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All editorial correspondence should be directed to the incoming editor-in-chief:

Selma Moidel Smith, Esq.
Telephone: (818) 345-9922
Email: smsth@aol.com

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Oral History: Joseph R. Grodin, Professor of Law and Supreme Court Justice

Conducted by Leah McGarrigle

With this issue of California Legal History, the California Supreme Court Historical Society invites the bench and bar to explore the oral history of a distinguished jurist and scholar, Justice Joseph R. Grodin.

Justice Grodin was born in Oakland, California, in 1930, and was educated in public schools there and in nearby Piedmont. His early interests included football, poetry, Democratic Party politics, and Jewish leadership youth organizations. He studied labor economics and majored in political science at the University of California, Berkeley, graduating with honors in 1951. He went on to Yale Law School, completing his law degree cum laude in 1954. His summers were spent at the San Francisco law firm of Tobriner & Lazarus, where he began a long and influential association with Mathew O. Tobriner.

After pursuing a Ph.D. in labor law and labor relations at the London School of Economics, Justice Grodin continued his practice at Tobriner & Lazarus until 1971. He was a visiting professor of law

for a year at the University of Oregon before joining the faculty at Hastings College of the Law full time from 1972 to 1979. During this period Governor Jerry Brown appointed him to the Agricultural Labor Relations Board.

In 1979 Governor Brown appointed Justice Grodin to the First District of the California Court of Appeal (Division One), elevating him in 1981 to presiding justice. In 1982 Governor Brown named him associate justice of the California Supreme Court, where he served until 1987. He and two other Brown-appointed colleagues, Chief Justice Rose Bird and Associate Justice Cruz Reynoso, lost their statewide retention elections in November 1986 amid a controversial campaign to unseat them, largely over the issue of the death penalty.

Justice Grodin returned to the faculty of Hastings, where he taught labor law, employment discrimination, arbitration, and contracts. He continues to serve as Distinguished Emeritus Professor of Law. His memoir, *In Pursuit of Justice: Reflections of a State Supreme Court Justice*, is just one of his many publications.

The interviews on which this piece is based were conducted in 2004 by Leah McGarrigle, an oral historian and a former student of Justice Grodin's at Hastings. The oral history transcript presented here has been edited for readability and typographical correctness. Those wishing to read the full text or to quote from the official oral history may consult the original transcript online via http://bancroft.berkeley.edu/ROHO/collections/subjectarea/law/ca_supremecourt.html or in the hardbound manuscript in UC Berkeley's Bancroft Library.

— Laura McCreery, 2008
Program Director, Regional Oral History Office
University of California, Berkeley

TOPICAL SUMMARY

SESSION 1: September 14, 2004

McGarrigle: Today is September 14, 2004. Well, I'd like to start by asking you first to tell me when and where you were born, and then we can talk some about your family on both sides, what you know.

Grodin: Sure. I was born in Oakland in 1930. My father came here from Lithuania when he was about seventeen years old, back around the turn of the last century. He had an uncle here who was in the clothing business. His father was a rabbi, and his grandfather was also a rabbi in Lithuania. I don't know whether he came here primarily to escape the rabbinical succession or the czar's army. I suspect it was the czar's army, which was not a good place for a Jewish person to be. In any event, he came here. My mother was born in New York. Her parents had just recently emigrated there from someplace in Russia. They went from New York, almost immediately, to an obscure mining town in eastern Oregon called Sumpter, then moved down from there to Napa, and then from there my mother enrolled in University of California, Berkeley. This was in 1913. It was not all that usual for women to go to college, and in order to be able to go to college she moved down to Oakland to live with her aunt. As it happens, her aunt was married to my father's uncle, and my father was living in the same place. One thing led to another, and they were married. I had an older brother, twelve years older. Well, two older brothers, twelve and nine years older, who preceded me. I was the baby in the family.

McGarrigle: Was that decision of your mother's, to go to college, supported by the family?

Grodin: Oh, I think so. I have no reason to believe otherwise. I can't imagine she would have been able to do it without that. Her father had a small clothing store in Napa. My father's uncle had a clothing store in Oakland, and my father started to work for his uncle as a tailor and then later became a partner in the store, so that it became known as Schwartz and Grodin. It was a well known clothing store, located at that time on 11th and Washington Streets in Oakland. What else do you want to know about that period?

McGarrigle: Do you have family stories from either of your parents going back farther to the time, to their village in Lithuania?

Grodin: No, they didn't either of them talk about that. Of course, my mother never lived anywhere but the United States. My father I don't recall ever talking about his village life. He went back there once before I was born to visit. He sponsored two nephews to come to this country in the early 1930s. He was happy to get out of there and didn't seem to be particularly interested in talking about it.

McGarrigle: Was that a religious upbringing that either of your parents had in this country, once they—I mean, I know there was the rabbinical line—?

Grodin: Yes, well, of course my father, I think, inescapably had a religious upbringing in Lithuania. He lived in a small town called Vilkaviskis, the spelling of which I've seen as V-I-L-K-A-V-I-S-K-I-S, but pronounced Vilkavisk. I've seen pictures of the synagogue in Vilkaviskis where his father was a rabbi. When he came to this country he did not follow any kind of orthodoxy. He became active in the Jewish community in Oakland, and he was president of Temple Sinai in Oakland, which is a Reform congregation. It was a very sort of non-involved kind of religion that I grew up with. Both my parents seemed very eager to assimilate and be American, so my mother displayed no interest in her upbringing. My father died when I was thirteen, so that was before I myself became interested in exploring my roots. Later on when I talked to my mother, who lived until age ninety-six, died in 1989, she remembered very little and apparently didn't inquire herself. So she was very vague about where they lived, somewhere near Kiev, and that's all I ever knew. Her family was not particularly religious either.

McGarrigle: Did you celebrate holidays growing up, religious holidays?

Grodin: Not much. I do now, but at that time I guess we had seders and we went to temple on high holidays, and that was about it.

McGarrigle: You said you were born in Oakland. Where was your first home in Oakland?

Grodin: It was on Annerley Road, which is just off of Lakeshore.

McGarrigle: Did you go to Oakland public schools?

Grodin: No. By the time I was five and ready to go to school we had moved to Piedmont, and so I went to Wildwood School in Piedmont, and then to Piedmont Junior and High School.

McGarrigle: Do you have recollections early on, for example, of kindergarten or first or second grade, elementary school memories?

Grodin: Well, I remember some things. Piedmont was not a terribly hospitable place for Jews. Or Democrats! [laughter] So I remember my family among the few Democrats who lived in Piedmont, and I remember being teased at the school playground. This must have been 1936 or 1940, I don't remember which election, one of those two elections when Roosevelt was on the ballot. Everybody else was Republican and I was about the sole Democrat.

McGarrigle: And the children knew that?

Grodin: Yes, they knew that. I don't know, they talked about it.

McGarrigle: Were things then as they are now in Piedmont, that people moved there because of the schools? I wonder what motivated your parents.

Grodin: I don't know that the schools were regarded as being better than the schools in Oakland. Perhaps they were. It was kind of an upwardly mobile enclave. My father struggled during his early years here, and the place on Annerley Road was a very modest house with two bedrooms. My two brothers shared a room, and I was in the room with my parents until I was five years old and we moved. My father and their store did surprisingly well during the Depression. Of course, land was inexpensive, construction was inexpensive, and he built that house in Piedmont, on Requa Road, that we lived in until after my

father died. The Piedmont schools I don't remember being particularly stimulating anywhere along the line, certainly not in Wildwood School. In Piedmont High School, there were a couple of outstanding teachers who were stimulating, but I don't remember being really excited over studying things. I mean, I did very well and I got all A's, but I don't remember being excited about learning or studying things until I got to college.

McGarrigle: That being said, were there particular subjects that stood out more than others, even though the whole flavor wasn't necessarily so interesting?

Grodin: There was a very interesting history teacher there by the name of Anna Guest, who was a Texas Democrat and so was one of the few kindred souls in Piedmont High School. At election time it was her practice to put on a mock convention. She had students who nominated candidates and gave speeches for candidates and so forth, and because I was one of the few Democrats there, I volunteered to nominate Franklin Roosevelt. Yes, she was a creative teacher and that was interesting, and I suppose stimulated interest on my part in political matters.

I had a pretty good English teacher, and I liked to read. I read a lot. I enjoyed math, and we had an excellent math teacher, and a very good science teacher. I was interested in science, and at one point thought that I might want to be a chemist because my older brother Cliff had a chemistry set in our basement, and I inherited that. I used to like to fool around, and he taught me chemical equations before I had a chemistry course, and so I was interested in all of that. But, that interest didn't last.

McGarrigle: In terms of reading, do you remember being introduced to certain books that caught your attention, maybe in high school English?

Grodin: You know, about the only thing I remember from the English class was that we read books and wrote book reviews, and I wrote a review of a book—I think it may have been *The Last of the Mohicans* by [James Fenimore] Cooper—and expressed the view that it wasn't a

very good book. I got the paper back where the teacher had put a big "X" by that and said I was wrong, it was a very good book. [laughter] That was my introduction to literary criticism.

Apart from that, I was a rather shy kid. There was a good deal of anti-Semitism that was in the atmosphere at Piedmont High School at the time. It was in the atmosphere among the students—certainly not all of them, but some of them—and it was in the atmosphere among some of the faculty. I felt during that period sort of awkward about my being Jewish. That changed when I got into college, but that was the case with high school. I felt awkward also because I was rather pudgy and not very athletic until I was about fourteen or fifteen. Then I began to lose my pudginess and became very athletic and became a football player. I was a first-string, all-county guard, and I ran on the track team, although not very well. That sort of changed my outlook on life because it changed the way the other kids looked at me, and I acquired a lot more self-confidence.

McGarrigle: In terms of the anti-Semitism and this general atmosphere among some of the students and the faculty, were there overt incidents of people saying things to you, or doing things to you?

Grodin: Not directly to me. It was just remarks they would make with one another.

McGarrigle: Did that relate at that time to what was happening in Europe and to the war?

Grodin: I suspect it did. I suspect it did, but in a very complex way, one I haven't really thought about. But, then anti-Semitism even before the war was a common thing in this country, and particularly among the well-to-do kind of folk that inhabited Piedmont. They were the upper crust. That, of course, has changed. We had no black students in the school. Zero. There was one Japanese-American student who came to the school, it must have been after the evacuation camps, after the Japanese were released from the interment camps. He had a terrible time in the school. The other kids picked on him mercilessly. The war was still on. Was it still on? I don't know, maybe it was over by that time. I remember when Roosevelt died and his death was announced

through the loudspeaker system that went into all the classrooms. Many of my classmates cheered and clapped at the news, so that was the kind of atmosphere that existed in Piedmont. That's all changed.

McGarrigle: I'm interested in learning about how you became aware of politics, and if that was a part of your dinner discussion, for example, at home.

Grodin: I'm sure it was. My father was somewhat active in the local Democratic Party, and they were very interested in what was going on in the world. I remember sitting at the dinner table and listening to Walter Winchell every Sunday, and H. V. Kaltenborn, the news commentator. Most of it was about the war, and I followed the war very closely. I had a map, and I knew where our troops were, and where the battles were going on. My older brother Cliff was in the army by the time I was nine or ten, so it was of great interest to me, where he was and what was going on. I vaguely remember discussions about Roosevelt; of course Roosevelt was a great hero in our family, and in most Jewish families for that matter. Yes, it was nothing specific, but it was in the air, an interest in world affairs, current events, politics.

McGarrigle: So, the social programs and the other developments in the Roosevelt administration, they weren't something that you specifically followed?

Grodin: Not at that time. I didn't know that much. I was not that sophisticated.

McGarrigle: Were labor issues relevant for your father at that point in his business?

Grodin: There was a union that represented the employees of the store, the Retail Clerks [International] Union. I think they got along very well. I worked in the store when I was a kid, during summers and Christmas vacation, selling shirts and ties and stuff—they didn't trust me with suits and jackets. I worked down in men's furnishings and also marking prices, putting tags on shirts and socks, hours and hours at a time. One of the people who was a salesman in furnishings

was the head of the union, or maybe the shop steward for the union, I don't know. At any rate, he used to talk to me a little bit about the union, and he thought highly of my father and they got along well. Otherwise, I was not much aware of unions. I remember a paper I did. I guess I was a senior in high school. There was a strike by milk wagon drivers, and so no milk was being delivered. Later on when I went into practice and represented unions, the milk wagon drivers local was one of our clients. But, at that time I remember being rather upset about the idea that there would be a strike that would disrupt the delivery of milk. [laughter] I wrote a paper called "Our Alienable Rights." I'm a little bit ashamed about this now. The paper was called, "Our Alienable Rights," and when my teacher first read it, she was distressed because she assumed that I meant inalienable rights. I actually meant alienable rights because the argument of the paper was that humans' right to strike should be balanced against the interests of the public and the children in getting their daily milk. I became interested in unions when I went to Cal [University of California, Berkeley] and started studying economics, history, and political science more seriously.

McGarrigle: You mentioned that when you were about fourteen or fifteen, you underwent a physical change.

Grodin: Yes, I grew up. I grew taller and thinner and physically active. I became a pretty good athlete, and that leads to popularity among teenagers.

McGarrigle: What was your position on the football team?

Grodin: I was what they called a running guard and also a fullback, because in those days you didn't have an offensive and defensive team. You went in and played for sixty minutes, or until you got tired, or hurt, and then somebody else went in. You played both offense and defense. On offense I was a running guard, which meant that on certain plays I would pull out from the line and run around the end to do interference for the runner and block the end. That was my job. Piedmont High was champion of the Alameda County Athletic League two years in a row, and that was all very exciting.

McGarrigle: Who was your coach?

Grodin: A nasty fellow by the name of Brick Johnson, who was one of the overt anti-Semites among the faculty at the school. [laughter] He treated me well because I performed on the field. He never said anything directly to me about my being Jewish, but I remember his referring to a fellow who was not Jewish, but whose name was Mike. Johnson referred to him as "Mike the kike," in a joking way, because it was not—the coach knew he was not Jewish, so it was not aimed at him. It was just fun, he thought.

We had a game against Richmond High School, and Richmond, at that time, had a lot of minorities in the school system. It still does. I remember a pep talk that the coach gave, and he said, "Now, we want you to get out there and show them that we are better than those niggers and wops." That just struck me. I didn't say anything. I'm ashamed that I didn't, but it just struck me in the gut. It's interesting, I still react with emotion about that. I didn't like that guy, but I did well as a football player nonetheless.

McGarrigle: Was it a situation at home where your parents understood this was part of your experience in the outside world? Or, where you discussed it, or were you more on your own?

Grodin: I don't think that I ever discussed it with them. I doubt that I did. I mean, it was one of those things where you come home and, "How was school?" "It was fine." "What happened?" "Nothing."

McGarrigle: Did you have other friends in high school who were Jewish who shared similar experiences?

Grodin: Yes.

McGarrigle: Would you discuss among yourselves the—?

Grodin: Not much, not much. No, I don't really remember any discussions with other kids about that. I guess it was sort of a sensitive topic for all of us, and we just didn't talk about it.

McGarrigle: I don't think it's uncommon, I just wondered. I think

that's very common.

Grodin: I went to Sunday School at Temple Sinai. It was a dreary religious education which became less dreary as I grew older and interested in girls. There was a teen club there, so I sort of looked forward to going to Sunday School because there would be teen club meetings afterwards at which we would plan dances and things. I forget the question.

McGarrigle: I asked if you socialized with other Jewish kids who maybe had similar experiences?

Grodin: Yes, right. None of the kids in the teen club were from Piedmont. There were only a handful of Jewish kids in Piedmont, among whom was my wife. Our families knew one another, but we had no relationship with one another during high school at all. Not even an acquaintance.

McGarrigle: It was in college.

Grodin: Yes, it was. Right.

McGarrigle: Did your mother work following her graduation from Berkeley?

Grodin: No, she married my father. She didn't graduate from Berkeley. She married my father, left school, and had a baby, who was my older brother Dick. That was in 1917 or 1918, which saved my father from having to go into the army here.

My mother was very active in a variety of community affairs, both Jewish and non-Jewish. She was active in Hadassah. She was active in the women's needle guild. They made endless quantities of socks and sweaters or whatever to send over to the troops during World War II. My brother Cliff was the block warden on our block in Piedmont when the war started. Every block was organized with block wardens, who would go around and make sure that when an air-raid siren sounded—we all had black curtains on the windows and black shades—that these were all pulled down so that no light would show up. We had a couple of—two or three—test sirens, and a couple

of actual events, which proved not to be attacks, but it was kind of exciting.

McGarrigle: Do you remember when he first went off? You said he went overseas.

Grodin: First he went into the army when—it must have been 1941 or 1942. I was wrong before, I was about eleven, I guess. He went to Monterey to, maybe language school? He went to officers' training school in Colorado. We would then see him from time to time, and then he was sent over to Europe after the invasion, after D-Day. He was part of the military intelligence, and so he was behind the lines, except that I remember getting letters from him during the Battle of the Bulge, when the Germans broke through our lines. He was suddenly a lot closer to the front than he had been, and they suddenly thrust a rifle into his hands, which he didn't remember how to use because he was using a typewriter. Fortunately, they didn't get that close.

McGarrigle: He returned from the war?

Grodin: He returned from the war.

McGarrigle: Do you recall rationing during that period? You were talking blackouts.

Grodin: Oh, sure. There was rationing, mainly of sugar, which was of particular interest to me at the time, because I loved sweets, and candy was very hard to come by. There was gasoline rationing, and we used to trade gas stamps with people who didn't need them, for something else.

McGarrigle: Do you recall what kind of family car you had at that time?

Grodin: It was a Packard. My father used to like to take trips. Before he became ill, about when I was twelve, we took a lot of trips and they were quite adventuresome. Looking back on it, it's rather surprising. When I was nine years old, we went up to—we must have driven up to Vancouver and taken a boat trip on the inland passage in Alaska.

This was 1939. I don't think anybody was doing that then! The war had already broken out in Europe. I remember seeing signs in Canada about the war. We used to go to Yosemite, we used to go to Tahoe, and up the Russian River, and up to Crater Lake, traveled around a lot.

McGarrigle: Did you start your hiking, your lifetime interest in hiking, at that time?

Grodin: Not really until a little later. I went to Boy Scout camp during summers and I was active in the Boy Scouts. My older brother Dick had been a troop leader. I became some kind of leader, I guess troop leader. I became a counselor when I was in high school, at the Boy Scout camp. I became a hiking counselor, so I would take kids out on hikes. We would take all of our food along. There was no freeze-dried food then, so it was pretty heavy usually, and backpacks that we had were pretty primitive. They hadn't figured out how to pad shoulder straps, so they just cut into your shoulders. They hadn't figured out how to make down sleeping bags, so the sleeping bags weighed about ten pounds. We would go sometimes for five-day trips, and I would do cooking for the group, so I became a master chef in the outdoors. I enjoyed that. I was an Eagle Scout at thirteen. My love of hiking and wilderness stems from my scouting experience.

McGarrigle: That must have been quite an expedition. How did you get to the Sierras from here? Or, I'm assuming you were in the Sierras for Boy Scouts.

Grodin: Yes. The camp was near Keddie, California, which is on the Feather River, and there was a lot of country that was accessible from there. We had a camp truck that would take us to the trailhead, and then we would hike.

McGarrigle: You mentioned that when you were about twelve your father became ill, and he passed away when you were about thirteen. What did he die of?

Grodin: A heart attack.

McGarrigle: At that point, did you and your mother leave the home

in Piedmont?

Grodin: Actually, it was some time after. It was several years after that that we left the home in Piedmont and moved to the Regillus Apartments down by Lake Merritt. I was already a freshman in high school by the time we did that, so it was about four years after my father died.

McGarrigle: Your older brothers were out of that house. At least Cliff was out of the house in the army?

Grodin: Oh, Dick was out of the house. Dick was twelve years older than I, so I barely remember him being in the house. By the time we moved to Piedmont when I was five, he was seventeen. Not long after that—well, he was off all the time—he went to college, he went to college down at St. Mary's for a while. Then he was in my father's business, and he got married and moved out, so he wasn't around a whole lot. My two cousins, my father's nephews whom he brought over from Lithuania, lived with us in our house in Piedmont.

McGarrigle: What ages were they relative to you?

Grodin: One was eight years older and the other, I don't know, thirteen years older. The older one, Allen, had studied law in Lithuania and came over here. Of course, he couldn't use his law degree from Lithuania, so he went to Boalt and passed the bar. Then he went into the JAG [Judge Advocate General] in the army and served in the army. Then, became an administrative law judge and moved back to Washington, D.C. I was never particularly close to Allen. The younger one, his name was Joe, had trouble learning English and I spent a lot of time teaching him. We would read poetry together. We had a book called *101 Famous Poems*, and he loved that and so did I. We just spent a lot of time reading this poetry, and teaching him to pronounce correctly.

McGarrigle: Did you have particular poems or poets that you gravitated towards?

Grodin: Oh, let's see. There were some poems that I still remember, or at least parts of. Who was the author? "I want to live in a house by

the side of the road and watch the race of men go by, some good, some bad, as good and as bad as I" [Samuel Walter Foss, 1899]. Something like that. I forget who wrote that. I remember liking very much the poem which contains the lines, "I am the captain of my fate, the master of my soul" [William Earnst Henley, 1875], but I don't remember the rest of it, nor do I remember the author. I remember being very fond of Rudyard Kipling's "If." Do you remember that? Part of it goes, "If you can trust yourself when all men doubt you, and make allowance for their doubting too." If you can do this and that, et cetera, ending up "You'll be a man, my son." That was the bottom line. I think there was some Robert Frost in there. It was not very obscure poetry, it was sort of on the surface of reading poetry, but I liked it.

McGarrigle: Well, you grew up in a household, even though I know that your older cousin and your oldest brother were quite a bit older—both your brothers were quite a bit older—a lot of men in your household, boys and men.

Grodin: Yes, that's true. Yes, my mother was the only female in the household.

McGarrigle: Did she cook any kinds of traditional foods?

Grodin: Oh, yes, she did.

McGarrigle: What kinds of things did she make?

Grodin: Delicious things that I don't know how we managed to survive. Chicken cooked in its own chicken fat on the stove. They tended to be oily things. Chopped chicken livers was a favorite of hers. She had a sweet and sour salmon dish which was very good. Brisket, she made brisket. She made a lot of eastern European things, which were also Jewish things.

McGarrigle: How did it come to be that your father brought the two boys over? It sounds like they were quite young when they came here.

Grodin: Well, they were in their twenties already, maybe late teens.

