California grape shipments (1921–1927).*<sup>188</sup>

Year	Railway Cars
1921	33,344
1922	43,952
1923	55,348
1924	57,695
1925	76,066
1926	64,327
1927	75,764

*Table VI: California grape shipments (1917–1926).*<sup>189</sup>

Year	Railway Cars
1917	17,500
1918	19,800
1919	24,167
1920	28,832
1921	33,344
1922	43,952
1923	55,348
1924	57,695
1925	76,065
1926	63,522

*Table VII: California grape planting (1919–1928).*<sup>190</sup>

Year	Acres Bearing Grapes (Thousands)			
	Raisin	Table	Wine	Total
1919	170	55	97	322
1920	189	57	100	346
1921	197	60	105	362
1922	232	65	110	407
1923	244	77	113	434
1924	300	97	122	519
1925	339	126	138	603
1926	352	144	157	653
1927	349	148	164	661
1928	345	148	170	663

<sup>187</sup> CHARLES L. SULLIVAN, *A COMPANION TO CALIFORNIA WINE* 48 (1998) (providing data from the California Agricultural Statistics Service).

<sup>188</sup> E.W. Stillwell & W.F. Cox, *supra* note 186, at 8.

<sup>189</sup> S.W. Shear & H.F. Gould, *Economic Status of the Grape Industry* 38 (U. Cal. Col. Agriculture Agricultural Experiment Station Bulletin 429, June 1927).

<sup>190</sup> *Id.* at 34.

Table VIII: California grape production (1899–1928).<sup>191</sup>

Year	Acres Bearing Grapes (Thousands)			
	Raisin	Table	Wine	Total
1899	143	13	236	392
1900	189	12	232	433
1901	148	14	379	541
1902	216	15	380	611
1903	240	27	314	581
1904	160	22	328	510
1905	180	24	370	574
1906	200	31	423	654
1907	300	52	462	814
1908	260	57	478	795
1909	280	88	490	858
1910	250	74	489	813
1911	260	96	549	905
1912	380	95	462	937
1913	264	95	459	818
1914	364	132	497	993
1915	512	134	342	988
1916	528	136	507	1,171
1917	652	161	441	1,254
1918	668	173	343	1,184
1919	730	200	400	1,330
1920	732	166	375	1,273
1921	627	163	310	1,100
1922	1,043	213	450	1,706
1923	1,290	312	428	2,030
1924	860	325	350	1,535
1925	1,178	339	395	1,912
1926*	1,261	366	413	2,040
1926	1,317	383	414	2,114
1927*	1,443	348	473	2,264
1928*	1,321	385	472	2,178

\*estimate

Table IX: Estimated U.S. wine consumption (1900–1930).<sup>192</sup>

Year	Wine Consumed in United States (Millions of Gallons)	
	Fisher	Warburton
1900	29.99	–
1901	28.40	–
1902	49.76	–
1903	38.24	–
1904	43.31	–
1905	35.06	–
1906	46.49	–
1907	57.74	–
1908	52.12	–
1909	61.78	–
1910	60.55	–
1911	63.86	–
1912	56.42	–
1913	55.33	–
1914	52.42	–
1915	32.91	–
1916	47.59	–
1917	42.72	–
1918	51.60	–
1919	54.27	–
1920	12.72	–
1921	27.24	48
1922	40.35	63
1923	39.57	106
1924	34.57	102
1925	42.81	99
1926	41.21	122
1927	48.51	128
1928	48.39	128
1929	–	108
1930	–	107

<sup>191</sup> FISHER, *supra* note 134, at 269; Shear & Gould, *supra* note 189, at 30.

<sup>192</sup> FISHER, *supra* note 134, at 277; WARBURTON, *supra* note 146, at 34–40.

*Table X: California grape production and United States wine production (1921–1931).*<sup>193</sup>

Year	Grapes Produced in California (Thousands of Tons)	Wine Produced in United States (Millions of Gallons)		
		Illegal		Legal
		Total Method	Varietal Method	
1921	1,249	56	52	21
1922	1,053	11	53	6
1923	1,611	98	74	15
1924	2,030	137	100	9
1925	1,535	57	94	4
1926	1,912	89	132	6
1927	2,114	130	119	4
1928	2,264	115	137	5
1929	2,213	107	141	11
1930	1,751	56	116	3
1931	1,967	85	159	7

<sup>193</sup> WARBURTON, *supra* note 146, at 34–40.

*Table XI: California raisin and wine production (1897–1915).*<sup>194</sup>

Year	Raisin Crop (Tons)	Wine Production (Gallons)	
		Dry	Sweet
1897	46,852	28,736,400	5,197,500
1898	40,368	10,750,000	7,779,000
1899	35,784	15,103,000	8,330,000
1900	47,167	16,737,260	6,940,300
1901	37,125	16,473,731	6,270,300
1902	54,375	28,224,146	14,835,146
1903	60,000	21,900,500	12,670,356
1904	37,500	15,589,342	13,571,856
1905	43,750	20,000,000	10,700,000
1906	47,500	26,000,000	15,000,000
1907	60,000	27,500,500	15,500,000
1908	60,000	22,500,000	14,750,000
1909	70,000	27,000,000	18,000,000
1910	56,000	27,500,000	18,000,000
1911	67,500	26,000,000	23,280,044
1912	85,000	22,500,000	17,797,781
1913	65,000	25,000,000	17,307,600
1914	90,000	22,000,000	16,620,212
1915 (est.)	124,000	21,571,000	4,035,240

<sup>194</sup> CAL. DEVELOPMENT BD., CALIFORNIA RESOURCES AND POSSIBILITIES 30–31 (1915).

# CALIFORNIA'S IMPLAUSIBLE CRIME OF ASSAULT

MIGUEL A. MÉNDEZ\*

## I. INTRODUCTION: *PEOPLE V. WILLIAMS*

Williams and King were competing for the affections of King's former wife. King drove to his former wife's home to persuade her to accompany him and his two sons on an outing. When King knocked on the door, Williams opened it and told King to stay away from his former wife.

[Williams] then walked to his own truck and removed a shotgun, which he loaded with two 12 gauge shotgun rounds. [Williams] walked back toward the house and fired, in his words, a "warning shot" directly into the rear passenger side wheel well of King's truck. [Williams] testified that, at the time he fired the shot, King's truck was parked between him and King, and that he saw King crouched approximately a foot and a

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\* Professor of Law and Martin Luther King, Jr. Scholar, UC Davis School of Law; Adelbert H. Sweet Professor of Law, Emeritus, Stanford University. I want to thank my colleagues, Anupam Chander, Jack Chin, Floyd Feeney, Lawrence Friedman, Angela Harris, Elizabeth Joh, Donna Shestowsky, and Robert Weisberg, for their helpful comments. I alone, however, am responsible for any errors. I am especially grateful for the assistance provided by my research assistant, Daniel Shimell, and Peg Durkin and other members of the UC Davis School of Law Mabie Library.

half away from the rear fender well of the truck. [Williams] further testified that he never saw King's sons before he fired and only noticed them afterwards standing on a curb outside the immediate vicinity of King's truck. King, however, testified that both of his sons were getting into the truck when [Williams] fired.

Although [Williams] did not hit King or King's sons, he did hit the rear tire of King's truck. The shotgun pellets also left marks on the truck's rear wheel well, its undercarriage, and its gas tank.<sup>1</sup>

Williams was charged with one count of shooting at an occupied motor vehicle and three counts of assault with a firearm, one count each for King and his two sons.<sup>2</sup> The trial judge instructed the jury that the crime of assault requires proof of the following elements:

1. A person willfully and unlawfully committed an act that by its nature would probably and directly result in the application of physical force on another person; and
2. At the time the act was committed, such person had the present ability to apply physical force to the person of another.<sup>3</sup>

The jury convicted Williams of assaulting King with a firearm, but deadlocked on the remaining counts.<sup>4</sup> Williams appealed on the ground that the instruction failed to correctly define the mental state of assault. The Court of Appeal agreed and reversed his conviction, holding that the instruction was erroneous because it described the mental state as negligence instead of requiring the jury to find that at the time Williams fired the shotgun either his goal was to apply physical force or he was substantially certain that firing the gun could result in applying physical force.<sup>5</sup>

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<sup>1</sup> *People v. Williams*, 26 Cal. 4th 779, 782–83, 29 P.3d 197, 199, 111 Cal. Rptr. 2d 114, 116–17 (2001).

<sup>2</sup> *Id.* at 783, 29 P.3d at 199, 111 Cal. Rptr. 2d at 117.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.* California law also punishes a “person who, except in self-defense, in the presence of any other person, draws or exhibits any firearm, whether loaded or unloaded, in a rude, angry, or threatening manner, or who in any manner, unlawfully uses a firearm in any fight or quarrel.” CAL. PENAL CODE § 417(a)(2) (Deering 2008 & Supp. 2013). If the firearm is not capable of being concealed, the offense is a misdemeanor punishable in the county jail for not less than three months. *Id.* § 417(a)(2)(B). Williams used a shotgun.

<sup>5</sup> *Williams*, 29 Cal. 4th at 783–84, 29 P.3d at 200, 111 Cal. Rptr. 2d at 117.

The California Supreme Court granted review to clarify the mental state of assault. It reinstated Williams' conviction.

Attempt is an "inchoate" offense in that it seeks to punish harms that have not and may not materialize.<sup>6</sup> A person who shoots at the victim with the goal of killing her cannot be prosecuted for murder if he misses her because no homicide has taken place. But by taking concrete steps that evince his desire to take human life, that person has demonstrated his dangerousness. The fact that he missed is but a fortuity that is immaterial to his dangerousness. Society is still justified in punishing his attempt to kill as a crime, for the need to stop, deter, and reform such a person is just as great as when he succeeds in achieving his goal.<sup>7</sup> Society, moreover, should not have to wait until he succeeds in his criminal enterprise before noticing him.<sup>8</sup>

Attempt is also a relatively modern crime. Its conception did not crystallize in England and the United States until the early 1800s.<sup>9</sup> Its crystallization, however, occurred before California became a state in 1850. Attempt's most modern formulation has been available since 1962, when the American Law Institute promulgated the Model Penal Code.<sup>10</sup>

Attempt is a crime of purpose. As Perkins and Boyce explain, "A criminal attempt is a step towards a criminal offense with specific intent to commit that particular crime."<sup>11</sup> The crime, according to LaFave, consists of "(1) an intent to do an act or bring about a certain consequence that in law would amount to a crime; and (2) an act in furtherance of that intent."<sup>12</sup> Like most crimes, attempt is composed of an *actus reus* (the conduct undertaken to attain the goal) and a *mens rea* (the desire to attain that goal). As the definition of attempt formulated in Model Penal Code Section 5.01 emphasizes, the *mens rea* is the purpose to attain a criminal goal:

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<sup>6</sup> See MODEL PENAL CODE § 5.01 (Official Draft 1962).

<sup>7</sup> See WAYNE R. LAFAVE, CRIMINAL LAW § 11.3 (West 5th ed. 2010).

<sup>8</sup> An ancillary goal of the crime of attempt is that affords law enforcement an opportunity to take preventive action before the defendant achieves his goal. See *id.* § 11.2(b).

<sup>9</sup> See *id.* § 11.2.

<sup>10</sup> See 2 AM. LAW INST., MODEL PENAL CODE AND COMMENTARIES: PART I (1985) (providing the text of and commentaries the Model Penal Code, sections 3.01–5.07, as enacted in 1962).

<sup>11</sup> ROLLIN M. PERKINS & RONALD N. BOYCE, CRIMINAL LAW 611 (3d ed. 1982).

<sup>12</sup> See LAFAVE, *supra* note 7, § 11.2(b).

(1) Definition of Attempt. A person is guilty of an attempt to commit a crime if, acting with the kind of culpability otherwise required for the commission of the crime, he:

(a) *purposely* engages in conduct that would constitute the crime if the attendant circumstances were as he believes them to be; or

(b) when causing a particular result is an element of the crime, does or omits to do anything with the *purpose* of causing or with the belief that it will cause such result without further conduct on his part; or

(c) *purposely* does or omits to do anything that, under the circumstances as he believes them to be, is an act or omission constituting a substantial step in a course of conduct planned to culminate in his commission of the crime.<sup>13</sup>

An assault is the common law name for an attempt to inflict a battery.<sup>14</sup> But contrary to established criminal law doctrine, in *Williams* the Court defined assault as a negligence offense. It defined the mental state as follows:

[A] defendant guilty of assault must be aware of the facts that would lead a reasonable person to realize that a battery would directly, naturally and probably result from his conduct. He may not be convicted based on facts he did not know but should have known. He, however, need not be subjectively aware of the risk that a battery might occur.

....

... [W]e hold that assault does not require a specific intent to cause injury or subjective awareness of the risk that an injury might occur. Rather, assault only requires an intentional act and actual

<sup>13</sup> MODEL PENAL CODE § 5.01(1) (Official Draft 1962) (emphasis added).

<sup>14</sup> See *In re James M.*, 9 Cal. 3d 517, 521, 510 P.2d 33, 35, 108 Cal. Rptr. 89, 91 (1973) (noting that “at common law an assault was defined as an attempted battery”); see also PERKINS & BOYCE, *supra* note 11, at 159 (noting that in the early law, assault “was an attempt to commit a battery”); 1 AM. LAW INST., MODEL PENAL CODE AND COMMENTARIES: PART II § 211.1, at 176 (1980) (“Originally, common-law assault was simply an attempt to commit a battery.”).

knowledge of those facts sufficient to establish that the act by its nature will probably and directly result in the application of physical force against another.<sup>15</sup>

Although the Court did clarify the mental state of assault, its specification of negligence as the mental state is at odds with established criminal law doctrine. To the extent that the Court's definition departs from the mental state that, as a statutory matter, should accompany the actus reus of an assault, the Court risks undermining the Legislature's goal in enacting the crime of assault and other attempted batteries. That goal is to single out for punishment only those whose purpose is to inflict some kind of criminal battery.

An examination of how the Court arrived at its definition of the mental state of assault discloses why the Court got it wrong. In defining assault as a crime of negligence, the Court undertook a three-step analysis:

(1) The Court first reviewed three key decisions in which the Court had attempted to define the mental state of assault.

(2) Having concluded that the two later decisions might not have "fully" described the mental state, the Court then examined the legislative history of section 240 to determine the Legislature's intent in enacting the section.

(3) Finally, the Court cited both legislative action and inaction as evidence that the Legislature had implicitly approved the Court's earlier definition of the mental state of assault. The legislative action consisted of the enactment of section 21a in 1986 and of an amendment to section 22(b) in 1981. The inaction consisted of the Legislature's failure to overturn the Court's earlier construction of the mental state of section 240 and to replace the mental state of assault in section 240 with that of section 21a.

Each of these steps will be examined. In addition, this article describes how the California Legislature can overturn *Williams* if the Court continues to decline to do so. The article also explores how the Court's construction of section 240 creates unanticipated conflicts with California's second degree felony murder doctrine. But before examining the Court's holding in *Williams*, it is important to understand California's approach to criminalizing

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<sup>15</sup> *People v. Williams*, 26 Cal. 4th 779, 788–90, 29 P.3d 197, 203–04, 111 Cal. Rptr. 2d 114, 122–23 (2001).

the crimes of assaults, batteries, and attempts to commit a crime other than a battery. Had the Court understood this framework, it might have avoided some of the errors that led it to the mistaken conclusion that assault is a crime of negligence.

## II. CALIFORNIA'S STATUTORY FRAMEWORK

A state can punish attempts and batteries in one of two ways. The more efficient is for the state to enact (1) statutes defining the batteries it wishes to punish and (2) a separate statute defining an attempt and criminalizing an attempt to commit those batteries. This is the approach taken by the Model Penal Code<sup>16</sup> and those states that have used the Code as the model for their penal codes.

A less efficient way is for the state to enact two sets of statutes. One set would define a battery and then provide different punishments for different kinds of batteries. A second set of statutes would define an assault and then provide different punishments for different kinds of assaults.

California follows the latter model. For example, Penal Code section 242 defines a battery as “any willful and unlawful use of force or violence upon the person of another.”<sup>17</sup> Section 243(a) punishes the commission of a battery by a fine or by imprisonment in a county jail not exceeding six months, or by both a fine and imprisonment.<sup>18</sup> Other sections impose a greater punishment for aggravated batteries. For example, section 243(c)(2) raises the punishment to include the option of felony incarceration for up to three years if the battery is committed against a peace officer in the performance of his or her duties.<sup>19</sup> Under this formulation, the actus reus of a battery is provided by section 242 which defines the actus reus as the “use of force or violence upon the person of another.”<sup>20</sup> The mens rea is also supplied by section 242

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<sup>16</sup> See MODEL PENAL CODE § 5.01(1)–(2). The MPC approach also embraces an attempt to commit other crimes, not just batteries. See *id.* Because of grading considerations, however, the MPC includes a separate section defining various assaults and batteries. See MODEL PENAL CODE § 211.1.

<sup>17</sup> CAL. PENAL CODE § 242 (Deering 2008).

<sup>18</sup> See *id.* § 243(a) (Deering 2008 & Supp. 2013).

<sup>19</sup> *Id.* §§ 243(c)(2), 1170(h).

<sup>20</sup> *Id.* § 242 (Deering 2008).

which defines it as the “willful and unlawful” use of that force.<sup>21</sup> If the state charges the defendant with committing an aggravated battery under section 243, it must prove an additional actus reus element — that the victim was a peace officer who was performing his or her duties.

If the perpetrator does not succeed in inflicting the battery on a peace officer, he can be prosecuted for attempting to commit the aggravated battery if his conduct qualifies as an attempt under section 240. Section 240 defines the mens rea and actus reus of a simple assault as “an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another.”<sup>22</sup> Section 241 punishes the commission of a simple assault with a fine or by imprisonment in a county jail not exceeding six months, or by both a fine and imprisonment.<sup>23</sup> Section 241.4 raises the punishment to include the option of felony incarceration for up to three years if the assault is committed against a peace officer who was performing his or her duties.<sup>24</sup>

Under section 240, the mens rea of a simple assault is the “attempt” to inflict a “violent injury.”<sup>25</sup> The actus reus consists of the conduct the perpetrator undertakes to inflict the violent injury. Determining whether the defendant’s conduct satisfies the actus reus of an assault has been the subject of many appellate court opinions that have statutes similar to California’s. Merely thinking about inflicting a battery or some other crime does not constitute an attempt. The law wisely requires that to be guilty of attempting to commit a crime, the perpetrator must manifest his firm intention to do so through concrete action. In an attempt prosecution, the concrete action takes the form of evidence of the steps he takes in pursuit of his goal. In California, a person is not guilty of an attempt to commit a crime, including a battery, unless the steps he takes toward the commission of the crime go beyond merely preparing to commit the crime.<sup>26</sup> Under section 240, this requirement takes the form of the “present ability” language. A defendant is

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<sup>21</sup> *Id.* The term “unlawful” adds little, if anything, to the mental state. Most likely it was used to distinguish criminal batteries from batteries allowed in the exercise of self-defense. Those batteries are lawful.

<sup>22</sup> *Id.* § 240.

<sup>23</sup> *Id.* § 241 (Deering 2008 & Supp. 2013).

<sup>24</sup> *Id.* §§ 241.4, 1170(h).

<sup>25</sup> *Id.* § 240 (Deering 2008).

<sup>26</sup> *See, e.g.,* *People v. Kipp*, 18 Cal. 4th 349, 376, 956 P.2d 1169, 1186, 75 Cal. Rptr. 2d 716, 733 (1998) (“The act must go beyond mere preparation, and it must show that the

not guilty of an attempt to commit a violent injury unless the steps he takes toward inflicting that injury include a present ability to inflict the injury.<sup>27</sup> If the state charges the defendant with the aggravated assault under section 241.4, the state would have to prove an additional actus reus element — that the intended victim was a peace officer performing his or her duties.

In addition to punishing attempts to commit various batteries through its assault statutes, California also punishes an attempt to commit other crimes. When the Legislature enacted section 240 in 1872, it also enacted section 664.<sup>28</sup> This section punishes “[e]very person who attempts to commit any crime.”<sup>29</sup> Although the terms “any crime” would embrace the various batteries in the Penal Code, California courts apply section 664 only to an attempt to commit a crime other than a battery. Under section 240, an assault and its aggravated derivatives require proof that the defendant had “a present ability” to inflict the battery contemplated by section 240 and, in the case of aggravated assaults, the batteries contemplated by the statutes defining those assaults. Section 664 does not contain the present ability requirement. This additional element in the actus reus of an assault accounts for why only section 240 may be used to punish an attempt to commit a battery. As *In re James M.* explains:

Section 6 of the Penal Code declares that “No act or omission . . . is criminal or punishable, except as prescribed or authorized by this Code” or by other statutes or ordinances. Since its first session, our Legislature has defined criminal assault as an attempt to commit a battery by one *having present ability* to do so and no offense known as attempt to assault was recognized in California at the time that statutory definition of assault was adopted. Under the doctrine of manifested legislative intent, an omission from a penal provision evinces a legislative purpose not to punish the omitted act. Hence, there is a clear manifestation of legislative intent under this doctrine for an attempt to commit a battery without present ability to go unpunished.

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perpetrator is putting his or her plan into action, but the act need not be the last proximate or ultimate step toward commission of the substantive crime.”).

<sup>27</sup> See CAL. PENAL CODE § 240.

<sup>28</sup> See *id.* § 664 (Deering 2008 & Supp. 2013).

<sup>29</sup> *Id.*

It is also an established rule of statutory construction that particular provisions will prevail over general provisions. Therefore, the legislative intent not to punish batteries attempted without present ability prevails over the general criminal attempt provisions of section 664. It follows that to judicially find a crime in California in an attempt to commit a battery where the actor lacks the present ability to consummate the battery would be to invade the province of the Legislature by redefining the elements of the underlying crime.<sup>30</sup>

To understand more fully California's approach to punishing assaults and batteries, an additional statutory aspect needs to be considered. Like section 241.4, many other aggravated assaults also leave the definition of the mens rea and actus reus of an assault to section 240. These aggravated assaults include assaults with specific means, such as machine guns,<sup>31</sup> as well as assaults against specific victims, such as firefighters.<sup>32</sup> This is why in *Williams* the Court looked to section 240 to determine the mental state of an assault with a firearm.<sup>33</sup> This is also why the Court's construction of section 240 as a crime of negligence converted into crimes of negligence all criminal assaults specified merely as an "assault" with some kind of an instrumentality (e.g., a deadly weapon) or upon some category of victim (e.g., a peace officer) and leaving the definition of the mens rea and actus reus of the assault to section 240.

### III. CONFUSING APPLES AND ORANGES: *PEOPLE V. HOOD*

In reaching the conclusion that assault under section 240 is a crime of negligence, the Court first reviewed three prior decisions — *People v. Hood*,<sup>34</sup> *People v. Rocha*,<sup>35</sup> and *People v. Colantuono*<sup>36</sup> — in which the Court had

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<sup>30</sup> *In re James M.*, 9 Cal. 3d 517, 522, 510 P.2d 33, 35–36, 108 Cal. Rptr. 89, 91–92 (1973) (footnote omitted) (citations omitted) (emphasis in original).

<sup>31</sup> CAL. PENAL CODE § 245(d)(3).

<sup>32</sup> *Id.* § 245(c).

<sup>33</sup> *See People v. Williams*, 26 Cal. 4th 779, 784, 29 P.3d 197, 200, 111 Cal. Rptr. 2d 114, 118 (2001).

<sup>34</sup> 1 Cal. 3d 444, 462 P.2d 370, 82 Cal. Rptr. 618 (1969).

<sup>35</sup> 3 Cal. 3d 893, 479 P.2d 372, 92 Cal. Rptr. 172 (1971).

<sup>36</sup> 7 Cal. 4th 206, 865 P.2d 704, 26 Cal. Rptr. 2d 908 (1994).

attempted to define the mental state of an assault. The Court committed its first error by considering *People v. Hood*,<sup>37</sup> California's seminal case on the use of intoxication to disprove the mental state of the crime charged.

At the time the Court decided *Hood* in 1969, the Penal Code had two provisions on the admissibility of intoxication to disprove the mental state of a crime. The first sentence of section 22, as enacted in the 1872 Penal Code, provided that “[n]o act committed by a person while in a state of voluntary intoxication is less criminal by reason of his having been in such condition.”<sup>38</sup> Obviously, the purpose of this provision was to prevent defendants from offering evidence of their intoxication to disprove the mental state of the crime charged. Although the Legislature was free to make this policy choice,<sup>39</sup> the next sentence of section 22 provided that “when-ever the actual existence of any particular purpose, motive, or intent is a necessary element to constitute any particular species or degree of crime, the jury may take into consideration the fact that the accused was intoxicated at the time, in determining the purpose, motive, or intent with which he committed the act.”<sup>40</sup> Read together, the two provisions would appear to prevent a defendant from offering evidence of his voluntary intoxication unless the evidence helps disprove the mental state of the offense charged.

Concerned that this relevance-based approach would undermine the general prohibition on the use of intoxication by allowing its use in all offenses requiring a mens rea higher than negligence, the Court sought to place limitations on the use of intoxication to disprove the mental state of the crime charged.<sup>41</sup> The Court achieved this goal by construing the second sentence of section 22 as permitting the use of intoxication only when offered to disprove the mental state of “specific intent” offenses.<sup>42</sup> The Court

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<sup>37</sup> 1 Cal. 3d 444, 462 P.2d 370, 82 Cal. Rptr. 618 (1969).

<sup>38</sup> CAL. PENAL CODE § 22 (1872) (current version at CAL. PENAL CODE § 29.4 (Deering Supp. 2013)).

<sup>39</sup> See *Montana v. Egelhoff*, 518 U.S. 37, 56 (1996) (holding that substantive due process does not prohibit a state from barring the use of intoxication to disprove the mens rea of the offense charged).

<sup>40</sup> CAL. PENAL CODE § 22 (1872).

<sup>41</sup> *Hood*, 1 Cal. 3d at 455–56, 462 P.2d at 377, 82 Cal. Rptr. at 625.

<sup>42</sup> *Id.* at 457–58, 462 P.2d at 378–79, 82 Cal. Rptr. at 626–27. The Court said that allowing the use of intoxication would have undermined the rule barring the use of intoxication in all but strict liability offenses. *Id.* at 456, 462 P.2d at 377, 82 Cal. Rptr.

acknowledged that the distinction between “specific” and “general” intent offenses had evolved as a judicial response to the problem of the intoxicated offender.<sup>43</sup> In adopting the distinction as the proper way to construe section 22, the Court conceded that specific and general intent were terms “notoriously” difficult to define and that commentators had urged their abandonment.<sup>44</sup> Nonetheless, the Court accepted the formulation as follows:

When the definition of a crime consists of only the description of a particular act, without reference to intent to do a further act or achieve a future consequence, we ask whether the defendant intended to do the proscribed act. This intention is deemed to be a general criminal intent. When the definition refers to defendant’s intent to do some further act or achieve some additional consequence, the crime is deemed to be one of specific intent. There is no real difference, however, only a linguistic one, between an intent to do an act already performed and an intent to do that same act in the future.<sup>45</sup>

Although this aspect of *Hood* is the one most often cited by the California appellate courts, the Court did not intend the definitions to be controlling in all cases. Sound criminal law policy as interpreted by the courts, not just parsing of statutes, should also be taken into account. Convincing proof of a second approach were the crimes before the Court. The defendant had been convicted of assault with a deadly weapon as well as assault with the intent to commit murder.<sup>46</sup> Both charges stemmed from evidence that the defendant, after drinking for several hours,<sup>47</sup> had wounded a police officer who was attempting to arrest him.<sup>48</sup> The Court reversed his conviction for assault with a deadly weapon because the trial judge incorrectly refused to instruct the jury on the lesser included offense of simple assault.<sup>49</sup> The Court

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at 625. However, when a defendant is charged with a crime of negligence, the fact that he was voluntarily intoxicated is irrelevant if he offers his intoxication to disprove his negligence.

<sup>43</sup> *Hood*, 1 Cal. 3d at 455, 462 P.2d at 377, 82 Cal. Rptr. at 625.

<sup>44</sup> *Id.* at 456, 462 P.2d at 377, 82 Cal. Rptr. at 625.

<sup>45</sup> *Id.* at 456–57, 462 P.2d at 378, 82 Cal. Rptr. at 626.

<sup>46</sup> *Id.* at 447, 462 P.2d at 370, 82 Cal. Rptr. at 618.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at 448, 462 P.2d at 371, 82 Cal. Rptr. at 619.

<sup>49</sup> *Id.* at 450–51, 462 P.2d at 373, 82 Cal. Rptr. at 621.

reversed his conviction for assault with the intent to commit murder because the judge gave conflicting instructions on whether the defendant could offer his intoxication to disprove the mental state of this offense.<sup>50</sup> The Court held that the defendant was entitled to offer evidence of his intoxication to disprove the mental state of this assault.<sup>51</sup> To guide the trial Court on retrial on the question whether the defendant could offer his intoxication on the other assault, the Court considered whether assault with a deadly weapon was a specific or general intent crime. The Court declined to define it as a specific intent offense, observing that it would be unsound criminal law policy to allow intoxication to disprove the mental state of this offense as well as of other lesser assaults:

Alcohol apparently has less effect on the ability to engage in simple goal-directed behavior, although it may impair the efficiency of that behavior. In other words, a drunk man is capable of forming an intent to do something simple, such as strike another, unless he is so drunk that he has reached the stage of unconsciousness. What he is not as capable as a sober man of doing is exercising judgment about the social consequences of his acts or controlling his impulses toward antisocial acts. He is more likely to act rashly and impulsively and to be susceptible to passion and anger. It would therefore be anomalous to allow evidence of intoxication to relieve a man of responsibility for the crimes of assault with a deadly weapon or simple assault, which are so frequently committed in just such a manner.<sup>52</sup>

One may or may not agree with the Court's assessment that allowing intoxication to disprove the mental state of assault with a deadly weapon or other lesser assaults would be unsound criminal law policy. The point, though, is that if as a matter of parsing, assault with the intent to commit murder is a specific intent offense, so too are assault with a deadly weapon and even simple assault. Assault is the common law name for an unsuccessful attempt to inflict a battery. Accordingly, a simple assault is an unsuccessful attempt to inflict a battery. An assault with a deadly weapon is an

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<sup>50</sup> *Id.* at 451–52, 462 P.2d at 373–74, 682 Cal. Rptr. at 621–22.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* at 458, 462 P.2d at 379, 82 Cal. Rptr. at 627.

unsuccessful attempt to inflict a battery with a deadly weapon. An assault with intent to commit murder is an unsuccessful attempt to inflict a fatal battery. All three are different forms of an attempt, and share a common mental state — the desire to inflict some kind of battery.

That all three offenses have this commonality is central to understanding why the *Williams* Court erred in citing *Hood*. *Hood* adopted the specific–general intent classification in an effort to put restraints on the use of intoxication when offered to disprove the mental states of offenses higher than those predicated on negligence. *Hood* did not employ the classification to determine the mental state of the offense charged. That determination depends on the language defining the mental state of the offense. *Hood* simply calls for deploying the dichotomy when determining whether the defendant should be permitted to offer his voluntary intoxication to disprove the mental state of the offense. Accordingly, whether a crime qualifies as a specific or general intent offense under *Hood*'s parsing or policy prongs is immaterial in determining how a judge should instruct a jury on the mental elements of the offense charged.

This aspect becomes clearer when we recall that *Williams* never offered evidence of intoxication. Therefore, *Hood* did not apply. His complaint was that a proper construction of the provision defining assault with a firearm under Penal Code section 245(a)(2) required the judge to instruct the jurors that to convict they had to find that when he fired the shotgun his purpose was to inflict a battery upon the victim. Assuming *Williams* had been drinking, he still could have raised the same complaint even if *Hood* barred him from offering intoxication evidence to disprove the mental state of assault with a firearm. In *Williams*, the Court erred by opening its discussion with a case — *Hood* — that had no bearing on the question of the mental state of assault under section 240.

#### IV. BEWARE OF DICTUM: *PEOPLE V. ROCHA*

Following its discussion of *Hood*, the *Williams* Court next focused on *People v. Rocha*.<sup>53</sup> The Court began its discussion by noting that “[a]pproximately one year [after *Hood*], we confronted the issue of the mental state

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<sup>53</sup> 3 Cal. 3d 893, 479 P.2d 372, 92 Cal. Rptr. 172 (1971).

for assault head-on [in *Rocha*].”<sup>54</sup> In the next two sentences, the Court concluded the discussion by quoting from *Rocha*:

In *Rocha*, we held that assault does not require the specific “intent to cause any particular injury [citation], to severely injure another, or to injure in the sense of inflicting bodily harm . . . [Fns. omitted.]” Rather, assault required “the general intent to willfully commit an act the direct, natural and probable consequences of which if successfully completed would be the injury to another.” (*Ibid.*)<sup>55</sup>

The Court, however, overlooked other language in *Rocha* that makes clear that the mental state of section 240 is the intent to inflict an injury on another. *Rocha* appealed his conviction of assault with a deadly weapon on two grounds that required the Court to consider the mental state of an assault with a deadly weapon. One was the judge’s refusal to instruct the jurors that they could consider his intoxication in determining whether he was guilty of the offense.<sup>56</sup> The Court found no error;<sup>57</sup> it refused to reconsider its position in *Hood* that the crime of assault with a deadly weapon was a general intent offense.<sup>58</sup>

*Rocha* also claimed that the trial judge had erred in failing to instruct the jurors that to convict him of assault with a deadly weapon they had to find that he had “the specific intent to injure.”<sup>59</sup> The judge instructed the jurors that:

An assault with a deadly weapon is an unlawful attempt, coupled with a present ability, to commit a violent injury upon the person of another with a deadly weapon. Any object, instrument or weapon, when used in a manner capable of producing and likely to produce death or great bodily injury, is then a deadly weapon.

To constitute an assault with a deadly weapon, actual injury need not be caused. The characteristic and necessary elements of the offense are the unlawful attempt, with criminal intent, to

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<sup>54</sup> *People v. Williams*, 26 Cal. 4th 779, 784, 29 P.3d 197, 200, 111 Cal. Rptr. 2d 114, 118 (2001).

<sup>55</sup> *Id.* (alterations in original) (citations omitted).

<sup>56</sup> *Rocha*, 3 Cal. 3d at 896, 479 P.2d at 374, 92 Cal. Rptr. at 174.

<sup>57</sup> *Id.* at 896–97, 479 P.2d at 374–75, 92 Cal. Rptr. at 174–75.

<sup>58</sup> *Id.* at 898–99, 479 P.2d at 376–77, 92 Cal. Rptr. at 176–77.

<sup>59</sup> *Id.* at 896, 479 P.2d at 374, 92 Cal. Rptr. at 174.

commit a violent injury upon the person of another, the use of a deadly weapon in that attempt, and the then present ability to accomplish the injury. If an injury is inflicted, that fact may be considered by the jury, in connection with all the evidence, in determining the means used, manner in which the injury was inflicted, and the type of offense committed.<sup>60</sup>

In assessing the legal adequacy of the judge's charge, the Court first determined the mental state of the offense. It held that:

An assault is an unlawful attempt, coupled with the present ability, to commit a violent injury on the person of another, or in other words, it is an attempt to commit a battery. (1 Witkin, Cal. Crimes (1969) § 255, p. 241; *People v. McCaffrey*, 118 Cal. App. 2d 611, 258 P.2d 557.) Accordingly the intent for an assault with a deadly weapon is the intent to attempt to commit a battery, a battery being "any willful and unlawful use of force or violence upon the person of another." (Pen. Code, § 242)<sup>61</sup>

In light of this definition, the Court approved the instruction the judge had given to the jury, noting that in "the case at bench there was ample evidence from which the jury could infer that the defendant had the intent to commit a battery upon the victim, Piceno, and the instructions given clearly informed the jury of the elements of assault with a deadly weapon."<sup>62</sup>

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<sup>60</sup> *Id.* at 900 n.13, 479 P.2d at 377 n.13, 92 Cal. Rptr. at 177 n.13 (citation omitted).

<sup>61</sup> *Id.* at 899, 479 P.2d at 376, 92 Cal. Rptr. at 176. Such a construction of § 245 was consistent with § 245 as originally enacted in 1872. It punished "[e]very person who, with intent to do bodily harm . . . commits an assault upon the person of another with a deadly weapon." See CAL. PENAL CODE § 245 (1872).

<sup>62</sup> *Rocha*, 3 Cal. 3d at 900, 427 P.2d at 377, 92 Cal. Rptr. at 177. In charging the jury, the judge used CALJIC No. 605, which had been in effect since 1958. See CALJIC No. 605 (West rev. ed. 1958). Interestingly, at the time the Court decided *Rocha* in 1971, CALJIC 9.03 instructed the jurors that "[a]n assault is an unlawful attempt, coupled with a present ability *and with the specific intent*, to commit a violent injury upon the person of another with a deadly weapon." See CALJIC No. 9.03 (West 3d ed. 1970) (emphasis added). The crime in *Rocha* occurred in 1968, and the case may have been tried before the 1970 version of CALJIC No. 9.03 went into effect. The italicized language was no longer included in the fourth edition which was published in 1979. See CALJIC Nos. 9.00, 9.03 (West 4th rev. ed. 1979).

However, in holding that assault with a deadly weapon requires proof that the defendant attempted to inflict a battery, the Court made a crucial error when, by way of summary, it added the following sentence:

We conclude that the criminal intent which is required for assault with a deadly weapon and set forth in the instructions in the case at bench, is the general intent to willfully commit an act the direct, natural and probable consequences of which if successfully completed would be the injury to another.<sup>63</sup>

This language was unnecessary and has been described by Justice Mosk as “dictum.”<sup>64</sup> Its inclusion has proven to be most unfortunate, since it is precisely the language which the *Williams* Court chose to quote as *Rocha*’s holding. Although the explicit reference to the jury instructions makes clear that assault with a deadly weapon requires proof that the defendant intended to inflict a battery, divorced both from the jury instructions and the Court’s preceding sentence, the language lends itself to a totally contradictory interpretation. It can be construed as requiring the prosecution to prove merely that the defendant volitionally performed an “act” that, if completed successfully, would likely result in injury to another. The actus reus would be performing an act that, if completed successfully, would likely result in injury to another. The mens rea would be limited to proving that the defendant volitionally performed the act (such as firing a weapon) and that he was aware that he was performing that act (firing the weapon). But the prosecution would not have to prove that the defendant committed the act (firing the weapon) for the purpose of inflicting a battery. Such a construction, of course, would be inconsistent with *Rocha*’s preceding sentence in which the Court explicitly held that “the intent for an assault with a deadly weapon is the intent to attempt to commit a battery, a battery being ‘any willful and unlawful use of force or violence upon the person of another.’”<sup>65</sup>

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<sup>63</sup> *Id.* at 899, 479 P.2d at 376–77, 92 Cal. Rptr. at 176–77 (footnote omitted).

<sup>64</sup> *People v. Colantuono*, 7 Cal. 4th 206, 224, 865 P.2d 704, 716, 26 Cal. Rptr. 2d 908, 920 (1994) (Mosk, J., concurring) (“*Rocha* was by and large soundly decided, and the dictum quoted above constituted a minor flaw. But so is a pinhole in a dike, and alas, the dictum gave rise to mischief.”).

<sup>65</sup> *Rocha*, 3 Cal. 3d at 899, 479 P.2d at 376, 92 Cal. Rptr. at 176.

The *Rocha* Court erred by including the last, unnecessary sentence. The *Williams* Court compounded the error by singling out this sentence as the one defining the mental state of an assault.

## V. THE MYSTERY OF THE MISSING INSTRUCTIONS

The last of the three cases the *Williams* Court chose to review was *People v. Colantuono*.<sup>66</sup> The Court opened its discussion of *Colantuono* by noting that twenty-three years after *Rocha* it “once again attempted to decipher ‘the requisite intent for assault and assault with a deadly weapon,’” because of concerns that *Rocha* might “have left a ‘measure of understandable analytical uncertainty.’”<sup>67</sup> In fact, in *Colantuono* the Court expressly said that it agreed to review the defendant’s claims in order to “eliminate the confusion . . . which [had] developed throughout the courts of this state” on the elements of assault.<sup>68</sup> As will be explained, however, the *Colantuono* Court fell short of its goal and, worse, added one more layer to the uncertainty.

*Colantuono* was convicted of assault with a deadly weapon.<sup>69</sup> He appealed on the ground that the trial judge had failed to properly instruct the jury on the mens rea of assault and compounded this error by inviting the jury to presume the existence of the mens rea of assault with a deadly weapon.<sup>70</sup>

The evidence offered in *Colantuono*, while conflicting, was not complicated. The victim and his friends testified that the accused aimed and

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<sup>66</sup> 7 Cal. 4th 206, 865 P.2d 704, 26 Cal. Rptr. 2d 908 (1994).

<sup>67</sup> *People v. Williams*, 26 Cal. 4th 779, 784–85, 29 P.3d 197, 200, 111 Cal. Rptr. 2d 114, 118 (2001) (quoting *Colantuono*, 7 Cal. 4th at 213, 215, 865 P.2d at 708–09, 26 Cal. Rptr. 2d at 911, 913).

<sup>68</sup> *Colantuono*, 7 Cal. 4th at 210, 865 P.2d at 706, 26 Cal. Rptr. 2d at 910 (citation omitted).

<sup>69</sup> *Id.* at 212, 865 P.2d at 707, 26 Cal. Rptr. 2d at 911. Although the Court refers to the conviction of the aggravated assault as one for assault with a deadly weapon, the Court cites Penal Code § 245(a)(2), which punishes an assault with a firearm. Compare CAL. PENAL CODE § 245(a)(1) (Deering 2008 & Supp. 2013) (assault with a deadly weapon other than a firearm), with *id.* § 245(a)(2) (assault with a firearm). The evidence at the trial showed that *Colantuono* used a firearm. See *Colantuono*, 7 Cal. 4th at 211, 865 P.2d at 706, 26 Cal. Rptr. 2d at 910.

<sup>70</sup> *Colantuono*, 7 Cal. 4th at 212, 865 P.2d at 707, 26 Cal. Rptr. 2d at 911.

shot the victim with a revolver when the victim attempted to engage the accused in a “play fight.”<sup>71</sup> The accused conceded that he aimed the gun at the victim but claimed that he did not intend to shoot him. He thought that the gun was unloaded and testified that it fired when the victim tried to push it away.<sup>72</sup>

With respect to the assault charge, the judge instructed the jurors that to convict the accused they would have to find that:

The person making the attempt had a general criminal intent, which, in this case, means that such person intended to commit an act, the direct[,] natural and probable consequences of which if successfully completed would be the application of physical force upon the person of another.<sup>73</sup>

On the charge of assaulting the victim with a deadly weapon, the judge instructed the jury, “The requisite intent for the commission of an assault with a deadly weapon is the intent to commit a battery. Reckless conduct alone, does not constitute a sufficient basis for assault or for battery even if the assault results in an injury to another.”<sup>74</sup> Though this language makes clear that to be guilty of an assault with a deadly weapon Colantuono had to have the intent to commit a battery, the Court then added the following language: “However, when an act inherently dangerous to others is committed with a conscious disregard of human life and safety, the act transcends recklessness, and the intent to commit a battery is presumed.”<sup>75</sup>

Colantuono objected to these instructions on the ground that they unconstitutionally relieved the prosecution from having to prove that at the time he fired the gun it was his purpose to commit the battery contemplated in the assault statute.<sup>76</sup>

In evaluating Colantuono’s claims the Court began by quoting that part of *Rocha* in which the Court held that the mental state of assault must

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<sup>71</sup> *Id.* at 211, 865 P.2d at 706, 26 Cal. Rptr. 2d at 910.

<sup>72</sup> *Id.* at 211, 865 P.2d at 707, 26 Cal. Rptr. 2d at 910.

<sup>73</sup> *Id.* at 211–12 n.1, 865 P.2d at 707 n.1, 26 Cal. Rptr. 2d at 911 n.1. The judge’s instruction was based on CALJIC No. 9.00 (5th ed. 1988).

<sup>74</sup> *Colantuono*, 7 Cal. 4th at 211–12, 865 P.2d at 707, 26 Cal. Rptr. 2d at 911.