The war had started in Europe, and Lithuania was clearly not a safe place for Jews to be. He tried to get all of his family out, but they wouldn't go. His father, the rabbi, had come to this country briefly in the thirties and had a pulpit somewhere in northern New York, but went back to Lithuania because it was not kosher, nothing was kosher enough for him. There were a couple of other, I guess, nephews of his, or nieces, relatives of his—I'm not precisely sure how they were related—who had tried to get out. We have the papers of his offering to sponsor them and all that, and then, all of a sudden it became too late, and they couldn't get out, and the Germans were in there. His entire family was wiped out, not by the Germans but by the Lithuanians, we learned later after the war.

McGarrigle: You mentioned the older of your cousins who came went to Boalt, and the younger one who you read poetry with?

Grodin: The younger one, although he liked to read poetry with me, had not gone to college, was not interested in a college education. He was sort of a rustic person, I would say, a simple kind of person. He went into the army, he came out, he got married, and moved to Petaluma. Sebastopol actually, near Petaluma, where he, along with many other Jews, started chicken farming. He was a chicken farmer, but also a machinist. He did have a background in tool-and-die ware for some kind of machinist's work. He worked in the Moore Shipyard in Vallejo, so he commuted from Sebastopol to there. Then one day he was driving back late at night, he was on the swing shift or something like that, and had an accident and was killed. He and I used to go for walks together. I liked to walk a lot when I was in high school. We would start out in Piedmont and walk down to Lake Merritt and all the way around Lake Merritt and back again. That must have been eight miles or so, and that was fun.

Grodin: I went over to Europe in 1947 for an international Boy Scout Jamboree, and I traveled with a couple hundred Boy Scouts across the country and visited the Grand Canyon and New York, and I don't know where else we visited. Then we went by troop ship, what had been a troop ship during the war, to sail to Antwerp, in Belgium. This was a very impressive experience for me all the way around. It opened

my horizons a good deal. I'd been pretty insular in Piedmont. All of a sudden, first of all, I became aware of how big a country this was. I became aware of how diverse a country it was. I encountered, for the first time, the kind of overt racial bigotry that existed in the South at the time. I remember passing through the South and seeing signs "colored" and "white" outside lavatories, and just being astonished and horrified by that. I became friendly with a kid from Florida, who was a nice kid, and a bright kid, and we had good times together. But, he was a Southerner, and he reflected that outlook, which was just quite new to me. I mean, I was aware of racial bigotry even at Piedmont High School, but not of that kind—the kind that sort of admired the Ku Klux Klan and that sort of thing. That was an eye opener for me. We went across on the troop ship to Antwerp. This was just two years after the end of the war, so there were a lot of ruins, a lot of bomb damage, that you could see walking around. That brought home to me what the war was like. Then we went to a small place on the Seine River west of Paris, near wherever it is that the Seine River dumps into the Atlantic.

McGarrigle: Near La Rochelle, maybe?

Grodin: No. Anyway. Le Havre? Maybe Le Havre? At any rate, there I met kids from all over the world. We walked around—each country had their own area—and we spent a lot of time walking around seeing kids doing whatever they did. I remember Indian kids making Indian bread over a stove. I became aware as I had not been before of the world's diversity, and differences, and intolerances. The Cold War was just beginning, and there were Russian kids there. That was the last time that there was any kind of interaction. I remember when I came back to high school after that experience, I was asked to give a talk to the school assembly. I did that, recounting some of my experiences, and I remember talking about how it was inconceivable to me that any of us would be asked to go to war and fight against any of those people who had been there. I was specifically referring to the Russians. There was a lot of Cold War talk in the air, about how we might have to fight the Russians. That was a formative experience.

McGarrigle: How long do you think you were gone? That sounds like a huge trip.

Grodin: Probably six weeks.

McGarrigle: Who were the chaperones on that trip?

Grodin: Some men who were Boy Scout leaders. They went off to Paris while we were camped, but they wouldn't let us go. It was years later that I—I had to wait to go to Paris.

McGarrigle: Was that a trip that your mother was eager for you to go on?

Grodin: I think she was. I think she understood that I had probably become somewhat introverted after my father's death, and that I needed to have some experience like that. I think she understood that. In any event, she was quite enthusiastic about it.

McGarrigle: Even today that's quite a major undertaking, and things have changed so much in terms of transportation and communication, so I couldn't imagine this, a mother, letting her son go off so far.

Grodin: Well, I must say she was very good that way. She had a lot of confidence in me. When I graduated from high school, I went off on a week-long backpack trip with another kid in Yosemite, and she felt that was fine. I was pretty self-reliant by that time.

McGarrigle: What year was it in your high school education that you went overseas?

Grodin: This was 1947, so I would have been a junior. I graduated in January of 1948, so junior/senior, in between my junior and senior year.

McGarrigle: After graduation, did you go directly to UC Berkeley?

Grodin: Yes.

McGarrigle: How did that decision come about, to attend Cal Berkeley?

Grodin: You know, it just seemed like a natural thing to do. The idea of going away to school was not something which had great appeal to me at the time. A bit later, I went off to law school. At the time, staying home and going to school seemed like an easy thing to do, and there Cal was close by, and why not? All my friends were going to Cal, and so I did too.

McGarrigle: How did you get yourself to school every day?

Grodin: I had a car, a little Plymouth.

McGarrigle: Was that unusual in your group of friends, to have a car?

Grodin: I have to say, not in Piedmont! [laughter]

McGarrigle: Things haven't changed that much.

Grodin: My mother bought me a car when I graduated. A lot of my friends had cars before they graduated. I didn't get one until I graduated.

McGarrigle: And there weren't the parking issues there are today?

Grodin: No, it was pretty easy to park. Although that's actually how Janet and I became better acquainted. We had a carpool, which meant that I drove a car and picked up other people. One of the people I picked up was her brother, and when he graduated she inherited his place in the carpool. She was very important to me, because she could remember where I had parked the car. From that we went to a more substantial relationship. Yes, I went by car.

My first semester, my first year at Cal, was just an enormous awakening, because, as I say, high school was not very exciting. I found myself with some truly inspired teachers. I just began to balloon intellectually.

McGarrigle: I'm sure you recall the subject areas and the teachers specifically.

Grodin: There was one who was particularly important to me, his name was Jacobus ten Broek. He was a graduate of Chicago Law School, a brilliant, brilliant guy. He was blind. He should have been in the law school except, fortunately for those of us who had him, they didn't take him. He taught in what was then called the Speech Department, but it had very little to do with public speaking. It's now called the Rhetoric Department, and it had much more to do with reasoning and logic and analysis and dialogue. It was an eclectic department which attracted people from various other departments, like history and political science. Ten Broek's interest was legal, and I had the idea then that I might want to go to law school. I guess I was not really strong on going to law school at that point. He taught a yearlong speech 1A/1B course; the first semester of which focused upon U.S. Supreme Court decisions and related material on the subject of the First Amendment, and free speech, and the second semester on equal protection. It was just a marvelous course, absolutely wonderful in terms of his ability to engage in Socratic dialogue with his students and draw us into thinking about these problems. I never had as good a teacher as that before or since. I spoke a lot in ten Broek's class, and apparently, ten Broek was impressed with some of the things that I had to say.

He invited me to join a group of professors and students, mainly graduate students—I was just a freshman—which met weekly in the home of Charles Aikin, who was a political science professor. These meetings took the form of someone who had been assigned a particular topic or a particular book, or who was writing something, presenting some ideas and then the rest of us would sit around and discuss those ideas. That was more valuable to me as a learning experience than any formal course that I took. One of the people who attended those weekly sessions was a fellow by the name of Richard Wilson, who was an assistant professor there, but who headed the debate team. I was invited to join the debate team, and the debate team—just as the Speech Department had very little to do with speech, the debate team had very little to do with debates. Although, since we were called the debate team, we got some money from the ASUC student association to travel and debate. Once a year, usually it was during the Christmas break, we would form teams and go around and debate other colleges, and we would do some debating in Berkeley. I remember there were a couple of people who came over from Britain, from Oxford, or one

from Oxford and one from Cambridge, from their debating teams. They came over, and we had a joint debate. I was matched with one of them, and another fellow, I think it was Ed Kallgren, who has since—

McGarrigle: I know Ed.

Grodin: You know Ed?

McGarrigle: Yes.

Grodin: I think he was on the other side, along with the other person from Britain. As I recall, the subject was, "Resolved, that democratic socialism is the best alternative to communism." I had the affirmative of that proposition, along with a fellow by the name of Jack Ashley, who later became a member of the House of Commons in the Labour Party in England. These guys from England were so good. I mean, they just humiliated us. I remember one line that my British opponent said. He said he had taken the boat over, the ship from England, and experienced for the first time American tinned food. He said he found nothing more depressing than American tinned food unless it was American tinned debates. [laughter] Kind of a low blow! At any rate, the debate team met weekly and was patterned after these weekly meetings at Charles Aikin's house. We would sign up for topics that we were interested in. Wilson would post a bunch of topics and books, and we would just sign up for them. Very little supervision. When the time came for the weekly meeting, individually or in pairs, we would make a presentation about a book and then there would be discussion. That was a very, very stimulating group of people, some of whom I continued to be friends with over the years. Kallgren was one of them. His wife Joyce was one of them.

Leah, this is my wife Janet.

McGarrigle: Hi, Janet. We won't be more than twenty minutes.

Grodin: Allen Broussard, who I later served with on the California Supreme Court, was a member of that group. Jim Goodwin, who we're still friendly with, was a member of that group. It was an enormously exciting experience. I was with it for my whole period through—I guess

through three years. It was a course you would sign up for. You'd get two units of credit for it. At Cal, I was interested in so many different things that I found it difficult to select a major, so I selected what they called general curriculum, which was usually something that people who wanted to go into teaching selected, until I got tired of telling people that my major was general curriculum. Then I switched into political science, which had requirements that were less strict than the other majors that I would have considered, like economics or sociology.

McGarrigle: Janet, feel free to have a seat if you'd like.

Grodin: In other majors, you had to have twenty-four units. In economics, in sociology. In political science, you only had to have eighteen units, plus six in related fields, but everything was a related field. So, that's what I did, and I had a wide variety of courses. I was interested in economics, I was interested in political science, I was interested in sociology and in cultural anthropology. For a while there, I thought I had the answer to all of life's value questions through a combination of those studies. I don't know how rapidly you want to move through this or whatever other questions that occur to you.

McGarrigle: We'll take our time. The answer to life's value questions—can you speak to that?

Grodin: Oh, you want to know the answer to life's value questions?

McGarrigle: Yes, I'm very interested!

Grodin: The central question that I confronted in all of these classes that stimulated me—the speech class, the debate class, Aikin's weekly sessions—stemmed from a kind of skeptical relativism about moral values, about value judgments. The constant question that we always debated endlessly and without resolution was: How do you persuade somebody that this policy decision is preferable to that policy decision? Is there a way to justify the choices you make, other than by saying, "That's what I like. It appeals to me." One focus for that question was "society in general." What is the best society? What is the best political

system? What is the best economic system? That was a central question at the time. Are we going to move in the direction of socialism or not, and if so, how? I became very interested in the work of Eric Fromm, who made a kind of psychologically oriented argument about political choices. He tried to argue that the best system is one that is cooperative and not competitive, and so forth.

My idea was this, a very simple idea. All you have to do is, you find out what social system seems to be most conducive to people's psychological well being, and that assumed that somehow you could measure and evaluate people's psychological well being. Then, that's what you do. I saw this as being an antidote, or an answer, along the lines of Jeremy Bentham and the British utilitarians who talked about the greatest good for the greatest number, but the economists were translating that into simply the choices that people make. The greatest good for the greatest number meant whatever stocks people bought, or whatever houses people bought, or whatever medical care they bought, or whatever, whereas this purported to provide some kind of objective criteria for evaluating society and social systems. For a while I was very excited about the idea that cultural anthropology combined with psychology/psychiatry combined with sociology and political science could somehow develop theories that would provide answers to these questions. I've since—I was pretty naïve about that. At any rate, that was a central theme with my thinking in college.

McGarrigle: The shift is tremendous. I was going to ask you about the students, but you already answered the question by talking about some of the people that you knew at that point, and how different they were than the people who you knew in high school.

Grodin: Oh, yes. I didn't know anybody in high school of that caliber. As it turns out, there were a couple that I guess like me didn't really blossom until they were out of high school. I've since become very friendly over the years with Rich Morris, who became the head of the Lawyer's Committee for Urban Affairs and very dedicated to legal aid programs and things of that sort. But, at the time, in high school, I don't remember any discussions with anybody that involved any of these sorts of things.

Another thing that happened along the way, after my freshman

year in high school, I went to Brandeis Camp. Are you familiar with that?

McGarrigle: With Brandeis, but not with the camp.

Grodin: You're familiar with Brandeis University?

McGarrigle: Yes.

Grodin: Well, before there was a Brandeis University, there was a Brandeis Camp. They're unrelated. Brandeis Camp was a camp that had a facility in Southern California and also one back east, and aimed at taking kids at seventeen, eighteen, who were involved in some kind of Jewish leadership. As a senior in high school, I had become involved in something called the Western States Jewish Youth Conference. I liked the idea of having meetings and talking to people about issues. Israel had just recently become a state, and Brandeis Camp had a pro-Israel, pro-Zionist flavor to it. It combined an emotional appeal, based on music and Israeli dancing and songs and all that—the kind of very strong emotional appeal—with substantive courses in Jewish history, Jewish literature, that sort of thing. It was a six-week program. Janet went there a year or two after I did. That was another kind of formative experience for me, because it was an atmosphere in which everybody else was Jewish, and being Jewish was a great thing, and being identified with Israel was a great thing. I came out of that really totally changed. I mean I'd lost the previous—I guess, what would you say—inhibitions or feelings of inferiority that I had developed over time about being Jewish, and just completely lost it, just really in a six-week period.

McGarrigle: How did it come to be that you—was that a program that your mother knew about? Or that you knew about?

Grodin: It was something my mother knew about and had been approached on. I don't know whether the approach came to her first or to me first. I really don't remember. There was a person in the Bay Area by the name of Rita Semel, who was very active with Brandeis Camp and a lot of other things, and somehow, she and I had made contact.

Janet Grodin: You were active before—

Grodin: Yes, in the Western States Jewish Youth Conference. She urged me to do it, and that seemed like a good idea.

Janet Grodin: There you met kids from all over the place, too, that you kept in touch with, like Marty Rosen.

Grodin: Yes, I made some very close friends. It was a very intense experience.

McGarrigle: You did that more than one summer?

Grodin: No. One summer.

McGarrigle: Just one summer. Before college.

Grodin: No. The summer between my freshman and sophomore years.

Janet Grodin: It wasn't high school, though. It was freshman and sophomore in college, wasn't it, Joe?

Grodin: Yes. Isn't that what I said?

McGarrigle: Oh, okay. I'm the one who misunderstood.

Janet Grodin: You might tell her who Marty became. The friends you met there.

Grodin: I think I may have given you Marty Rosen's name. Marty was a lawyer, for a while associated with our firm, but went off and formed an organization called Trust for Public Land. He was the president of that for many years. We can go back and fill in, but just to bring this to conclusion for the day, at some point, I had somewhere in my junior year enrolled to do graduate work at Harvard in what they called political economy, which was a combination of political science and economics. That's what interested me. I was interested in public policy issues, and that seemed the way to go. What would I do after that I

didn't know, but that seemed like a good idea.

I encountered a fellow by the name of Vic Rosenblum, who was working on a Ph.D. at Cal and was a section leader and teaching assistant in some political science course I had. I became familiar with him through that. He had a law degree from Columbia, and he and I talked about what I was going to do. He persuaded me that instead of going to graduate school to do political economy, I should instead go to law school and get a law degree. His argument was that a law degree, especially if I went—and he was pushing me on Yale—to a place like Yale, the course of study would be a lot like political science, political theory, but in the end I would come out with a law degree, and that would be valuable no matter what I wanted to do. Maybe I would want to practice law, or maybe I would want to teach, or maybe I would want to go on and get a Ph.D., but in any event that would be a good building block. He was very persuasive.

I started out to make inquiry about going to law school, and I guess it was my mother who suggested that I talk to a friend of the family's by the name of Monroe Friedman. Monroe Friedman was a lawyer, and he was one of the lawyers that my mother knew. He had been a judge, too. He was a superior court judge, and I don't remember if that came later or not. At any rate, I went to see Monroe and I told him about my interests. By that time, I had acquired an interest in labor unions. I had had some labor courses, labor history, labor economics, and I was interested in unions. I expressed an interest possibly in labor law, and he said, "Well, I have a friend from the Democratic Party who you ought to go to talk to." He sent me to Mat [Mathew O.] Tobriner. The two of them—Monroe had been a treasurer of the local Democratic Party, and Mat had been active.

I went over to San Francisco—they were then in the Russ Building—and we hit it off. Mat, who was a person who knew his own mind and was very forceful, said, "Yes, you ought to go law school and you ought to study labor law. Then you ought to come here after your first year and we'll put you to work." So, okay. I applied for Yale Law School and got in and went there. It was over a period of two or three months that I changed my mind from going to graduate school at Harvard to going to law school at Yale.

Janet Grodin: Were you already accepted at Harvard?

Grodin: Yes.

Janet Grodin: Then, the other thing, before you leave the University of California, there was that seminar that you were involved in with Joe Tussman and—

Grodin: I told Leah about that. Yes, Joe Tussman was also part of that Aikin seminar.

McGarrigle: In retrospect, what do you think about that change in plans?

Grodin: Oh, I never had any doubts about it. I mean, I never had any doubts about it from the moment I stepped foot in my first class in law school.

McGarrigle: Was it true that—what was the thread? The person who persuaded you to make the change and apply to Yale said that you would get some of the same subject matter at Yale. Did you get some of the same subject—?

Grodin: Yes.

McGarrigle: You did.

Grodin: Yale had been, for many years, at the forefront of the legal realist movement, and so it had some non-lawyers on the faculty, and it stressed the relationship between law and philosophy, and law and sociology and other disciplines. Not yet law and economics, that was not a big thing at the time. The whole curriculum at Yale was built around the idea that the law is more than a set of rules that you come there to learn, and that decisions that judges make are inevitably a product of many factors.

From the very first class, we would be talking about: What are the elements of this decision? What does it reflect? What kinds of judgments does it make about society, about the parties, about how the law relates to these questions? A kind of scientific approach to the law, if you like. That was exhilarating! I didn't know that's what law school was going to be.

McGarrigle: You went to the right place.

Grodin: I went to the right place. After that, other law schools moved in that direction. I mean, I don't know that there's that much difference now between, say, Yale and Harvard, or Boalt or Stanford. But at the time, Yale was at the forefront of that.

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McGarrigle: We had left off talking about your decision to go to Yale, a little bit about Yale, and I understand that maybe it wasn't too substantial, but you had some exposure to labor courses at Cal?

Grodin: I did. The only courses I recall are a course in the economics department on the Austrian labor movement by a guy by the name of [Charles A.] Gulick, who was fascinated by that, and a course from Lloyd Fisher on union government, which did influence me very substantially. I became interested in that. I had talked with Mat Tobriner about going to law school. Of course, his practice was labor law practice, and he not only encouraged me to go to law school but also promised me a job after my first year in law school, doing labor law. That encouraged an interest that I already had in labor law.

At Yale, I had only one course in labor law, and that was from a fellow by the name of Harry Schulman, who was a very well known arbitrator. He was the permanent arbitrator between the Ford Motor Company and United Auto Workers. He would commute from Detroit to New Haven. He was dean at Yale for a while. A very bright guy and he knew a lot, but it was a very dry course. The Taft-Hartley Act, 1947 Labor Management Relations Act, had then only recently been adopted. There were few court decisions under it, and we spent most of our time going through it section by section and discussing how the National Labor Relations Board and the courts might interpret each section. It was not a very exciting course, but I retained my interest in labor law nonetheless, and especially since I went back after my first year to work at Tobriner's office.

Otherwise, you asked about Yale. Yale was a very exciting place. From the moment I got there, I was very stimulated by what they used to call—and maybe still do—the Yale approach. Yale was in the vanguard of legal realism and still had some of the people who led that movement. While other law schools have since caught up to that to the point where there's probably not much difference between what's taught at Yale and at other places, at the time there was a difference. The difference was in the direction of emphasizing the relationship between law and social problems; viewing law as a way of dealing

with social problems, answering social questions. The functional aspects of the law. It was infused with policy questions, so that what we understood to be learning was not so much what the law was as what the law was becoming.

McGarrigle: Did you consider other law schools, or did you know that Yale—because of what you're describing—was the place?

Grodin: I had been convinced—I think I talked to you about Vic Rosenblum and his influence on me as an undergraduate. He had persuaded me to go to Yale law school precisely for that reason.

McGarrigle: Okay, it was specifically Yale.

Grodin: Yes, because I had been thinking of going to graduate school in political science or political economy, and he said, "Yale law school is more like a graduate school in political science than most graduate schools in political science," and I think he was right. I had courses in recent sociology and philosophy of the law, and jurisprudence, and things like that.

McGarrigle: In terms of student body, did you have that experience that you had had at Cal in another way, in terms of interacting with new people?

Grodin: Yes, it was a very exciting bunch of people, both students and faculty. They were not simply bright and high achievers, but they were people who had brought interests, and brought them to law school. Many of them had no intention of practicing law, and many of them did not. One of them, I remember, spent a lot of his time studying Sanskrit. There were just people with a variety of intellectual backgrounds and interests.

McGarrigle: Something I had read indicated that you and Janet were married also after your first year of law school.

Grodin: We were married after my first year at law school.

McGarrigle: So, were you married on the West Coast?

Grodin: We were married out here, yes.

McGarrigle: You came back and worked for Mat Tobriner the first year?

Grodin: Yes.

McGarrigle: What did he have you doing?

Grodin: Oh, he had me doing memos on cases that were pending in the office. He was a great teacher. He would not just have me write something, but he would have me bring the books in that I relied upon so that he could look at them and make sure that my reliance was accurate. He would review my writing, and so I learned very quickly that one must never use the passive tense, for example, and a number of other rules which stayed with me ever after.

McGarrigle: How did you find that work, being in a law office?

Grodin: Oh, it was great fun. I enjoyed it, and I enjoyed dealing with clients. I didn't do a whole lot of that during the summer, but I did some. Having actual people to talk to, rather than hypothetical questions, was exciting stuff.

McGarrigle: Was that unusual, the level of responsibility and exposure that you received for a first-year law student at that point in time?

Grodin: I suppose it was.

McGarrigle: It seems like it to me, just based on what I know, to be meeting clients and interacting at that point.

Grodin: Yes.

McGarrigle: Now, when you went back to New Haven, you went back for your second year?

Grodin: I went back for my second year.

McGarrigle: But, you had already taken these higher level courses, for example, in jurisprudence?

Grodin: No.

McGarrigle: Those came later?

Grodin: Well, let's see. I don't remember exactly, but at Yale, only the first semester consisted of required courses, so the second semester was optional and I don't remember what I took. I may have taken the jurisprudence course at that point. I had jurisprudence from F.S.C. Northrup, who had written a book that I had read as an undergraduate called, *The Meeting of East and West*. He was interested in the tension and synthesis between Western philosophy and its emphasis on science and logic, and Eastern philosophy and its emphasis upon—well, I wouldn't know how to describe it—but Eastern philosophy. He ran an extremely interesting seminar in which he gave the students the choice of philosophers to write about and had us not only submit papers, but lead the seminar in the discussion of those philosophers. I chose Morris Cohen and his son Felix Cohen, who was teaching at Yale, but primarily Morris Cohen. I could still give a lecture on Morris Cohen! [laughter] It made such an impression on me to do it in that kind of intense situation.

McGarrigle: What was it about the intellectual content of his work that grabbed you and inspired you?

Grodin: Well, Morris Cohen was a logician. He taught at City College in New York, and he taught courses in logic. He was interested in the relationship between logic and law, but he did not see the logic of the law as simply a deductive process, but rather a process of synthesis in which consideration of policy questions was necessary. Beyond that, he had an approach to the law and to philosophy which was very appealing to me. I remember that he wrote a book called something about *The Life of a Liberal* or something like that, in which he set out to define what he meant by a liberal. The core of that definition, for him, was someone who kept an open mind and was willing to consider the

possibility that he was wrong and that other people might be right. I was very impressed with that.

McGarrigle: Has that stood the test of time for you, that definition?

Grodin: Oh, yes.

McGarrigle: That's very intriguing. You spoke in the first interview about your interest in and consideration of some of the large value questions as an undergraduate: the best political system, and the best economic system, and so on. I'm interested to know, as you were exposed to these additional influences at Yale, how that impacted your earlier thinking and how it evolved.

Grodin: Well, it was very compatible with my earlier thinking because Yale stressed the relevance of other disciplines, including sociology and anthropology and history, to the study of law. There was a course, for example, called Law, Science, and Policy, in which Professors [Myres] McDougal and Harold Lasswell would pose questions like, "What is the likely effect upon the law and its development of the fact that the population is getting older?" "What is the impact of that on the kinds of questions that courts will be called upon to consider, or legislatures?"

McGarrigle: That's fascinating. Did your life change as a married student, once you returned for your second year?

Grodin: Well, it did. Law school was pretty absorbing, so I never had a lot of time to do things outside the law school. Being married meant that I spent probably less time outside the law school. We had people over to our apartment. We had a little apartment near the law school, so it was very close. I could walk back and forth. Janet was going to school down at Bridgeport. Yale, at that time, did not admit women, so she and another friend, who was married to a classmate of mine, commuted down to Bridgeport to classes. Being married brought a kind of stability, which in a way made it easier for me to study and do my work.

McGarrigle: I can imagine that. Did you have a plan to come back and work at the Tobriner firm that summer between second and third year as well?

Grodin: Oh, yes. And I did that.

McGarrigle: I imagine the work built on your earlier experience, but did it change between those two summers?

Grodin: As I recall, I spent that summer working on an amicus brief in a case pending before the United States Supreme Court that Tobriner was writing along with some other lawyers. The case was Garmon against San Diego Building Trades Council [*San Diego Building Trades Council v. Garmon* 359 U.S. 236 (1959)], and it involved very important questions of federal preemption and whether states could grant damages for union conduct that violated the federal laws. We were successful in that. I learned a great deal on that process.

McGarrigle: Who actually argued that case before the supreme court?

Grodin: Oh, I think someone for the A.F. of L. [American Federation of Labor]. Al Woll, I think, argued the case.

McGarrigle: Would Tobriner have gone back to Washington to hear that?

Grodin: I don't know whether he went back. I doubt it.

McGarrigle: Were there other people in your situation, working as law clerks, basically, second-year law students at the firm?

Grodin: During my first summer there, there was another person, Bob Le Prohn, who was in his second year, working there. I don't recall anybody else, any other students there. It was a small firm. There were only a half dozen people.

McGarrigle: I guess what I'm so struck by is the high level of interaction, the nature of the work that you were doing.

Grodin: Yes. Well, I guess Tobriner had confidence in me, and we worked very closely together.

McGarrigle: At this point in time were you contemplating what your next move would be after Yale?

Grodin: Yes. Actually, Tobriner was influential in that also. He knew that I wanted to teach eventually. He encouraged me to apply for a Fulbright grant and go study and write and maybe get an advanced degree in the area of union democracy and internal union affairs, which was an emerging field that he was interested in, active in, and thought would be important, as indeed it turned out to be. The events of that period—this was 1953—six years later Congress was to enact the Landrum-Griffin Act, which for the first time legislated with respect to the internal affairs of unions. At that time it was common law, and the common law was developing. It was developing in California more than it had in other states. I ended up applying for a Fulbright grant to go to the London School of Economics to study with a person, who somehow I found was there, by the name of Otto Kahn-Freund, who was also interested in that area. I remember going to Harry Schulman for a letter of recommendation and he said, "I'll write you a letter, but it's a long shot. You'll never get it." But, I did.

McGarrigle: [laughter] At this point, let's see, I've moved you ahead to the London School of Economics. But, you were already thinking about it between second and third year, because this is a plan for the following year. So, you go back to New Haven and you finish the third year.

Grodin: I was on law journal, that is to say I started out writing for law journal, and I wrote a piece that was published on some obscure topic having nothing to do with labor law. In my third year, instead of continuing with the journal, I opted for becoming a teacher of legal writing and research. Yale had third-year students doing that, and it was cheap for them. They didn't have to pay us very much! [laughter] I was interested in teaching, and I saw that as an opportunity to do something toward a teaching career.

McGarrigle: As a third-year student, then, you're teaching first-year legal writing and research?

Grodin: Right.

McGarrigle: Okay. Did you like it?

Grodin: Yes, that was interesting. That was fun.

McGarrigle: Then you must have, during that third year, applied for the London School of Economics? You were ready to go, then?

Grodin: Yes.

McGarrigle: I think I read in the interview from the [*Hastings*] *Con[stitutional] Law Quarterly* that you came back, took the bar exam, and immediately went to catch a flight.

Grodin: To the airport, that's right. I came back, I had a bar review course with Bernie Witkin, I took the exam. The term had already started at the London school, so I was already going to be a few days late. Janet's father came by with Janet, and picked me up from wherever the bar exam was given, and whisked us off to the airport.

McGarrigle: Before we talk about being in London, what was the bar exam experience like for you?

Grodin: I was pretty well prepared. Not as a result of Yale particularly, which paid no attention to bar exams and very little attention to California law. [laughter] Bernie Witkin was very good, and his materials were very good, so I didn't have much trouble.

McGarrigle: He was a one-man bar review course for many years.

Grodin: Yes, that's right.

McGarrigle: At that time, what was it like to be an American deciding to live in England and actually going abroad?

Grodin: It was cold, mainly. [laughter] That's what I remember, it was very cold. Well, this was 1954, October. It was not that long after World War II, so that not only were the memories of World War II still very vivid, but the physical consequences of the war were still around. You could still see bombed-out places and that sort of thing. Janet had relatives in London, and we very quickly established contact with them. Actually, we arrived on one of the Jewish holidays, whether it was Rosh Hashanah or Yom Kippur, I don't recall which. We had been told that Janet's cousin, who was a solicitor, was a member of the Bevis Marks Synagogue, which was an old Sephardic synagogue in London. We went there and found him as he was leaving the service with a top hat, he was wearing, as was customary. [laughter] He embraced us and took us in, and Janet had other relatives there, which made living in a strange place much easier.

We had to find a flat to live in, and that wasn't easy. We finally located one in the attic of a house in Highgate, which is north of London, north of Hampstead Heath, owned by a couple. He was an architect and had redesigned this attic to make it livable, except for the fact that it was icy cold, heated only by coal. When the winter came, it was just quite surprising. We moved about in London in search of central heating. We lived in several different places that year. Apart from that, it was a very enjoyable experience. I met Kahn-Freund, and he was very cordial and encouraging and made suggestions as to how I would go about learning English law, because it was my objective to do a comparison of British and American law, common law relating to internal union affairs. He gave me a list of things to read, and I went out and read them and then started working in the library. That was very exciting.

At the same time, LSE was a place which is itself exciting, because it was a place where people from other countries, primarily Commonwealth countries, came to study with the intention of going back and running their countries. The people I met, from Africa and from South America and whatever, many of them went back and became influential in their own areas. Your question, what was [it like] living in a foreign country, [it] was fun, it was interesting. English universities have very long vacations between terms. For English students, those are supposed to be times that they spend studying and reading and preparing for exams. For us, it was a period to travel, and

so when the—whatever it was—the Michaelmas term was over, I guess in late November or early December, we got into our little Hillman Husky that we had purchased for eleven hundred dollars and went on the continent and drove down through France and to northern Spain, and then down through Madrid to southern Spain and spent some time in Torremolinos—which is now a very fancy resort area but was then a little fishing village—and then up through Barcelona and back. That was a great time.

McGarrigle: When you're working on your thesis, you're working independently, but under the supervision of the faculty member?

Grodin: Yes, I would meet with him every week and bring to him what I had done and get his thoughts about what I should do. He was very helpful.

McGarrigle: Did you maintain contact with him after your stay there?

Grodin: Oh, I did, yes. I went back and saw him some years afterward. He was a great man.

McGarrigle: So, as you're going through this process of writing the thesis, you still have in mind the idea that you're going to come back and teach? Was that your idea at the time?

Grodin: I had in mind that I was going to come back and practice law and then eventually teach. I thought labor law was not something that I wanted to teach without practical experience, and more than I'd had during the summers with the Tobriner firm.

Somewhere along the way I indicated that I would like to do a Ph.D. under Kahn-Freund, and he agreed to do that. Janet became pregnant, and we decided that we wanted to have the baby here rather than there. We were there for a year and a half, and we came back and I got a job teaching part time at Cal in the Speech Department, as it was then called. I talked about that last time. I tried to get a job with Tobriner. I think I told you this story or you've read about it.

McGarrigle: I've read it.

Grodin: How he had first told me how he'd really like to have me there, but unfortunately, he couldn't afford me at the time? So, I accepted a job with his principal competitor, Charlie Scully. When I told Tobriner that, Tobriner said, "Well, you can't do that. You've got to come work for me." He found a way for me to do that. I went to work for Tobriner at three hundred dollars a month, which was less than my secretary was getting, but I didn't care. That was the beginning of my real career in labor law.

McGarrigle: Did you go back and continue the Ph.D.?

Grodin: What I did was this: I continued to work on my thesis, and how I did that I don't know. I mean, now it seems quite impossible. I worked during the day at the firm, and I came back and spent some time with our baby and Janet, and then went in and batted away on my old typewriter. I would work just about every evening and most weekends and continued to send drafts of chapters back to Kahn-Freund, and he would send them back to me. The understanding was that I would finish my thesis and then go back for my orals and get my doctorate, but the pressure of the law firm was such that I couldn't do that until some years later. It was 1959 that I was able to do that. In that year, Tobriner had been appointed to the court of appeal, so our firm was sort of struggling to stay alive. But, I was determined to go, and fortunately I had partners at the firm who were supportive of that. And so, I did. Janet and I went back. We left poor Sharon here with her grandparents and went back to submit my thesis, which was pretty much a formality, and to spend the requisite final term at LSE, which was also a formality. Kahn-Freund said, "You don't really need to be here. Why don't you do something else and come back in time for your orals?" So, Janet and I went to Israel and to Greece and came back in time for my orals, which were successful, and I got my degree and then went back to law practice.

McGarrigle: I've asked you how marriage changed your life as a law student. I'm wondering how fatherhood, your first experience of parenting, changed your life.

Grodin: I loved being a father, and I like to think I was a pretty good

father. I think I managed to spend a good deal of time with Sharon, and then with Lisa, who was born five years later. They affirmed that I did, even though I was doing a lot of other things too. As a family, we did a lot of things together. We'd go off on a lot of camping trips. Sharon loved to be picked up in the middle of the night and put into the car to wake up while driving up to somewhere where we would go car camping, usually Bliss State Park in Tahoe. I read a lot to the kids, taught them to read.

McGarrigle: It sounds like your mentor at the London School of Economics was very flexible and wanted to make this Ph.D. happen for you.

Grodin: Yes, I learned a lot from him. I'm doing that for a student from Holland now. She is sending me chapters. It's a lot of work to read them and make suggestions and whatnot, but I remember how important it was to me, for Kahn-Freund to do that. Yes, he was very flexible.

McGarrigle: When you came back with the Ph.D. in 1959 and Tobriner had been appointed to the court of appeal, it was a huge transition for the firm. Then another partner went on the bench as well, shortly thereafter.

Grodin: Yes, Leland Lazarus. The firm name was Tobriner and Lazarus, and Leland Lazarus was appointed to the bench. Actually, Leland didn't do labor law. He did workers' compensation and personal injury, mainly personal injury work that came into the firm from time to time. His departure did not impact our labor law work, and there were successors to him who did the other work. Actually, worker's compensation work is something that we all did. I sort of broke in on that. My early years there, I spent at least half my time handling worker's comp cases, and that was considered a kind of apprenticeship that you had to go through. It was a period of uncertainty and instability for the firm. We weren't sure that we would keep our clients because they were so attached to Tobriner. But, we did. In fact, the firm grew and we hired more people. My plans to teach were sort of put on ice, partly because nobody was pounding on my door to invite me to teach. Also, because

being now a partner at a relatively young age—I was only twenty-nine when I came back from England the second time and became a partner in the firm—there was pretty heady stuff. It was exciting, exhilarating, stimulating, and I wasn't all that anxious to leave it for teaching. As time went on, it became less and less novel, and teaching became increasingly attractive.

One thing that accelerated my transition into teaching was that the Vietnam War was going on and the unions, with a couple of exceptions, were extremely supportive of the war and critical of people who opposed the war. I was active during that period with Americans for Democratic Action. I became the president of the Northern California Americans for Democratic Action, and high on our agenda was opposition to the war. We were a key component of the "Dump Johnson" movement, and then when Johnson withdrew the movement supported [Eugene] McCarthy for president. I was very active in that. In fact, that's where I met Jerry Brown [Edmund G. Brown, Jr.]. I was the treasurer of that campaign, and he was active in that campaign. There was tension over that issue with some of my clients.

McGarrigle: Would that be something that they would verbalize to you, or how was that communicated?

Grodin: Only once was it verbalized, and then not by a client, but by the head of the San Francisco Labor Council, who I remember because of the shock of the remark. At some kind of event that he was at, making some remark about my eating at labor's trough and doing things that were opposed to the policies of the labor movement. My clients never said anything like that, and one of my clients, the head of the garment workers' union, was strongly anti-war. We would collaborate on ways to try to change the views of the labor movement, but not very successfully. Apart from that, there was a lot of repetition that set in, a lot of phone calls from clients asking my advice about questions that I had gone over and over in my own head. They were no longer novel. To some extent, the novelty wore off. And, there was tension, in the early years, with some building trades clients over the subject of integration. I kept my eye out for a teaching opportunity. In 1971—I don't remember whether I described this to you or you had read about it. Well, I was really rather desperate to have some time away from

the law firm. I wanted to be able to do something else, teach, write. I proposed a sabbatical program in which each of us could leave the firm for three months, six months, or a year and do something else and simply not take any money out of the firm during that period, be self-supportive during that period, so that the net effect on the firm might well be to increase the take-home compensation of the other partners. My partners had difficulties thinking of reasons why that was not acceptable. They were all reasonable people but somehow had difficulty accepting it. It was sort of the work ethic. That was before law firms started the practice of sabbaticals, and the idea that somebody would actually want to take time away from the firm and do something else seemed sort of strange.

I got them all into a meeting to discuss that, and while we were discussing it, knock on the door, and I was told there was a long-distance phone call for me from the dean of the [University of] Oregon law school. I excused myself from the meeting. I went to take the call and it was Gene Scoles up in Eugene, Oregon. He asked me would I like to come up the following year and teach labor law, administrative law, and constitutional law to take the place of a professor who was going off on leave. I said, "I'll be there." He said, "Is that it? You don't want to know what we're going to pay you?" [laughter] I said, "Whatever it is, that'll be fine." I went back to the meeting and I said, "I'm taking my sabbatical. I'm going up to Oregon to teach." And that was that. So I did. I arranged for two associates to fill in with my clients. One of them we had recently hired out of the Thelen firm [Thelen, Marrin, Johnson & Bridges]. He was a few years out of law school and a fairly experienced labor lawyer. The other was Nancy Keane, who had been with me for a few years. I said I would stay in touch if they had any problems, but I had little doubt that they would be able to satisfy the clients in my absence, and they did.

I went up to Oregon, Janet and the two kids, and we had just a great year up there. It was a year in which Sharon was in junior high school, and that was a very troubled period here in Berkeley. This was 1971, and there was tear gas and there was all kinds of turmoil, and junior high school was a particularly troubled place. So it was a great relief to go up to relatively bucolic Eugene and a small college town. Sharon had a great experience in junior high school there, and Lisa had a great experience in school, and Janet took art classes, and I had my

first experience with full-time teaching. I had been teaching part time at Hastings [College of the Law] before that.

I decided that indeed I liked it. They asked me to stay in Oregon, offered me a position there, but I didn't want to stay in Oregon, and so I came back. I came back to the firm, and the firm was still there, and my clients were still there. I started doing what I had always done, when I had a call from Dean [Marvin] Anderson at Hastings, and he knew that I wanted to teach and I had kept pestering him about it. He said, "Well, maybe here's your chance." He said, "We have admitted too many students, or rather an unexpectedly large number of students accepted our invitations to join the first-year class, so we have to add a section. Would you like to come teach property law?" I said, "Well, I would if I knew anything about property law, but I don't. How about contracts?" He said, "I'll call you back." He called the poor fellow who had agreed to teach contracts and persuaded him to teach property. I don't remember who that was. I started teaching contracts in the fall of 1972, I guess it was. I was juggling that with my law practice. Then, later on in the year, he called and told me that Clarence Updegraf, who had been teaching labor law, had had a stroke, and would I be good enough to fill in for the balance of the semester teaching labor law. I said, "Sure, I'll do that, too." So, now I'm teaching two courses, which is a full load, and trying to practice also; I told Marvin Anderson that I couldn't continue to do it that way, that he was going to have to hire me as a faculty member.

That was a period of transition at Hastings. Hastings had survived for many years on the Sixty-Five Club and the idea that only members of the Sixty-Five Club would be full-time faculty. They would hire adjuncts, or they would hire people who in fact taught full time, but were given some administrative title rather than "professor" to get around that. They decided to move away from that policy under pressure largely of students and faculty, decided to hire some younger faculty. For the first time, then, they had a faculty appointments committee. They never had one before. All hiring was done by the dean. The faculty appointments committee was headed by Jerome Hall, who was a criminal law professor, legal philosopher, wonderful man. Fortunately for me, he was familiar with my thesis, which had since been published, because he was interested in the definition of the legal system, and what is the legal system. I had argued in my thesis, my

book, that the internal affairs of a labor union were in effect a system of laws. He had invoked that against his nemesis at Harvard—Lon Fuller—with whom he was having constant arguments—in any event, he recognized my name. The fact that I had been in the practice of law for seventeen years by that time and had become a successful and fairly well recognized labor law practitioner—that carried no weight with Jerome Hall, or for that matter the other professors. The people who went out and actually practiced law were not regarded highly. They were regarded as people who were sort of traitors to the purity of the cloth. The fact that I had gone on to get a Ph.D., and that I had written this thesis, which contained some things that he thought were worthwhile, persuaded him that I would be a worthy member of the faculty, and so, I was hired.

I left the practice of law that summer. That summer I devoted to writing a book on trails in the Silver Lake area of the Sierra Nevada, and I began teaching full time in the fall of 1972. I taught labor law and related courses. I mean, I had full rein to develop whatever courses I wanted to develop. We had labor law courses all over the place. I taught a course in arbitration, and a course in internal union affairs, and a course in public-sector labor law. I was writing about public-sector labor law then, and that was a coming area. I was sort of a one-man show in labor law during that period, and also I was doing some arbitrating.

McGarrigle: I'm interested, going back to the seventeen years in the practice of law, in the way that you developed your own leadership style in the firm, working with your partners and then bringing up the younger, less experienced lawyers as well. Your style of operating as a partner who had to make decisions in conjunction with another group of, I imagine, sometimes strong personalities.

Grodin: Yes, I wouldn't characterize it as leadership style. I would characterize it as—I don't know—mediator style. The fact is that it was a very small firm, and the principals were Stanley Neyhart, who was with the firm before I got there, and Harry Polland, who was not a lawyer, but an economist, but who negotiated for unions and handled their negotiations and the drafting of their agreements, and handled arbitrations, and did much of the work that lawyers might do. Those

two are very strong personalities, kind of polar opposites. I found myself sort of in the middle between them, mediating between them. We hired out of the National Labor Relations Board in Washington a wonderful lawyer by the name of Duane Beeson, who is still in practice. Duane was also a mediating influence within the firm. it was not so much a leadership style, a question of leadership, as it was just sort of muddling through day to day, week to week, trying to avoid serious disagreements. That was one of the things also that stimulated me to leave the firm and go into practice. It became somewhat contentious at times.

McGarrigle: You not only had this role of mediation that's necessary in the partnership, but then you're out working as a mediator as well. Were you working doing arbitration and mediation—?

Grodin: No, well, I was in practice because I was an advocate. Nobody would select me as an arbitrator. That came when I became a professor.

McGarrigle: In terms of your work with the Americans for Democratic Action, did that continue as well through this period? We talked about the Vietnam War.

Grodin: Yes, I continued to be active in ADA. I was also active—I don't remember whether we've talked about this—but I was also active in American Jewish Congress.

McGarrigle: We have not talked about that.

Grodin: While I was in practice—this is after Tobriner had left the firm, I guess—we had a tenant in the firm by the name of Irving Rosenblatt, who was very active in American Jewish Congress, and he got me active. American Jewish Congress was, at that time, a more progressive organization among Jewish organizations, compared to American Jewish Committee, Anti-Defamation League. It was very active, not only in promoting the kinds of issues that Jewish organizations were typically interested in like separation of church and state, but also civil rights issues. It had a component called the Commission on Law and Social

Action, which was very active on the national scene in collaborating with NAACP [National Association for the Advancement of Colored People] and with other civil rights organizations, doing amicus briefs, and taking on cases, and so forth. Ephraim Margolin was the director of the American Jewish Congress of Northern California for a number of years, and locally we were involved as such projects as drafting a fair housing ordinance for the City of San Francisco before there was any state law, helping to draft a state law of fair employment—then just the Fair Employment Act—and a variety of other activities of that sort. So I was active during that period in that sort of thing. Also, I'm appearing in court on cases that involve civil rights issues, along with my labor practice. So those were the two organizations, American Jewish Congress and ADA, that I was particularly active in.