<sup>75</sup> *Id.*

<sup>76</sup> Due process requires the prosecution to prove every fact essential to conviction beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364 (1970).

be “the intent to commit a battery.”<sup>77</sup> Rather than stop at that point, the Court went on to quote the next sentence in *Rocha* as follows:

We conclude that the criminal intent which is required for assault with a deadly weapon . . . is the general intent to willfully commit an act the direct, natural and probable consequences of which if successfully completed would be the injury to another.<sup>78</sup>

The Court, however, omitted from the quotation the crucial language the *Rocha* Court had used in this sentence. What the *Rocha* Court said was:

We conclude that the criminal intent which is required for assault with a deadly weapon *and set forth in the instructions in the case at bench*, is the general intent to willfully commit an act the direct, natural and probable consequences of which if successfully completed would be the injury to another.<sup>79</sup>

The reference to the jury instructions was critical, for in the instructions the judge charged the jurors that to convict a defendant of the crime of assault with a deadly weapon, they had to find that the defendant engaged in “unlawful attempt, coupled with a present ability, to commit a violent injury upon the person of another with a deadly weapon.”<sup>80</sup>

Having omitted the reference to the jury instructions, the Court then defined the mental state of an assault as follows:

From the foregoing [language in *Rocha*] we can distill the following principles concerning the mental state for assault: The mens rea is established upon proof the defendant willfully committed an act that by its nature will probably and directly result in injury to another, i.e., a battery. Although the defendant must intentionally engage in conduct that will likely produce injurious consequences, the prosecution need not prove a specific intent to inflict a particular harm. (Cf. Pen. Code § 7, subd. 1 [“‘willfully’ when applied to the intent with which an act is done or omitted, implies simply a purpose or willingness to commit the act, or make the omission

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<sup>77</sup> *Colantuono*, 7 Cal. 4th at 214, 865 P.2d at 708–09, 26 Cal. Rptr. 2d at 912.

<sup>78</sup> *Id.*

<sup>79</sup> *People v. Rocha*, 3 Cal. 3d 893, 899, 479 P.2d 372, 376–77, 92 Cal. Rptr. at 172, 176–77 (1971) (footnote omitted).

<sup>80</sup> *Id.* at 900 n.13, 479 P.2d at 377 n.13, 92 Cal. Rptr. at 177 n.13.

referred to”]). The evidence must only demonstrate that the defendant willfully or purposefully attempted a “violent injury” or the “least touching,” i.e., “any wrongful act committed by means of physical force against the person of another.” [citations omitted] In other words, “[t]he use of the described force is what counts, not the intent with which same is employed.” [citations omitted]<sup>81</sup>

As a matter of criminal law doctrine, the exact opposite is true. What matters is whether or not the defendant’s purpose was to commit the battery defined in the assault provision (a violent injury on the person of another). Under the Court’s formulation, however, all that the prosecution has to prove is (1) that the defendant performed an act that by its nature will probably and directly result in a battery and (2) that the defendant willingly performed that act. Under this formulation, the prosecution would not have to prove that the defendant was aware that performing the act would probably result in a battery, much less that in performing the act the defendant intended to commit a battery. Indeed, the *actus reus* — performing an act that by its nature will probably and directly result in a battery — does not appear to require any mental state. If bereft of any, it would be a strict liability element.<sup>82</sup>

Having concluded that the prosecution did not have to prove that Colantuono was aware that committing the act could result in a battery (recklessness), much less that in committing the act the Colantuono intended to commit a battery (purpose), the Court held that the jury instructions did not improperly define the *mens rea* of an assault and affirmed the convictions.<sup>83</sup> No unconstitutional presumption was involved because assault, as construed by the Court, did not require the prosecution to prove

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<sup>81</sup> *Colantuono*, 7 Cal. 4th at 214–15, 865 P.2d at 709, 26 Cal. Rptr. 2d at 913 (citations omitted).

<sup>82</sup> Under the common law rules of statutory interpretation, it is very difficult for courts to determine exactly to which elements the mental state attaches. See generally Miguel Angel Méndez, *A Sisyphean Task: The Common Law Approach to Mens Rea*, 28 U.C. DAVIS L. REV. 407 (1995) (discussing the problems California and federal courts have faced in defining and applying *mens rea* terms). The Model Penal Code solves this problem by providing that the mental states attach to all material elements of the offense. See MODEL PENAL CODE § 2.02(1) (Official Draft 1962). A material element is one that does not relate exclusively to such matters as the statute of limitations, venue, or jurisdiction. *Id.* § 1.13(10).

<sup>83</sup> *Colantuono*, 7 Cal. 4th at 220–21, 865 P.2d at 713–14, 26 Cal. Rptr. 2d at 917–18.

recklessness, much less purpose, with respect to the battery contemplated in the simple or aggravated assault provisions.<sup>84</sup>

Dictum, we have been taught, has little or no precedential value because it is not essential to the Court's holding. *Colantuono* turns this rule of interpretation on its head. Dictum, as it turned out, can bite.

The *Colantuono* Court erred by omitting the *Rocha* Court's crucial reference to the jury instructions when it summed up its holding. In fairness to the *Williams* Court, the Court did not approve or disapprove *Colantuono*'s construction of section 240. Instead, the Court conceded that *Colantuono* might have contributed to the "apparent confusion" concerning the mental state of section 240 and "[w]ith this in mind" decided to "revisit the mental state for assault."<sup>85</sup>

## VI. ACTUS REUS IS NOT MENS REA

The Court began its inquiry by examining the legislative history of the assault provision to ascertain the Legislature's intent when it enacted section 240. The Court first consulted a legal dictionary that was available at the time the Legislature enacted the assault provision.

In 1872, attempt apparently had three possible definitions: (1) "[a]n endeavor to accomplish a crime carried beyond mere preparation, but falling short of execution of the ultimate design in any part of

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<sup>84</sup> *Id.* Justice Mosk concluded that the instructions violated the defendant's due process rights because they authorized the jury to convict the defendant of assault without finding beyond a reasonable doubt that he had a purpose to commit a battery. *Id.* at 224, 865 P.2d at 716, 26 Cal. Rptr. 2d at 920, (Mosk, J., concurring). In his view, assault and its derivatives are necessarily crimes of purpose. But he concurred on the ground that the instructional errors were harmless. *Id.* Justice Kennard agreed that the instructions were defective; in her view, assault is a crime of purpose because it is a "specific intent" offense. *Id.* at 225, 865 P.2d at 716-17, 26 Cal. Rptr. 2d at 921, (Kennard, J., concurring & dissenting). She would have overruled the case holding that assault is a general intent offense because of her belief that it has misled some of the lower courts (as well as the *Colantuono* majority) into concluding that the mens rea of assault is something less than purpose. *Id.* But like Justice Mosk, she concurred in the affirmance of the convictions on the ground that the error was harmless. *Id.* at 227-28, 865 P.2d at 718, 26 Cal. Rptr. 2d at 922.

<sup>85</sup> *People v. Williams*, 26 Cal. 4th 779, 785, 29 P.3d 197, 201, 111 Cal. Rptr. 2d 114, 119 (2001).

it” (1 Bouvier’s Law Dict. (1872) p. 166) ; (2) “[a]n intent to do a thing combined with an act which falls short of the thing intended” (*ibid.*); and (3) “an intent to commit some act which would be indictable, if done, either from its own character or that of its natural and probable consequences” (*ibid.*). With respect to mental states, the third definition requires only an intent to commit the act — and not a specific intent to obtain some further objective — and focuses on the objective nature of that act. The first definition is ambiguous. It focuses on the nature of the act but may or may not require an intent to “accomplish a crime.” (*Ibid.*) The second definition appears to describe the traditional formulation of criminal attempt later codified in section 21a, which requires a specific intent.<sup>86</sup>

Bouvier’s first two definitions clearly accord with the traditional formulation of an attempt as in codified Penal Code section 21a: “a specific intent to commit the crime, and a direct but ineffectual act done toward its commission.”<sup>87</sup> The Court’s claims of ambiguity notwithstanding, an “endeavor to accomplish a crime” is in the words of section 21a an attempt “to commit the crime.” An “intent to do a thing,” as the Court concedes, also connotes a purpose to do that thing, but the goal is not attained because the “act” undertaken to accomplish the goal proved to be “ineffectual.” The third definition is eerily reminiscent of *Rocha*’s dictum. It would require proof (1) that the defendant performed an act that would be indictable, if done, either from its own character or that of its natural and probable consequences and (2) that the defendant willingly performed that act. With respect to the first element — the *actus reus* — no evidence would be required that the defendant was aware that performing the act would have the results described, much less that his purpose was to achieve those results.

Because the Court did not consult any other legal treatises of the time, the question the Court considered was which of Bouvier’s three definitions the Legislature had in mind when it enacted section 240. To answer this question, the Court turned first to the historical development of assault and attempt and concluded that the crime of assault crystallized

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<sup>86</sup> *Id.* at 785–86, 29 P.3d at 201, 111 Cal. Rptr. 2d at 119.

<sup>87</sup> Compare CAL. PENAL CODE § 21a (Deering 2008), with LAFAVE, *supra* note 7, § 11.3.

before the general concept of attempt.<sup>88</sup> Citing *Colantuono*, the Court then noted that assault is not “simply an adjunct” of an attempt, but “an independent crime.”<sup>89</sup> The Court emphasized that unlike attempt, “where the ‘act constituting an attempt to commit a felony may be more remote,’<sup>90</sup> ‘[a]n assault is an act done toward the commission of a battery’ and must ‘immediately precede the battery.’”<sup>91</sup> The Court then concluded that as a result of this difference in the proximity requirement, “criminal attempt and assault require different mental states.”<sup>92</sup> It cited two well-known criminal law commentators — Rollin Perkins and Ronald Boyce — for the proposition that less proximity to completing the crime is required for an attempt than an assault.<sup>93</sup>

But citing Perkins and Boyce was error. They were not discussing the mental states of attempts generally or assaults in particular. Perkins and Boyce were focusing on the *actus reus* of the crime of attempt. They were simply pointing out that courts appeared to insist that the perpetrator come closer to inflicting the harm proscribed by the substantive criminal law in the case of assaults than in the case of other attempts.<sup>94</sup> Accordingly, the Court’s conclusion that assault and attempt “require the different mental states” is based on having confused the *actus reus* of assault with its *mens rea*. But oblivious to its error, the Court then specified the difference between the mental states of attempt and assault:

Because the act constituting a criminal attempt “need not be the last proximate or ultimate step toward commission of the substantive crime,” criminal attempt has always required “a specific intent to commit the crime.” (*People v. Kipp* (1998) 18 Cal. 4th 349, 376, 75 Cal. Rptr. 2d 716, 956 P.2d 1169.) In contrast, the crime of assault has always focused on the nature of the act and not on the perpetrator’s specific intent. An assault occurs whenever “[t]he next movement would, *at least to all appearances*, complete

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<sup>88</sup> See *Williams*, 26 Cal. 4th at 786, 29 P.3d at 201, 111 Cal. Rptr. 2d at 119.

<sup>89</sup> *Id.* (quoting *Colantuono*, 7 Cal. 4th at 216, 865 P.2d at 710, 26 Cal. Rptr. 2d. at 914).

<sup>90</sup> *Id.* (quoting PERKINS & BOYCE, *supra* note 11, at 164).

<sup>91</sup> *Id.*; see also *Fox v. State*, 34 Ohio St. 377, 380 (1878).

<sup>92</sup> *Williams*, 26 Cal. 4th at 786, 29 P.3d at 202, 111 Cal. Rptr. 2d at 120.

<sup>93</sup> *Id.* at 786, 29 P.3d at 201–02, 111 Cal. Rptr. 2d at 119.

<sup>94</sup> See PERKINS & BOYCE, *supra* note 11, at 164.

the battery.’” (Perkins, *supra*, at p. 164, italics added.) Thus, assault “lies on a definitional . . . *continuum of conduct* that describes its essential relation to battery: An assault is an incipient or inchoate battery; a battery is a consummated assault.” (Colantuono, *supra*, 7 Cal. 4th at p. 216, 26 Cal. Rptr. 2d 908, 865 P.2d 704, italics added.) As a result, a specific intent to injure is not an element of assault because the assaultive act, by its nature, subsumes such an intent.<sup>95</sup>

Having started with a flawed premise — that the core mental states for assault and other attempts are different — the Court reached the equally flawed conclusion that “as a result, a specific intent to injure is not an element of assault because the assaultive act, by its nature, subsumes such an intent.” But even this conclusion is based on a faulty premise. The Court’s claim that “the crime of assault has always focused on the nature of the act and not on the perpetrator’s specific intent” is mistaken. Although most cases focus on whether the conduct undertaken by the defendant qualifies as the actus reus of an assault,<sup>96</sup> the issue of the mental state of the offense has also been the subject of appellate opinions.<sup>97</sup> Ample proof is provided by the number of cases, including *Williams*, the Court has selected for review on this very question.<sup>98</sup> Moreover, the issue of the mental state has also attracted appellate attention when defendants claim that “impossibility” should result in the dismissal or acquittal of the attempt charges,<sup>99</sup> as

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<sup>95</sup> *Williams*, 26 Cal. 4th at 786, 29 P.3d at 202, 111 Cal. Rptr. 2d at 120.

<sup>96</sup> See, e.g., AM. LAW INST., *supra* note 10, at 329–54 (discussing cases that examine the Model Penal Code’s “substantial step” requirement for the actus reus of attempt).

<sup>97</sup> See, e.g., *People v. Harris*, 377 N.E.2d 28 (Ill. 1978).

<sup>98</sup> See, e.g., *People v. Colantuono*, 7 Cal. 4th 206, 865 P.2d 704, 26 Cal. Rptr. 2d 908 (1994); *People v. Rocha*, 3 Cal. 3d 893, 479 P.2d 372, 92 Cal. Rptr. 172 (1971). Moreover, the Court has also considered the mental state of an assault in other contexts. See, e.g., *People v. Carmen*, 36 Cal. 2d 768, 775, 228 P.2d 281, 286 (1951), *abrogated on other grounds by People v. Flannel*, 25 Cal. 3d 668, 603 P.2d 1, 160 Cal. Rptr. 84 (1979).

<sup>99</sup> See, e.g., *United States v. Everett*, 700 F.2d 900, 908 (3d Cir. 1983) (holding that a jury could convict for attempted distribution of a controlled substance where the defendant “[distributed] a noncontrolled substance [he] believed to be a controlled substance”); *State v. Smith*, 621 A.2d 493 (N.J. Super. Ct. App. Div. 1993) (examining the relationship between the defendant’s mental state and the defense of impossibility); *Commonwealth v. Henley*, 474 A.2d 1115, 1119 (Pa. 1984) (“[I]f one forms intent to commit a substantive crime, and it is shown that the completion of the substantive crime is impossible, the actor can still be culpable of attempt to commit the substantive crime.”).

well as when judges must select the proper mens rea of the crime attempted when that crime has more than one mental state.<sup>100</sup>

Finally, the Court's reliance on Perkins and Boyce is again misplaced. They were focusing on the actus reus of assault, especially on the present ability requirement, and not on its mental state.<sup>101</sup> With respect to the mens rea of an assault, Perkins and Boyce make their views unmistakably known. In their introduction to the crime of assault, they state in bold letters that an assault is "an attempt to commit a battery. . . ."<sup>102</sup>

Having erroneously concluded that "the crime of assault has always focused on the nature of the act and not on the perpetrator's specific intent," the Court took the final step. If this has always been true, then when enacting section 240 the Legislature "presumably intended to adopt the third 1872 definition of attempt: 'an intent to commit some act which would be indictable, if done, either from its own character or that of its natural and probable consequences . . . .'"<sup>103</sup>

## VII. FROM A CRIME OF PURPOSE TO A CRIME OF NEGLIGENT ENDANGERMENT

The Court's conclusion about the Legislature's intent may be mistaken, however. Bypassing for the moment why the Court chose to consult only Bouvier, an examination of the four cases he cites in support of his third definition reveals that he was wrong either in his analysis of the cases or in his summary of their holdings. In *Davidson v. State*,<sup>104</sup> the defendant was convicted of assaulting and shooting the victim with intent to kill. The appellate court upheld the conviction, ruling that the trial judge had correctly instructed the jury that to convict the defendant of assault, they

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<sup>100</sup> See, e.g., *Harris*, 377 N.E.2d at 33 (holding that "criminal intent to kill must be shown" to convict for attempted murder even though recklessness may be sufficient for a murder conviction).

<sup>101</sup> See PERKINS & BOYCE, *supra* note 11, at 164.

<sup>102</sup> *Id.* at 159. They exempt from this definition intentionally placing others in apprehension of receiving an immediate battery as the perpetrator's goal is instilling fear, not a battery. *Id.*

<sup>103</sup> *People v. Williams*, 26 Cal. 4th 779, 787, 29 P.3d 197, 202, 111 Cal. Rptr. 2d 114, 120 (2001).

<sup>104</sup> 28 Tenn. (9 Hum.) 455 (1848).

had to find that he intended “to take the life of the [victim] at the time the assault and battery was made.”<sup>105</sup>

In *Moore v. State*,<sup>106</sup> the defendant was convicted of assault with intent to commit murder. The appellate court reversed the conviction, holding that the trial judge erred in instructing the jurors that they could convict if they found that death would have ensued.<sup>107</sup> To convict they had to find that the defendant intended to kill at the time of the assault.<sup>108</sup>

In *State v. Jefferson*,<sup>109</sup> the defendant was indicted for assault with the intent to commit murder. Though the court said that the prosecution could rely on circumstantial evidence, it held that to convict, the prosecution was required to prove that the defendant’s intent was to kill the victim at the time of the assault.<sup>110</sup>

In *People v. Shaw*,<sup>111</sup> the defendant was convicted of committing an assault and battery “with an axe, with the intent to kill.”<sup>112</sup> The trial judge instructed the jurors that they could convict of the assault “if the assault and battery were made under such circumstances that, had the person been killed, the offence would have been either murder or manslaughter in any of the various degrees of manslaughter, and that the prisoner could not be convicted on the main charge, if he had no intent to kill . . .”<sup>113</sup> The defendant appealed on the ground that the judge had refused to instruct the jurors that they would have to acquit if he would have been guilty only of manslaughter if the victim had died.<sup>114</sup> The court affirmed the conviction summarily without giving a reason.

Despite the affirmance, *Shaw* does not provide unqualified support for Bouvier’s third definition. First, the trial judge instructed the jurors that they could not convict unless they found that the defendant intended to kill the victim. Second, the common element of the manslaughter and murder

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<sup>105</sup> *Id.* at 457.

<sup>106</sup> 18 Ala. 532 (1851).

<sup>107</sup> *Id.* at 534.

<sup>108</sup> *See id.*

<sup>109</sup> 3 Del. (3 Harr.) 571 (1842).

<sup>110</sup> *Id.*

<sup>111</sup> 1 Park. 327 (1852).

<sup>112</sup> *Id.*

<sup>113</sup> *Id.* at 328.

<sup>114</sup> *Id.* at 327–28.

statutes is the death of a human being. If the jurors understood the judge's instruction as requiring them to find that the defendant intended to bring about the death of the victim, the trial judge's reference to the manslaughter statutes would not have been erroneous. In any event, the judge did not instruct the jurors that they could convict the defendant of assault if they found that if the assault materialized, he would have been guilty of committing a homicide. The judge made it clear that to convict they had to find that the defendant intended to kill.

Tellingly, in support of his third definition, Bouvier cites Bishop's criminal law treatise as a secondary authority.<sup>115</sup> In his Commentaries, Bishop also cites the four cases cited by Bouvier, but Bishop cites them in support of the *opposite* proposition: that the "clear preponderance of judicial authority, English and American[,] is that the evidentiary value of the circumstances attending an attempt to commit a crime is in determining whether the defendant intended to inflict the criminal harm."<sup>116</sup> Like Bouvier, Bishop also makes reference to an "act" as well as to "the natural and probable consequences" of the act, but he makes clear that the jury is to consider the act and its natural and probable consequences only in determining whether the defendant undertook the attempt for the purpose of inflicting a criminal wrong.<sup>117</sup> If this is also what Bouvier meant by his third definition, then the Court misconstrued Bouvier. Although not free of all doubt, the fact that Bouvier and Bishop cite the same cases and that, in addition, Bouvier cites Bishop suggests that Bouvier is in agreement with Bishop.

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<sup>115</sup> See 1 BOUVIER'S LAW DICTIONARY 166 (Philadelphia, J. B. Lippincott & Co. 14th ed. 1872).

<sup>116</sup> See 1 JOEL PRENTISS BISHOP, COMMENTARIES ON THE CRIMINAL LAW § 514, at 538 (Boston, Little, Brown & Co. 2d ed. 1858) [hereinafter BISHOP, COMMENTARIES 2D ED.]. Bishop includes the same language and cites the four cases in his 1872 edition. 1 JOEL PRENTISS BISHOP, COMMENTARIES ON THE CRIMINAL LAW § 735, at 430 n.5 (Boston, Little, Brown & Co. 5th ed. 1872) [hereinafter BISHOP, COMMENTARIES 5TH ED.]. That is the year that Bouvier published the edition of the dictionary the Court used in *Williams*.

<sup>117</sup> See BISHOP, COMMENTARIES 2D ED., *supra* note 116, § 514, at 538. Bishop includes the same language in his 1872 edition. See BISHOP, COMMENTARIES 5TH ED., § 735, at 430.

Of course, we do not know whether the Legislature consulted Bouvier and, if so, whether it had his third definition in mind when it enacted section 240. Nor do we know whether the Legislature discarded the third definition if its own research disclosed that at least three and perhaps all four cases cited by Bouvier did not support the third definition and that Bishop cited the four cases as authority for the opposite proposition. But by relying exclusively on Bouvier's legal dictionary, the Court ignored some of the criminal law commentators of the early nineteenth century the Legislature might have consulted in enacting section 240. In the 1858 and 1872 editions of his treatise, Bishop observes that:

An attempt always implies a specific intent, not merely a general culpability. When we say, that a man attempted to do a thing, we mean, that he intended to do, specifically, it; and proceeded a certain way in the doing.<sup>118</sup>

Similarly, in the 1846 edition of his criminal law treatise, Wharton begins his chapter on assaults by stating:

An assault is an intentional attempt, by violence, to do an injury to another. (a) The attempt must be intentional; for, if it can be collected, notwithstanding appearances to the contrary, that there is not a present *purpose* to do an injury, there is no assault.<sup>119</sup>

In *Williams* the Court erred by relying exclusively on Bouvier and ignoring other legal commentators in determining the Legislature's intent. The Court compounded its error by failing to distinguish between the *actus reus* and the *mens rea* of an assault. These errors, as well as others, misled the Court into reaching a startling conclusion, one at odds with established criminal law doctrine. Contrary to what generations of law

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<sup>118</sup> See BISHOP, COMMENTARIES 2D ED., *supra* note 116, § 510, at 535. Bishop includes the same language in his 1872 edition. See BISHOP, COMMENTARIES 5TH ED., *supra* note 116, § 729, at 426.