McGarrigle: I think at a later date, did you become active with ACLU [American Civil Liberties Union]?

Grodin: Well, somewhere in there I became a board member of ACLU. I don't remember exactly when it was. Yes, I was active with ACLU and served on their board until I had to resign when I was appointed to the court in 1979.

McGarrigle: Did it come as a shock to your partners when you decided to make that transition to full-time faculty work at Hastings?

Grodin: Oh, they had a pretty good idea that that was something I wanted to do. It came as a surprise that the opportunity arose to do it just then, but I was clearly moving in that direction.

McGarrigle: Did you miss the role of advocate that you had had for so long, when you went into teaching?

Grodin: I did. Mostly, I missed the contact with clients. Not so much being an advocate, but I had become very friendly with a lot of clients and I missed their calling me for advice. [laughter] Being a professor—students ask questions, but they're different kinds of questions. They're not related to, "What are we going to do tomorrow on the picket line?" I did miss that. But then, I enjoyed teaching a great deal, and I was

writing, and I was pretty deeply involved in academic life.

McGarrigle: I can see from just what you're saying there's a different kind of—the urgency and the excitement in the kinds of decisions that you make.

Grodin: Yes, sure. At the same time, I was ambivalent because it was also pleasant to get a little removed from that. Because—while the practice was exciting in the sense that things were happening all the time, and there was always a great deal of urgency and human beings involved—the kinds of things that the unions were doing was, for the most part, not intrinsically exciting. I mean, they were doing pretty much what they had done before. There wasn't a lot of organizing going on.

McGarrigle: Now you're back in Berkeley after that year in Oregon. Did you ever consider moving from Berkeley during those years when it was such a hotbed? I happen to have gone through Berkeley public schools around the same time as your daughters, so I experienced it.

Grodin: Yes, right. So, you know, you have an idea about that. No, we didn't consider moving out of Berkeley.

McGarrigle: I'm just trying to think of the other things that were going on at the time, and how they might have impacted you. The war protests were earlier.

Grodin: Yes, well, I was involved in the war protests.

McGarrigle: Were you involved in Democratic politics, in a state or a national sense?

Grodin: I was involved sort of on the fringes. I worked for Adlai Stevenson. The [Eugene] McCarthy campaign [for president in 1968] was the first campaign in which I played an active role above the level of the rank and file.

McGarrigle: What was that experience like?

Grodin: I didn't know what I was doing. I had no idea how to run a campaign. I was supposed to be treasurer. People kept calling and saying that they needed checks to do this and that. We had not very much in the way of centralized control over how the money was spent. It was a pretty, kind of free-for-all campaign. It was a rough and tumble campaign for McCarthy that was sort of on the fringe of the Democratic Party. I mean, we were not mainstream. We became mainstream, but at the time we were not mainstream. Robert Kennedy came in and announced his candidacy, and then everybody was split in every direction. McCarthy was a reluctant and not very effective candidate. I remember a fundraising dinner that we had for him. I was presiding and he was the speaker, and he gave this kind of lackluster speech in which the message came through that he had been drafted for this, was not really terribly enthusiastic about it, was willing to do it because it was his duty, and you know, that sort of thing.

Nevertheless, we made a big impact, collectively. My classmate Allard Lowenstein was the spearhead of the "Dump Johnson" movement, and I would get calls from Allard every so often telling me what he was doing, and urging me to do it. I went back to the national ADA convention during that period, and it was organized around opposition to the war and opposition to Johnson. It was very contentious. You had the foreign affairs person of the AFL-CIO coming there and arguing against the ADA doing anything to split with Johnson. They were supportive of the war. People who had been friends became angry with one another. It was a difficult period.

McGarrigle: Did you find that within Berkeley as well, that there was this kind of contentiousness?

Grodin: Well, Berkeley was pretty much solidly anti-war. I ran for Berkeley City Council. Did I tell you that?

McGarrigle: I know that.

Grodin: I ran for Berkeley City Council, and the fact that I had been with ADA and opposing the war was a plus with everybody. It's just that I didn't win. [laughter] No, I don't think there was much split opinion within Berkeley. Well, I shouldn't say that. Jeff Cohelan was

the congressman from Berkeley who was supportive of the war. Jeff had been a friend and a client of mine. Jeff was the head of the milk-wagon drivers' union before he went back to Congress. Not only that, he had been to the London School of Economics on a Fulbright grant. So we had a lot in common. Jeff went back to Washington and became a member of the Armed Services Committee of the House and became a defender of the Vietnam War, much to the chagrin of many of his constituents here. That did create a very substantial split and led to the creation of the rival organization in Berkeley. Up to that time, the Berkeley Democratic Club—which was an arm really of the Democratic Party, de facto Democratic Party, although local elections are supposed to be non-partisan—was Jeff Cohelan and his people. There was a good deal of division over the issue. When I said there wasn't a lot of division, I was speaking numerically. In Berkeley, if you took a vote, the overwhelming majority would be opposed to the war, but at the level of political organization, there was a lot of division and a lot of acrimony.

I remember going back to Washington when I went back to an ADA meeting, and I met with Jeff. We had lunch together, and he said, "Well, Joe, things look different from back here. We see the big picture back here, and when you see the big picture it looks different." The big picture was the picture that was being portrayed by the generals and admirals who came to testify before the Armed Services Committee, and Jeff was enamored of them. These were not your stereotype army people. These were highly intelligent people with very humanistic views of the world, and Jeff felt very strongly attracted to them. When they supported the war, Jeff supported the war. He was in my living room here when we got a phone call. We were having dinner, and we got a phone call that American planes were bombing Cambodia, and I said, "Jeff, you just can't support this. You've got to speak out." He did, but in the most mild of ways that was barely audible. The tide ran against him as it ran against the war.

McGarrigle: What happened to him, ultimately, in terms of his career?

Grodin: He was defeated for Congress by Ron Dellums, and he became a lobbyist for health plans in Washington. When I ran for Berke-

ley City Council it was exactly the time that that split was occurring. I was still loyal to Jeff Cohelan as a friend and former client, and I was tied too into the Berkeley Democratic Club. I was urged to run by the Democratic Club as a person who could bridge the gap between the Democratic Club and the emerging BCA [Berkeley Citizens Action], whatever it was called at the time. I was persuaded to do that, against Janet's better judgment. [laughter]

McGarrigle: Because she saw that as an impossible divide?

Grodin: Well, for one thing, "Why do you want to be on the Berkeley City Council?" she said, which was a very good question for which I had no good answer. It took a lot of time campaigning. It was a contentious campaign, and ultimately I came in fifth in a field in which there were four seats available. Looking back on it, that was very fortunate. I'm very happy not to have been on the Berkeley City Council.

McGarrigle: Jim Goodwin worked with you on that campaign.

Grodin: Yes, he did.

McGarrigle: He mentioned that. At that time, then, in Berkeley—I'm not sure of the exact dates without looking it up—I don't know if Loni Hancock was mayor at the time.

Grodin: That was the year in which, I guess, Loni was a candidate for mayor. Yes, and that was the year in which she emerged as the Berkeley mayor.

McGarrigle: Tom Bates was representing Berkeley in the state legislature then. It's interesting that even though I know that Berkeley would in the main, numerically, have supported the war, that there was still divisiveness. Then if you go back another ten years, Berkeley is not anything near the liberal bastion that it was.

Grodin: Oh, no, it was quite Republican. During that early period, there was a Republican majority on the city council for a while. Yes, that's right.

McGarrigle: Were you paying attention to local politics when you were a student at Cal and then when you returned from Yale? Was that an interest for you?

Grodin: I can't say that it was. I became interested in the course of what was going on in Berkeley around the opposition to the war. There was support for a police commission, for example, a citizens' review board, which I thought was a good idea, and other issues that I supported.

McGarrigle: Was rent control an issue that had relevance for you?

Grodin: No, I don't think rent control—I don't know whether we had rent control then. In any event, I don't recall it being an issue.

McGarrigle: So, it was this time that you've met Jerry Brown through your other activities, then. I'm just trying to get a sense for where your focus was, if you were also interested in state politics, or if that held any—?

Grodin: No, I was not active in state politics. My contact with Jerry Brown during the McCarthy campaign was pretty minimal. I guess the next time I heard from Jerry Brown was when he called me to ask me to be on the farm labor board [Agricultural Labor Relations Board] in 1975. By then, I'd been teaching for three years.

McGarrigle: When you went full time on the faculty at Hastings, you'd mentioned earlier there was this divide among the faculty who didn't look favorably upon colleagues who had spent time practicing law.

Grodin: Yes, that was the general view among academics at the time.

McGarrigle: Did you come into a faculty that was collegial at that point in time? Or what was that like when you first joined?

Grodin: Well, when I first joined the faculty at Hastings there were hardly any faculty meetings. I can't say that it was collegial. There was

a group of the older professors that I was close to. Roger Traynor had come off the [California Supreme] Court and was teaching there, and I felt close to him. There were a couple of others. By and large, the age divide, until other younger faculty started being hired, meant that our interests were different. A couple of the older professors were just remarkable for their vitality and interests. Richard Powell was one of those. Powell taught into his nineties, and he was a highly acclaimed teacher. One day I asked him, "Could I come and sit in on your class to see what this is all about?" He said, "Sure." I sat in, and he was just a remarkable teacher with the Socratic method. Even at Yale, I didn't encounter anybody who could use the Socratic method to such effect as he. He sided with the students during a student strike over the Vietnam War. The question was whether their exams were going to be postponed, or whatever, and he sided with them. He was a great guy.

McGarrigle: In terms of his technique with Socratic method, can you describe it at all, what it was that he would do with it?

Grodin: Oh, he was teaching property. Property law really is pretty much a set of rules. I mean, if you're teaching the Rule in Shelley's Case, or the rule against perpetuities, or whatever, it's a kind of logical process. He was toying with the students. He had asked these questions and knew all the possible answers for the previous sixty years, and so it was just a masterful performance. [laughter] I can't say that I learned anything from him that I used in my teaching. He was a guy who was open to new ideas, and from time to time I would talk with him about some idea that the younger faculty had about doing this or that, and he said, "Well, that's not a bad idea. We did that at Columbia. We tried that at Columbia for a few years in the 1920s. [laughter] It worked all right. You might give it a try." But, he'd been around for so long he'd heard every idea. Jerome Hall was still there when I was teaching, and he was very lively and philosophical and engaged. There were a few others that I had lively contact with.

McGarrigle: Given how different Hastings is from Yale, was that an environment—how was that difference for you? How you described Yale to me as almost the antithesis of Hastings.

Grodin: Yes, I think that's true. I ran my course the way I wanted to run it. I ran my course the way I would teach it at Yale. It's not in fact the way it was taught at Yale with Harry Schulman. [laughter] I taught my course from the perspective of somebody who'd been practicing labor law, and I would bring practitioners in to talk to my class. Arthur Goldberg was visiting at Hastings for a while. I brought him into my class. Warren Madden was a member of the faculty, and Warren had been the first chairman of the National Labor Relations Board when it was formed in 1935. He came into my class and told them what it was like when President Roosevelt called him at University of Pennsylvania, where he was teaching property law, and said, "How would you like to be the chairman of the first National Labor Relations Board?" Yes, many of the older faculty were not particularly geared toward the Yale approach, so it was different. Gradually Hastings changed.

McGarrigle: Now, Harry Schulman and that labor law class—what was that class like?

Grodin: It was dull. He would sit. He would read from the statute and perhaps ask our thoughts about how it might be interpreted, and at that point I had no idea at all. He was not a very good teacher. He was a great arbitrator and a fine person, but a lousy teacher.

McGarrigle: He thought it was a long shot that you would end up at London School of Economics?

Grodin: Or practice labor law. He said, "Everybody wants to practice labor law. You're not going to be able to do that. Too much demand for too few positions."

McGarrigle: Did he track your career as you developed?

Grodin: I doubt it. No, he died soon after that of a heart attack—flying between Detroit and New Haven all the time!

McGarrigle: So, when you go on the faculty at Hastings, it's about 1972. Did you immediately—now that you're not working as an advocate and you're available to do mediation and arbitration—did you start doing that?

Grodin: Yes, I did. I put my name in with the State [Mediation and] Conciliation Service and the Federal Mediation [and Conciliation] Service, and I got more cases than I wanted. The employer attorneys who I had practiced against were very supportive of me as an arbitrator, and one of them so much so that even after I had decided two cases against him, he kept on choosing me as an arbitrator, even though he didn't like my opinions. [laughter] I did arbitration in the private sector, public sector. I had written a lot of stuff on public-sector labor law, some of which began to be relied upon in opinions by Justice Tobriner in the California Supreme Court, so I became sort of the authority on the Myers Millias Brown Act, which was the statute applicable to labor relations between unions and local governments. I was called upon to do quite a bit of local government arbitration. I don't recall doing any mediation.

McGarrigle: Was that a change—well, it was a change, but I'm just wondering experientially how that was for you after being an advocate in practice? Did you like that role?

Grodin: Yes, it was a switch, and it was a good transition to becoming a judge.

McGarrigle: I don't want to get into your judicial career today, because I want to start with that next time.

Grodin: All right. Well, we could talk about the farm labor board. We haven't talked about that.

McGarrigle: That would be great.

Grodin: Jerry Brown became governor of California in 1974, I think, and he promoted the idea of an Agricultural Labor Relations Act. Work began on the drafting of that, but I was not involved with that. A professor from Santa Clara [University] by the name of Herman Levy, was involved. I knew it was going on, but I really wasn't paying much attention to it. In the summer of 1975 Janet and I and the girls went up to British Columbia to go backpacking. We went to Garibaldi Provincial Park, and we were backpacking for several days. We came

out, and we drove down to some motel on the coast, near Vancouver, to spend the night before coming home. I called my mother to tell her we were safely out of the mountains, and my mother said that the governor's office had been trying to reach me. Actually, that's not the way it worked. The way it worked was somehow, I guess my mother knew where we were staying, that she had given the governor's office the name of the motel. So when we arrived to check into the motel, I was told that the governor of California was trying to reach me. They got all excited about that, and they gave me a bunch of brochures for the motel to give to the governor. [laughter]

McGarrigle: To promote British Columbia tourism! [laughter]

Grodin: Right. I called the governor's office and I didn't get him, but I got Tony Kline, and Tony said that the governor wanted to appoint me to the farm labor board. He explained that the governor had already made several appointments to the board, but that the growers were insisting that some member of the board be somebody who knew something about labor law and had experience under the National Labor Relations Act. Which to some extent—a very considerable extent—was a model for the ALRA [California's Agricultural Labor Relations Act of 1975] and, in the eyes of the growers, the principal model, although the United Farm Workers had different ideas. They didn't like the national law that much, and they wanted their own provisions, and to some extent they got them.

At any rate, that was the scenario. He had already appointed Roger Mahony, who was a priest, Father Mahony at the time, and he had already appointed a fellow by the name of Joe Ortega, who was a lawyer in Los Angeles. He had already appointed LeRoy Chatfield, who had worked for the United Farm Workers' union. He had already appointed a guy who represented growers, Richard Johnsen, Jr., but who was friendly with the union. He was regarded as a moderate employer representative. The teamsters [Teamsters Union] were unhappy because they were in battle with the United Farm Workers, and there was nobody who had any background with the teamsters on the board, and I had that.

I said I'd call back. The governor was going to call me later, and meanwhile, I called Tobriner, and I said I had this call and did

he think that was a good idea? He said, "Absolutely, that's a good idea. You should do that." I said, "Well, I really don't want to give up my teaching position at Hastings, because I don't know where this is going." He said, "Well, do it for a year." There were one-year positions, two-year positions, three-year positions, and so forth. They were staggered terms. Eventually, everybody had a five-year term, but at the beginning they were staggered terms. When I talked to the governor I said, "Yes, I'll do it for a year." He said, "That's fine."

McGarrigle: So, this was a full-time position, then?

Grodin: Oh, yes. We moved to Sacramento.

McGarrigle: Oh, I didn't understand that.

Grodin: We moved to Sacramento, and Lisa was in school up there. Sharon was off at college, but Lisa went to school in Sacramento. We rented a little apartment in Sacramento. It was a very hectic period. I don't know to what extent you want to take time to talk about it.

McGarrigle: Let's talk about it.

Grodin: It was a very hectic period. I just went back for a twentieth, twenty-fifth, what would it be—thirtieth reunion, a conference put on by UC Davis on the farm labor act and what's happened in the last thirty years. At that time, it seemed full of promise. Jerry Brown, when he talked to me when I was up in Canada, was exuberant about how the farm labor law and collective bargaining could bring stability to California agriculture, and actually benefit California agriculture. The statute went into effect, I think, in August. When I came back from Canada, there was already a group working on proposed rules that the board might adopt. There was a procedure and so forth, people out of the National Labor Relations Board. [Governor Brown] had appointed as general counsel a fellow out of the National Labor Relations Board regional office in San Francisco by the name of Walter Kintz, who was a very good lawyer. The [California] statute provided—in contrast to the National Labor Relations Act, where the NLRB sort of takes its time with everything—the [Agricultural Labor Relations] Act provided

that when a petition for election was filed, there had to be an election within seven days. We were confronting the lettuce season in Salinas, which is a major area of activity for the farm workers and where we knew they were going to be filing election petitions all over the place.

The challenge was first of all, administratively, to set up an administrative office down in Salinas that was capable of handling that, and then devising rules that would govern those elections. They would be patterned after NLRA's rules, but obviously different to take into account the quite different context. Under the NLRA, you have a hearing before the election, and briefs filed, and you resolve all kinds of questions, and under the ALRA there wasn't time to do that. Whatever questions there were would have to be deferred until after the election. That meant that there would be issues with respect to who could vote, who would be eligible to vote, and that sort of thing that would have to be dealt with on the basis of challenges in postelection returns.

McGarrigle: Who wrote the act, that it had this—?

Grodin: It was a collective, negotiated statute. The principal author, I would say, was Herman Levy of Santa Clara. Rose Bird, who was the head of the Agriculture and Services Agency, played some role. The lawyers for the United Farm Workers' union and the lawyers for the various growers' groups all participated in the drafting process. Jerry Brown personally mediated agreement on the terms of the statute. When the act went into effect, it was a very hectic period. We were immediately charged from all sides with bias toward other sides, before we had rendered any opinions or taken any directions whatsoever. We did adopt a rule that was known as the access rule, which allowed union organizers access onto growers' property for the purpose of organizing on a limited basis. This is contrary to the rule in the National Labor Relations Act, in which the organizers would have to keep out. The growers were unhappy with us for that. The teamsters were unhappy because they thought that the composition of the board was such that the board would be favoring farm workers. And the farm workers were not unhappy, but viewed life as a constant challenge to exert pressure for whatever it is that they wanted! We were bombarded from all sides, and there was one wonderful day in which we were picketed both by the teamsters and the farm workers, and someone, presumably from

the farm workers' union, put a picket sign through the window of Father Mahony's office. Then, there was another time when we all went down—over my strong objection—to Salinas, to hold meetings with the growers, and the farm workers, and the teamsters, which I thought was a terrible idea, but which the majority of the board voted to do. It turned out to be a disaster.

McGarrigle: The reasons that you were opposed to it were—?

Grodin: I thought that the board should remain as—not aloof, but somewhat neutral and independent, and not go out of its way to subject itself to on-the-ground kinds of pressures. It was enough to have people come to Sacramento and present their views in an orderly meeting before the board. We didn't have to go down to Salinas to hear their views.

It turned out to be really disastrous. First we met with the growers, and they were very polite, and their lawyers presented their ideas with chalk on the blackboard and tried to persuade us that we should interpret the act in a particular language—in itself, I thought, inappropriate. There were cases pending. Then we were to meet with the teamsters in the teamsters' hall down there. We get there to the teamsters' hall at the appointed hour, and there's nobody in it. We go up to the platform at the head of the hall. People start to file in, and these are obviously teamster members. They're not teamster organizers or teamster officials. There are a couple of teamster organizers we recognize, and they stay in the back of the room. It is clear that these teamster members have been programmed to challenge the board on alleged bias toward the farm workers' union. We had not yet rendered any decision. Although they may have regarded the access rule as favoring the farm workers, there's no reason why it should favor the farm workers any more than the teamsters.

Roger Mahony was supposed to be the spokesperson for this meeting, and he started to speak, and he began to be interrupted by cat calls and questions. It became raucous to the point where it was impossible for him to be heard. I said, "I think we ought to get out of here." We all got up and walked out, left the teamsters' hall, and we went over to the UFW, which had a cottage and a little garden setting. They sat us down in the garden, and they gave us some sherry to drink

and some almonds. Jerry Cohen, who was a very competent lawyer for the farm workers' union, and [Marc] Grossman, who was a chief negotiator, talked with us about how they saw the problems, and so forth, and that was fine.

Then they said, "We're going to have some farm workers here. We'd like you to talk to them." Buses arrive, and farm workers pour out of these buses into the garden. Members of the farm labor board, the official agency of the State of California, were standing there with our backs up against the wall. Here are all these farm workers, and as Roger Mahony, who speaks fluent Spanish, starts to speak to them, they start yelling that they want to get rid of Walter Kintz, the general counsel, whom they perceive to be too imbued with the philosophy of the National Labor Relations Board and its rather plodding, bureaucratic nature. They want to get rid of him, but he's been appointed to a five-year term by the governor, just like us. We can't get rid of him, nor can the governor get rid of him. They want him to resign, but there's nothing we can do about that. Roger keeps telling them that. I'm standing next to Joe Ortega, who speaks Spanish, and Joe is translating for me, and at one point he turns to me and he says, "Oh, my God." I said, "What's wrong?" The farm workers are shouting, "Sí, se puede," "Yes, there is something we can do." Joe says, "Roger just said yes, maybe there would be something." I thought, "Oh, my God."

Just about that point, Cesar Chavez, who had been waiting outside in the car, enters the garden amid—the place goes wild when they see Cesar. He comes up and greets us, and then he proceeds to speak to the farm workers in Spanish, with the members of the farm labor board standing there, telling them, "Yes, they will get rid of Walter Kintz." I say to Roger, "I think we ought to get out of here." But, he doesn't do anything. He stands there. So, I leave. Then, one by one, other members of the board leave. It was just a disastrous situation.