<sup>119</sup> FRANCIS WHARTON, A TREATISE ON THE CRIMINAL LAW OF THE UNITED STATES 311 (Philadelphia, James Kay, Jun. & Brother 1846) (footnotes omitted) (emphasis added). Wharton is perhaps best known to this day for originating a limitation on the crime of conspiracy. If the crime punished by the Legislature necessarily contemplates a two-party crime (prostitution, for example), the prosecution should not in addition punish the perpetrators for conspiring to commit that crime. See 1 RONALD A. ANDERSON, WHARTON'S CRIMINAL LAW AND PROCEDURE § 89, at 191–92 (1957).

students have been taught, assault in California is not a crime of purpose. It is a crime of negligence. As the Court explained:

Recognizing that *Colantuono*'s language may have been confusing, we now clarify the mental state for assault. Based on the 1872 definition of attempt, a defendant is only guilty of assault if he intends to commit an act "which would be indictable [as a battery], if done, either from its own character or that of its natural and probable consequences." (1 Bouvier's Law Dict., *supra*, at p. 166.) Logically, a defendant cannot have such an intent unless he actually knows those facts sufficient to establish that his act by its nature will probably and directly result in physical force being applied to another, i.e., a battery. (Cf. § 7, subd. 5 [actual knowledge means "a knowledge that the facts exist which bring the act or omission within the provisions of this code"].) In other words, a defendant guilty of assault must be aware of the facts that would lead a reasonable person to realize that a battery would directly, naturally and probably result from his conduct. He may not be convicted based on facts he did not know but should have known. He, however, need not be subjectively aware of the risk that a battery might occur.<sup>120</sup>

Even in defining assault as a crime of negligence, the Court's reasoning was faulty. Conditioning negligence on the defendant's awareness of "facts" that would lead a reasonable person to realize that a battery would probably result from the defendant's conduct does not accord with negligence principles. Negligence in criminal law is the failure to appreciate a risk that would have been apparent to reasonable people in similar circumstances.<sup>121</sup> The focus is on what the defendant should have known, not necessarily on what he knew. For example, if Williams had been prosecuted for negligent homicide (involuntary manslaughter), his ignorance that the gun he fired had the capacity to kill people would have been immaterial

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<sup>120</sup> See *People v. Williams*, 26 Cal. 4th 779, 787–88, 29 P.3d 197, 202–03, 111 Cal. Rptr. 2d 114, 121 (2001) (footnote omitted).

<sup>121</sup> See MODEL PENAL CODE § 2.02(2)(d) (Official Draft 1962); see also RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 3 cmt. k (2010) ("Negligence, as defined by the law of crimes, generally concerns problems of inadvertence, and relates to the defendant whose negligence consists in failing to appreciate the risk that the defendant's conduct entails.").

to his liability.<sup>122</sup> Still, despite the Court's flawed analysis, the Court left no doubt about its view that an assault under section 240 is a negligence offense.

By declaring assault a negligence offense, the Court converted the crime from an attempt to inflict a battery into a type of negligent endangerment. Under some circumstances the creation of serious bodily or fatal risks can be the basis of criminal liability. Under the Model Penal Code, for example, "[a] person commits a misdemeanor if he recklessly engages in conduct which places or may place another person in danger of death or serious bodily injury."<sup>123</sup> Under the Code, the prosecution must prove that the defendant consciously disregarded a substantial and unjustifiable risk that his conduct might place another person in that dangerous situation.<sup>124</sup> Under the Court's construction of section 240, however, the prosecution needs to prove only that the defendant should have been aware of the risk that his conduct might result in the infliction of a battery.

## VIII. IMPLICIT RATIFICATION — LEGISLATIVE ACTIONS AND INACTIONS

In defense of its newly minted rule, the Court cited the Legislature's failure to overturn *Rocha* and *Colantuono*. "[If] we erred 30 years ago in *Rocha* and compounded this error seven years ago in *Colantuono*, the Legislature's subsequent conduct strongly militates against any belated correction of this 'error' today."<sup>125</sup> The Court then cited three instances of legislative inaction.

First, the Court noted that when the Legislature enacted section 21a in 1986, it intended merely to codify the definition of an attempt as reflected in then-current jury instructions used for criminal attempt under section

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<sup>122</sup> If in the example Williams was aware that the gun had the capacity to kill, he clearly would have been negligent. But this outcome is simply a reflection of the principle that a higher mental state (recklessness in the example) can always be offered as proof of a lower mental state (negligence). See MODEL PENAL CODE § 2.02(5); see also CAL. EVID. CODE § 210 (Deering 2004) (defining relevant evidence).

<sup>123</sup> See MODEL PENAL CODE § 211.2.

<sup>124</sup> See *id.* § 2.02(2)(c).

<sup>125</sup> See *Williams*, 26 Cal. 4th at 788, 29 P.3d at 203, 111 Cal. Rptr. 2d at 121.

664.<sup>126</sup> In support of this construction, the Court cited the Assembly Committee on Public Safety's report that states the purpose behind the legislation proposing section 21a was to codify "the attempt definition now used in jury instructions."<sup>127</sup> If the intent of the Legislature was to codify the definition of an attempt only when the defendant was charged under section 664 but not under section 240, then the Legislature did not intend section 21a to affect the jury instructions given when the defendant was charged with assault.<sup>128</sup> Since these instructions were based on *Rocha*, the Court concluded that by enacting section 21a, the Legislature must have "implicitly recognized that assault and criminal attempt were two statutorily independent offenses with different requisite mental states."<sup>129</sup>

But, as has been explained, California has two separate sets of statutes that punish attempts.<sup>130</sup> Section 240 punishes simple assaults and related statutes punish its aggravated derivatives.<sup>131</sup> Section 664 punishes attempts to commit crimes *other* than assaults.<sup>132</sup> Section 240 differs from section 664 in that the actus reus of an assault includes the present ability requirement.<sup>133</sup> It is the presence of this element in section 240 that precludes prosecutors from using section 664 to punish attempts to commit batteries.<sup>134</sup> In enacting section 21a, as the Court points out, the Legislature was merely codifying the language used in jury instructions to instruct juries when a defendant was charged with committing an attempt under section 664. Otherwise, one would have expected the Legislature to replace section 240's definition of the actus reus and mens rea of an assault with those of section 21a. Therefore, the enactment of section 21a cannot be construed as an

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<sup>126</sup> See *id.* at 788–89, 29 P.3d at 203, 111 Cal. Rptr. 2d at 121–22. Prior to the enactment of § 21a, CALJIC No. 6.00 instructed jurors that "[a]n attempt to commit a crime consists of two elements, namely, a specific intent to commit the crime, and a direct but ineffectual act done toward its commission." See CALJIC No. 6.00 (4th rev. ed. 1979).

<sup>127</sup> See *Williams*, 26 Cal. 4th at 789, 29 P.3d at 203, 111 Cal. Rptr. 2d at 122 (quoting ASSEMB. COMM. ON PUB. SAFETY, REP. ON S. BILL NO. 1668 AS AMENDED MAY 28, 1986, 1985–86 Reg. Sess., at 5 (Ca. 1986)).

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> See *supra* text accompanying note 28.

<sup>131</sup> See *supra* text accompanying note 32.

<sup>132</sup> See *supra* text accompanying note 28.

<sup>133</sup> See *supra* text accompanying note 28.

<sup>134</sup> See *supra* text accompanying note 28.

implicit recognition by the Legislature “that assault and criminal attempt were two statutorily independent offenses with different requisite mental states.”<sup>135</sup> On the contrary, the Legislature’s decision to retain section 240 when it enacted section 21a signals the Legislature’s appreciation that it is the *actus reus* — not the *mens rea* — of an assault that differs from the *actus reus* of attempts punishable under section 664, and that it is the presence of this element that gives rise to California’s approach to using two separate sets of statutes to punish attempts.

Second, the Court noted that in response to its decision in *People v. Whitfield*,<sup>136</sup> the Legislature in 1995 amended section 22(b) of the intoxication statute to provide that when murder is charged, a defendant may offer his intoxication to disprove only express malice (purpose) but not implied malice (recklessness).<sup>137</sup> At the time the Court decided *Whitfield* in 1994, section 22(b) provided that intoxication was admissible to disprove only the mental state of specific intent offenses.<sup>138</sup> Section 22(b) had included the “specific intent” language since the Legislature amended original section 22 in 1982.<sup>139</sup> In *Whitfield*, the Court held that murder was a specific intent offense.<sup>140</sup> Accordingly, a defendant was entitled to offer his intoxication to disprove the mental state of murder, irrespective of whether the prosecution was relying on express or implied malice.<sup>141</sup> But since under the parsing provisions of *Hood* implied malice, as a form of recklessness, would not qualify as a specific intent offense, the Legislature in 1995 reversed this aspect of *Whitfield*. It limited intoxication to disprove only express malice when a defendant is charged with murder.<sup>142</sup> As the Court explained in *Williams*:

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<sup>135</sup> See *People v. Williams*, 25 Cal. 4th 779, 789, 29 P.3d 197, 203, 111 Cal. Rptr. 2d 114, 122 (2001).

<sup>136</sup> 7 Cal. 4th 437, 868 P.2d 272, 27 Cal. Rptr. 2d 858 (1994).

<sup>137</sup> See CAL. PENAL CODE § 22(b) (1995) (current version at CAL. PENAL CODE § 29.4(b) (Deering Supp. 2013)).

<sup>138</sup> See CAL. PENAL CODE § 22(b) (1994) (amended 1995).

<sup>139</sup> See CAL. PENAL CODE § 22(b) (Deering 1985) (amended 1995).

<sup>140</sup> See *Whitfield*, 7 Cal. 4th at 449, 868 P.2d at 277, 27 Cal. Rptr. 2d at 863.

<sup>141</sup> See *id.* at 441, 868 P.2d at 273, 27 Cal. Rptr. 2d at 859.

<sup>142</sup> See CAL. PENAL CODE § 22(b) (1995) (current version at CAL. PENAL CODE § 29.4(b) (Deering Supp. 2013)).

In making [the 1982] amendment, the Legislature intended to preserve existing law, including *Hood*, which held that voluntary intoxication is not a defense to assault. Thus, under the plain language of section 22, assault could not require a specific intent to cause injury. Otherwise, evidence of voluntary intoxication would be admissible to negate the requisite mental state for assault in contravention of *Hood*.<sup>143</sup>

But this justification is misplaced. Again, the question of whether an offense entitles a defendant to offer his intoxication to disprove the mental state of the offense charged is distinct from the question of what constitutes the mental state of that offense. To be sure, by using the term “specific intent” in the 1982 amendment, the Legislature acted to preserve the parsing aspects of *Hood* when a court determines whether the offense entitles the defendant to offer his intoxication. But as has been explained, a ruling that an offense is or is not a specific intent offense for purposes of applying the intoxication rule is immaterial when a court is faced with defining the mental state of an offense.<sup>144</sup> Williams never claimed that he had been intoxicated.

As a third justification for its new rule the Court cited the fact that in enacting section 21a in 1986, the Legislature took the precaution of using the term “specific intent.”<sup>145</sup> To the Court, this signaled the Legislature’s intent to allow a defendant to offer his intoxication to disprove the mental state when charged with committing an attempt.<sup>146</sup> If the Legislature

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<sup>143</sup> *People v. Williams*, 26 Cal. 4th 779, 789, 29 P.3d 197, 204, 111 Cal. Rptr. 2d 114, 122 (2001) (citation omitted).

<sup>144</sup> See *supra* text accompanying note 52.

<sup>145</sup> See *Williams*, 26 Cal. 4th at 789, 29 P.3d at 204, 111 Cal. Rptr. 2d at 122.

<sup>146</sup> *Id.* Moreover, it is not clear that the use in the jury instructions of the term “specific intent” authorized defendants charged with attempts under Section 664 to use their voluntary intoxication to disprove the mental element of the attempt. CALJIC No. 6.00 (4th rev. ed. 1979) reads as follows: “An attempt to commit a crime consists of two elements, namely, a specific intent to commit the crime, and a direct but ineffectual act done toward its commission . . . . Mere preparation, which may consist of planning the offense or of devising, obtaining or arranging the means for its commission, is not sufficient to constitute an attempt; but acts of a person who intends to commit a crime will constitute an attempt where they themselves clearly indicate a certain, unambiguous intent to commit that specific crime, and, in themselves, are an immediate step in the present execution of the criminal design, the progress of which would be completed

intended section 21a to replace the mental state of assault as defined in section 240, a defendant charged with assault could now offer his intoxication to disprove the mental state. But, in the Court's view, this is not what the Legislature intended by enacting section 21a in 1986. When the Legislature amended section 22(b) in 1982 to allow a defendant to offer his intoxication to disprove only the mental state of a specific intent offense, the Legislature did not intend to affect existing law.<sup>147</sup> Existing law in 1982 included *Rocha*, which since 1971 had held that a defendant charged with assault could not offer his intoxication to disprove the mental state of the crime because assault is a general intent offense.<sup>148</sup> To the *Williams* Court, this meant that section 21a was not intended to replace section 240's definition of the mental state of an assault with section 21a's definition. Such a construction, the Court maintained, bolstered its conclusion that by enacting section 21a the Legislature implicitly recognized that the mental states of attempts and assaults were different.<sup>149</sup>

But, as has been explained, by enacting section 21a in 1986, the Legislature was merely codifying the language judges had used in instructing juries about the mens rea and actus reus of an attempt when a defendant was charged with committing an attempt under section 664.<sup>150</sup> The key difference between an assault under section 240 and an attempt under section 664 is in their respective actus reus. Only section 240 includes the present ability requirement, the very element that precludes prosecutors from using section 664 when charging an attempt to commit a battery.<sup>151</sup> Accordingly, the fact that the Legislature retained section 240 when it enacted section 21a evidences the Legislature's unwillingness to replace the

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unless interrupted by some circumstance not intended in the original design." As is apparent, the instruction may have used "specific intent" to refer merely to the particular crime or criminal harm the defendant is attempting to commit.

<sup>147</sup> See *Williams*, 26 Cal. 4th at 789, 29 P.3d at 204, 111 Cal. Rptr. 2d at 122.

<sup>148</sup> See *id.* The *Williams* Court refers to *Hood*, not *Rocha*, but this reference seems inadvertent. It is not entirely misplaced, however, since in *Hood* the Court held that upon retrial Hood could offer his intoxication to disprove the mental state of assault to commit murder but not assault with a deadly weapon. See *supra* text accompanying note 52. If under *Hood* the aggravated assault (assault with a deadly weapon) did not entitle Hood to offer his intoxication, neither would the simple assault defined in § 240.

<sup>149</sup> See *Williams*, 26 Cal. 4th at 789, 29 P.3d at 204, 111 Cal. Rptr. 2d at 122.

<sup>150</sup> See *supra* text accompanying note 28.

<sup>151</sup> See *supra* text accompanying note 28.

present ability requirement with the “direct but ineffectual act” language of section 21a.<sup>152</sup> Equally important, it signals the Legislature’s intent, since the enactment of the 1872 Penal Code, to limit the use of section 664 to punish attempts other than attempts to commit a battery.<sup>153</sup>

As a final justification for its new rule, the Court emphasized once more the Legislature’s failure to amend section 240:

[T]he Legislature has had 30 years to amend section 240 and overturn *Rocha*, but has not done so. While legislative inaction is not necessarily conclusive, the longevity of our holding in *Rocha*, our subsequent reaffirmation of *Rocha* seven years ago in *Colantuono*, and the existence of other legislative enactments implicitly approving *Rocha* indicate that the Legislature has acquiesced in our conclusion that assault does not require a specific intent. (See *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.* (1999) 20 Cal. 4th 163, 178, 83 Cal. Rptr. 2d 548, 973 P.2d 527 [declining to overrule a judicial interpretation after decades of legislative inaction and the unanimity of our decisions restating that interpretation].) Under these circumstances, we “believe it is up to the Legislature to change it if it is to be changed.”<sup>154</sup>

Since in the same time period the Court has declined to disapprove the *Rocha* language that has been at the core of the controversy over the mental state of assault, the question now is whether the Legislature should act and, if so, what form its action should take.

## IX. LEGISLATIVE REFORM

Whether the Legislature should act to overturn *Williams* depends on whether converting the crime of assault from a crime of purpose to one of negligence undermines the Legislature’s goal in enacting the assault statute. Because assault is simply an attempted battery,<sup>155</sup> that goal is to single out for punishment only those whose purpose is to inflict some kind of

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<sup>152</sup> See CAL. PENAL CODE § 21a (Deering 2008).

<sup>153</sup> See *supra* text accompanying note 28.

<sup>154</sup> *Williams*, 26 Cal. 4th at 789–90, 29 P.3d at 204, 111 Cal. Rptr. 2d at 122.

<sup>155</sup> See *In re James M.*, 9 Cal. 3d 517, 521, 510 P.2d 33, 35, 108 Cal. Rptr. 89, 91 (1973) (noting that “at common law an assault was defined as an attempted battery”).

criminal battery. By extending the definition of assault to include those who act negligently, the Court equated negligence with purpose.

Negligence, however, is considered a much less blameworthy mental state than purpose. This is why purposeful homicides, such as express malice murder, are punished much more heavily than negligent homicides, such as involuntary manslaughter. Under the Penal Code, the punishment for second degree murder can range from fifteen years to life,<sup>156</sup> and the punishment for first degree murder from twenty-five years to life and can include death.<sup>157</sup> In contrast, the punishment for involuntary manslaughter is two, three, or four years.<sup>158</sup> By grading homicide into different categories of homicide and prescribing a penalty that is dependent on the mental state of the offender, the Legislature has made it clear that punishment should be proportionate with blameworthiness. Likewise, by prescribing a particular punishment for those who commit various forms of attempted batteries (i.e., assaults), the Legislature has reserved a specific punishment for those whose goal is to inflict these batteries. But by including negligent offenders in the definition of assault, the Court has extended the punishment to those who have a much less blameworthy state of mind. To prevent the imposition of excess punishment on negligent offenders, the Legislature should exclude them from the definition of assault by overturning *Williams*.<sup>159</sup>

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<sup>156</sup> See CAL. PENAL CODE § 190(a) (Deering 2008).

<sup>157</sup> *Id.*

<sup>158</sup> *Id.* § 193(b) (Deering 2008 & Supp. 2013).

<sup>159</sup> California, of course, can punish negligent as well as reckless and purposeful batteries. Section 242 of the Penal Code defines a battery as “any willful and unlawful use of force or violence upon the person of another.” See CAL. PENAL CODE § 242 (Deering 2008). While the actus reus is the infliction of force or violence, the mens rea is not entirely clear. Penal Code § 7(1) provides that “[t]he word ‘willfully,’ when applied to the intent with which an act is done or omitted, implies simply a purpose or willingness to commit the act, or make the omission referred to.” See *id.* § 7(1). Under this definition, “willful” in § 242 requires proof that the perpetrator chose to engage in the conduct that constitutes the actus reus. But the term does not appear to require proof that the perpetrator was aware that his conduct would result in the infliction of force or violence, much less that his purpose was to inflict force or violence. If this is the correct construction of § 242, a battery in California can be committed negligently.

Citing *Williams*, the California Court of Appeal construed § 242 as defining a crime of negligence. See *People v. Hayes*, 142 Cal. App. 4th 175, 180, 47 Cal. Rptr. 3d 695, 699 (2006). The court reached this conclusion on the questionable assumption that the “mental state required for battery is the same as that required for assault.” *Id.* The

The most efficient way for the Legislature to punish batteries and the attempt to commit those batteries is by enacting statutes defining those batteries and a separate general statute defining an attempt and criminalizing an attempt to commit those batteries. This is the approach taken by the Model Penal Code<sup>160</sup> and those states that have used the Code as the model for their penal codes.

A less efficient way is for the Legislature to retain its present system. One set of laws punishes simple battery and its aggravated forms.<sup>161</sup> Another set of laws punishes simple assault and its aggravated forms.<sup>162</sup> One problem with this approach is that not all punishable batteries are identical with the batteries contemplated in the assault sections and not all of the batteries contemplated in the assault sections are punished independently as batteries.

For example, under section 245(a)(2), it is a felony to “assault” a person with a firearm.<sup>163</sup> Because section 245(a)(2) does not define an “assault,” recourse must be made to section 240. Under section 240, the mens rea is the attempt to commit the actus reus as defined in section 240.<sup>164</sup> That actus reus is the conduct the defendant undertakes to commit a violent injury and must include a present ability to do so.<sup>165</sup> But since the felony is charged, the actus reus would also require proof that the defendant used

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fact that a battery can be committed negligently, however, does not affect the mental state of an attempt to commit the battery. For example, under the Model Penal Code, a battery can be committed negligently, recklessly, knowingly, or purposely. *See* MODEL PENAL CODE § 211.0(1)(a)–(b) (Official Draft 1962). Unlike purposeful, knowing, or reckless batteries, however, a negligent battery requires the use of a deadly weapon. *See id.* § 211.0(b). However, one is guilty of attempting to commit a battery only if one’s purpose is to inflict the battery. *See id.* § 5.01(1). Accordingly, one is guilty of attempting to commit a battery with a deadly weapon only if one’s purpose was to inflict a battery with a deadly weapon.

The punishment for a simple battery in California is a fine not exceeding \$2000 or by incarceration in the county jail not exceeding six months or by both. *See* CAL. PENAL CODE § 243(a).

<sup>160</sup> *See* MODEL PENAL CODE §§ 5.01(1)–(2), 211.1.

<sup>161</sup> *See* CAL. PENAL CODE §§ 242, 243 (Deering 2008 & Supp. 2013) (defining simple battery and diverse aggravated batteries, respectively).

<sup>162</sup> *See id.* §§ 240, 245 (defining simple assault and diverse aggravated assaults, respectively).

<sup>163</sup> *See id.* § 245(a)(2).

<sup>164</sup> *See id.* § 240.

<sup>165</sup> *See id.*

a firearm. California, however, does not independently punish as a felony inflicting a battery with a firearm. Only if the battery results in serious bodily injury can the perpetrator be punished as a felon.<sup>166</sup> Otherwise, he can be punished only as a misdemeanor.<sup>167</sup>

California also punishes some batteries that are not independently punished as an attempt by a separate assault statute when the defendant fails to inflict the battery. For example, under section 243.25, inflicting a battery as defined by section 242 is punished as a separate aggravated battery if the victim is a dependent adult as defined in section 368.<sup>168</sup> Under section 242, the actus reus of a battery is inflicting “force or violence upon the person of another.”<sup>169</sup> The mens rea is the “willful” infliction of that force or violence.<sup>170</sup> When a violation of section 243.25 is charged, the prosecution must prove an additional actus reus element — that the victim was a dependent adult as defined in section 368. The Penal Code, however, does not have a separate provision explicitly punishing the attempt to inflict a battery on a dependent adult.

The lack of symmetry means that if the Legislature wants to overturn *Williams* it has to do one of two things. It can adopt the Model Penal Code’s approach, but before doing so it needs to amend the battery provisions of the Penal Code to ensure that they capture all of the batteries contemplated in the assault provisions. Once the Legislature has enacted these statutes, it can repeal both section 240 and the remaining assault provisions. Assaults would then be punished under section 664 and section 21a would supply the mens rea and actus reus of the attempt. This would ensure overruling *Williams*, as the California Supreme Court has conceded that section 21a requires the prosecution to prove that the defendant’s purpose is to commit a battery.<sup>171</sup> It would also eliminate the cumbersome relationship between the various assaults and batteries by repealing the statutes defining the assaults, including simple assault. If the Legislature, however, chooses

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<sup>166</sup> See *id.* § 243(d).

<sup>167</sup> *Id.* § 243(a).

<sup>168</sup> *Id.* § 243.25 (Deering 2008).

<sup>169</sup> *Id.* § 242.

<sup>170</sup> *Id.*

<sup>171</sup> See *People v. Williams*, 26 Cal. 4th 779, 789, 29 P.3d 197, 203–04, 111 Cal. Rptr. 2d 114, 122 (2001) (“Section 21a unequivocally states that criminal attempt requires a specific intent.”).

this option, it would have to decide whether to retain or eliminate the term “specific” from section 21a. Retaining the term would be a signal that voluntary intoxication should be admitted in all attempt cases to disprove the mental state of the attempt. The Legislature would also have to decide whether to incorporate section 240’s present ability requirement into section 21a’s definition of the actus reus of an attempt when the attempt is to commit a battery.

The other alternative is for the Legislature to retain the present, less efficient system. Section 240 would continue to make it a crime to attempt to commit a battery. But to overturn *Williams*, the Legislature would have to amend section 240 to clarify that the mental state of assault is the defendant’s purpose to inflict a battery. It could achieve this goal by incorporating into section 240, section 21a’s definition of the mens rea of attempt.<sup>172</sup> If the Legislature chooses this option, it will have to consider whether to exclude the term “specific” used in section 21a if it wants to preserve the current intoxication rule.

## X. STATUTORY INTERPRETATION REVISITED

The *Williams* majority found that the weight of legislative history favored construing assault as a negligence offense. Suppose that the Court had also found that such a construction squares neither with accepted contemporary criminal law doctrine (which it does not) nor with the evolution of legislative thinking as reflected in the enactment of section 21a (which it does not). Would such a finding entitle the Court to construe assault as a crime of purpose? If the Court had done so it would have risked criticism that it was substituting its view of what it thinks the Legislature would have done had it done its job properly. Is the Court empowered to rewrite a statute on this basis?

The Court has confronted this question in two important criminal law areas — felony murder and insanity. The Court has been quite critical of the felony murder rule because convicting a defendant of murder without

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<sup>172</sup> To achieve some symmetry with the battery provisions, the Legislature should also define a battery in sections 240 and 242 identically. The battery contemplated in § 240 is defined as a “violent injury” whereas the battery in § 242 is defined as “the use of force or violence.” Compare CAL. PENAL CODE § 240, with *id.* § 242.

proving that he has the mens rea for that crime divorces punishment from blameworthiness and undercuts the policy of requiring prosecutors to prove malice when they seek to punish offenders for committing murder.<sup>173</sup> Yet, despite its stinging criticism of the felony murder rule, the Court has gone to great lengths to preserve it because, as the Court stated in *People v. Dillon*,<sup>174</sup> its abolition is a legislative, not a judicial, prerogative.<sup>175</sup>

From a statutory construction perspective, the Court's reluctance is surprising. The Penal Code defines murder as the killing of a human being with malice aforethought.<sup>176</sup> Malice is either "express" (a desire to bring about the death) or "implied" (conscious disregard of a substantial homicidal risk).<sup>177</sup> Section 189 provides that all murder that is committed during the commission of enumerated felonies is murder of the first degree.<sup>178</sup> As a matter of statutory construction, it is clear that to obtain a first degree felony murder conviction, the prosecutor must prove that the killing was malicious and that it occurred during the commission of one of the enumerated felonies. Section 189 is merely a degree fixing statute. Yet, despite the clarity of this language, the Court in *Dillon* refused to strike down California's first degree felony rule.

If the felony is not enumerated in section 189, prosecutors can charge a defendant with second degree felony murder. Because the murder provisions do not mention second degree felony murder, some justices have questioned whether this offense exists in California.<sup>179</sup> The Court resolved the controversy when it held in *People v. Chun*<sup>180</sup> that the term "malice aforethought" in section 188 encompassed the second degree murder doctrine.<sup>181</sup> But as a matter of statutory interpretation, giving implied malice

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<sup>173</sup> See, e.g., *People v. Phillips*, 64 Cal. 2d 574, 582–83, 414 P.2d 353, 360, 51 Cal. Rptr. 225, 232 (1966) (holding that "the felony-murder doctrine expresses a highly artificial concept that deserves no extension beyond its required application" and that the rule "has been subjected to severe and sweeping criticism").

<sup>174</sup> 34 Cal. 3d 441, 668 P.2d 697, 194 Cal. Rptr. 390 (1983).

<sup>175</sup> See *id.* at 472 n.19, 668 P.2d at 715 n.19, 194 Cal. Rptr. at 408 n.19.

<sup>176</sup> See CAL. PENAL CODE § 187 (Deering 2008).

<sup>177</sup> *Id.* § 188.

<sup>178</sup> *Id.* § 189 (Deering 2008 & Supp. 2013).

<sup>179</sup> See, e.g., *People v. Patterson*, 49 Cal. 3d 615, 641, 778 P.2d 549, 568, 262 Cal. Rptr. 195, 214 (1989) (Panelli, J., dissenting).

<sup>180</sup> *People v. Chun*, 45 Cal. 4th 1172, 203 P.3d 425, 91 Cal. Rptr. 3d 106 (2009).

<sup>181</sup> See *id.* at 1184, 203 P.3d at 431, 91 Cal. Rptr. 3d at 113–14.

this construction is surprising because section 189 — the only provision addressing a death occurring during the commission of a felony — plainly is only a degree fixing statute.

There is an inescapable irony here. If the Legislature had included the terms “second degree felony murder” in the provision defining implied malice and “first degree felony murder” in the provision enumerating the felonies, the Legislature could have eliminated the second and first degree felony murder rules simply by rewriting these two provisions to read *exactly* as they do today.

The Court, however, did not evince the same restraint when determining whether in codifying the *M’Naghten* insanity test the drafters erred when making the test conjunctive rather than disjunctive. Under the *M’Naghten* test, a defendant can be acquitted on the grounds of insanity if at the time he committed the offense he was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of his act, or if did know it, as to not know that his act was wrong.<sup>182</sup> Under this formulation, a defendant is not guilty by reason of insanity if as a result of a mental disease he believes he is squeezing lemons when in fact he is squeezing necks. Moreover, even if he was aware that he was squeezing necks, he would be not guilty by reason of insanity if as a result of a mental disease he believes that there is nothing wrong with squeezing necks. However, Penal Code section 25(b) uses “and” instead of “or” in stating the two prongs.<sup>183</sup> The use of the conjunctive would require the defendant to prove that by reason of a mental disease he not only thought that he was squeezing lemons but also that he believed that there was nothing wrong with squeezing necks. Such a test has been described as the “wild beast” test on the assumption that such extreme cognitive dysfunctions would reduce a human to the cognitive level of a wild beast.<sup>184</sup> Confronted with the question whether the use of the conjunctive instead of the disjunctive was a drafting error, the Court in *People v. Skinner*<sup>185</sup> held that it was.<sup>186</sup>

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<sup>182</sup> See WAYNE R. LAFAVE, CRIMINAL LAW § 7.1 (West 4th ed. 2003).

<sup>183</sup> See CAL. PENAL CODE § 25(b) (Deering 2008).

<sup>184</sup> See *People v. Skinner*, 39 Cal. 3d 765, 776–77, 704 P.2d 752, 759, 217 Cal. Rptr. 685, 692 (1985). Wild beasts might object to this comparison.

<sup>185</sup> 39 Cal. 3d at 765, 704 P.2d at 752, 217 Cal. Rptr. at 685.

<sup>186</sup> *Id.* at 777, 704 P.2d at 759, 217 Cal. Rptr. at 692.

Prior to the codification of the insanity test, California had no statutory definition of insanity, and the Courts had employed the *M'Naghten* test as a result of judicial decision.<sup>187</sup> In *People v. Drew*,<sup>188</sup> the California Supreme Court replaced the *M'Naghten* test with the more liberal test formulated by the American Law Institute.<sup>189</sup> Because the subsequent codification of the definition of insanity was effected through an initiative, the Court reviewed the ballot summaries and arguments and found that they were not helpful.<sup>190</sup> So the Court turned to the history of the insanity defense and found that the use of the *M'Naghten* test since 1850 had been accepted “as the rule by which the minimum cognitive function which constitutes wrongful intent will be measured in this state.”<sup>191</sup>

As such it is itself among the fundamental principles of our criminal law. Had it been the intent of the drafters of Proposition 8 or of the electorate which adopted it both to abrogate the more expansive *ALI-Drew* test and to abandon that prior fundamental principle of culpability for crime, we would anticipate that this intent would be expressed in some more obvious manner than the substitution of a single conjunctive in a lengthy initiative provision.<sup>192</sup>

Having thus framed the issue, the Court concluded that the drafters of the initiative had inadvertently erred when they used “and” instead of “or” in defining the two prongs of the insanity test. In giving the initiative this construction, the Court was not constrained by one of its own rules of statutory construction: “the basic principle of statutory and constitutional construction which mandates that courts, in construing a measure, not undertake to rewrite its unambiguous language.”<sup>193</sup> But, plainly, “and” does not mean “or.” The Court, however, did not as in *Dillon* defer to the prerogative of those who had drafted the initiative in language that was

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<sup>187</sup> See *People v. Drew*, 22 Cal. 3d 333, 340–41, 583 P.2d 1318, 1321, 149 Cal. Rptr. 275, 278 (1978).

<sup>188</sup> 22 Cal. 3d 333, 583 P.2d 1318, 149 Cal. Rptr. 275 (1978).

<sup>189</sup> *Id.* at 348, 583 P.2d at 1326, 149 Cal. Rptr. at 283.

<sup>190</sup> See *Skinner*, 39 Cal. 3d at 776, 704 P.2d at 758–59, 217 Cal. Rptr. at 691–92.

<sup>191</sup> *Id.*

<sup>192</sup> *Id.*

<sup>193</sup> *Id.* at 775, 704 P.2d at 758, 217 Cal. Rptr. at 691, (citing *In re Waters of Long Valley Creek Sys.*, 25 Cal. 3d 339, 348, 599 P.2d 658, 661, 158 Cal. Rptr. 350, 355 (1979)).

not the least ambiguous or to the prerogative of the voters who presumably read the initiative before voting to approve it.

Had the *Williams* Court found that the Legislature had erred in failing to define the mental state of assault as purpose, would the Court have followed *Dillon* or *Skinner*? It would likely depend on whether the Court viewed extending assault liability to negligent offenders as implicating fundamental principles of culpability as deeply as does insanity. But because of its mistaken interpretation of the legislative history of section 240, the Court did not have to confront this difficult question.

## XI. UNANTICIPATED CONSEQUENCES: WILLIAMS AND THE SECOND DEGREE FELONY MURDER RULE

California recognizes both first degree and second degree felony murder. First degree felony murder is limited to deaths that occur in the commission of those felonies enumerated in Penal Code section 189.<sup>194</sup> If the felony is not among those enumerated, then the second degree felony murder doctrine applies.

Under the common law felony murder rule, a defendant is guilty of murder if he kills negligently or even accidentally in the course of committing a felony.<sup>195</sup> To obtain a murder conviction, the prosecution does not need to prove the mental state of murder (malice). Instead, the prosecution needs to prove only the actus reus and mens rea of the felony and a causal connection between the death and the commission of the felony.<sup>196</sup> Causation does not pose unusual difficulties, as all that is required is causation in fact: the prosecution needs to prove only that but for the commission of the felony the death would not have occurred.<sup>197</sup>

The felony murder rule is disfavored because it divorces the harm (death) from what otherwise would be the blameworthy mental state (malice) that justifies punishment for murder. No mental state is associated

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<sup>194</sup> See CAL. PENAL CODE § 189 (Deering 2008 & Supp. 2013).

<sup>195</sup> See *People v. Stamp*, 2 Cal. App. 3d 203, 82 Cal. Rptr. 598 (1969).

<sup>196</sup> *Id.* at 209–10, 82 Cal. Rptr. at 602–03.

<sup>197</sup> *Id.*

with the death, only with the felony.<sup>198</sup> The death element in felony murder is a strict liability element.<sup>199</sup> Yet, the defendant is punished for murder, a crime requiring proof of malice in a non-felony murder setting.

Not surprisingly, state courts have responded by imposing limitations on the felony murder rule. One is to elevate the death element from strict liability to negligence.<sup>200</sup> In these jurisdictions, prosecutors must convince the jurors that the accused either foresaw or should have foreseen the death. The California courts, however, have never imposed this limitation in their construction of the state's felony murder rule. Instead, in the case of second degree felony murder, the California courts impose a limitation first announced by the California Supreme Court in *People v. Ireland*.<sup>201</sup>

Ireland was prosecuted for murdering his wife. Although he testified that he had no recollection of shooting his wife, his six-year-old daughter testified that she saw him retrieve a gun and use it to shoot the victim. The trial judge instructed the jury on second degree felony murder, using the felony of assault with a deadly weapon as the predicate felony.<sup>202</sup> Ireland objected to the use of this felony and appealed his conviction. The Court agreed with Ireland, holding that it was error for the judge to have used assault with a deadly weapon to instruct on second degree felony murder.

We have concluded that the utilization of the felony-murder rule in circumstances such as those before us extends the operation of that rule “beyond any rational function that it is designed to serve.” (*People v. Washington* (1965) 62 Cal. 2d 777, 783, 22 Cal. Rptr. 442, 446, 402 P.2d 130, 134.) To allow such use of the felony-murder rule would effectively preclude the jury from considering the issue of malice aforethought in all cases wherein homicide has been committed as a result of a felonious assault — a category which includes the great majority of all homicides. This kind of bootstrapping finds support neither in logic nor in law. We

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<sup>198</sup> *Id.*

<sup>199</sup> *Id.*

<sup>200</sup> *See, e.g., State v. Hoang*, 755 P.2d 7, 9 (1988) (“A requirement of the felony murder rule is the fact the participants in the felony could reasonably foresee or expect that a life might be taken in the perpetration of such felony.”).

<sup>201</sup> 70 Cal. 2d 522, 450 P.2d 580, 75 Cal. Rptr. 188 (1969).

<sup>202</sup> *Id.* at 539, 450 P.2d at 589–90, 75 Cal. Rptr. at 197–98.

therefore hold that a second degree felony-murder instruction may not properly be given when it is based upon a felony which is an integral part of the homicide and which the evidence produced by the prosecution shows to be an offense included in fact within the offense charged.<sup>203</sup>

As the Court emphasized, allowing the use of a felonious assault to serve as the predicate battery would undermine the Legislature's determination that only those who kill with malice deserve to be condemned and punished as murderers. Since in the Court's view most homicides are the result of a felonious assault, permitting the state to use the felonious assault would eliminate the state's burden to prove malice in most cases. Equally important, allowing the state to use a felonious assault which requires proof that the perpetrator intended to inflict a battery would be irrational for an additional reason:

Where a person enters a building with an intent to assault his victim with a deadly weapon, he is not deterred by the felony-murder rule. That doctrine can serve its purpose only when applied to a felony independent of the homicide.<sup>204</sup>

That the Court intended the term "intent" to mean the perpetrator's purpose to inflict a battery was made clear in *People v. Burton*.<sup>205</sup> The Court summed up *Ireland* and its progeny as prohibiting the use of a felony where "the *purpose* of the conduct which eventually resulted in a homicide was

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<sup>203</sup> *Id.* (footnotes omitted).

<sup>204</sup> *People v. Wilson*, 1 Cal. 3d 431, 440, 462 P.2d 22, 28, 82 Cal. Rptr. 494, 499–500 (1969), *abrogated on other grounds by* *People v. Farley*, 46 Cal. 4th 1053, 210 P.3d 361, 96 Cal. Rptr. 3d 191 (2009). *Wilson* was a first degree felony murder case, but this aspect of its reasoning would apply equally to a second degree murder prosecution. In *Wilson* the predicate felony was burglary, one of the felonies enumerated in § 189. *See* CAL. PENAL CODE § 189 (Deering 2008 & Supp. 2013).

<sup>205</sup> 6 Cal. 3d 375, 491 P.2d 793, 99 Cal. Rptr. 1 (1971), *abrogated on other grounds by* *People v. Leslie*, 47 Cal. 4th 1152, 223 P.3d 3, 104 Cal. Rptr. 3d 131 (2010). *Burton*, like *Wilson*, was also a first degree felony murder case, but this aspect of its reasoning, as the Court made clear, would apply equally to a second degree felony murder prosecution. In *Burton* the predicate felony was robbery, one of the felonies enumerated in § 189. *See* CAL. PENAL CODE § 189.

assault with a deadly weapon, namely the infliction of bodily injury upon the person of another.”<sup>206</sup>

It was uncertain, however, whether judges could take into account the evidence produced at the trial in determining whether the felony qualified as a predicate felony, or whether judges were limited to a facial analysis of the statute. *Ireland* favors letting the judge consider the evidence offered by the prosecution at the trial. Otherwise, how is the judge to determine whether the felony was an “integral part of the homicide” and whether the felony was included in “fact” within the offense charged?<sup>207</sup> On the other hand, allowing the judge to consider the evidence could invite extended hearings on whether the felony as committed was barred by *Ireland*. In *People v. Chun*<sup>208</sup> the Court clarified the role of the judge:

When the underlying felony is assaultive in nature, such as a violation of section 246 or 246.3, we now conclude that the felony merges with the homicide and cannot be the basis of a felony-murder instruction. An “assaultive” felony is one that involves a threat of immediate violent injury. (See *People v. Chance* (2008) 44 Cal. 4th 1164, 1167–1168, 81 Cal. Rptr. 3d 723, 189 P.3d 971.) In determining whether a crime merges, the court looks to its elements and not the facts of the case. Accordingly, if the elements of the crime have an assaultive aspect, the crime merges with the underlying homicide even if the elements also include conduct that is not assaultive.<sup>209</sup>

The Court, however, left for another day the question of which “felonies are assaultive in nature, and hence may not form the basis of a felony-murder instruction, and which are inherently collateral to the resulting homicide and do not merge.”<sup>210</sup> Until the Court defines what it means by “assaultive in nature,” judges will have to make the determination of whether the felony qualifies as the predicate felony solely on their facial analysis of the statute defining the felony. So long as this procedure remains in place, *Williams* threatens to undermine *Ireland*. Judges examining felony

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<sup>206</sup> *Burton*, 6 Cal. 3d at 387, 491 P.2d at 801, 99 Cal. Rptr. at 9 (emphasis added).

<sup>207</sup> See *Ireland*, 70 Cal. 2d at 539 n.14, 450 P.2d at 590 n.14, 75 Cal. Rptr. at 198 n.14.

<sup>208</sup> 45 Cal. 4th 1172, 203 P.3d 425, 91 Cal. Rptr. 3d 106 (2009).

<sup>209</sup> See *id.* at 1200, 203 P.3d at 443, 91 Cal. Rptr. 3d at 127.

<sup>210</sup> See *id.* at 1200, 203 P.3d at 443, 91 Cal. Rptr. 3d at 128.

assaults that derive their mens rea from section 240 will have to read the section as defining a negligence offense.

Since *Ireland* and its progeny target felony assaults that require proof that the perpetrator's purpose was to inflict life-threatening batteries, *Ireland* should no longer bar the use of a felony assault whose mental state is negligence. A judge doing a facial analysis of the felony would have difficulty concluding that the perpetrator of a negligent assault would not be deterred by the felony murder rule. A person who commits a battery negligently is negligent precisely because he does not foresee the risk that he might commit such a battery. He cannot form a firm purpose to inflict a battery he does not contemplate. This analysis would require judges to allow the use of most, if not all, of the felony assaults defined in the Penal Code sections following section 240. They would include "assault" committed against a custodial officer,<sup>211</sup> a peace officer,<sup>212</sup> or a juror,<sup>213</sup> as well as "assault" with a stun gun,<sup>214</sup> "assault" of a peace officer or firefighter with a stun gun,<sup>215</sup> "assault" with a deadly weapon,<sup>216</sup> with a firearm,<sup>217</sup> with a machine gun, assault weapon, or BMG rifle,<sup>218</sup> with a semiautomatic firearm,<sup>219</sup> with a deadly weapon upon a peace officer or firefighter engaged in the performance of his or her duties,<sup>220</sup> with a firearm upon a peace officer or firefighter engaged in the performance of his or her duties,<sup>221</sup> with a semiautomatic firearm upon a peace officer or firefighter engaged in the performance of his or her duties,<sup>222</sup> with a machine gun, assault weapon, or BMG rifle upon a peace officer or firefighter engaged in the performance of his or her duties,<sup>223</sup> with a deadly weapon or means likely to produce great bodily injury upon a custodial officer engaged in the performance of

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<sup>211</sup> See CAL. PENAL CODE § 241.1 (Deering 2008 & Supp. 2013).