But, we were able to conduct these elections and we were able to—I drafted a former member of the National Labor Relations Board whose name was Gerald Brown—Jerry Brown—to come to Sacramento. He was happily playing golf, retired in Texas. I called him down in Texas and I said, "Jerry, we have a job for you. You've got to do it." "We have challenges to the elections at Gallo—that was the big election—and challenges by the growers and the farm workers and the teamsters. It's going to be a big hearing, and we need somebody to

handle it who knows what they're doing and is beyond reproach and not going to be accused of bias." He said, "How long do you think it will take?" I said, "Well, maybe it will take a week. It's a big hearing." He said, "Okay, I'll do it. I speak Spanish, and this is something I could do." Three months later, Janet and I are driving through the [San Joaquin]Valley in Merced, where this hearing is taking place, and Jerry Brown and his wife are still there. The hearing is still going on, but he's loving it. He later became a member of the farm labor board.

McGarrigle: Getting back to the event that you just finished describing; what was the media coverage of that?

Grodin: Well, yes, there was a local paper.

McGarrigle: There were quite a few photo opportunities there for you to be captured.

Grodin: Pictures of the board with Cesar Chavez. Yes, they actually took those pictures, and they appeared in the paper down in Salinas. They probably did not contribute to the atmosphere that we wanted to have. Before long, in the springtime of 1976, it began to appear that the legislature might not re-fund the board. The growers were putting a lot of pressure on the legislature not to re-fund the board. Some of the legislators who were friendly to the statute were perplexed by events and all the turmoil, and so as it happened the legislature passed a budget which did not provide funds for the ALRB. It was later, a couple of months later, amended to revive the ALRB. But, for a period of time, everybody left. All the secretaries left. The staff left. Nobody was being paid. Board members were not being paid. I stayed on for a while, but then I told the governor that I needed to go back—well, I needed to do something. I mean, I wasn't getting paid.

McGarrigle: You were on leave from Hastings?

Grodin: I was on leave from Hastings. I thought probably it would be—LeRoy Chatfield resigned from the board, and I thought it would be a good idea for me to resign from the board, too. For that matter, I thought everybody should resign and let the governor start from

scratch. So, I resigned, and I went back to teaching. Then the board ultimately picked up, but it never picked up, it never did—the whole statute never fulfilled the goals that were originally set for it or anticipated. The farm workers organized some places, but where they organized they found it very difficult to negotiate contracts. They're dealing with high turnover in the workforce. People are there for a little while picking, and then they go off somewhere else. Very difficult to exert economic pressure effectively. Things just sort of went downhill for the farm workers. Cesar Chavez became, I think, more insular. Their whole union became more insular, but that's another story. So, I went back to teaching.

McGarrigle: I'm just also thinking that you mentioned the contentiousness of the practice before you left and made the switch to academia full time. When you went into this role in Sacramento, which became, it seems, pretty much from the outset, contentious. Was that a clear possibility, or was there a hope that it would be somehow less contentious from the outset?

Grodin: Well, I thought—I had no idea. I had no idea the depth of feeling between the farm workers and the teamsters that existed then. It was later they reached an agreement and everything became fine. There was no contentiousness within the board. We got along fine, and we all assumed that this was a turbulent period that we had to get through and things would settle down, and indeed they have. The problem is that they've now settled down to a point of placidness where nothing happens. There's no organizing going on. The board rarely meets. They don't have a lot to do.

McGarrigle: Are they still full-time appointments by the governor?

Grodin: Yes, yes. [laughter]

McGarrigle: Okay, I understand. So then, you go again back to teaching.

Grodin: Yes, I go back to teaching, and still labor law and related courses. I'm active in publishing a casebook on public-sector labor

relations, and writing articles here and there, and all of the things that professors are supposed to do, and doing some arbitrating.

McGarrigle: Did your role on the board influence the kinds of arbitrations that you did subsequently?

Grodin: No, I don't think I got any farm labor—well, they weren't doing any. But, I don't recall being involved in any.

McGarrigle: Were there perceptions about your having fulfilled that role that altered in any way the views of—?

Grodin: No, I don't think so. I was still selected as arbitrator to the extent that I wanted to be selected. I just couldn't do very many cases. A case a month is about all I could do because I didn't want to take time away from teaching and academic activities. Just really to keep abreast of what was going on in the real world of labor relations was why I did it, and I still do it for that reason.

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Grodin: I was under consideration for one of those vacancies [on the California Court of Appeal]. Along the line I had a call from the governor [Jerry Brown] asking me whether I would go back to Sacramento and be the general counsel for the ag board, and I really didn't want to do that. I told him no, with full awareness that that might prejudice my chances of being appointed to the court of appeal, to tell the governor that I didn't want to do what he was asking me to do. Ultimately—let's see, that was in—well, ultimately it was a long while. Ultimately, it was three years, almost, from the time I came back from Sacramento to the time I was finally appointed to the court of appeal. Meanwhile, Cruz Reynoso was appointed to the [third district] court of appeal in Sacramento, and I don't remember what other appointments were made.

McGarrigle: You said that Tobriner had—I think he was, from what I've read elsewhere— he was lobbying for you to be—?

Grodin: He was lobbying for me to be appointed to the court of appeal. There is no question about that. I don't know how often he talked to the governor or how much he pestered him, but I do know that the governor had worked for Tobriner as a law clerk, and I knew that they talked about things. That was one of the things they talked about. So, yes, ultimately I was appointed and I've told that story elsewhere, so if you want to pick up on it you can.

McGarrigle: I'm interested in that relationship between Tobriner and Jerry Brown, and if you'd like to say more about that.

Grodin: Well, you know, Tobriner had a very close relationship with Pat Brown, Jerry's father. He had a very close relationship with him growing up, in politics, and then Pat appointed him to the court of appeal. So, when Jerry came out of Yale Law School, it was natural for Tobriner to offer him a clerkship. He served as a clerk for, I guess, a year. They became quite close during that year, so that I think Jerry would call Mat and consult with him on political matters from time to time, as Jerry was gearing up to run for governor. I remember Mat

saying, "I think he's going to be your next governor," which seemed quite surprising at the time, but then Mat had a good feel for politics. I knew that they would talk from time to time. I assume they didn't talk about pending cases, but they did talk about the political situation, and they talked about me—or at least Mat talked about me! [laughter] I guess it got to the point where Jerry couldn't stand it any more, and I had an appointment. I don't know.

McGarrigle: Did you ever talk to Jerry Brown about that?

Grodin: You know, I never have. I've talked to him many times, including recently, but I just never brought that up.

McGarrigle: How would you describe the mood of California at that point in time, when you were appointed? Looking back on it, what do you think were the different currents that were—?

Grodin: Well, Jerry was very popular. He had been elected—I don't remember what the vote was—by a substantial margin, and he brought a kind of energy and enthusiasm to the governor's office. Among Democrats, at least, there was a good deal of excitement and enthusiasm. He was appointing people to the bench who had been activists in one way or another in civil rights, civil liberties work. There was some opposition to that, but not nearly what there would be now if a governor tried to appoint the sort of people that Jerry appointed. At the same time he appointed me to the first district, he appointed Cole [Coleman A.] Blease to the court of appeal in Sacramento. Cole had been a lobbyist for the ACLU and had built up some opposition in some quarters. He was controversial to some extent. That is why, I think, it was arranged that he and I would come before the Commission on Judicial Appointments at the same time, at the same hearing. I think it was understood that I was less controversial and that I would be sort of a cover for him. In any event, we were both confirmed.

McGarrigle: What was that hearing like?

Grodin: Well, there was opposition to me from some law-and-order group. I don't remember the name of it. They introduced evidence,

they had written a letter—I don't remember whether they appeared and testified at the hearing— but, they had written a letter to the commission urging that I not be confirmed because of a variety of activities that I had undertaken, of which I was most proud. They included going down to Mississippi in 1966 to oppose the seating of a Mississippi congressman that had been elected in an election in which blacks were systematically excluded. Senator [James O.] Eastland from Mississippi, a right-wing, racist senator, had given a speech on the floor of the Senate in which he had denounced those of us who went down there, by name, referring to us as fellow travelers, or something like that.

McGarrigle: This was in 1966?

Grodin: Yes, but this group had obtained this information. How they obtained it, I don't know, but I suspect from the FBI. I've never asked for my FBI file, so I don't know, but I suspect that that information was in there. Also, they brought up the fact that I had participated in a suit against the sheriff of Alameda County seeking relief, I guess in the form of an injunction, against his actions and the manner in which he was arresting young people who were demonstrating in People's Park. They were being held under very severe conditions and without promptly being brought to charges. A couple of us brought a suit that was successful. We got an injunction against this sheriff, but this group held that against me and the fact that I had gone to London School of Economics. That was something that Senator Eastland had mentioned on the floor as being a mark against my good character, and so these people also brought that up. But, I was approved and so was Cole Blease, unanimously. I guess [George] Deukmejian was the attorney general and so was a member of this commission, but he voted for me.

McGarrigle: Just to pick up that thread with Deukmejian, was it clear at that time that he had differences with Rose Bird, and was that already evident?

Grodin: She had been appointed, and I think he voted against her. I think it was a two-to-one vote on the commission. I think that's right. That was 1975 or 1976 that she was appointed. I think that he was on

the commission, and I think he voted against her. But, he didn't have anything against me. I remember receiving a questionnaire from him, asking me a variety of questions about how I felt about separation of powers, and the role of the courts in relation to the legislature, and so forth. I answered them all in good political science fashion. [laughter] It didn't go very deep, and of course the death penalty was not an issue because the court of appeal had nothing to do with the death penalty.

McGarrigle: This hearing that took place with you and the other person who was appointed—

Grodin: Cole Blease?

McGarrigle: Cole Blease, at the same time. Were the questions directed differently towards him than towards you?

Grodin: I think Deukmejian's questions of him were a little more vigorous than of me. To tell you the truth, I don't remember anymore what the questions were.

McGarrigle: What was the reaction of the bar upon news of your appointment?

Grodin: I have no reason to believe that it was anything other than positive. Nobody showed up to oppose me. Nobody other than this group opposed me, to the best of my knowledge. The State Bar survey that they did, were doing, and still do, had me rated at the top rating. I had a pretty good reputation in the bar at the time. I had some people testify before me at the hearing, including a lawyer against whom I had litigated frequently, Bill Diedrich, with Pillsbury Madison & Sutro, as it was then. He spoke highly of me, although he acknowledged that he didn't agree with all of my arbitration decisions. He had chosen me as an arbitrator after I left the practice and had agreed to use me in a couple of cases, and I had decided against his client. He acknowledged that I had "made some errors," but nevertheless he thought I should be confirmed. I don't remember who else I had there. I don't recall. Hart Spiegel was one, I think. He had been a president of the State Bar.

McGarrigle: What was the timing like? You went through this hearing,

and then you learned about your appointment, and then do you—?

Grodin: Then I went to work almost immediately. As soon as I was confirmed, I went in to see Justice [John T.] Racanelli, who was the presiding justice, and he gave me some homework to do. Almost immediately I began to participate in the work of the court. I was assigned a case to work on and attended the weekly sessions at which the court passed on writ matters. No, it took a little bit of education. I was confronting issues that I had no background in, issues of criminal procedure, for example. Racanelli suggested to me that I go read LaFave's two volume treatise on search and seizure. I did that. I read it from cover to cover, and then I made myself a nuisance in the writ hearings by quoting from LaFave. It was a very congenial court. We had John Racanelli and Bill Newsom and Norman Elkington. Although we didn't agree on everything—particularly Elkington was a little more conservative in certain respects than Newsom or Racanelli or myself—we all had great respect for one another, and we never had any controversies that rose above the level of a respectful argument. It was very pleasant.

McGarrigle: So, at this point in your career, you've had multiple roles as advocate, and professor, and arbitrator, and now as judge. Was that transition fairly seamless? I know you mentioned having to do the background work, and there are all these different matters of law that you encounter. How would you describe that?

Grodin: There were some similarities to what I had done before. The cases presented legal issues which required research and analysis that I did as a lawyer and as a professor. The decision-making process was something that I was somewhat familiar with from my work on the ag board and as an arbitrator. But, the dynamics are quite different, sitting in that very imposing courtroom, with robes on, and two other judges with you, listening to oral argument. There's a certain heightened awareness, but it wasn't an abrupt departure from the kind of analysis and writing that I had done before. It just had to do with different subject matter.

McGarrigle: Did you notice a change in the way that people perceived you in this new role?

Grodin: Well, certainly lawyers tend to be very respectful of judges, and lawyers who I was close friends with, and who never called me anything but Joe, suddenly started calling me Justice Grodin, which made me feel uncomfortable. There were always some lawyers who just weren't comfortable calling me anything else. No matter, even if I invited them to do that, they just wouldn't do it because that was sort of their attitude towards judges. I found it to be a more isolating environment than any I had been in before. Nobody calls. You sit in your chambers and nobody calls except the presiding justice to say there's a meeting or something. Friends don't call because they're concerned about appearing to exert pressure or something like that, or they're just frightened away by the title of the position. I had to call them in order to go out to lunch with people and have some opening to the real world. But there is the real risk, in that situation, that judges get isolated because there's so much work to do. They don't have time to get out and see people that they've seen before, participate in activities. I found that I had to make a real effort to do that.

McGarrigle: There's this intimidation factor, even among people who you're close to.

Grodin: Yes, that's right. Then there's the new people you encounter. Judge [Thelton] Henderson said at a certain point he stopped telling people, at some points, that he is a federal judge. He'd say he's a federal employee, because even his fishing guides would stop talking when they knew he was a judge. [laughter] He did speak to that more isolating aspect. Thelton is a prime example of a judge who is just absolutely unimpressed with his own position or authority. I mean, he's just available to people, and yet it is intimidating for lawyers.

McGarrigle: Well then, extending that idea a little bit, do you then enter this new rank of judges? You said there's collegiality on the court, but in a broader sense, did you then relate differently to, for example, federal judges and state court judges?

Grodin: Yes, yes, sure. For one thing, within the state system, there was a certain collegiality among all judges. There were appellate judges' conferences that you go to, and you see appellate judges, including the supreme court judges come there too, and most of them had been appellate judges themselves, court of appeal judges. Within the bench, there was a pretty democratic kind of atmosphere. In Division One of District One, where I was appointed, that's the oldest appellate court in California. When they first started appellate courts, there weren't any other divisions. It was District One and that was it. And Division One had certain traditions, which included having lunch together every Friday at a restaurant called The Embassy Restaurant, which no longer exists. It was a terrible restaurant, but we went there every Friday. There was a booth that was reserved for Division One, and above the booth was a wit that was attributed to Justice Ray Peters when he was the presiding justice of Division One, and a gavel. Did I tell you the story about how that lunch came to be?

McGarrigle: No.

Grodin: Well, the story is—I don't know whether it's true—that Ray Peters was appointed to the court of appeal from his position as clerk to the supreme court. He came to Division One, and I forget the name of the presiding justice, with whom he almost immediately had a falling out because he wrote a dissenting opinion in a case. The presiding justice came to him and said that it was the tradition of Division One that there weren't any dissenting opinions. If you didn't feel that you could go along with the opinion of the majority you just didn't sign it, and it would go out as a two-justice opinion. Peters allowed as how that was a lousy way to run a court, and he insisted on filing his dissenting opinion, and so for a while they didn't speak. [laughter] Then one day, at the suggestion of a mutual friend, they went out to lunch together at the Cliff House. The story has it that they didn't come back at all. It was a Friday, and they went out for lunch, and they never came back until the following Monday. From that time on, they were the closest of friends, and the tradition was that, every Friday, Division One would have lunch together, and you would have to have at least one drink in honor of Ray Peters. Anyone who had ever served on Division One, including supreme court justices—and that included Tobriner and

[Raymond] Sullivan—including former retired members of Division One—and that included people like Judge [John B.] Molinari—or people from other districts and divisions who had been assigned temporarily to Division One, the trial court—anybody who had ever sat with Division One, even for a day, was invited to this lunch. It was a very pleasant affair. It was very congenial.

Within District One, there was a lot of interaction among the judges. There was a good deal of discussion, perhaps improperly, over cases. The same issue might be pending in more than one division, and the judges would in fact talk about that. Whether that was entirely proper, I'm not sure. When I came there, Justice Caldecott, Tom Caldecott, was the administrative presiding justice, and nobody could remember how he came to be the administrative presiding justice, because that's not an appointment from the governor. There's nothing in writing that says how that happens, but presumably he was elected or self-appointed somewhere. He ran the district, in terms of its budget and logistics and that sort of thing, rather closed-handedly. Some of the newer appointees—the "Brownies"—decided that that was not the right way to do things, and the court as a whole should be democratically operated. The Constitution or the statute says—I guess it's the Constitution—that it's the court that makes certain decisions, and we argued that that meant that we all had to participate in those decisions. Well, that was a great mistake because what happened was, we succeeded in this kind of velvet revolution. We established committees of the court, and we had meetings of the court, and then it became like the law school became—you had to go to faculty meetings and committee meetings! [laughter] I think most of us would have been prepared to return power to Caldecott or any other benign dictator if it weren't too embarrassing to do it at that point. But, District One as a whole was a very congenial place.

McGarrigle: Did he stay on, Caldecott?

Grodin: Oh, yes, Caldecott stayed on as a justice. He was no longer—Racanelli became the administrative presiding justice.

McGarrigle: What kind of caseload did you have when you first started there?

Grodin: Oh, it was a horrendous caseload. There was a backlog, and the practice had been that each justice would be responsible for *x* number of opinions per month—it was four or five—and that was it. The cases kept coming in faster than they were going out, but the prevailing attitude was that there wasn't much we could do about that. We worked very hard, even though we only turned out four or five opinions a month. There were all the writ matters that we had to consider each week, and of course we had to consider the opinions circulated by our colleagues, so that amounted to twenty to twenty-five opinions a month. Nonetheless, I found that I had the time, in some cases, to draft my own opinions, and some other judges did too. I remember going to a meeting of appellate judges, and hearing Otto Kaus, who had then recently been appointed from the court of appeal to the supreme court, talk about what life was like on the supreme court. He told us that compared to the supreme court, the life of an appellate court justice was enviable in terms of workload, and that although he expected when he got to the supreme court that this would be a group of, sort of, philosopher kings who would sit around and talk about the deep legal and jurisprudential issues in cases, the fact of the matter was that he had less time to reflect on individual cases in the supreme court than he did in the court of appeal, and no time to write his own opinions. I didn't believe him. I thought he was telling us all this so we wouldn't feel so bad that he was there and we were down below. When I got to the supreme court, I learned that he was absolutely right.

When I became presiding justice of Division Two—I don't know whether you want to talk about any of my opinions on Division One.

McGarrigle: Well, I'm interested to know just some basic things and then for you to build on that—what your preferred work style is for writing opinions and also for the times when you aren't able to write your own opinions, but you work with staff on writing them.

Grodin: Well, my preferred work style is to write the opinions from scratch, and I did some of that on the court of appeal, but when I got to the supreme court, I found that there was just no time to do that. I tried to do it in one case and I got so bogged down that I never did it again. But, on the court of appeal we had calendar memos prepared by

law clerks, who were very good, and the memos were very good. If we were assigned the case—and assignments operated in rotation on the court of appeal. The presiding justice didn't make assignments case by case, as is the practice on the supreme court. The clerk would assign the cases on a rotation basis.

There was one case that I took over, if that's the right phrase, from Justice Newsom, out of rotation, and that was a case in which the issue was wrongful termination from employment. That was something that I was extremely interested in, and Newsom came to me to talk about it and said he didn't know what to do with this case. I said, "Would you like to give to me?" and he said that would be fine. I asked Racanelli whether that was okay, and I just took the case over, and that became *Pugh v. See's Candies* [(1981) 116 Cal.App.3d 311].

I've written, I think, about the different styles and inclinations of judges in oral argument. I think that's quite important. Judges look upon oral argument differently, and I think it has to do with how different people process information. Norman Elkington did not care for oral argument. As far as he was concerned, it was useless. He would look at the briefs. I mean, he would really look at the briefs, and he would look at the memo, and he would come to his conclusion, and he was prepared to write his opinion. He would get into oral argument, and he would be very impatient. The poor lawyer would stand up there and start arguing, and Norman would either say, "You've already made that argument in your brief, counselor. You don't need to repeat it here." Or he would say, "We don't allow parties to make arguments in court that they haven't made in their briefs. We don't allow them to make new arguments here." [laughter] Or he would say, "Counselor, you've made your point very well," in which case, unless the lawyer was absolutely dense he would understand that, so far as Norman was concerned, he should sit down and shut up. I tended to be at the other extreme. I process information and ideas much better in dialogue than on paper, and so I would often come into oral argument having read the briefs, having read the memos, but uncertain about what I wanted to do in the case and genuinely interested in what the lawyers had to say and how they would respond to my questions. I would tend to be very active in oral argument, to the consternation at times, I think, of my colleagues. Later on, when I became P.J. [presiding justice] in Division Two, after the first oral argument we had, in which I asked questions as

I typically do, I had a visitation from the senior associate justice, who told me very politely that, of course, I was presiding justice and I could do whatever I wanted to do, but it had been the practice in that division that the judge to whom the case was assigned for opinion would get to ask the first question. Now that seemed to be an utterly ridiculous rule, and I never abided by it. To me, oral argument was very important. But it is not to some judges, and I don't think that's a matter of one judge being better than another. I think it has to do with the style of decision making and processing information.

McGarrigle: So how would that work in practice? If you were at one extreme, and you had a colleague at another extreme, were you interrupting each other, or were you having to get time for—? How would you—?

Grodin: Norman never interrupted anybody because he never asked any questions, hardly ever, and I never interrupted him. [laughter] The only problem in Division One would be between me and Racanelli or Newsom, who might want to ask their own questions. Of course, they got a chance to do that, but from time to time I think they got a little irritated with my monopolizing the conversation.

McGarrigle: Then in terms of the style of working and processing information, either when you wrote your own opinions or in the cases where you didn't, but where you worked from memos and so on, did you have dialogue with the staff people and the law clerks who were presenting you with the information?

Grodin: Oh, sure. I would have regular meetings with my law clerks and externs, and we would go over the agenda before each oral argument and discuss all of the cases. Then, after, I would have further discussion with the clerk who was going to be writing the draft of the opinion, about how it should be written. After I got a draft, I would be pretty aggressive in modifying it to my own style, to my own analysis. I think the other judges did that too. Norman Elkington, I think, pretty much wrote his own opinions. He rarely found a criminal conviction that he couldn't affirm, so he started with that premise. [laughter] But, he was a fair-minded person, and there were plenty of cases in which

he joined in a reversal.

I think I may have told you about one case—maybe not. Maybe I told my students. The defendant was a high school teacher who had been convicted of aiding and abetting her husband's sale of a small quantity of marijuana. She was tried first, and convicted, and sentenced to jail. He was tried after and acquitted. Now, there was some case law in support of the proposition that there was something wrong if it were the other way around, if the principal were first acquitted, you couldn't then proceed to trial against aiding and abetting. The way this was set up, theoretically each was a separate trial, and so the evidence against her may have come in differently than the evidence against him. There was no precedent for saying that this trial conviction should be set aside for that reason, and yet I just didn't have the stomach for upholding a conviction of this woman who had no prior record, a high school teacher—to send her off to jail is going to really be devastating. She had kids to take care of. So I drafted an opinion for reversal, and I took it to Norman, because I was pretty sure that whoever else was on the case with me—I don't remember, Newsom or Racanelli—that they would agree with this. But if Norman didn't and he chose to write a dissent, that would sort of cast light on the whole process and make it more difficult to do what I thought had to be done. I went to Norman and I showed him this opinion. I said, "Norman, this is the opinion that I would intend to issue, and it would be an unpublished opinion. I'm interested in knowing whether you would go along with it." He said, "Well, leave it with me. I'll have a look at it." He calls me back and he says, "You know, Joe," he says, "I have a granddaughter about the age of that woman, and I could imagine my granddaughter doing something like that." He says, "I'll sign your opinion." He was a very decent guy. I wrote a tribute to him. Once when I came in over the weekend to work and he was there working a way, and it was a rainy day, I wrote a tribute to him, which I published in *The Daily Journal*, or something like that, which was actually read at the court's memorial service for Norman when he passed away. That was life on Division One.

McGarrigle: I want to talk about your change to presiding justice at Division Two, but just to finish up with one thing. There had been this tradition in different divisions about not writing a dissent.

Grodin: Oh, that was ancient. That was ancient.

McGarrigle: That was ancient history.

Grodin: Yes. No, longer.

McGarrigle: Okay. So in the case of opinion that you just described, this case you just described, it was unpublished, and the reason for that was—?

Grodin: We would unpublish opinions that had no precedential value and this one probably had no precedential value. It was sort of an *ad hoc* doing of justice. The presiding justice of Division Two had retired, and I got a call from the governor's office, I guess Tony Kline, asking whether I would be prepared to be appointed to presiding justice. I discussed that with Mat Tobriner. The truth was that I really liked Division One. I liked the people on Division One. I enjoyed what I was doing on Division One. Having the title of presiding justice was not in itself something that I yearned for. There's not much that a presiding justice has by way of power, except to organize things and preside over the hearings. He does sign off on some writs without the necessity of the others participating, but that was not power that I yearned for. Mat led me to believe that this might well be a step toward appointment to the supreme court, and so I told the governor, "Yes, I'd be happy to do that."

I became the P.J. in Division Two, and Division Two had a rather relaxed attitude toward productivity. It had been the view within Division Two that there was no point trying to turn out more cases, because if you turn out more cases, there'll be just more appeals, and you won't really reduce the backlog, and so you might as well take your time. [laughter] I came there convinced that we needed to do something to step up the pace of turning out decisions, and so I developed two procedures to that end.

One was that we had law clerks go over the cases that were pending and divide them into two categories, those that they thought could be decided one way or the other without very much discussion, and possibly with a brief opinion, and possibly without oral argument, and those that were more complex that probably required some discus-

sion, maybe oral argument. We had an A list and B list. With respect to the B list cases, the simpler ones supposedly, we all agreed that we would pursue them with our law clerks, circulate very brief opinions among ourselves—just simultaneously with the A track—that we would just do this to whatever extent we had time to do it. Then we would advise the lawyers that we thought oral argument was unnecessary—which didn't mean that it didn't occur, because they could still ask for it—and at the same time step up the pace a little with respect to the A list, in terms of the number of cases that we were getting out. Through that, we were able to at least double the number of cases that we were deciding each month.

Then, in cooperation with other divisions, Winslow Christian, Justice Christian, was particularly interested in developing settlement procedures. We developed a settlement calendar of cases that were on appeal that seemed amenable to settlement discussions. We would have a judge who was on a different division than the one that would be deciding the case act as the settlement mediator and schedule a number of settlement conferences. It's hard to measure whether that had any success. Some cases settled, but then some cases would have settled anyway. It was very difficult to develop meaningful comparisons. I think probably we got rid of some cases that way, but probably not enough in terms of the amount of energy that judges had to put into the process to warrant it, and I think it was discontinued.

McGarrigle: What was the difference in atmosphere in Division Two? You describe the backlog of cases and this sort of different attitude about getting cases out. But, in terms of collegiality, was that any different—?

Grodin: Well, it was a collegial group, but it was not as easy to go around and discuss individual cases and argue with people or discuss with people what we should do. Just as a matter of personality, the judges on Division Two seemed to want to operate within their chambers more. Otherwise, it was a perfectly congenial group.

McGarrigle: Who were the other judges who you served with on Division Two?

Grodin: Allison Rouse, Al Rouse, was the senior judge. John Miller and Jerry [Jerome] Smith, both of whom had been in the legislature and were appointed by Jerry Brown out of the legislature. They had a sort of legislative background and perspective, which proved to be very useful and enlightening to me when it came to issues of statutory interpretation. I mean, they knew how these things worked in the legislature and were often very helpful.

McGarrigle: How was that change that you implemented received, because this stepped up the workload?

Grodin: Yes, it did. Well, there was a little bit of reticence about it. It was hard to argue with it in principle because Division Two had a very large workload and a relatively low level of productivity in comparison to other divisions, and so they recognized that they had an obligation to do something about that.

McGarrigle: Does the bar at that point in time respond? Is there like a notice being made about the change? Do you see articles, for example?

Grodin: I don't remember whether we gave notice of this A-list, B-list procedure. I would talk about it; if I went to a meeting of lawyers and they asked me to talk about the appellate process, I would talk to them about that. I don't think we ever made any official announcement. I don't think there was any—I never heard any criticism of it. I think lawyers recognize that some cases are more controversial than others and that some cases get appealed just because the appellate process is there.

McGarrigle: I actually meant that people must have picked up on this change in productivity, and I wondered if that was—?

Grodin: Well, the only people who really pay attention to that are a small group of appellate lawyers, the [California] Academy of Appellate Lawyers and those kind of folk. A lawyer who has a case on appeal once every five years has no idea what division is doing what, so it was not the show of the year. It didn't receive any Academy Awards.

McGarrigle: You didn't make front page news.

Grodin: Of the cases that I remember from the court of appeal, Pugh against See's Candies. I would have trouble coming up with any other cases that presented legal issues of great significance. There were a couple of cases that had a lot of significance for me, in terms of the kind of human challenges that they presented.

One of these involved a young boy who had Down syndrome. His parents had placed him in an institutional facility and had effectively abandoned him there. I mean, they went to see him maybe once a year. He never came to the house. Their view of the matter was that he could never function normally, he would always need institutional care, and he would probably die at a young age, especially because there was evidence that he had heart problems, which are characteristic of young people with Down syndrome. The doctors had recommended a procedure for dealing with that, catheterization. The parents refused to consent to that, and the basis of their refusal was that there really was not much point in trying to deal with his heart condition, that he was pretty much hopeless.

While he was in this institution, there was a couple who came to visit the institution from time to time and befriended kids who were there and in particular befriended this kid—I guess he was eight, nine at the time. No, he must have been ten or eleven—and began to invite him home to have dinner with them and their children, who were normal children. When they found out about the parents' refusal to allow the catheterization, they got a lawyer and sought to adopt the child and to get court approval for the catheterization. That was opposed by the natural parents, and it was a bitter, bitter confrontation, which ended up in the Santa Clara Superior Court.

There was a trial. The superior court judge appointed a lawyer to represent the child, and the lawyer argued vigorously in favor of the prospective adoptive parents' petition for adoption and catheterization. The trial court, after a lengthy trial, ruled in favor of adoption and the catheterization procedure, but stayed his opinion pending appeal. An appeal was filed and ended up in Division One. The trial court had made lengthy findings, and what he had to find was, not merely that it would be in the best interests of the child to be adopted, but that it would be—what's the proper terminology?—positively against his—

I'll think of the phrase.

McGarrigle: It would be detrimental not to be—?

Grodin: That's right. Detrimental. That was the factual legal question which came before us. It was really a heart-wrenching kind, because the parents were there in the courtroom and there was a lawyer arguing for them, the natural parents were. The nature of their interest was so unclear. They were so ambivalent about all of this. They were not prepared to take any steps to ensure the longevity of the child, and yet they were dead set against anybody else taking over. We ended up affirming. Racanelli wrote the opinion, and that would have been the end of the matter. I think that they filed a petition for review with the supreme court, which was denied.

Years later, there was a birthday party for Racanelli. It was held in one of the buildings down on the waterfront, big barn of a building. They had music and whatever. Janet and I went, and we were greeted at the door by Racanelli's wife, Betty Medsger. She said, "There's somebody here that you're going to be interested in seeing." So I go over and she leads me to a table, and there is this kid with his fiancée and the parents who had adopted him. He had been told who I was, and he thanked me for what we did. These kids were going to get married.

McGarrigle: How did he come to know that this was a celebration for Racanelli and that you would be there?

Grodin: Oh, he didn't just come there. I think somehow the adoptive parents must have contacted Racanelli and told him. By this time, I was in the supreme court, so I wasn't around. I think they must have told him that things were well, that they did the catheterization and it turned out well, and there were no complications. The kid was rather at the high end of Down syndrome children, notwithstanding his previous parents' evaluation of the situation, and that there was no reason why he couldn't have a normal relationship with this woman, who was also Down syndrome.

McGarrigle: So, these adoptive parents, who were able to successfully take over and get the medical treatment and so on, there was,

maybe when he reached the age of maturity, he was released from the institution?

Grodin: Oh, I guess so. You know, I don't know what happened. I don't know what the living situation was. But, you sit there in the courtroom and you issue decisions, and for the most part you have no idea what happens after that. In many cases, it really doesn't matter. In many cases, they're disputes over money so one side got more money than the other side, and so that's it, and you really don't want to know anyway. In criminal cases, if you set aside a conviction, why that can be very important to the individual, obviously. It's just rare that a judge gets to see the results of a decision, and especially rare when the results are that gratifying.

There was another case that was heart wrenching, where the results were not as gratifying. That was a case in which a woman had all kinds of problems, physical and psychological. She was grossly obese, she had diabetes, she had heart problems, she had kidney problems, she was on dialysis, she had drinking problems, she was an alcoholic, she had drug problems, she would take drugs of various kinds. To make matters worse, she was poor. She didn't have any money. When she went in for dialysis, she would make life miserable for the nurses and for the other patients. This particular dialysis machine—I don't know whether it's true of all dialysis machines—more than one person is hooked up to the machine at a time. She would be uttering obscenities and screaming. She would tear out the tube. She showed up once in an ambulance. When she got sick, of course, she had no medical insurance, and she couldn't afford a doctor on an ongoing basis. Whenever she got sick she went to emergency. She would show up in emergency in an ambulance, having called 9-1-1, and usually drunk.

There was this perfect saint of a doctor who continued to provide her with care, and tried to get her to go to Alcoholics Anonymous, and tried to deal with her drug problem, and tried to deal with her obesity and get her to go on a diet. He was just everything you would want from a doctor, but there came a time when he said, "I just can't do this anymore. It is consuming my whole life. I'm going to have to cease treating you." Whereupon she sued him. [laughter] He was giving her dialysis in his office, and she sued him. I'm sorry. I misspoke when I said the only way she could get care was through emergency.

This doctor was doing it for her in his office. Occasionally she would go into emergency, but he was doing it. He just said, "I can't do it anymore. I'm sorry." And so she sued, and she claimed that he had an obligation to continue to provide her with care. She also sued hospitals and whatnot.

We had the oral argument in chambers. I forget what happened in the trial court. I think the trial court decided against her. She appealed. We didn't have the oral argument in the courtroom, we had it in chambers. We invited the lawyers, and we had a kind of informal discussion, and then we decided that enough was enough. I wrote the opinion for the court, saying that this guy had done everything that we could expect a physician to do and there wasn't any legal or equitable basis for requiring him to do more, and that was it. She died not long after that. She couldn't get the care that she needed, or she died from complications from various illnesses. What that case taught me is that there are just limits to what the law can do. It can't do everything. Those were cases I remember from the court of appeal.

McGarrigle: The first story that you told about the encounter at Racanelli's birthday party—what kind of an exchange did you have with the boy and his fiancée, and his adoptive parents were there too, you said?

Grodin: I think I cried. It was such an emotional encounter. Well, the exchange, as I said, I was really happy that things turned out this way. Let's see. One other case on Division Two. While my appointment was pending at the supreme court—I guess my name was in, and I don't remember what stage it was. Or, it may have been before I was appointed, but while there was an opening that I was being considered for. Along comes a case. I'm presiding judge, and along comes a writ motion in the case of Archie Fain. Archie Fain had been convicted and had served his time in prison for murder. He came before the parole board, and the—what happened? The recommendations of the prison authority was that he be paroled. The parole board held a hearing, and all the evidence showed that he had reformed, that he had repented, that he would be a good bet on parole. But there was a substantial public outcry against his release, and the parole board acceded to that. They denied parole but made it clear that they were denying parole based

upon this public outcry, and not because of any findings they made contrary to the recommendations of the prison authority. He brought a writ of habeas corpus to the—or mandate or whatever—to the trial court in Marin County. The trial judge over there—whose name I might remember if I have enough time to reflect on it, but a wonderful and courageous trial judge—issued an order requiring his release and saying, "This is not a Roman forum. We do not sentence people to live or die, or stay in prison or not, based upon public outcry. We go by the rule of law." It was a wonderful opinion.

There was an appeal to our court, and this was a very hot political issue. We had oral argument, and we had discussions within the court. It was a three-way split. I thought that we should simply affirm the decision of the trial court and order his immediate release. Al Rouse thought otherwise. He thought that we should reverse the decision of the trial court and in effect affirm the decision of the parole board. John Miller agreed with me, but was not prepared to order his immediate release. Instead, what he wanted to do was order the case back to the parole board with instructions to the parole board. I thought that that was sort of a cowardly way to do things, but there we were with a three-way split, each of us proposing a different disposition, which would result in nothing. I reluctantly agreed with Miller, and we sent the case back to the parole board. But, Fain was released, and it did cause a lot of fuss, and so I worried about the consequences of that for my confirmation to the—first of all my appointment and then my confirmation—supreme court. But, it turned out not to have any effect.

McGarrigle: So, when you said there was a lot of fuss and that it was a very political issue—can you expand on it?

Grodin: I mean, people were writing letters to the editor, and they were writing letters to the court expressing outrage that this murderer should be released upon the public. So far as I know, after his release, he behaved himself. I've never heard otherwise.

McGarrigle: At that kind of juncture, do you start to get pressure from legislators at all, or elected officials?

Grodin: Well, no. I never had any calls. I never had any calls from public officials on any case on the court of appeal or the supreme court.

McGarrigle: You had said earlier about the difference in the dynamics when you went to Division One, and this was now Division Two.

Grodin: Well, this case we talked about. This was one we talked about a lot.

McGarrigle: That's what I wondered about. So, you've got three people, and trying to make a decision, each of you with your different powers of persuasion and so on.

Grodin: Well, you might say that John Miller was more persuasive than I, but I couldn't move him from his position. I understood his position, and maybe mine was overly rigid. He was more alert to the political environment, perhaps, than I was, more sensitive to it because he had been there. It didn't make a whole lot of difference. It was just a stop along the way.

McGarrigle: It was a matter of principle, at that point.

Grodin: Yes, it was a matter of principle. I didn't see any principle basis for returning it to the parole board once we had decided that they had acted erroneously and that the trial court was correct. But that's what we did, because I needed another vote and I didn't have it. Miller's position was better than Rouse's, so far as I was concerned.

McGarrigle: The inner workings, or the interpersonal interaction and these dynamics, I think, are fascinating. Not something we get to know a lot about.

Grodin: Then I'll tell you about how I came to be appointed to the supreme court, or at least what I know of it.

McGarrigle: Yes, tell what you know of it.

Grodin: There was a vacancy left the by the resignation of Frank Newman. Frank Newman was appointed to the court by Jerry Brown. He had been dean and professor at Boalt Hall. He really never took to being a judge. The way the court operated and the kinds of cases he had to decide, it just seemed to wear on him. I had participated—well, this is all irrelevant. There was a vacancy on the supreme court, and it soon became apparent that there were three of us that were being considered for that vacancy. I guess, how did it become apparent? Whether somebody told me or whether the State Bar, "Jenny" committee [Commission on Judicial Nominees Evaluation], started sending out letters for all three of us, I don't remember. So it was me, and it was Howard Weiner, and it was Tony Kline. Howard Weiner was a wonderful, wonderful judge down in San Diego, a marvelous appellate judge. I thought to myself, well, if I were the governor I don't know how I would choose between the two of us, but I probably wouldn't because, after all, Tony Kline was there. Tony had been with the governor since the governor was appointed. They both came out of Yale law school. I guess they were classmates, I don't know. I sort of assumed that it would be Tony who would be appointed to the court.

At one point when I was on the court of appeal, still on Division One, and there was a vacancy on the court, Governor Brown had done a rather strange thing. He invited himself to come down from Sacramento to a meeting of all the justices on the court of appeal, just to chat with us about judicial administration, to have expressions of views about this or that. It was unclear what the purpose of this meeting was but, I don't know, it may have been to sort of look us over. It was a stable! [laughter] At any rate, when this later vacancy occurred with Frank Newman, I had no communications with the governor. I had no idea what was going on. I had no idea what procedure was going to be followed, nothing. Then I was told that the governor was actually meeting with people in Sacramento and in the process of making a decision. He announced that he would make the decision the following day.

That night I went to dinner with my wife to a Chinese restaurant. At the end of the meal we had fortune cookies, and my fortune cookie had two fortunes in it, not just one. One of them said, "You are about to receive good news," and the other one said, "You are about to be promoted." [laughter] I went home that night thinking, okay, I don't

have great faith in fortune cookies, but it certainly could have been worse. That night—I don't remember, I think during the night or early the next morning, I got a call from the governor saying he wanted to appoint me. That was it.

McGarrigle: Now, as in the court of appeal appointment, was Tobriner active?

Grodin: Tobriner had died.

McGarrigle: Oh, he had died.

Grodin: Tobriner died in the spring of [1982]. I don't know what conversations he had with the governor before he died, and I've never inquired of Jerry Brown about that. I'm quite sure that at some point he had conversations urging the governor to appoint me. But, he fell ill earlier that year, and was in the hospital, and died rather quickly. This was later on in the year, August, September, something like that.

McGarrigle: That was a big year.

Grodin: That was a big year. Do you want to move into the supreme court confirmation hearing?

McGarrigle: Let's talk about the confirmation hearing, yes. Well, first let me ask you. You got the fortunes and then you had the invitation for the appointment the following day.

Grodin: Or later that night, I don't remember which.

McGarrigle: What was your reaction to that?

Grodin: I guess I said, "Thank you very much." [laughter] It wasn't totally unexpected, but it was not predicted either. Actually, the previous day—the day of the evening that I went to the fortune cookie restaurant—I got a call from a reporter with *The [San Francisco] Chronicle*. I don't remember who that was, Harriet Chiang maybe? I'm not sure. I got a call from a reporter, and the reporter says, "Congratulations." I said, "About what?" She said, "You mean they haven't

told you? They haven't called you?" I said, "No. Nobody's called me about anything." Now, I never did find out whether (a) she had some kind of inside information; or (b) she was using this as a ploy to get information from me. I don't know, and I've never followed up on that either. I didn't place much stock on her call. I assumed that she was just using that as a technique to try to get me to blurt out information, which I didn't have.

McGarrigle: So, when you get a call from the governor inviting you to go on the supreme court, do you then call your friends, or call your daughters, or—?

Grodin: Oh, I called everybody in sight and we had a party over here. Did we do that before the confirmation? I think we did. Yes, I still have a huge magnum of champagne that Ephraim Margolin brought over to help celebrate. Yes, that was very exciting.

McGarrigle: And your mother, at this point—is she following your life?

Grodin: Yes, my mother was alive and very excited about the whole thing. Then the confirmation hearing was scheduled, and I guess I again brought people there to be witnesses, I don't remember who. I think the hearing was down in Los Angeles. Deukmejian asked me some questions about the death penalty, or a question, and my response was something to the effect that I was not an enthusiast about the death penalty but that I recognized that it was part of my obligation as a supreme court justice to enforce the law. So, he voted for me. It was a unanimous confirmation. I hadn't expected any real difficulty there. Then, immediately after the confirmation, I went into the Chief's office, chambers, down there and took the oath, and I think immediately started participating in decisions of cases. When I came into my chambers in San Francisco, there was a pile of papers about four feet high, which represented the writ petitions, petitions for review that would be on the next Wednesday's conference. That was when I started getting submerged in the review process and never quite entirely became unsubmerged. It was just continuing.

McGarrigle: This was Otto Kaus's description coming true.

Grodin: This was Otto Kaus's prediction come true, that if you're going to be serious and conscientious about the Wednesday conference, then you're going to prepare for it. That means at least—it would take me at least a day and a half of each week, sometimes two days, to get through, first of all the writ petitions that were assigned to my chambers to write memos to be circulated among the other judges, and then to review the memos that they had written. The memos were usually circulated at the end of the week, by Friday, before the Wednesday writ conference, so pretty much every weekend was taken up with reviewing those. In fact, Newman had told me that—I inherited Frank's chambers—and he told me that there were cockroaches behind Witkin in the shelves in the library. [laughter]

McGarrigle: And you found that to be true?

Grodin: No, I never saw the cockroaches.

McGarrigle: Was that apocryphal or was there—?

Grodin: I don't know.

McGarrigle: In terms of that transition, you spoke to the isolation of being a judge when you went on the court of appeal.

Grodin: Even more so on the supreme court. Very difficult to get time to see anybody else, do anything else, other than your own family. It's just very difficult. You have to really make an effort to do that. Going back and forth to court I would go most times with Otto Kaus, and we would spend the time talking about cases. There just weren't very many waking hours in which I wasn't talking about cases, even with my law clerks or with another judge, or studying on my own, preparing for oral argument, whatever.

McGarrigle: What was your sense of this tradition that you were joining on the California Supreme Court, with Tobriner and previously with Traynor?

Grodin: Well, it was very awesome. I had served—two or three times I had participated on the court on *pro tem* assignments. In one of those, I was actually assigned the writing of the court's opinion, which is very unusual. I don't know whether there are any other cases in which the court's opinion was written by a *pro tem* justice. During those periods Tobriner was still on the court, and Richardson was still on the court, and it was very impressive. It was a high quality of discussion and generally mutual respect and, as you say, within a tradition that was pretty awesome.