<sup>212</sup> *Id.* § 241.4.

<sup>213</sup> *Id.* § 241.7.

<sup>214</sup> *Id.* § 244.5(b).

<sup>215</sup> *Id.* § 244.5(c).

<sup>216</sup> *Id.* § 245(a)(1).

<sup>217</sup> *Id.* § 245(a)(2).

<sup>218</sup> *Id.* § 245(a)(3).

<sup>219</sup> *Id.* § 245(b).

<sup>220</sup> *Id.* § 245(c).

<sup>221</sup> *Id.* § 245(d)(1).

<sup>222</sup> *Id.* § 245(d)(2).

<sup>223</sup> *Id.* § 245(d)(3).

his or her duties,<sup>224</sup> with a deadly weapon or means likely to produce great bodily injury upon a school employee engaged in the performance of his or her duties,<sup>225</sup> with a firearm upon a school employee engaged in the performance of his or her duties,<sup>226</sup> and with a stun gun or taser upon a school employee engaged in the performance of his or her duties.<sup>227</sup>

Persuasive evidence that *Ireland* would no longer bar the use of negligent felonies is provided by the felonies under consideration in *Ireland* and *Williams*. In both cases the felonies were analytically the same. *Ireland* used a gun that under section 245 qualified as a “deadly weapon” at the time of his conviction. *Williams* used a shotgun that under section 245 qualified as a “firearm.”<sup>228</sup> If King (*Williams*’ victim) had died and the prosecution charged *Williams* with second degree felony murder, would *Ireland* have barred the use of the felony? When *Ireland* was decided, the answer would have been “yes.” *Ireland* and its progeny considered assault with a deadly weapon as a felony that required proof that the perpetrator intended to inflict a serious battery. Applying the felony murder rule in such a circumstance would be irrational because a perpetrator committed to inflicting a serious battery would not be deterred by the rule. After *Williams*, however, the answer to the question whether *Ireland* would bar the use of the felony would likely be “no.” The judge reviewing assault with a firearm in the abstract would have to give the offense the construction the California Supreme Court gave it in *Williams*. A judge, construing the felony as a negligence offense, would have difficulty concluding that the perpetrator of a negligent assault would not be deterred by the felony murder rule.

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<sup>224</sup> *Id.* § 245.3.

<sup>225</sup> *Id.* § 245.5(a) (Deering 2008).

<sup>226</sup> *Id.* § 245.5(b).

<sup>227</sup> *Id.* § 245.5(c).

<sup>228</sup> Today, § 245 punishes assaults with a deadly weapon, other than a firearm, under § 245(a)(1) and assaults with a firearm under § 245(a)(2). The fines and state prison terms that a judge can impose are the same, but if the judge chooses to impose a county jail term, in the case of assault with a firearm the judge may sentence the defendant to a term of not less than six months or more than one year, whereas in the case of assault with a deadly weapon the judge may sentence the defendant to a county jail term not exceeding one year. *See* CAL. PENAL CODE § 245(a)(1)–(2) (Deering 2008 & Supp. 2013).

In *People v. Ford*,<sup>229</sup> the California Supreme Court further restricted the scope of the second degree felony murder rule by requiring that the felony be “inherently dangerous to human life” in the abstract.<sup>230</sup> “If the felony is not inherently dangerous it is improbable that a potential felon will be deterred; he will not anticipate that any injury or death might arise solely from the fact that he will commit the felony.”<sup>231</sup> In *People v. Patterson*<sup>232</sup> the Court held that a facial analysis of the statute defining the felony must disclose that it carries “a high probability” of death.<sup>233</sup>

An example of a felony barred by *Ford* is that provision of the Penal Code making it an offense for “[a]ny person who willfully, under circumstances or conditions which cause or create risk of great bodily harm, serious physical or mental illness, or death,” to practice medicine without a license.<sup>234</sup> In *People v. Burroughs*<sup>235</sup> the Court held that a prosecutor could not use this felony as the predicate felony in a murder prosecution. The felony was not inherently dangerous to human life in the abstract because the felony could be committed in nonhazardous ways; for example, treating someone suffering from delusions, while creating a risk of mental illness, would not necessarily place the victim’s life in jeopardy.<sup>236</sup> As the Court stressed, in applying *Ford*, a judge has to view “the statutory definition of the offense as a whole, taking into account even nonhazardous ways of

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<sup>229</sup> *People v. Ford*, 60 Cal. 2d 772, 388 P.2d 892, 36 Cal. Rptr. 620 (1964), *overruled in part by* *People v. Satchell*, 6 Cal. 3d 28, 489 P.2d 1361, 98 Cal. Rptr. 33 (1971).

<sup>230</sup> *Id.* at 795, 388 P.2d at 907, 36 Cal. Rptr. at 635.

<sup>231</sup> *See* *People v. Williams*, 63 Cal. 2d 452, 457 n.4, 406 P.2d 647, 650 n.4, 47 Cal. Rptr. 7, 10 n.4 (1965).

<sup>232</sup> *See* *People v. Patterson*, 49 Cal. 3d 615, 778 P.2d 549, 262 Cal. Rptr. 195 (1989).

<sup>233</sup> *Id.* at 627, 778 P.2d at 558, 262 Cal. Rptr. at 204. Although the analysis must be facial, the judge may hear from experts in determining whether the commission of the felony as contemplated in the statute poses a high probability of death. *See, e.g.,* *People v. James*, 62 Cal. App. 4th 244, 259, 74 Cal. Rptr. 2d 7, 15 (1998). Moreover, in making the determination, the judge can consider whether the felony can be committed in dangerous as well and in non-dangerous ways. If the judge concludes that the felony can be committed in non-dangerous ways, the judge should disqualify the felony. *See Patterson*, 49 Cal. 3d at 623–24, 778 P.2d at 555–56, 262 Cal. Rptr. at 201–02 (examining three cases where the Court disqualified an underlying felony because it could be committed in a manner not inherently dangerous to human life).

<sup>234</sup> *See* CAL. BUS. & PROF. CODE § 2053 (Deering 1998) (repealed 2002).

<sup>235</sup> *People v. Burroughs*, 35 Cal. 3d 824, 678 P.2d 894, 201 Cal. Rptr. 319 (1984).

<sup>236</sup> *See id.* at 832, 678 P.2d at 899, 201 Cal. Rptr. at 324.

violating the provisions of the law which do not necessarily pose a threat to human life.”<sup>237</sup>

*Ford* plays an important role in constraining the use of the second degree felony rule whenever *Ireland* does not disqualify the felony. This would have been the case in *Burroughs*, as the felony did not contemplate the kind of determined assault condemned in *Ireland*. *Williams*, however, threatens to undermine the interplay between the *Ireland* and *Ford* prophylactic rules. If assaults are no longer disqualified as the predicate felony under *Ireland*, can a prosecutor still use them under *Ford* because they are dangerous to human life in the abstract? If the answer is “yes,” *Williams* will undermine the Court’s efforts to constrain the second degree felony murder rule.

The question, then, is whether a judge can exclude the felony of an assault with a firearm under *Ford*. Prior to *Williams*, the answer most likely would be “no.” A judge applying *Ford* could find that assault with a firearm qualifies as the predicate felony. In the abstract, the commission of such a felony would be dangerous to human life. Allowing the use of the felony murder rule under *Ford* would not be irrational. Potential perpetrators contemplating using a firearm might be deterred by the rule because committing such a dangerous felony should put them on notice that injury or death might arise solely from committing the felony.

After *Williams*, however, a judge could conclude that committing an assault with a firearm is *not* dangerous to human life in the abstract and thus bar the prosecution from using the felony. A judge might conclude that the assault is not dangerous to human life because it would be irrational to apply the felony murder rule to negligent offenders. They cannot be deterred by the rule for committing a felony they do not contemplate committing. If that is the proper construction of the felony under *Ford*, the judge should bar the prosecution from using assault with a firearm as the predicate felony. That construction would preserve the constraints on the use of the felony murder rule.

A judge, on the other hand, could conclude that committing an assault with a firearm *is* dangerous to human life in the abstract and allow the prosecution to use the felony. A judge might conclude that the assault is

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<sup>237</sup> See *id.* at 830, 678 P.2d at 898, 201 Cal. Rptr. at 323.

dangerous to human life because of the dangers to human life if the assault materializes, irrespective of whether the perpetrator was determined to inflict the battery or it was merely inadvertent. If that is the proper construction of the felony under *Ford*, the judge should allow the prosecution to use assault with a firearm as the predicate felony. That construction would undermine the constraints on the use of the felony murder rule.

Determining the interest the Court had in mind in *Ford* is crucial. If *Ford* is concerned with identifying felonies dangerous to human life by considering only the commission of the actus reus, then felony assaults no longer barred by *Ireland* should be allowed by *Ford* to serve as the predicate felony. That construction, however, would undermine the constraints on the use of the felony murder rule. But if *Ford* is concerned with the actus reus of the felony because of what it discloses about the mental state of potential felons, then *Ford* should bar use of the assault as the predicate felony. That construction would preserve the constraints on the use of the felony murder rule. According to *Ford* and its progeny, applying the felony murder rule to offenders who commit dangerous felonies is rational because the nature of the felony puts them on notice that death or injury might arise and such knowledge might dissuade them from committing the felony. But offenders who commit negligent assaults cannot be deterred by the rule; they cannot be aware of the risk of injury or death posed by committing an assault they do not contemplate committing in the first place.

If under *Williams* a judge may no longer use *Ireland* and *Ford* to bar the use of felonious assaults as the predicate felony, then the danger the Court warned against in *Ireland* can materialize: in most murder cases the prosecution will be able to avoid having to prove malice by relying on the felonious assault giving rise to the homicide. To prevent *Williams* from undermining rules designed to prevent the irrational application of the second degree felony murder rule, either the Court should disapprove of *Williams* and hold that under section 240 the prosecution must prove that it was the defendant's purpose to commit the battery, or the Legislature should amend the assault and battery provisions along the lines that have been suggested.

The Court, however, has an obligation to act, for the Court, not the Legislature, has created the conflict between *Williams* and *Ireland*. In its 1989 *Patterson* opinion, the Court defended its "judicially created" second

degree felony murder rule on the ground that the Legislature had failed to accept the Court's invitation to reconsider retaining the rule.<sup>238</sup> By this logic, the Legislature has accepted not just the existence of the rule but also the *Ireland* limitation the Court imposed in 1969. In its 2001 *Williams* opinion, the Court defended its construction of section 240 by underscoring the Legislature's failure to overturn *Rocha* by amending section 240.<sup>239</sup> However, it is unlikely that by failing to act the Legislature is signaling its approval of two conflicting principles — one that prevents the irrational application of the second degree felony murder rule and another that undermines that limiting principle. To resolve this *judicially* created conflict, the Court, not the Legislature, should choose between retaining a construction of the mental state of an assault that is at odds with conventional doctrine and preserving a limitation on a doctrine that would otherwise result in the irrational application of the second degree felony rule. The choice seems clear.<sup>240</sup>

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<sup>238</sup> See *Patterson*, 49 Cal. 3d at 621, 778 P.2d at 554, 262 Cal. Rptr. at 200.

<sup>239</sup> See *People v. Williams*, 26 Cal. 4th 779, 789–90, 29 P.3d 197, 204, 111 Cal. Rptr. 2d 114, 122 (2001).

<sup>240</sup> *Williams*' unanticipated consequences are not limited to California cases. Under the federal sentencing guidelines, a federal district court can impose an enhanced sentence if previously the defendant had been convicted of a crime of violence. See *United States v. Grajeda*, 581 F.3d 1186, 1187 (9th Cir. 2009). Grajeda appealed a sentence enhancement based on having been convicted of violating California Penal Code section 245(a)(1), assault with a deadly weapon or by means likely to produce great bodily injury. *Id.* Under the guidelines, to qualify as a predicate offense the conviction requires proof of the “use, attempted use, or threatened use of physical force.” *Id.* at 1190. Grajeda argued that his California conviction did not qualify because the aggravated assault, as a crime of negligence after *Williams*, did not require proof that he was attempting to use force. *Id.* at 1192.

The Ninth Circuit rejected the defendant's claim. In doing so, the court seized on the *Williams* language requiring the prosecution to prove that the defendant was aware that he was performing acts that would lead a reasonable person to conclude that those acts would “probably and directly result in physical force being applied to another, i.e., a battery” even if the defendant was unaware “of the risk that a battery might occur.” *Id.* at 1194. In defense of its construction of the California aggravated assault offense, the Ninth Circuit observed, “While this formulation of the necessary mens rea does not fit neatly with the standard articulated in *Fernandez-Ruiz*, it satisfies the concerns animating *Leocal* and *Fernandez-Ruiz* that the proscribed conduct be “violent” and “active,” and the use of force not merely accidental, as in an automobile accident stemming

## XII. CONCLUSION

By converting the crime of assault into a form of negligent endangerment, *Williams* unjustly extends criminal liability for assault to those who commit assaults negligently. The crime of assault, as a form of attempt, is designed to punish only those whose purpose is to inflict a criminal battery. Extending the punishment to those who do not entertain this blameworthy mental state is unjust because it punishes those the Legislature did not have in mind when it enacted the assault statutes and prescribed their punishments.

*Williams*' adverse consequences, however, are not limited to the crime of assault. By defining assaults as crimes of negligence, *Williams* threatens to undermine important limitations on the use of felony assaults as the predicate felony in second degree felony murder prosecutions. Without these restraints, prosecutors can circumvent the requirement of having to prove the mental state of murder by relying on the second degree felony murder doctrine. Since most homicides result from some kind of felonious assault, judges would find it much more difficult to use *Ireland* and *Ford* to bar the use of these assaults when their mental state is supplied by section 240 as construed by the Court.

In addition, *Williams*' flawed analysis of treatises, inappropriate appeals to intoxication doctrines, and failure to distinguish assault's actus reus from its mens rea all contravene established criminal law doctrine. *Williams* is bad law doctrinally and even worse law normatively. If the Court continues to decline to overturn it,<sup>241</sup> then the Legislature should do so by enacting the kind of legislation that has been described.

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from drunk or reckless driving." *Id.* at 1195. Despite its protestations, however, the court permitted a negligence offense to serve as the predicate offense.

An important federal question is whether crimes of negligence, such as assaults after *Williams*, can be the basis of removal in Immigration and Naturalization Service proceedings on the ground the offenses constitute crimes of moral turpitude. In *Partyka v. Attorney General of U.S.*, 417 F.3d 408 (3d Cir. 2005), the Third Circuit held that crimes of negligence do not qualify as removable offenses; to qualify, the offense must require the prosecution to prove that the accused inflicted the proscribed harm purposely or recklessly. *Id.* at 414. Under this construction of the federal removal statute, convictions under *Williams* would not qualify as crimes of moral turpitude.

<sup>241</sup> Not all justices agree that assault is a negligence offense. Justices Kennard, *People v. Colantuono*, 7 Cal. 4th 206, 226, 865 P.2d 704, 717, 26 Cal. Rptr. 2d 908, 921–22

## POSTSCRIPT: A NOMENCLATURE PROBLEM

One of the reasons that the Court may have gotten in trouble in *Williams* and *Colantuono* is the imprecise meaning of the terms, “general” and “specific” intent. Although used mainly to signal whether a defendant can offer his voluntary intoxication to disprove the mental state of the crime charged, the terms have migrated to other areas of the law, taking with them their imprecision.

Section 21a is an example. Prior to the enactment of the section, trial judges used “specific” to denote the mental state of an attempt under section 664. Section 664 punishes every person “who attempts to commit any crime, but fails . . . .”<sup>242</sup> To help jurors understand the mental state of the attempt, the standard CALJIC instruction instructed them as follows:

An attempt to commit a crime consists of two elements, namely, a specific intent to commit the crime, and a direct but ineffectual act done toward its commission . . . . Mere preparation, which may consist of planning the offense or of devising, obtaining or arranging the means for its commission, is not sufficient to constitute an attempt; but acts of a person who intends to commit a crime will constitute an attempt where they themselves clearly indicate a certain, unambiguous intent to commit that specific crime, and, in themselves, are an immediate step in the present execution of the criminal design, the progress of which would be

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(1994) (Kennard, J., concurring & dissenting), and Mosk, *id.* at 224, 865 P.2d at 716, 26 Cal. Rptr. 2d at 920, each disagreed with the Court’s construction of § 240, arguing instead that assault requires an intent to injure. Justice Kennard reiterated this position in her dissent in *Williams*, which Justice Werdegar joined. *Williams*, 26 Cal. 4th at 791, 29 P.3d at 206, 111 Cal. Rptr. 2d at 124 (Kennard, J., dissenting). They believe that the mental state of § 240 is purpose. *See id.*

The issue of the proper construction of § 240 continues to recur. *See, e.g.,* *People v. Chance*, 44 Cal.4th 1164, 1178, 189 P.3d 971, 981, 81 Cal. Rptr. 3d 723, 734 (2008) (Kennard, J., dissenting) (“The way out of this legal morass is easy. Simply recognize that assault is a specific intent crime . . . .”). To avoid the intoxication controversy, Justice Kennard should drop the term “specific intent” and simply insist that § 240 require the prosecution to prove that the defendant’s purpose is to inflict the harm defined by the crime the defendant is attempting to commit.

<sup>242</sup> *See* CAL. PENAL CODE § 664 (Deering 2008 & Supp. 2013).

completed unless interrupted by some circumstance not intended in the original design.<sup>243</sup>

As is apparent, the instruction may have used “specific intent” to refer merely to the particular crime or criminal harm the defendant is attempting to commit. Jurors should not convict the defendant of an attempt to commit a crime unless they find that it was his purpose to commit *that* crime. The instruction would have attained that goal if instead it had used this language or even if it had omitted “specific.” But as we have seen, because of *Hood*’s use of the same term to denote when a defendant may offer his voluntary intoxication to disprove the mental element of the crime charged, the inclusion of the term in a statute can have the effect of misleading judges into concluding that that is the purpose of the term.

It is difficult to believe that when the instruction first surfaced in connection with attempts prosecuted under section 664, those who framed the instruction intended the term to denote the admissibility of intoxication evidence to disprove the mental state of *any* attempt charged under the statute. Had that been the Legislature’s intent in 1872 when it enacted section 664, the Legislature would have used some language to signal that intention. The Legislature, however, would not have used “specific” or “general” intent since those terms were not used for that purpose until a later time.<sup>244</sup> Moreover, as we have seen, in *Hood* the Court reserved for the judiciary the prerogative of designating an offense as a “general intent” offense even if its definition lent itself to being designated as a “specific intent” crime.<sup>245</sup> This prerogative makes it even more difficult to believe that the framers of the instruction intended the term “specific” intent to indicate the admissibility of voluntary intoxication to disprove the mental state of any attempt charged under section 664.

When writing the Court’s opinion in *Hood*, Chief Justice Traynor conceded that the terms “specific” and “general” intent were notoriously

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<sup>243</sup> CALJIC No. 6.00 (4th rev. ed. 1979).

<sup>244</sup> See *People v. Hood*, 1 Cal. 3d 444, 457, 462 P.2d 370, 378, 82 Cal. Rptr. 618, 626 (1969) (noting that the terms “specific intent” and “general intent” came into use after the enactment of the Penal Code in 1872 to determine whether intoxication should be admitted to disprove the mental state of the crime charged).

<sup>245</sup> See *supra* text accompanying note 46.

difficult to define and commentators had urged their abandonment.<sup>246</sup> As we have seen, the mischief these terms have unleashed has not been limited to the intoxication area. When the Legislature enacted section 21a to codify the words used in the jury instruction to define the mens rea and actus reus of an attempt under section 664, it included the term “specific.” The Assembly Committee’s report states that no change in jury instructions was intended by the enactment of section 21a.<sup>247</sup> So if those who framed the CALJIC instruction did not intend for the term to signal the admissibility of voluntary intoxication to disprove the mental state of any attempt prosecution brought under section 664, then its inclusion in section 21a would not indicate that intention. The problem is that this matter is not entirely free of doubt. We may never know what the framers of the instruction had in mind. They cite no case for the proposition that the term was intended to denote the admissibility of intoxication; so it is likely that they meant to emphasize to the jurors only that to convict a defendant of attempting to commit a crime, they had to find that his purpose was to commit the crime identified in the charging instrument and in the instructions. But because the term has now acquired another meaning, its inclusion in section 21a is not free of ambiguity. That is why the Legislature has to think about the term’s intoxication implications if it chooses to replace the mental state of an attempt under section 240 with that of section 21a.

The Model Penal Code avoids the pitfalls of the term by not using it. Its intoxication rule is encased in a different concept. As a general rule, a defendant may offer his voluntary intoxication to disprove the mental state of any crime that under the Code is committed purposely, knowingly, or recklessly.<sup>248</sup> But when the mental state of the offense is recklessness, the jurors must be told to disregard the evidence if they find that the defendant would have been aware of the risk if sober.<sup>249</sup> Since jurors are likely to find this to be the case, the effect of the Code’s approach is to discourage defendants from offering their intoxication when charged with reckless offenses.

The Model Penal Code’s approach solves two problems facing the California Legislature and courts. By omitting the term “specific” intent, it

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<sup>246</sup> See *supra* text accompanying note 43.

<sup>247</sup> See *supra* text accompanying note 127.

<sup>248</sup> See MODEL PENAL CODE § 2.08(1) (Official Draft 1962).

<sup>249</sup> See *id.* § 2.08(2).

avoids uncertainty about whether the term is used to denote the use of intoxication or merely a particular mental state. The Code's approach also allows the use of an easy test to determine the admissibility of intoxication when offered to disprove the mental state of the crime. Had the Legislature adopted the Code's intoxication rule, it would have enabled the courts to avoid the recurring problems posed by the specific-general intent dichotomy in making the same call.

To be sure, the Code's intoxication rule has been criticized. Most serious crimes under the Code require purpose, knowledge, or recklessness. Problems with the Code's intoxication rule arise when a crime can be committed with any of the three mental states. Murder is such a crime.<sup>250</sup> Those charged with purposeful or knowing murder can offer their intoxication to disprove that they killed purposely or knowingly without any limiting jury instructions, but those charged with reckless murder may not. Since those who kill purposely or knowingly have less regard for the value of human life than those who merely disregard a substantial homicidal risk, it is hard to justify why the most blameworthy murderers should be able to use their intoxication to escape conviction of murder but not the least blameworthy murderers. It has been suggested that the solution is to allow the use of voluntary intoxication whenever, as an evidentiary matter, it helps disprove the mental state of the offense charged. A state could then punish the intoxicated offender by enacting statutes punishing the commission of harms while intoxicated. If the jury finds a particular defendant not guilty by reason of intoxication, it could still find the defendant guilty of the crime of committing the harm while intoxicated.<sup>251</sup> Whether this is a sound solution to the problem of the intoxicated offender is not the central point. The concern is finding an approach that is not susceptible to the confusion the California courts have encountered in determining (1) the mental state of an offense and (2) when voluntary intoxication should be admissible to disprove that mental state.

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<sup>250</sup> See *id.* § 2.10.2(1).

<sup>251</sup> See Miguel A. Méndez, *Solving California's Intoxication Riddle*, 13 STAN. L. & POL'Y REV. 211, 229 (2002).



# CALIFORNIA LAWYER:

## *Aaron Sapiro and the Progressive-Era Vision of Law as Public Service*

VICTORIA SAKER WOESTE\*

Much scholarly attention has been paid to the lawyers who established the profession in California during the nineteenth century. By following the migration of Midwesterners and former Confederate officers to the West after the 1860s, historians have reconstructed the lives and work of the legal and judicial professions in California after statehood. During the Progressive Era, California's lawyers took up the concerns of Progressives nationwide, sanding the sharp corners of industrialism and the economic inequalities that resulted from it. The rights of workers, small-scale entrepreneurs, children, women laborers, and women's right to vote all became central focus points of California politics after 1900. The stories of many lawyers who played a part in transitioning California to this new era of public policy and the new areas of law practice that came with it have gone largely untold. With the founding of the state's first law schools, a generation of home-grown and — trained

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\* Research Professor, American Bar Foundation. This article is derived substantially from material included in chapters 4, 6, and 9 of Victoria Saker Woeste, *Henry Ford's War on Jews and the Legal Battle Against Hate Speech* (Stanford, Cal.: Stanford University Press, 2012), and is republished here with the permission of the Press.

lawyers were positioned to become the foundation of Progressive Era California.<sup>1</sup>

One such lawyer was Aaron Sapiro, who typified several salient characteristics of this new generation of lawyers. Sapiro is best known as the man who sued Henry Ford for libel in 1927. The case ended in mistrial and an out-of-court settlement; as a result, few people understand not only what the trial was about but what Sapiro had done in his legal career to draw Ford's ire in the first place. For more than a dozen years, Sapiro organized farmers' marketing cooperatives that were designed to provide farmers with the same economic advantages as those enjoyed by labor unions and corporations. Sapiro saw law as a tool to reshape society and to make economic institutions behave rationally. His determination to use law to achieve social change stemmed from an awareness of his own talent as well as an undeniable ability to seize the moment. As he told an interviewer in 1923, "[T]he gift of leadership is not so much a matter of brains as of *intensity*. If you are so completely saturated with anything that you think it and dream it and live it, to the exclusion of all distracting influences, nothing on earth can stop you from being a leader in that particular movement." For Sapiro, what mattered was to have a vision of the world as it ought to be; persuading others was merely a matter of insisting on his vision as against "all distracting influences."<sup>2</sup> This article, in telling Sapiro's life story, reconnects him to his intellectual roots in California's tradition of legal progressivism.

Sapiro's career followed an unlikely route. He was born in San Francisco to Polish immigrants who raised him and seven siblings in desperate

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<sup>1</sup> A good example of work on this topic is Molly Selvin, "The Loeb Firm and the Origins of Entertainment Law Practice in Los Angeles, 1908–1940" (unpublished paper on file with author). On nineteenth-century developments in California legal history and the establishment of the legal profession, see, e.g., Gordon Bakken, *Practicing Law in Frontier California* (Lincoln: University of Nebraska Press, 1991); Bakken, *The Development of Law in Frontier California: Civil Law and Society, 1850–1890* (Westport, Conn.: Greenwood Press, 1985); Christian G. Fritz, *Federal Justice in California: The Court of Ogden Hoffman, 1851–1891* (Lincoln: University of Nebraska Press, 1991); Lucy E. Salyer, *Laws Harsh as Tigers: Chinese Immigrants and the Shaping of Modern Immigration Law* (Chapel Hill: University of North Carolina Press, 1995).

<sup>2</sup> Merle Crowell, "Nothing Could Keep This Boy Down," *American Magazine* (Apr. 1923), 16–17, 136–46, 146.

poverty. His father died in a train accident when Aaron was nine, forcing his mother to send him and most of the Sapiro children to a San Francisco orphanage. After six wretched years, Aaron escaped to Hebrew Union College in Cincinnati, where he attended college and studied for the rabbinate. His orphanage experience seared into him a thorough distrust for authority. Spending time in seminary hardened in him the conviction that organized religion was useless if he were going to change the world. And so with one year left before ordination, he returned to California to enroll at Hastings College of the Law.<sup>3</sup>

During his seminary years, Sapiro encountered new friends who influenced his life in lasting ways. On his summer breaks, he returned to Northern California to visit his mother and teach in synagogues. One assignment placed him in a children's bible class in Stockton, up the Sacramento River Delta from Oakland. Sapiro's teaching position brought him in contact with one of Stockton's most prominent Jewish families, Michael and Rose Arndt. The Arndts had two children: Stanley, a studious boy, and Janet, a girl who was barely ten in 1905 when her parents enrolled her in Aaron's scripture class.<sup>4</sup> Rose Arndt took more than a passing interest in the serious seminarian. She introduced him to Stockton society, broadening his circle beyond the families he met at the synagogue. Soon she invited him to accompany the family on day trips around Northern California. Before long an understanding emerged: Aaron and Janet were betrothed. In 1913, the couple married and settled in San Francisco.<sup>5</sup>

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<sup>3</sup> Victoria Saker Woeste, "Sapiro, Aaron," *American National Biography Online*, April 2004 update, accessed 8 Nov. 2013, <http://www.anb.org/articles/11/11-01215.html>.

<sup>4</sup> Jeannette Arndt Anderson, interview by author, tape recording, Palo Alto, Cal., 31 Mar. 2005, p. 14 (transcript on file); Janet Sapiro, Certificate of Death, County of Los Angeles, State of California, Department of Public Health, 4 June 1936, no. 7502. Stanley Arndt became a lawyer who wrote an article on agricultural cooperation and practiced law for a time with his brother-in-law. Anderson interview, 7; Stanley Arndt, "The Law of California Co-operative Marketing Associations," *California Law Review* 8 (1920): 281-94.

<sup>5</sup> Anderson interview, 13-14; Linda Sapiro Moon, interview by author, tape recording, Huntington Beach, Cal., 23 Sept. 2002, pp. 4-5 (transcript on file). On the practice of Jewish families betrothing their young daughters through the late nineteenth century, see Sydney Stahl Weinberg, *The World of Our Mothers: The Lives of Jewish Immigrant Women* (Chapel Hill: University of North Carolina Press, 1988), 23-24.

Law proved to be Sapiro's *métier*. As the top graduate in his class at Hastings, he was selected to address the commencement exercises. His speech, entitled "Law as a Training for Citizenship," conveyed his conviction that lawyers played a special role in building the American civic community. More particularly, he wanted to express a sense of vocation. Such a profession marked out, he said, a "prominent and important place . . . in the upbuilding of [the] state," according to the Berkeley *Daily Gazette*. In his "eloquent and forceful speech," Sapiro argued that the standards for professional attainment had shifted: "A lawyer who wins big cases is no longer considered successful unless he takes an important part in the issues of the day and works for the advancement of the community." Law — or, more precisely, the life of a lawyer — gave his inchoate sense of mission concrete meaning. As a lawyer, he planned to work for social change.<sup>6</sup>

As it so happened, California Governor Hiram Johnson attended the Hastings law school graduation and heard Sapiro's inspiring speech. A barnstorming Progressive reformer, he was seeking out lawyers to help wage what a contemporary journalist called a "political revolution" in California state government. Just a few months after completing law school, Sapiro was offered the position of secretary and legal counsel to the state's new Industrial Accident Board. At a time when victims of dangerous working conditions could expect little help from their employers, the innovation of workers' compensation programs provided real relief. Providing help in such cases was a favorite cause of Progressive reformers; California was not far behind states such as New York in passing these laws.<sup>7</sup>

The Board's first task was to set up a voluntary workers' compensation program that included the administrative forms and processes for handling workers' cases under the new law. Dealing with these cases showed

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<sup>6</sup> *Berkeley Daily Gazette*, 17 May 1911, p. 1.

<sup>7</sup> Robert Cherny, "Johnson, Hiram Warren," *American National Biography Online*, Feb. 2000, accessed 8 Nov. 2013, <http://anb.org/articles/06/06-00315.html>; Trial Transcript, 1148. On the legal history of workers' compensation, see, e.g., Lawrence Friedman and Jack Ladinsky, "Social Change and the Law of Industrial Accidents," *Columbia Law Review* 67 (1967): 50–82; Arthur F. McEvoy, "Freedom of Contract, Labor, and the Administrative State," in Harry N. Scheiber, ed., *The State and Freedom of Contract* (Palo Alto, Cal.: Stanford University Press, 1998), 198–235; and John Fabian Witt, *The Accidental Republic: Crippled Workingmen, Destitute Widows, and the Remaking of American Law* (Cambridge, Mass.: Harvard University Press, 2004).

the Board and its counsel that a voluntary program was inadequate to meet the scope of workers' injuries and damages. Sapiro then was assigned to redraft the statute to require employer participation, guide the bill through the state legislature, and then defend the act in the state courts. The compulsory participation act that Sapiro drafted remains the foundation of California's workers' compensation system. Sapiro stayed with the Industrial Accident Board for nearly two years, while practicing law on the side with a small firm in San Francisco.<sup>8</sup>

Sapiro had his mind fixed on other goals. During these years, Sapiro began to capitalize on the personal and professional connections he had been building for years in the Sacramento Delta area. Through his future father-in-law, he met the person who would provide direction for his legal career after he left state employment. In mid-1908, he was introduced to Harris Weinstock, a wealthy Sacramento merchant who had begun a second career in public service around the turn of the century.<sup>9</sup>

Weinstock and his half-brother David Lubin dedicated their lives to public service and agricultural reform. Both believed in the Jeffersonian vision of agrarian freeholding. The idea was that democratic values went hand-in-hand with individual landownership and that agriculture supplied the bedrock of American civic virtue. In the mid-1880s, the brothers purchased a 300-acre fruit orchard near Sacramento and two wheat farms in a neighboring county. Then they took the lead in forming the California Fruit Union, an early growers' cooperative that was one of the first organizations to market fruit east of the Rockies. To help realize his twin goals of

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<sup>8</sup> Roseberry Act of 1911 (Stats. 1911, ch. 399, p. 796; participation voluntary for employers); Boynton Act of 1913 (Stats. 1913, ch. 176, p. 279; compulsory participation); Testimony, *Aaron Sapiro v. Henry Ford and the Dearborn Publishing Company*, Case No. 7522, U.S. District Court, Eastern Division of Michigan, Southern Division, Transcript of Proceedings, 28 Mar. 1927, pp. 1148–50 (hereafter Trial Transcript), file 4, box 43, accession 48, Benson Ford Research Center, Dearborn, Michigan; Glenn Merrill Shor, "The Evolution of Workers' Compensation Policy in California, 1911–1990" (Ph.D. diss., University of California, Berkeley, 1990); Sam Bubrick, interview by author, tape recording, 23 Sept. 2002 (transcript on file); Leland Sapiro, telephone interview by author, June 1998.

<sup>9</sup> Grace H. Larsen and Henry E. Erdman, "Aaron Sapiro: Genius of Farm Co-operative Promotion," *Mississippi Valley Historical Review* 49:2 (1962), 242–68. Larsen and Erdman say the two met in 1905 ("Genius of Co-operative Promotion," 244), but this claim contradicts Sapiro's Ford trial testimony.

rural prosperity and world peace, Lubin founded the International Institute of Agriculture in Rome in 1905. The organization eventually worked on projects with the League of Nations in the 1930s and became a part of the Food and Agricultural Organization of the United Nations in 1946. For his part, Weinstock stayed closer to home, working in California state government. When Harris Weinstock met Aaron Sapiro, he found a ready-made acolyte.<sup>10</sup>

Weinstock introduced Sapiro to the study of agricultural cooperation and the problems bedeviling California producers. Weinstock gave Sapiro access to his enormous library of books on farming, agricultural cooperation, and law, some in German and French. Sapiro proved an adept and quick student, devouring every volume Weinstock “had . . . on the subject of world credits and farm marketing, and also [everything] that I could get in the library at the University of California.” By the time Sapiro began law school, he had drawn a handmade chart of all state laws dealing with agricultural credits and marketing. On visits to Stockton, Aaron often traveled the countryside with Weinstock, visiting fruit orchards and dairy farms while Weinstock “point[ed] out to me a great many things.” Sapiro was eager to “[sit] at the feet” of Lubin and Weinstock and “absorb some of their views and vision and some of their sense of service.”<sup>11</sup>

The relationship blossomed. Weinstock was already a member of Governor Johnson’s administration by the time Sapiro delivered his law school graduation address. That proximity enabled Weinstock to buttress the governor’s inclination to hire the young lawyer with a strong recommendation of his own: “There are two classes of men. One you have to drive. On one you have to keep a bridle to hold them back. Aaron Sapiro is one of the latter.”<sup>12</sup> Sapiro was already fully committed to Weinstock and

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<sup>10</sup> Olivia Rossetti Agresti, *David Lubin: A Study in Practical Idealism* (Boston: Little, Brown and Co., 1922), 267–79; Michael Magliari, “Lubin, David,” *American National Biography Online*, Feb. 2000, accessed 8 Nov. 2013, <http://www.anb.org/articles/15/15-00979.html>. Jefferson expressed these ideas most fully in his *Notes on the State of Virginia*. See his *Writings*, ed. Merrill D. Peterson (New York: Viking Press, 1984).

<sup>11</sup> Larsen and Erdman, “Genius of Farm Co-operative Promotion,” 245; Trial Transcript, 1153–54; Aaron Sapiro, “An Experience with American Justice,” *Free Synagogue Pulpit* 8, no. 5 (1927–28): 5.

<sup>12</sup> Quoted in Larsen and Erdman, “Genius of Farm Co-operative Promotion,” 244.

Lubin's platform of economic reform and government service by the time he finished law school. Lubin and Weinstock's belief that world peace and national prosperity could only be secured through agricultural prosperity gave Sapiro's social justice convictions a concrete underpinning. Soon he would have another opportunity to put those convictions into practice, this time working directly with his mentor, Weinstock.

The 1900s and 1910s were a time of real innovation for California's agricultural marketing cooperatives and their members. By that time, California's Central and San Joaquin valleys were chockablock with small fruit and nut farms. Raisins, apricots, plums, cherries, almonds, and many other tree crops were growing by the tidy acre. Armenians, Turks, Greeks, Japanese, Italians, Scandinavians, Hindus, and northern Europeans all combined in a great agricultural melting pot as California's arid lands turned green under the artificial rain of constructed irrigation works. As fruits and nuts became profitable to produce, growers sought to expand their markets eastward and reach consumers year-round. Even before the turn of the century, growers banded together in cooperatives to sell their crops collectively. Still, they encountered difficulties.<sup>13</sup>

The traditional form of cooperative was a loose affiliation of individuals, held together by good will and the bonds of neighborliness. True cooperatives returned all proceeds to members in proportion to the amount of business each conducted through the organization; they were "non-profit" in the fullest sense. In the nineteenth century, such local non-profit societies proved no match for the corporate brawn of industrial distributors. California fruit growers quickly learned they had to overcome more than geography in order to get their crops onto the dinner tables of Eastern consumers. Packing companies charged an arm and a leg to prepare the fruit for shipping, railroads added their share for transportation, and then the distribution system larded on surcharges, all before the fruit got to retailers. Informal associations tended to implode when confronted with the competitive forces of the industrial marketplace.<sup>14</sup>

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<sup>13</sup> Victoria Saker Woeste, *The Farmer's Benevolent Trust: Law and Agricultural Cooperation in Industrial America, 1865-1945* (Chapel Hill: University of North Carolina Press, 1998), 17-24.

<sup>14</sup> *Ibid.*, 24-36.

After repeated failures and long, vituperative struggles, growers took a page from their opponents' book. They pooled their crops and then marketed them collectively for the highest price obtainable. The new cooperatives that formed during the Progressive Era used monopoly and price-fixing to control the marketing of the state's largest horticultural industries. By 1915, Sunkist oranges, Sun-Maid raisins, Blue Diamond almonds, and Diamond walnuts became multi-million dollar brand names. These cooperatives looked less like the traditional small-scale organizations of the previous century and more like U.S. Steel.<sup>15</sup> This new model had already drastically reconfigured the relationship of growers to markets by the time Weinstock and Sapiro became advocates of the cooperative movement.

Johnson and Weinstock saw these developments as essential to agricultural progress. They had witnessed the destruction and misery that accompanied the boom and bust cycles of the previous generation. At the same time, the governor and state legislature wanted to quell public outrage over the high food prices that consumers attributed to these powerful growers' organizations. But the different branches of California's government had different ways of going about this task. In June 1915, the Legislature created the California State Commission Market and the position of State Market Director, who was to "act as a head commission merchant" for all staple goods such as milk, eggs, and flour sold in the state. The Legislature's intent was to instill a nominal level of supervision over the markets for essential foodstuffs. Johnson appointed Weinstock as State Market Director, ostensibly to run the Commission Market under its enabling legislation. Weinstock had other ideas, and he intended for his protégé, Sapiro, to help execute them.<sup>16</sup>

With Johnson's support, Weinstock proceeded to turn the Commission Market into a vehicle for organizing marketing cooperatives for California's farmers and, by extension, for making the California model of cooperation the official model for the state's agricultural economy. Johnson and

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<sup>15</sup> Crowell, "Nothing Could Keep This Boy Down," 136.

<sup>16</sup> Steven Stoll, *The Fruits of Natural Advantage: Making the Industrial Countryside in California* (Berkeley: University of California Press, 1998), 212n61; Woeste, *Farmer's Benevolent Trust*, 197; Arthur F. McEvoy, *The Fisherman's Problem: Ecology and Law in the California Fisheries, 1850-1980* (New York: Cambridge University Press, 1986), 169; Larsen and Erdman, "Genius of Farm Co-operative Promotion," 245.

Weinstock did not want intermediaries and speculators or, worse, financial interests beholden to east coast investors and interests to determine agricultural profitability; yet they knew those interests would fight every move the Commission made to organize cooperatives. The Commission would need expert help from a well-informed lawyer who shared the governor's commitment to economic and political reform, but the Legislature had not provided funds for legal staff. By inviting Sapiro to serve as the Commission's staff attorney and paying his retainer personally, Weinstock neatly evaded the Legislature's fiscal handcuffs. The position enabled Sapiro to build a substantial private law practice from the referrals he received from the Commission.<sup>17</sup>

Sapiro eagerly greeted the parades of growers who traveled the dusty Central Valley roads to his San Francisco office. They came from "all classes of growers," Sapiro later remembered, including "Japanese onion growers and Japanese potato growers and Hindu potato diggers, and then the owners of the Delta lands. We would have conferences with other large growers and quite small growers, with owners and tenants — all different types and growers with different kinds of commodities." After these conferences, growers went back to their farms and their neighbors with what soon became known as the "Sapiro plan" for organizing a cooperative. This plan was hardly original; rather, Sapiro distilled what worked and carefully culled what did not from the various elements of cooperative marketing he had studied. In short order this plan made Sapiro famous among California's growers. It also made the Commission Market controversial for the activist way in which it reorganized the marketing of fruits and vegetables throughout the state.<sup>18</sup>

The Sapiro plan combined elements from many of the successful California cooperatives then in existence, particularly those in raisins, oranges, walnuts, and almonds. The most important principle these growers had discovered was to organize by commodity: thus, Sun-Maid sold only raisins and Sun-Kist only citrus. This kind of specialization enabled

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<sup>17</sup> Sapiro was already on retainer as Weinstock's personal attorney; see Larsen and Erdman, "Genius of Farm Co-operative Promotion," 245; on Sapiro's not receiving an official state salary, see Trial Transcript, 1154.

<sup>18</sup> Trial Transcript, 1155; Woeste, *Farmer's Benevolent Trust*, 197; McEvoy, *Fisherman's Problem*, 170.

cooperatives to invest in all of the operations involved in harvesting, processing, packing, and marketing — including retail branding — for just their own crops and nothing else. The raisin growers found an innovative device to keep their organization together from one year to the next. To solve the perennial problem of losing members to commercial packers, who easily tempted growers with temporarily higher prices, the California Associated Raisin Company came up with a long-term membership contract that “ran with the land,” rather than ending when the farm changed owners. Cooperatives conducted membership campaigns to get growers to sign contracts, and they ran these campaigns with all the fanfare of county fairs and community picnics. Cooperative officials knew that their only hope of maintaining a fair price lay in maintaining the loyalty of a majority of the growers.<sup>19</sup>

Sapiro treated growers as pupils who needed instruction, good care, and expert leadership. Once they were organized into cooperatives run by leaders with business acumen and armed with the proper corporate authority, he felt, growers could live the lives they deserved. Their wives would be able to keep lovely homes, and their children would stay in school, exactly the idyllic life he had been denied. As a lawyer, he believed that quality of life was what social and economic reform could bring about. But only the authority of law could make that gain secure.<sup>20</sup>

The growers who “crowded into the market director’s office for help” were largely oblivious to the sense of social mission that inspired Sapiro’s work. They asked him to form marketing cooperatives whose grower contracts would hold up in court. Sapiro organized his first cooperative for the poultry producers in 1916; the next year, he formed the prune and apricot growers association. The Central California Berry Growers Association also formed that year; two-thirds of its members were Japanese tenants barred by state law from owning land. In 1919, the pear, tomato, olive, milk, and bean industries used Sapiro’s plan to incorporate their own associations. Barely five years into his career as a cooperative lawyer, Sapiro was

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<sup>19</sup> Woeste, *Farmer’s Benevolent Trust*, 117–31; Catherine Merlo, *Heritage of Gold: The First 100 Years of Sunkist Growers, Inc., 1893–1993* (Los Angeles: Sunkist Growers, Inc., 1993), 1–58.