Outside each chambers was a little plaque, a bronze plaque containing the names and years of the prior occupants of the chambers. I knew who had occupied those chambers and when. I went and looked them up, and none of them were memorable jurists, I have to say. [laughter] If I mentioned their names to you, you wouldn't know who they were. Nevertheless, there was clearly a tradition, ongoing—the Chief's chambers, which had been inherited from, as you say, Traynor and Gibson. The traditions within the court with respect to how the Wednesday conference was conducted, and how oral argument was conducted, and how cases would be assigned for opinion—those were longstanding traditions. They weren't written down anywhere. For example, the California Supreme Court grants review on the basis of a majority vote, as compared to the U.S. Supreme Court, where four justices can bring a case up there. That's not a rule that's written anywhere. It's just a long-standing tradition. The tradition in the U.S. Supreme Court is that at conferences the younger justices speak first, and then in ascending order of seniority, so as not to deter them from speaking by the awe that they have for the senior justices. Well, for some reason, it has never been assumed that the junior justices in the California Supreme Court would be intimidated in that fashion. In any event, the rule is otherwise, and the practice is that you start with the most senior justice. Every conference we would hear first from Justice Mosk and then going around the table.

McGarrigle: Some of these traditions I'm sure you knew already, but what was the method for passing down this tradition to new justices?

Grodin: You just came there, to Wednesday conference, and you were told where to sit. You sat in the same chair again, that was by order

of seniority around the table. By the time I came there I had already participated in other conferences, not Wednesday conferences, but conferences on cases to which I had been assigned as *pro tem*, so I knew what the routine was, but I don't remember whether anybody told me that or I just knew it.

McGarrigle: It's an oral tradition.

Grodin: It's an oral tradition, exactly. It's an oral tradition. The traditions among the law clerks as to how they relate to the judges and to judges of other chambers is also a matter of tradition.

McGarrigle: Was there a certain kind of formalized welcoming? You said you came to your office and there was four feet high of—.

Grodin: I think when I was confirmed, probably there was a bottle of champagne or something. I remember my mother was there, right at the confirmation, so that must have been right after the confirmation itself. I remember her telling me what a nice man she thought George Deukmejian was.

McGarrigle: Based on his remarks?

Grodin: No, based upon his welcoming her, and being very friendly to her, and congratulating her. He was a nice man—is, I guess! What else can I tell you about that process?

McGarrigle: Well, did you leave the court of appeal right after learning about your appointment, and go through the confirmation?

Grodin: There was a short period of transition to the confirmation hearing, during which I turned my caseload over to others and got out whatever remaining opinions I had to get out.

McGarrigle: It sounds like trial by fire.

Grodin: Yes, it pretty much is. You get immersed, or whatever it is that happens with a fire, you get thrown into it.

McGarrigle: Is there some kind of a mentor system, or is that informal?

Grodin: It's informal. As I say, I had been friendly with Otto Kaus before either of us were appointed to the supreme court. He was living in Berkeley, not far from my house, so we would go over and back nearly every day in my car. His wife remained in Los Angeles. She didn't want to come up here, so he was renting an apartment in a place nearby. He would tell me how the game was played.

McGarrigle: I want to hold off for the substantive work of your career at that point, but in terms of getting personal time and continuing with your interests, backpacking and this kind of thing—were you able to do that?

Grodin: Oh, I continued to do that. The court did not hold oral argument during the summer months, although it continued to meet for writ conference purposes. But if you were away, you were away, and they took action without you. Yes, we continued to take vacations with our kids, grandchildren—did we have grandchildren at that point? I guess not. We continued to see our friends and otherwise lead normal lives, but the time available for that was substantially constrained.

McGarrigle: It must have seemed like an incredible respite to get to the mountains with this kind of work life that you had.

Grodin: Yes, sure.

McGarrigle: Well, let's stop there for today and pick up with the cases next time.

Grodin: Okay. All right. I think I should probably say something about my meetings with Tobriner, in any event.

McGarrigle: Yes, I'd like that.

Grodin: Beginning with the time that Tobriner left the law firm in 1979 to go to the court of appeal, and continuing through his tenure on the supreme court, or at least up until the time that I got appointed

to the court of appeal, while I was in practice and then while I was in teaching, we would have lunch together almost every week. At lunch we would talk about what movies we had seen, what books we had read, and sometimes we would talk about cases. Sometimes Tobriner used me as a sort of sounding board on cases, and so as he was writing these cases—cases dealing, for example, with contracts of adhesion—I remember his talking about Stephens against Fidelity, where a guy goes into an airport and buys an insurance policy from a machine and the policy turns out to have some fine print which excludes coverage that could not have reasonably been foreseen to be excluded. Tobriner wrote an opinion talking about contracts of adhesion, which is a fairly novel concept, at least in California jurisprudence, and how they call for different rules, interpretation, and waiver. As he would write opinions—developing the notion of common law, due process, extending from unions to other kinds of institutions the notions that even where the Constitution doesn't apply, the nature of the institution may be such as to call for some kind of due process notions, some hearing—he was very interested in the early common-law development of the notion of public utility.

There came a time, and I don't remember exactly what year it was, when we set out to write an article together, pulling these various strands of legal development into a more general theory or approach toward how courts should be dealing with private centers of power, with corporations, with insurance companies, with unions, with medical societies—institutions that were private in the sense that they were not publicly owned or controlled, but nevertheless performed public functions. The starting point for him, and therefore for me, was the [state] supreme court's 1944 decision in James against Marinship Corporation, in which Chief Justice Gibson wrote an opinion for the court saying that as a matter of common law, without benefit of any statute—there were no civil rights statutes on the books at the time—a union could not at the same time require union membership as a condition of an employment through contract with an employer, and at the same time exclude people on the basis of their race from full membership in the union, instead relegating them to what they called an auxiliary union. This was out at the Marinship Corporation where, during the war, they sent out a call for people with skills and got a lot of blacks from the South who came there and went to work [*James v. Marinship*

Corp. 25 Cal.2d 721 (1944)].

The union couldn't really stop them from working because that would interfere with the war effort. But, it developed an auxiliary union, in which they had to pay dues, but they had no voice in the selection of officers or in the negotiation of agreements, or anything else. Gibson wrote this opinion relying upon the notion of common-law public utility, of an institution that is holding itself out to perform services that are of importance to the public generally and the obligations which flow from that. That sort of formed the centerpiece of this article in which we talked about contracts of adhesion, the inequality of bargaining power which may exist in the real world, making a formal contract law inappropriate—the whole common-law due process issue. The central focus was on protecting individuals against abuse of power by these non-governmental organizations. Most of the case law that we relied upon for this article were cases that, by that time, Tobriner had written. [laughter] It was a kind of self-fulfilling prophecy. Then, after this article was published, Tobriner would begin referring to it in his opinions. [laughter] It was kind of a bootstrap process. We would talk about that kind of thing, and we would talk about pending cases, as inappropriate as one might think that was—but apparently helpful. We talked more broadly about the role of courts, and what it is that courts do, and what courts do when they interpret, and how they go about making constitutional decisions, and the like. He was always very reflective about that, and so we would have these unending conversations that would go on from week to week, and pick up where they left off about these things.

McGarrigle: That sounds like a seminar of this, in a sense.

Grodin: It was kind of a mutual—it would be difficult to identify which was the teacher and which the student. Obviously, he was the teacher when it came to what courts were actually doing and how they did it. But, perhaps I was the teacher in providing a framework of analysis in which that experience could be viewed, and how it could be generalized, and so forth.

McGarrigle: What was the process by which you would write the article? You had different types of research that you were both bringing

to the discussion. Were you both writing pieces of the article?

Grodin: I think we each undertook to write parts of it, and then blending it together. I think that's what we did.

McGarrigle: Well, you certainly must have known each other in a way that was very unique by this point in time.

Grodin: We were very close, yes.

McGarrigle: We started this last part of our discussion today based on something we said off tape, which was talking about the lack of time for justices to be reflective.

Grodin: Well, that's right. Tobriner deliberately opted to spend that time with me. I have to say, when I got on the court I found it very difficult to do that. I developed relationships with my law clerks, but I did not maintain any relationship of that sort with anyone outside the court. You really have to go out of your way to do that. He was just a very generous man, and he did that with me. I benefited enormously from that. I think there is a sense in which it was a kind of father/son relationship. My father had died when I was thirteen, and I think that he and I both saw it as a kind of quasi-father/son relationship.

McGarrigle: [A relationship] that's very multi-dimensional at this point.

Grodin: Yes, multi-dimensional.

McGarrigle: This is very professional, intellectual, personal interests combined.

Grodin: We would also be talking about our kids as they grew up. His were older than mine. We went on vacations together from time to time, our families. He liked to go up to Packer Lake, and we went up there with him once. We went to another place up near Echo Lake together, and our kids and their kids were with us.

McGarrigle: Do you remain in contact with his family?

Grodin: Yes, we've been in close contact over the years with his wife Rosabelle. She's failing now. We see the sons mainly at the annual Tobriner lectureships.

McGarrigle: I know you have that role with, among others, Judge Henderson, on the committee to decide—

Grodin: Yes, well, Michael Tobriner is a member of that committee.

McGarrigle: Well, let's end there for today then.

Grodin: Okay.

SESSION 4: November 23, 2004

McGarrigle: When we ended last time, you were reflecting on the, I think, maybe weekly get-togethers that you and Mat Tobriner had.

Grodin: Yes.

McGarrigle: Among other things, you mentioned that you and he had some very broad discussions around views of, for example, the [California] Constitution, the role of judges. I know you also described you were working together on an article that—.

Grodin: Well, we worked on an article while he was still on the court of appeal, and then I guess it wasn't published until after he was on the [California] Supreme Court. It was an article that focused on the role of courts in protecting individuals in relation both to government and to private sources of power. He felt very strongly that it was important for the law to recognize the kinds of power that non-governmental institutions may exercise. The idea that freedom consists simply in freedom from constraints by government is an artificial and narrow view of the nature of freedom. Our article focused upon the variety of ways in which the law, particularly common law, gave protection to individuals in their dealings with institutions and centers of power, both in terms of contract and tort, and public utility analogies, and so forth.

That really became a centerpiece for him. He saw the principal function of the law, and the principal task of the courts, being the protection of individuals. I thought he overdid that a bit. [laughter] I think that the law needs to balance protection for individuals with the needs of a community and the society. Of course, he did too, and that was very much a part of his philosophy during the period that he represented unions, and during the period that he worked with the New Deal in the Roosevelt days. To some extent, I think this was a reaction against that focus on the collective, on the community.

McGarrigle: Was that an area that the two of you debated at all at that point in time?

Grodin: No, I don't recall debating in particular. We pretty much

agreed. Later on I came to diverge a bit. But at the time, I don't recall us debating it. We also talked about the role of so-called activism on the part of judges, and he was very interested in exploring that notion. Again, he and I were in agreement that it was necessary for judges to make decisions, and in the process of making decisions they inevitably made or reflected policy choices because the law—as [Benjamin N.] Cardozo said, "The law never is, but it is always becoming." That was very much Tobriner's view of things, and I guess mine too. But nonetheless, he, as a good judge, operated within a system of constraints imposed by precedent and by statute. I found that very interesting, after I went off the court and had time to reflect on it more. The difference in perspective between, let's say, the political scientist, who looks at a court as a political institution and says, "Well, they have almost free rein with what they can do, and if they want to reach a particular result, they can interpret the statute, or interpret precedent to that result. It's appropriate to view courts as a part of the political process."

Then that sort of political science perspective was given impetus by the development of postmodern philosophical thought and theories of interpretation which went in the direction of saying, like *Alice in Wonderland,* words mean whatever you want them to mean. At the extreme, the critical legal-studies people came to view judges as essentially no different from legislators. What is interesting to me is that that is not the way judges view themselves. Judges view themselves as operating within a system of constraints. If you say to a judge, "Well, come on, this is all nonsense. I mean, these constraints are just fictions of your imagination, or they're simply reflections of your need for authority," like Jerome Frank used to write, that judges needed to be psychoanalyzed so that they could be free to do what they wanted to do. I don't know of many judges who regard their task in that way. Now, it may be that they're wrong. I mean, it may be that, objectively considered, they have more freedom than they think they have. But, judges operating within the system will act as if there are limits to what they can do. I've seen it myself. I've seen it with other judges, thinking that they want to write toward a particular result, and finding that it won't write that way—it just won't go that way—and changing direction as a result. That's very hard for political scientists to understand, I think.

When it comes to interpretation of statutes, I think most, if not all, judges have the view that they are restrained by what the legislature has said, and by what it is reasonable to attribute to the legislature by way of intent, and that they can't use the statute as a kind of blank slate for producing whatever result they want to produce. I think that that aspect of judging is often overlooked by the people who argue judging is nothing but expression of personal views. Just as the folks on the other side, who argue that—you know, "Give me strict constructionists," President Bush says. "I just want people who know what the law is and will apply it."—are being totally unrealistic about the nature of the legal process.

McGarrigle: In terms of the way the public views the judiciary, it seems to me that it's more in line with the political scientists.

Grodin: Yes, I think that's right. As you go from statutes and common law to constitutional adjudication, it becomes increasingly easy to view the courts that way, especially when we look at the United States Supreme Court and we see the five-to-four breakdowns. What divides the five from the four has to be something other than their skill at reading prior decisions or their legal reasoning, because they're all very bright people. It has to be something else. Yes, that point doesn't get lost on the public. There are very large elements of general policy or political philosophy or what have you in what judges do when they approach constitutions. That's not to say that there are no constraints there.

McGarrigle: I was just thinking about the difference in perception and how—about the public, speaking in very general terms—the general public, I think, viewing things more like the political scientists, with less sense of what really the constraints are that you're describing.

Grodin: Or, if you want to put it more objectively, with less appreciation of how judges are likely to view their decisions as being constrained. The extreme example is *Bush v. Gore*. I was teaching constitutional law after *Bush v. Gore* was decided. I had been telling my students, "Look, there is more to this stuff than simply the expression of political views. There is a body of doctrine that the judges have to

work with, and a history, and there are constraints that exist as a result of that." Then I had a very hard time explaining to my students how *Bush v. Gore* fit into that. I believe that if you were to ask each of the judges who participated in *Bush v. Gore*, "What did you think you were doing?" Nobody would answer, "I thought what I was doing was to further the candidacy, or oppose the candidacy, of George Bush." To some extent, there may be a degree of self-deception in that, and to that extent Jerome Frank may have been right. I think that the judges who voted with the majority in *Bush v. Gore* probably would say, "No, our politics had nothing to do with this. Our views of the outcome had nothing to do with this," and would probably believe what they said. I don't believe it. I don't think it was a matter as crass as, "We want George Bush." I think that probably somewhere in the process there was the thought that what they were doing was better than the consequences of their not doing it. They persuaded themselves that it would be disastrous for the nation to allow things to proceed as they were proceeding. I have to say I have a hard time persuading myself that they thought that what they were doing was somehow compelled by the law or legal precedent.

McGarrigle: Where do we go from there with that experience?

Grodin: Well, we just go chugging along. As I heard one judge put it—about the judging process and all of the elements that go into that—"Somebody's got to do it." I don't think we have a choice. If we're going to have a democracy, and if we're going to have judges appointed by a president or a governor, and if we're not going to try to have a closed system, I don't think there's any alternative to judges exercising very broad judgment, including judgment on matters of policy. At times, that borders on a situation in which it's very difficult to define what the rule of law is. But those are extreme situations. For the most part the system operates within a framework in which it can be said that constraints are there, and judges feel them, and even judges of differing views with respect to the outcome respect them.

McGarrigle: What do you think, for future generations looking back on *Bush v. Gore*, will be some of the key questions around that decision? You've already explained somewhat your view of what happened. Can

you expand on that?

Grodin: Well, I think that it was a stretch for the court to say that what was going on in Florida was a violation of the equal protection principle. Even Justices [Stephen] Breyer and [David] Souter, or I forget now which, signed on to at least a limited view that the equal protection principle was implicated. What is absolutely beyond explanation, I think, is the refusal of the supreme court then to send the case back to the supreme court of Florida to straighten things out. In terms of legal principles, I find that inexplicable. In terms of some of the judges' views about the Florida Supreme Court, perhaps, and how the supreme court in Florida might screw things up, in their view, I can understand that attitude, but I cannot explain the result in terms of legal principle. What will future generations say? Well, I think they will say this was an example of that occasional perfect storm, the hurricane or whatever, the typhoon that just sweeps in and we've never seen before, and we hope we'll never see again. I think that it'll be a long time before we persuade people that the supreme court is simply acting as a referee calling the shots on the basis of clearly established rules. If anybody ever believed that, they're not going to believe it now.

McGarrigle: Just in terms of the way things have changed in terms of public perception of the judiciary in general, and the U.S. Supreme Court as part of that, what's your perspective on how that's changed in your time practicing law?

Grodin: Oh, I think it has changed. Of course, we always knew that judges had a lot of leeway. When the populists in the mid-nineteenth century pushed toward election of judges, they had a very clear idea that judges were doing things they didn't want them to do. They were under the control, they thought, of political machines or business interests. They wanted to do something about that. They thought that subjecting them to the popular will was the right way to go about it. I don't think Americans have ever been under the impression that judges were automatons, or simply logicians extracting results from some kind of deductive process. Certainly when I went into the practice of labor

law it was very clear that the history of labor law is a history of judges being opposed to unions. There was never any doubt about that in the early part of the twentieth century.

I think that what did happen was that the whole push of the legal realists and the talk about the political or policy component of the judicial process began to reach the popular view of what judging was about in ways that it hadn't before. I think that played itself out in the election of 1986, that there was no use telling people that I thought what I was doing in relationship to the death penalty was implementing doctrine that had been established by the United States Supreme Court. In the popular view, it all depended upon what your voting record was. That was also Governor Deukmejian's view, and he made that very clear.

McGarrigle: Was there a time, do you think, when—we're talking generally about the public—the public had a maybe more nuanced view of judges' work and their role?

Grodin: Well, I think so. I think it goes in cycles. When you look back on the period of the New Deal and Roosevelt wanting to pack the [U.S. Supreme] Court to get rid of those old fogies and get acceptance for his legislation, there wasn't any doubt that he and the public largely viewed those old fogies as representing a particular political view of how the government ought to operate. Yet Roosevelt didn't get away with packing the court. There was popular opposition to that. There was a strong feeling that the court, as an institution, had to be protected against that kind of crude political action. Yes, I think there's always been a reservoir, in American culture, of respect for courts, respect for the independence of courts, and recognition that what they do—although it may in part be political—is more than that as well. I think it goes back and forth depending on what the issues are. Right now, I think people are quite cynical about the U.S. Supreme Court, and yet President Bush is able to appeal to the idea that it is possible to have judges who decide cases on the basis of the law without their personal views entering into the matter at all. It's possible for him to do that despite overwhelming evidence to the contrary in the case of the conservative judges who have been very activist on the supreme court in their development of principles protecting states against regulation by

the federal government. I mean, it's been an astonishing development of activism on the part of the supreme court that has escaped popular attention, primarily because it's so difficult to understand. What people do understand is how judges vote, for example, on abortion. People regard that as pretty much a matter of predilection. We want pro-choice judges or we want anti-choice judges, and the nuances of that get completely lost.

McGarrigle: Then there are the similarities between the abortion issue and the death penalty issue around the time of your election.

Grodin: Oh, absolutely. Yes, absolutely. European countries, their constitutional courts, still cling to the view that they are there simply to explicate the law as it exists in some objective fashion outside their control. One example of that is that they don't have dissenting opinions. When they arrive at a judgment, even though there may be vigorous dissent within the court, it comes out as the judgment of the court, and nobody knows that there was anybody who disagreed with that. I'm sure that helps underscore the image of the judge as being some kind of oracle who discerns the principles of law and translates them for the common folk. We've long lost that innocence in the United States, I think.

McGarrigle: I'm not sure the exact date, but maybe it was just before you joined the [supreme] court that Rose Bird, as chief justice, had allowed an investigation, and maybe it was the Judicial Council that didn't—?

Grodin: Yes, it was an unfortunate episode in the court's history, and I think, in retrospect, it was a lousy idea. It grew out of a story that appeared in the papers about the court supposedly holding up a decision—

McGarrigle: Until after the '78 election—

Grodin: —until after the '78 election. Somebody within the court must have given some reporter some information about what was going on within the court. It was widely suspected that the culprit was

Justice [William] Clark. Clark, is that right? Is that his name? Yes, the court not only allowed, but invited an investigation by the Judicial Council. It got out of hand. The court voted to allow that to be public, over Justice [Stanley] Mosk's opposition. In retrospect, I think Justice Mosk was right about that.

McGarrigle: I believe by the time it came to his hearings, or interviews, or that part of the investigation, he insisted that they be closed and that they were closed.

Grodin: That's right, yes. He was right about that. I think Chief Justice Bird and Justice Tobriner were on the wrong side of that issue. I think that all did great damage to the court. Tobriner was anxious to vindicate Rose Bird and the court, but the hearings did not have that effect. Instead, they tended to bring the whole court, the inner workings of the court, into public scrutiny in a way that they hadn't been before. I think Tobriner had kind of—I don't know how to characterize him—a view that the more the people know about the courts the better. In purely institutional terms, I'm not sure that's true. I'm not sure it's a good thing for the public to know everything about what goes on in a court. I don't think it would be a good thing, for example, to have the conferences of the court open to the public. I think there's a lot of merit to keeping confidential the process by which the court reaches its decisions in individual cases. I'm not talking about the general process. The public and lawyers should know about that. Too much exposure tends to equate the court with the political branches and to politicize the court.

McGarrigle: In practical terms, in terms of the time around the period when you were appointed to the court, what was happening around the discussion of the Judicial Council investigation?

Grodin: Well, that was all gone. That was all over with. Tobriner had left the court, and books had been written, and people still talked about it, I guess. Whatever impact it had upon the internal workings of the court had long since disappeared.

The court as I came to it was a collegial court. People disagreed, but never intemperately, never in personal terms. Argue extensively at

the Wednesday conference and then go out to lunch together. What else can I tell you?

McGarrigle: I was just thinking as you were saying that about some of the earlier, the justices who came before, more around Pat Brown's administration, and there wasn't such a distinction as we make now between a Republican and a Democrat. There were Republicans who—

Grodin: That's true. Well, what it meant to be a Republican in those days was different from what it means now. You know, Earl Warren was a Republican. There was a tradition of governors appointing people of the opposite party to the court. I am told that there was a lot that went on then that we would regard with some question now. For example, Phil Gibson as chief justice, when there was a writ pending in the supreme court, and it seemed pretty clear that some trial court had screwed up in some way, instead of letting the writ go through the process, Gibson would just call the trial court judge—he knew all of them by name because there were not that many judges in California at the time—and say, "George, why don't you have another look at this?"