<sup>20</sup> Crowell, “Nothing Can Keep This Boy Down,” 146.

earning as much as \$80,000 annually practicing an area of law he was essentially inventing as he went.<sup>21</sup>

By 1917, the nation was at war. The war disrupted and transformed American political and economic institutions. Conscription created an instant army, as young men of every race and ethnicity flowed into the armed forces. The administrative power of the modern American state expanded to regulate the nation's mobilization. In an act that would never have been tolerated in peacetime, the federal government set up an agency to freeze food prices for the duration of hostilities.<sup>22</sup> Instead of lending his expertise to the government, Sapiro sought to join the military. Rejected by the Officers Training Corps for color blindness (though he suspected antisemitic bias), Sapiro enlisted in the field artillery and was awaiting his assignment when the Armistice was declared in November 1918. His dream of defending his country in uniform was permanently deferred.<sup>23</sup>

The end of the war thus added a sense of urgency and missionary zeal to the work with cooperatives he had begun before the war. When Sapiro returned to California, he resumed his work organizing cooperatives, but he no longer needed an official affiliation with the State Marketing Director to draw referrals. Indeed, as Sapiro's private practice boomed, Weinstock and the commission became mired in controversy. The public markets Weinstock established in the fish industry, for example, drew accusations that the state was fixing prices and condoning monopolistic tactics. Complicating matters, Hiram Johnson was elected to the U.S. Senate in 1916; his successor as governor, William Stephens, was too distracted by radicalism, urban bombings, and labor unrest to defend Weinstock effectively. Exhausted and ill, Weinstock resigned under pressure in early 1920. A dispute over Sapiro's fees from a mutual business interest led to

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<sup>21</sup> Larsen and Erdman, "Genius of Farm Co-operative Promotion," 247; Trial Transcript, 1156–60, 1168; Arno G. Weinstein, "Aaron Sapiro v. Henry Ford: The Events Prior to, during and following the Confrontation" (M.A. thesis, Arizona State University, Tempe, 1986), 8.

<sup>22</sup> Richard Slotkin, *Lost Battalions: The Great War and the Crisis of American Nationality* (New York: Henry Holt and Company, 2005), 1; Woeste, *Farmer's Benevolent Trust*, 139.

<sup>23</sup> Trial Transcript, 1162–66; *New York Times*, 17 Mar. 1927, p. 1; "Sapiro, Aaron," *Who's Who in America* 15 (1928-29), 1831; Orville Dwyer, "Sapiro Reveals Life," *Chicago Daily Tribune*, 29 Mar. 1927, p. 8.

the permanent end of their relationship, once described as close as “father and son.”<sup>24</sup>

A larger stage was materializing for farmers’ cooperatives, and Sapiro was anxious to step onto it. In 1920, he burst onto the national scene with a two-hour speech at the meeting of the American Cotton Association in Birmingham, Alabama. His vision of cooperation as a system in which farmers, not detested middle merchants, controlled the prices they received for their crops, electrified the delegates. As one observer wrote, “The whole direction of the movement toward a new control of the cotton industry was changed by one man.” The depression into which agriculture sank after World War I led Congress to exempt farmers from federal antitrust liability, on the assumption that farmers could never create monopolies harmful to consumers. At the same time, Sapiro boldly claimed monopoly to be the farmers’ right: “Only the farmer can have a complete [and] unlimited monopoly and still be in any measure within the law.” Sapiro’s vision captivated because he did more than preach economic efficiency and free market competition; he uplifted “dirt farmers” with an inspiring modernization of the Jeffersonian ideal of the agrarian citizen. As he wrote in 1923, “The justification of cooperative marketing is that it [is] the means of a more progressive form of living and a superior type of citizenship, as well as an economic remedy.”<sup>25</sup>

Sapiro’s fame and popularity among farmers made him the nation’s premier cooperative organizer during the 1920s. He became a consultant to such figures as former War Industries Board chair Bernard Baruch, Illinois Governor Frank Lowden, and top officials in the U.S. Department of Agriculture. He also became affiliated with the American Farm Bureau Federation, serving for a short time as legal counsel to the organization.

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<sup>24</sup> Larsen and Erdman, “Genius of Farm Co-operative Promotion,” 250; Cherny, “Johnson, Hiram Warren,” Trial Transcript, 1169; Grace Larsen, “A Progressive in Agriculture: Harris Weinstock,” *Agricultural History* 32, no. 3 (July 1958): 187–93, 193; McEvoy, *Fisherman’s Problem*, 170.

<sup>25</sup> Woeste, *Farmer’s Benevolent Trust*, 198 (quoting Robert H. Montgomery, *The Cooperative Pattern in Cotton* [New York: Macmillan, 1929], 74, and William C. Brooker, *Cooperative Marketing Associations in Business* ([New York: Privately published, 1935], 69); Silas Bent, “Three City-Bred Jews that the Farmer Trusts,” *Outlook* 134 (8 Aug. 1923), 553–56, 555; Sapiro, “True Farmer Cooperation,” *World’s Work* 46 (1923), 85–96, 96. At the time, however, local newspapers entirely ignored his speech. See, e.g., *Birmingham Advertiser*, 1–20 Apr. 1920.

Having finally caught the attention of national agricultural leaders, Sapiro proceeded to bring the cooperative movement under his personal supervision and control. He oversaw the organization of dozens of cooperatives in major staple crops, coordinating thousands of farmers across many states under long-term contracts. Newspapers hailed him as the farmer's savior:

What John Wesley and John Knox did for religion, what Oliver Cromwell did for society, Aaron Sapiro is doing in an economic way for the farmers of this continent. He has liberated them, through the principles of cooperation, from the clutches of exploiters. . . . Sapiro went into the tobacco and cotton fields of the South, he went into the orchards of California, he went to the wheat fields of Canada. And by preaching the common sense of cooperation, he helped retrieve those areas from a condition of economic dry rot.

He moved his practice to Chicago in 1923 and opened offices in New York and Dallas; in his absence, his younger brother Milton, also a lawyer, ran the firm's San Francisco branch. The national press began to take notice, finding his biography compelling: "He stands as another personal proof that none is too poor to succeed in this country."<sup>26</sup>

Sapiro argued the case for commodity-based monopolistic cooperatives to two secretaries of agriculture. Henry C. Wallace remained skeptical, answering a distributor's demand for information about Sapiro with a noncommittal response that neither defended Sapiro nor endorsed his plan. The Farm Bureau split into two camps over the question of whether Sapiro should be retained as counsel. In 1923, when he insisted that he would not assist in any capacity unless he were placed on retainer, the factions engaged in an ugly civil war that ended Sapiro's association with the Farm Bureau and cost his partisans their jobs. After this highly publicized setback, Sapiro formed the National Council of Farmers' Cooperative Marketing Associations. Ineffective and poorly funded, it did little more than dilute agricultural influence in Congress.<sup>27</sup>

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<sup>26</sup> *Vancouver Sun*, 11 Aug. 1927, editorial page, File 5, Box 70, Lewis Lichtenstein Strauss Papers, American Jewish Historical Society, New York City; Bent, "Three City-Bred Jews," 554; *New York Times*, 30 Mar. 1927, p. 16.

<sup>27</sup> Henry C. Wallace to E.L. Mack, 8 Feb. 1924, Correspondence of the Secretary of Agriculture, Drawer 455 (1924 Marketing), RG 16, National Archives and Records Administration, College Park, Maryland; see also Sapiro to Edwin T. Meredith, 1 Sept.

By far Sapiro's most lasting accomplishment in cooperative marketing was to write a model statute that incorporated the salient features of the Sapiro plan. The statute legalized monopoly control for cooperatives, incorporated the iron-clad contract, and granted cooperatives the power to sue others for interfering with farmers' crop deliveries. Cooperatives, their members, and their officers were guaranteed immunity from anti-trust prosecution as long as they conformed to the goal of the statute. Since that goal was to serve the public interest by bringing rationality and order to the marketing of agricultural commodities, it was not an onerous condition. Between 1921 and 1926, thirty-eight states adopted versions of the law, which distributors and warehouses promptly attacked in the courts. Indeed, the most lucrative part of Sapiro's law practice after 1923 was the appellate advocacy he performed in defense of the marketing laws he had helped to enact. He was peerlessly effective. In 1923, the North Carolina Supreme Court awarded him a major victory by upholding the statute's broad public purpose in sweeping terms. Victories in a dozen other state high courts followed, topped off by a unanimous U.S. Supreme Court decision upholding Kentucky's version of the act in 1928. That case gave Sapiro his only opportunity to appear before the nation's highest court.<sup>28</sup>

Stunning as these achievements were, they could not change the stark facts of the 1920s agricultural economy: overproduction and low prices led to continuing cycles of excess supply and lower profits for producers. When some of the crown jewels of Sapiro's cooperative movement collapsed under the pressure of the continued postwar recession, Sapiro came under attack. His unyielding insistence on adherence to his model in all its particulars, some traditionalists complained, caused the cooperative movement's spectacular failures. The difficulty, agricultural leaders and economists insisted, was that the Sapiro model was best suited to California. It was relatively easy to organize fruit growers, according to this

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1920, Correspondence of the Secretary of Agriculture, Drawer 521 (1920 Marketing), *ibid.*; Meredith to Sapiro, 4 Sept. 1920, *ibid.*; Robert P. Howard, *James R. Howard and the Farm Bureau* (Ames: Iowa State University Press, 1983); James Shideler, *Farm Crisis: 1919–1923* (Berkeley: University of California Press, 1957).

<sup>28</sup> *Tobacco Growers Cooperative Association v. Jones*, 185 N.C. 265 (1923); *Liberty Warehouse Co. v. Burley Tobacco Assn.*, 276 US 71 (1928); Woeste, *Farmer's Benevolent Trust*, 203–06.

critique, because they lived in proximity to one another. In contrast, the nation's major staple crops — cotton, wheat, corn, and tobacco, to name a few — grew across states and regions. Producers in these industries had less in common, shared less of a social identity, and felt less connected to a growers' cooperative than the California cooperatives, with their strong community ties.<sup>29</sup>

Ultimately, Sapiro-style cooperation proved to be no panacea. Farmers continued to produce larger crops each year, and cooperatives could do nothing to stop it. Unable to break the continuing cycle of overproduction and depressed prices, many Sapiro cooperatives collapsed by mid-decade. Even after they gained the statutory authority to control their markets, cooperatives were undone by the fateful decisions of thousands of individual farmers and the structural workings of national and international economies. The movement was already dying when Henry Ford began accusing Sapiro of using cooperative marketing to enslave American farmers.<sup>30</sup> Sapiro's libel suit against Ford, as well as his subsequent legal career, have been discussed in detail.<sup>31</sup> It is sufficient to note that one of Ford's lawyers, sitting U.S. Senator James A. Reed, wrote privately in the case file: "[Our aim is] to harass and impoverish the plaintiff." In the end, Sapiro settled for a sum of money that did not come close to making him whole. As he told the press, however, the money was not the point: "I wanted no damages whatsoever, and I state this definitely and openly. I wanted no money from Mr. Ford. I wanted the truth from Mr. Ford."<sup>32</sup>

In 1928, he and his family relocated to Scarsdale, New York. There he aimed to start his career "with a clean slate," as he told Lewis Strauss in

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<sup>29</sup> Larsen and Erdman, "Genius of Farm Co-operative Promotion," 260, 263–68; Grant McConnell, *The Decline of Agrarian Democracy* (Berkeley: University of California Press, 1953), 60–61; William E. Ellis, "Robert Worth Bingham and the Crisis of Cooperative Marketing in the Twenties," *Agricultural History* 56 (1982): 99–116.

<sup>30</sup> Robert Morgan, "Jewish Exploitation of Farmers' Organizations," *Dearborn Independent*, 19 Apr. 1924, p. 4. In one of the lionizing biographies he commissioned, Ford claimed he supported agricultural cooperation in principle but criticized Sapiro-style cooperation as unnecessary in a free market. Henry Ford with Samuel Crowther, *Today and Tomorrow* (Garden City, N.Y.: Garden City Publishing Co., 1926), 214–22, esp. 219.

<sup>31</sup> See Woeste, *Henry Ford's War*.

<sup>32</sup> Aaron Sapiro, "An Experience With American Justice," *Free Synagogue Pulpit*, 8 (1927–28), 3–40, 36.

July 1927, with nothing but his dignity and his good name as collateral.<sup>33</sup> His career as a promoter of farmers' cooperatives, which had been on the wane at the time he filed suit, came to a slow and unheralded end, at least in the U.S. He remained an active consultant to the movement in Canada, where a more radical offshoot attempted to enforce compulsory pooling in the wheat industry. After the stock market crashed in 1929, accusations of profiteering proliferated in such essential commodities as milk and bread, and Sapiro was called upon to advise state and federal officials and agencies struggling to reconcile longstanding deference to free markets with pressing public need.<sup>34</sup>

Sapiro decided to return to California with his family in 1935. The Sapiros settled in Pasadena, just outside Los Angeles. Janet Sapiro fell ill in January 1936, and five months later she died of breast cancer at the age of forty-one. For the next two decades, Sapiro practiced law quietly, occasionally providing free legal services to distinguished friends such as John Barrymore and Igor Stravinsky. In his last years, Sapiro suffered badly from arthritis. When he died at 75 on November 23, 1959, he left his body to the UCLA medical center for arthritis research, disappointing competing schools.

Sapiro's indelible connection to Henry Ford should not obscure his contributions to the causes that Progressive politicians and lawyers held dear. The Sapiro model of cooperation, while not nearly as prevalent as it was in the 1920s, continues to offer farmers an economically viable mode of organization. Moreover, because of Sapiro's promotional, legislative, and advocacy work, agricultural cooperation is legally recognized across the country in state and federal statutes and remains immune from anti-trust prosecution. One scholar has argued that despite the brevity of Sapiro's stay with the California Industrial Accident Board, his work there is his greatest legal legacy.<sup>35</sup> There is no need to debate the point. We ought to view his contributions to labor and agriculture as two parts of a greater whole, as elements of a grand Progressive-Era vision.

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<sup>33</sup> Sapiro to Lewis Strauss, 18 July 1927, File 5, Box 70, Strauss Papers.

<sup>34</sup> *New York Times*, 6 Oct. 1929, p. E1; *ibid.*, 25 Aug. 1930, p.1.

<sup>35</sup> Shor, "The Evolution of Workers' Compensation Policy."

BOOK  
REVIEWS

## BOOK REVIEWS

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*AFTER THE GRIZZLY:  
Endangered Species and the Politics of Place  
in California*

PETER S. ALAGONA

Berkeley: University of California Press, 2013. viii, 323 pp.  
ISBN: 978-0-5202-7506-5

Professor Alagona sets the endangered species debate in California in a broad context fleshed out with specific reference to the California Condor, the San Joaquin Kit Fox, the Mojave Desert Tortoise and the Delta Smelt. He persuasively argues that endangered species debates transcend conservation biology and focus on governmental intervention in our market economy, issues of federalism, the role of science in public policy development, and the political economy of regionalism. In the historic process of discourse, habitat was the connective tissue between endangered species and contested places. Habitat was a key concept in conservation biology, law, and politics. In terms of federalism, endangered species illustrated the

expansion of federal governmental intrusion into the wildlife business of the states.

Professor Alagona contextualizes his analysis with the grizzly bear and its demise as well as the rise of conservation biology at the University of California, Berkeley under Joseph Grinnell. Grinnell's Berkeley circle did much to create the profession of wildlife management and the science of conservation biology. Science and policy worked to improve habitat and species preservation until the Endangered Species Act of 1973. Habitat was a means to conservation until environmental activists turned it on its head via litigation. In the hands of the Clinton Administration, "a new model of flexible, collaborative, and proactive management focused on the conservation of ecosystems and habitats." Then, "environmental organizations launched hundreds of lawsuits to force more aggressive implementation." These "lawsuits were beginning to drive natural resources management policy, and endangered species debates that once seemed contained had begun to proliferate and reverberate around the country" (p. 106). One example was the Defenders of Wildlife, Natural Resources Defense Council and the Environmental Defense Fund petition to the U.S. Fish and Wildlife Service to list the desert tortoise as endangered, albeit none of the organizations had participated in The Bureau of Land Management study of the tortoise (p. 162).

Beyond the California endangered species, the listing and delisting process has made national news. The U.S. Fish and Wildlife Service may take steps to remove a species from the list with standards and procedures akin to the listing process. Such actions are fraught with politics, much like the listing process. Most recently, the Rocky Mountain grey wolf was a contested delisting.

Professor Alagona does not explore the reasons for such intervention. They were free riders on the tortoise as were many green organizations on wolves. Many were anxious to cash in on Environmental Species Act litigation under the Equal Access to Justice Act, part of the litigation matrix left unexplored.

Why do lawsuits proliferate? Lowell Baier, President of the Boone and Crockett Club, explained to Wayne van Zwoll, one of America's most visible hunter-conservation advocates, that the Equal Access to Justice Act of 1980 has made it possible for "wealthy nonprofit groups to file round-robin

lawsuits against natural-resource agencies, impeding their work. A dozen such groups have filed more than 3,300 lawsuits in the last decade and recovered over \$37 million in litigation costs.” Who pays? “The awards come directly from agency budgets. Litigants and their attorneys profit, perpetuating the cycle.” Wayne van Zwoll correctly concluded, “Keeping the wolf in court enriches the people responsible for increased wolf predation of big game.”<sup>1</sup>

Clearly, litigation had impact beyond the courts and the administrative agencies. Although wolves were not part of Professor Alagona’s study, their fate helps explain the mass of litigation in California. For example, the Natural Resources Defense Council, using Earthjustice attorneys, collected \$1,906,500 in attorney fees in the delta smelt cases.<sup>2</sup>

Given California’s record, Professor Alagona concludes with the prescient wisdom of Aldo Leopold, the wildlife conservation biologist of the University of Wisconsin. Leopold believed “that it takes entire land communities, working together, to achieve a just, prosperous, and sustainable future” (p. 231). California needs “to move beyond the preservation of lands in protected areas to the integration of habitats in shared land communities” (p. 232). This book is a substantial contribution to our understanding of endangered species politics and forms a foundation for future research beyond the state’s boundaries.

— *Gordon Morris Bakken*  
*California State University, Fullerton*

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<sup>1</sup> Wayne van Zwoll, “Wolf War III: Issue is Cash Cow for Enviro,” *Petersen’s Hunting* 39:5 (August 2011), 13–15, 15. Bills to change the matrix are already in the congressional hopper. Representative Cynthia Lummis introduced The Government Litigation Savings Act or H. R. 1996 and Senator John Barasso introduced S. 1061 to get the legislative process started in July 2011.

<sup>2</sup> Lowell E. Baier, “Reforming the Equal Access to Justice Act,” 38 *University of Notre Dame Journal of Legislation* 1, 44 (2012).

*FREEDOM'S FRONTIER:  
California and the Struggle over Unfree Labor,  
Emancipation, and Reconstruction*

STACEY L. SMITH

Chapel Hill: University of North Carolina Press, 2013. xiv, 324 pp.

Index. Bibliography.

ISBN: 978-1-4696-0768-9

In 1850, as California was being compromised into the Union as a “free” state, the California Legislature passed an Act for the Government and Protection of Indians. The act created a system for indenturing Indian children within the state to white families, compromising California’s status as a “free” state. Over the subsequent decade, Californians created a variety of race- and gender-based unfree labor relations. Stacey Smith examines this “history of the unfree West” involving African-American, American Indian, Latin American, and Chinese laborers. In doing so, she challenges many prevailing interpretations of both California and the West in the Civil War era.

California’s gold rush turned the state into “an international labor borderlands” (p. 16). Laborers from all over the world migrated to California to mine the potential rewards from California’s veins. But the need for labor along with the ease of desertion from employers led to the emergence of a multitude of bound labor systems. Debt servitude, indentured labor, tenant labor, concubinage, and apprentice systems were some of the various forms of unfree labor in California. There was even a brief effort to bring Black slavery to California in the 1850s. California experimented with a fugitive slave law that allowed slaves brought to California before statehood to be taken back to the South. The rise of the California Republican Party by the end of the decade, though, ultimately halted the entrenchment of slavery in the state.

Other forms of unfree labor posed greater problems, both politically and ideologically. Mexican “peones” and Chinese “coolies” were particularly troubling. Largely imagined categories, they “became vehicles through which white Californians interrogated the troubling inequities of

the emerging capitalist economy and the unfreedoms of wage labor.” Not only did they represent what wage work could become, but by working for low wages, they could undermine the “rough economic democracy” of white miners (p. 81).

The domestic labor provided by women and children tended to escape the notice of free labor ideology. But Californians attempted to meet the demand for domestic labor in a variety of ways, including capturing, kidnapping, indenturing, and apprenticing Black, Indian, and Chinese children and women. As captured and apprenticed women and children were brought within the household, their exploitation was subsumed under “family relations” instead of labor relations, where male authority was at its apex under law.

Reconstruction affected these relationships in disparate ways. Slavery, of course, was ended with the Reconstruction Amendments. Indian apprenticeship was ended in 1863, although vagrants and convicts remained subject to forced labor regimes. The impact on the Chinese was more ambiguous. Chinese exclusion emerged out of California’s Reconstruction experience. Both the Page Act of 1875 and the Chinese Exclusion Act of 1882 grew out of antislavery ideology as they sought to exclude degraded forms of labor like prostitution and “coolieism,” which “helps explain how the Republican Party, ostensibly dedicated to equality before the law, could become a major force for Chinese restriction” (p. 229).

Smith’s study challenges the portrayal of the American West as a “free-labor landscape” (p. 3), and in doing so makes California’s history central to the story of emancipation. California’s diversity in the nineteenth century is what the rest of the nation would become in the twentieth, and its experiences a proving ground. One of the forms of labor left out of her story, though, is worth pursuing in more detail: exploration labor. Explorers in the West used a variety of militaristic labor forms, largely for security purposes. Given the inchoate nature of its government, and its official connections to railroads, agriculture, and slavery, the control of labor would seem to have been central to California’s state-building process.

— *Roman J. Hoyos*  
*Southwestern Law School, Los Angeles*





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