McGarrigle: This is maybe a little bit what the Judicial Council—the impetus behind this investigation—was trying to expose, expose some of this, I don't know if you want to call it a buddy system, or—.

Grodin: Yes, maybe so. Well, the specific charge was that Tobriner had held up this opinion in his chambers, held up the box that was circulating containing the proposed opinion until after Rose's election. I don't think that happened. Somebody alleged that it happened, and that's what gave rise to the investigation.

McGarrigle: I mentioned to you—

Janet Grodin: Excuse me. Was Clark still on the bench at that time?

Grodin: Oh, yes. He was very much part of that whole fracas.

Janet Grodin: Oh, okay. Sorry, I got my time frames confused.

Grodin: It was always clear that Tobriner and Rose thought that he was the culprit, and he probably was. I mean, the culprit in terms of leaking it to the press.

McGarrigle: You mentioned last time that you had sat on the supreme court—is it called as a *pro tem* too?

Grodin: Yes.

McGarrigle: —when you were on the court of appeal, and that you had been assigned to write an opinion and that that was highly unusual. I wondered how that came about that you had the assignment to write the opinion.

Grodin: I don't know for sure. I mean, all I know is that the Chief called and said, "Would you write this?" Maybe Tobriner made that suggestion to her. I really don't know. I ended up writing it and getting reversed by the United States Supreme Court. [laughter]

McGarrigle: What was the case?

Grodin: A case called Keating against Southland. The [U.S.] Supreme Court was wrong and there has been a lot of stuff written, including by some of the judges on the supreme court acknowledging that it was wrong, but there it was [*Keating v. Southland Corp.* 31 Cal.3d 584 (1982)]. [laughter]

McGarrigle: Going back to anticipating starting your work—and I know there wasn't much time between your appointment to the supreme court and finishing up your opinions at the court of appeal—were there things in particular that you anticipated enjoying, or looked forward to about making that change to the supreme court?

Grodin: Well, of course I was thrilled and excited at the prospect of being on the supreme court. I mean, who wouldn't be? I can't say that it was anything specific that I looked forward to. It was just participating at a level that most lawyers aspire to, sort of a peak of the profession. Tobriner had told me, when I was appointed to the court of appeal, he said, "Now, you have to recognize that after all the festivities are

over, and after you get over enjoying seeing yourself in the mirror in a robe, that there's a lot of work to be done, and that much of it is a lot of drudgery." He was right about that. I had that clearly in mind when I went to the supreme court. I knew that there was an awful lot of stuff to do, and much of it was not heroic, or notable, or for that matter necessarily intellectually stimulating, but that was part of the job. I've learned through all of the things that I've done, being a lawyer, and being a law professor, the court of appeal, and the supreme court—that there isn't anything that doesn't carry with it its share of cleaning the stables.

McGarrigle: How do you impress that upon young people who don't necessarily have that experience? Maybe even more and more, there's a less realistic view of work, maybe, this kind of work.

Grodin: Well, I don't think I've ever had occasion to press that upon young people. I don't know why I would. I mean, I wouldn't try to dissuade anybody from becoming a judge. I think it's a wonderful thing to do.

McGarrigle: Okay. We're talking about your views on state constitutions.

Grodin: State constitutions. I had been persuaded, by the time I got on the court, that courts should pay attention to state constitutions. My friend Hans Linde was a national leader in that movement, and Stanley Mosk had been very strong in that. What I found was, on the court, in the decision of actual cases, that the idea that you should consider the state Constitution before you considered the federal Constitution, tended to get lost. This is still true. It is still the case, and now I am in a position to be more objective about it, to look at it from the outside. What I see is that the members of the court are aware of the general principle that the state Constitution should come first, and that people can have rights under the state Constitution whether or not they have them under the federal Constitution. The court has rendered very important decisions along those lines, and there's not a judge on the court who is not aware of that general picture [Adequate and Independent State Grounds Doctrine].

When it comes down to individual cases, what we see time and time again is the court ignoring those principles, and generally without explanation. For example, from time to time, you'll see cases decided that involve issues that could be addressed under the state Constitution, but they're not, at all. In large measure, that's probably because the lawyers argued them that way, but that's really no justification for the court not insisting—as the Oregon Supreme Court does, for example—that lawyers always brief and argue cases, argue issues, under the state Constitution where the state Constitution is applicable. You find the court, where it does acknowledge that the state Constitution has been argued, nevertheless deciding the issue on the basis of the federal Constitution without reaching the state Constitution.

I suspect this is because they regard the body of doctrine that has been developed under the state Constitution with respect to the particular issue, whether it be free speech or privacy, some aspect of privacy or whatever— they regard the law that had been developed under the federal Constitution as being more well-developed, providing an easier answer, whereas under the state Constitution they would be embarking on new ground. I can understand that. The result of it is twofold. One is that the state Constitution doesn't get developed. The other is that the case may go up to the United States Supreme Court, and the U.S. Supreme Court will say, "No, you're wrong about the federal Constitution. Now, we're going to send it back to you to have a look at the state Constitution." That has happened to the California Supreme Court time and time again. I haven't tallied up the numbers, but I suspect at least twenty times the California Supreme Court has been in the position of having to reconsider a case, which it decided under the federal Constitution, and now reconsidering it under the state Constitution. Leading examples were Serrano against Priest, involving funding of education, search and seizure cases involving search of garbage cans, a whole variety of cases. I think it reflects a kind of—sloppiness is not the word, because I was guilty of this, too, and I don't want to call myself sloppy. It was kind of unwillingness to confront the difficult task of trying to give meaning to a state Constitution where there isn't a whole lot of precedent. But, they're getting better. I like to think my constant kvetching has helped [*Serrano v. Priest* 18 Cal.3d 728 (1976)].

McGarrigle: We're talking about the state Constitution and the manner in which the Oregon Supreme Court has been able to accomplish something that the California Supreme Court has not. You were describing—

Grodin: I think that's pretty well the work of one person, and that was Hans Linde, who, before he went on the court—the Oregon Supreme Court— published an article in which he made an absolutely irrefutable argument. He said, look, the court doesn't consider any constitution, state or federal, if it can decide the case on non-constitutional grounds. A court doesn't say, for example, "It doesn't matter how we interpret this statute because if we interpret it the way that the plaintiffs want it, it would be unconstitutional." A court will always confront and decide the statutory issue before deciding any constitutional issue.

The same logically ought to be true of the state Constitution *vis a vis* the federal Constitution. The Fourteenth Amendment says no state shall do certain things. If a state enacts a statute which is invalid under a state Constitution, then it should be declared invalid, and the state hasn't done that, and then there's no need to confront the federal constitutional issue. Hans persuaded his colleagues in the Oregon Supreme Court to tell the Oregon bar that if they didn't argue the state Constitution in a case where it was arguable, it was malpractice. I think that should be true.

I'm just publishing in the *Hastings Con[stitutional] Law Quarterly,* an article on the role of the California Supreme Court in interpreting Article I of the California Constitution—that's the Declaration of Rights—during the early years of the 1849 Constitution. That was a period in which everybody understood that the federal Constitution, Bill of Rights, had no application to the states. The United States Supreme Court had said so. The judges at that time did not sit around and say, "Well, what's the answer to this under the federal Constitution? Maybe there's an answer. Then we won't have to reach the state Constitution." They interpreted the state Constitution. They didn't have anything [else] to go by. There had been no prior decisions—cases under an anti-slavery provision, cases under Sunday closing law. They had decisions from other states to go by. They looked to those. But the federal Constitution provided no guide. I am a proponent [of interpreting the state Constitution].

I'm to some extent a purist on this. I have to say when I was on the court, I was not such a purist, and it's very easy to lose sight of that logical, principled framework when you get bogged down in the decision of a particular case.

McGarrigle: Well, this may get to—you can tell me if it does—what we started talking about off tape today, which is the stresses and demands of the workload. Is there a relationship?

Grodin: I think there's a relationship. I think that judges don't have a lot of time to reflect on what they're doing. I don't mean by that, "not time to consider a particular case." That's not really much of a justification for not taking the state Constitution into account when it's applicable. More generally, I found that judges are not inclined to sit around among themselves, or with their staff, and talk about jurisprudential issues like, "What is the nature of judging?" Or "Do judges make law?" Or "What is the role of constraint in the judicial process?" They're inside the fishbowl, and they're swimming around in there, and there's not much time nor is it easy to project yourself outside the fishbowl looking in. It's not very easy to be objective about that. In any event, you don't have a lot of time, and you have to decide the cases. The individual cases seldom get presented in philosophical terms.

The broad philosophical issues—that legal philosophers like to talk about and academicians like to talk about—judges very seldom talk about. There are exceptions. Tobriner was an exception. Cardozo was an exception. Oliver Wendell Holmes was an exception. To some extent, [William] Brennan was an exception. We don't find judges on the United States Supreme Court now, for example, writing philosophically about what it is that judges do. Some exotic character like Richard Posner will do that, but there are not very many Richard Posners in the world.

McGarrigle: With a return to the issue of state constitutions and your article, which focused on the nineteenth century, I think, your article does. At what point in time do you see a change from this earlier period that you're discussing in the article, where there was a willingness to tackle the state Constitution, and how much less law there was for those judges to refer to than there would be today?

Grodin: The Fourteenth Amendment got adopted after the Civil War, and that clearly had application to the states. But the supreme court gave it a very narrow interpretation in the *Slaughter-House Cases*, so for all practical purposes it didn't mean very much until much later [*In Re Slaughter-House Cases* 83 U.S. 36 (1873)]. It really wasn't until the supreme court got around to substantive due process in Lochner against New York that state courts began to react to federal decisions [*Lochner v. New York*, 198 U.S. 45 (1905)]. It really wasn't until the twentieth century, well into the twentieth century, that the court began to develop jurisprudence under the Bill of Rights. We didn't have a free speech case until the First World War, and even then they were pretty lousy cases. We didn't have any equal protection principle to speak of, except some very vague notion that the court couldn't treat like things in different ways. Except for Lochner, until the 1930s, there was such a substantial deference on the part of the court toward the legislative process that there was virtually no law under the Bill of Rights.

It really wasn't until the 1940s and 1950s, and then as the supreme court began to develop that jurisprudence, it became very easy for state courts to rely on. You have a free speech case? Here is this set of free speech cases from the United States Supreme Court. What better authority can you get? The fact that the California Constitution contains its own differently worded protection for free speech was not considered seriously until the early 1970s when the [California] Supreme Court decided the Pruneyard case and departed from U.S. Supreme Court precedent, to some extent [*Robins v. Pruneyard Shopping Center* 23 Cal.3d 899 [592 P.2d 341] (1979)].

Separation of church and state? The California Constitution has multiple provisions relating to separation of church and state. In fact, the language of the federal Constitution, the establishment-clause language, didn't even come into the California Constitution until the 1970s. Before that, there were provisions that were put in there back in 1879, which reflected a strong motivation to keep religion out of public schools, to keep public money away from religion. To some extent the California courts have invoked the state Constitution, but not an awful lot. You have the ironic situation in which the [U.S. Court of Appeals for the] Ninth Circuit has relied more upon the California Constitution than the California state courts have with respect to matters such as the constitutionality of public displays of religious symbols. Somewhere

along the line the California Supreme Court decided a case called Fox, in which it held that a cross on public land was unconstitutional, and it mentioned both the federal and state constitutions [*Fox v. City of Los Angeles* 22 Cal.3d 792 (1978)]. Well, the federal Constitution establishment clause got all bogged down in disagreements within the U.S. Supreme Court as to what it meant, and so when the Ninth Circuit was confronted with a case involving public display of religious symbols, it said, "We don't have to reach the federal constitutional issue. We can decide this case on state constitutional grounds." Well, that's what the California court should be doing.

McGarrigle: Who else is taking note of this discrepancy? [laughter]

Grodin: I don't know. I write about it from time to time, and I grumble about it. There are groups like the ACLU, for example, that are very well aware of the importance of the independent state constitutional rights. They will argue the state Constitution whenever they have a chance to do that. They won't let the court forget about it. The court has been very good about acknowledging the independent state constitutional jurisprudence in certain areas. One of them is the right of privacy.

After the U.S. Supreme Court decided *Griswold v. Connecticut*, the California Constitution was amended by a legislatively proposed amendment to add the word privacy to Article I, Section I, which otherwise just declared the inalienable right of people to have and to acquire and hold property, and to pursue and obtain happiness and safety. I think it was 1974 when the Constitution was amended simply to add the word privacy after safety, so it read "happiness, safety, and privacy." There was some legislative history, constitutional history, that went along with that in the ballot pamphlet that provided support for a fairly broad reading, both in terms of the scope of privacy interests that were protected, and also in terms of the kinds of entities against whom that protection ran. There was language in the ballot proposition which suggested that the privacy right ran not only against government, which is where it runs in the case of the federal Constitution, but against certain private establishments, at least private employers, as well. The California Supreme Court has accepted that as a premise.

It has also accepted as a premise that the substance of what

is protected by the California right of privacy isn't necessarily the same as under the federal Constitution. In the area of abortion rights, the California Supreme Court declined to follow the federal Supreme Court's rulings that it was perfectly okay for government to refuse—to withhold funding of information about abortion or abortion procedures from the generally applicable program for providing information to prospective mothers. The California Supreme Court went the other way on that and held that it violated the state Constitution. Then more recently, the [Ronald M.] George court struck down a California law that required minors to obtain permission from their parents or from a court to have an abortion, even though that very statute, the identical statute, had been upheld by the United States Supreme Court, out of Pennsylvania. The California Supreme Court has a track record of recognizing the privacy provisions of the California Constitution as providing distinct and superior coverage. Now they have a good base to work from.

With respect to the equal protection clause, and the equal protection principle, they've been somewhat less independent. They've tended to accept, without question, the federal doctrine which creates different levels of scrutiny and the degree of scrutiny which goes with each level. I participated in that. I just took that for granted, although since I've left the court and have had a chance to step back and look at it, I've asked myself, why should the California Supreme Court do that? It isn't that that analysis is so great that we should find it persuasive necessarily. We do need to identify certain categories of cases as calling for greater scrutiny than others, for a variety of reasons. We ought to at least consider, for example, the views of Gerry Gunther, that even rational-basis scrutiny should be more intensive than it is. The views of Justice [Thurgood] Marshall—that instead of having categories of scrutiny, that perhaps there should be more of a sliding scale—none of those possibilities ever gets considered. What the California Supreme Court has done is to feed into that analytical framework different views of what is entitled to strict scrutiny. For example, in California gender classifications are subject to strict scrutiny, even though under the federal Constitution, they're subject only to an intermediate level of scrutiny.

McGarrigle: To what do you attribute, or is there a way to attribute,

the California Supreme Court's willingness—I don't know if you want to call it willingness—to take up the state Constitution around the issue of privacy more than in other areas?

Grodin: I think that at least part of the answer lies in the fact that the California Constitution contains an explicit protection for privacy, whereas the whole idea of privacy under the federal Constitution arose sort of in a cloud of ambiguity. You had *Griswold v. Connecticut* [381 U.S. 479 (1965)]. You had Justice [Hugo] Black talking about the various provisions of the Constitution giving rise to a penumbra of privacy. Then you had the court sort of floundering around and you had a lot of criticism of *Roe v. Wade* because it rested on a notion of privacy that was nowhere to be found in the Constitution. Whereas in the California Constitution, it's there. We have it, we can look at it right there in Article I, Section I. I think it provides the court with greater assurance that what it is doing is applying the Constitution and not making it up.

The same is true for the willingness of the California court to accept gender classifications as being subject to strict scrutiny. The California Constitution, since 1879, contained a provision that says that entry into an occupation or profession shall not be denied on the basis of sex. It was an early kind of ERA, equal rights amendment, and it was unique among the states. It came about largely through the efforts of Clara Foltz, who had been denied admission to Hastings law school back in the 1870s, and brought suit against Hastings, and won. Hastings appealed to the supreme court—there was no intermediate court. While her appeal was pending, there was the constitutional convention going on, and Clara was personally familiar with some of the people who were drafting that Constitution. She was pushing for women's suffrage, and there was a lot of support for that. It almost got through in 1879. But it didn't, and as a sort of reward to Clara Foltz, maybe, for her efforts, they put in this provision, which clearly made it impossible for Hastings to keep her out because of her sex, which was the basis of the decision to exclude her. After that, Clara decided that she didn't want to go to law school anyway. She had become famous, and she had a great law practice, and so she didn't need it. But there was a provision which the California Supreme Court was able to point to and say our Constitution is unique in this respect.

Unfortunately, where the California constitutional language is not different from the federal Constitution, the [California] Supreme Court has a tendency to in some cases defer to federal precedent, even though the state constitutional language may have been adopted independently of the federal Constitution, and even though federal constitutional jurisprudence gets shifted around from time to time as changes on the court are reflected in decisions. It is obviously impractical or imprudent to say that the state Constitution has got to be given the same meaning, the same language, as the federal Constitution and then to adhere to that position even though the meaning attributed to the federal Constitution changes. Can the meaning of the state Constitution automatically change with changing opinions in the [U.S.] Supreme Court? Well, I would hope not. I'm urging the California Supreme Court to give greater independence to the state Constitution, even when the language is the same, unless there is some evidence that the language was put in there in order to track federal Supreme Court decisions.

McGarrigle: To what extent is California still considered unique and a leader in terms of the development of the law?

Grodin: I would have to say that the period immediately following the 1986 elections was a period of retrenchment, rather than development. Certainly the California Supreme Court is an important court if only because it is in the largest state. Beyond that, there are areas—employment discrimination law is one—in which the California Supreme Court under the leadership of Justice George is very much on the cutting edge. But the Traynor-Tobriner era, in which the court was in the lead in expanding product liability and developing protections for criminal defendants, that era is pretty much behind us, not only in California but throughout the country. Now there are challenges for state courts—gay marriage, the legal consequences of reproductive technology, family law questions—and on these the California court has shown considerable independence, and it has some very good people on board. Whether and to what extent it will establish itself as a national leader remains to be seen.

McGarrigle: Are there other state courts where that's happening

more? Do you follow nationally?

Grodin: Well, from time to time. I don't know that there's any court that has established itself as a leader among state courts the way the California Supreme Court was for a period of time. The New York court gets attention from time to time, the New Jersey court does, certainly the Massachusetts Supreme Court made a big splash with its decision on gay and lesbian marriages.

McGarrigle: I think I saw in the Hastings alumni publication that you were interviewed about that on television.

Grodin: I probably was. Yes, I was.

McGarrigle: What kinds of comments do you recall you made?

Grodin: I don't think I made any comments that were particularly noteworthy. I don't remember what I said. I found the Massachusetts court's opinion a very bold and well reasoned opinion. What it did was to adopt a rational-basis level of review for the statute which defined marriage as between a man and a woman, and then proceeded to say that it was irrational to deny marital status to people of the same sex. That application of the rational-basis test is more in line with the views of Gerald Gunther than it is with the classical view of rational-basis scrutiny, or lack of scrutiny. But I found it to be a very persuasive opinion. In political terms, I wish that it had waited a little while. It's going to be interesting to see what happens to that issue in California.

McGarrigle: You've mentioned Gerald Gunther a couple of times, and I know he passed away in the last couple of years, and he was at Stanford for his career. Did you work together or collaborate together?

Grodin: We didn't collaborate together. We knew one another. He was teaching in an adjacent room in the law school. From time to time, we would get together and talk about things. He was a great, great jurist. One of his early pitches was that courts should be more realistic about the legislative process, and that they should insist that legislatures provide some clue as to the connection between the contents of the

legislation and the goals that the legislation is supposed to be pursuing, so that the court would have some means of evaluating that relationship rather than making it up, which is what courts typically did for many years after the thirties. A court said, "Well, if we can conceive of any rational basis for this legislation, we'll uphold it." And that ended up upholding some really crazy statutes.

McGarrigle: So, something along the lines of a legislative history that doesn't exist for all legislation—?

Grodin: Yes, right, or just a refusal to indulge in the assumption that the legislature was being rational when there's a pretty good basis for believing that it was not. Now, Hans Linde never agreed with that. Hans said that the legislature is a bunch of people representing opposing views, and there's no way you can expect it to be a rational process, so trying to make the legislature give reasons for what it does is likely just to produce after-the-fact rationalizations, rather than give you a clue as to what went on.

McGarrigle: That's an interesting kind of realism.

Grodin: Yes.

McGarrigle: How would you describe Gerry Gunther in other respects?

Grodin: Gerry Gunther was in the Learned Hand mode. He spent a lot of his career writing a biography of Learned Hand. He was cautious and sometimes critical of the court for not being cautious. Learned Hand would have allowed, for example, some limitations on speech that the courts did not accept and that I think Gerry Gunther might be inclined to accept. He was sort of a middle-of-the-road, but non-ideological academic. From time to time in his classroom, there would be clapping and cheering, and I never knew—and I asked him, "Gerry, you must be very popular with your students." Oh, he said that was because some student was reciting in class or doing a mock argument and his fellow students were applauding him. In my last class, I told my students that I wanted them to applaud whenever I held up a sign

that said "applause." [laughter] So I did that, just at odd moments. I would hold up this sign, and the class would break into wild applause. After a while there was this pounding on the wall from Gunther's side, protesting.

McGarrigle: Now, is it true that he was thought to be a possibility for the U.S. Supreme Court?

Grodin: Oh, I think he was on the short list for the Supreme Court. Yes, I think he would have made a fine judge on the Supreme Court.

McGarrigle: We're talking about reflections, and having just reflected on Gerry Gunther, it would be wonderful for you to talk about Stanley Mosk.

Grodin: I knew Stanley [Mosk] for many years before I got on the court. When I came on the court he called me into his chambers. He and Justice Tobriner had been at odds, to some extent, over Rose Bird. Stanley was not happy with Rose's appointment as chief justice, and Tobriner was her principal defender on the court, so there was some tension between them. But, Stanley called me in and he said, "Despite that tension, you and I are starting out on a clean slate." I always admired his candor.

He was an extraordinarily efficient judge. That is to say, he seemed to be able to get his work done in much less time than it took the rest of us, and that wasn't because he cut corners. Otto Kaus gave a talk once in which he suggested that there was really more than one Stanley Mosk. [laughter]

Stanley was somehow able to get through the Wednesday calendar, to think his way through the pending cases, to know what his position was. He had a lot of history, both as a judge, and before that as attorney general, and before that as a judge. He knew what he thought, what he believed, on a wide range of issues, and he would always remember what his views were. So you could be pretty sure that if Stanley had ever expressed a view on a particular question on some prior case, that would be his view today, which is not to say that he never changed his mind. Sometimes he did. He had a long memory, and he never forgot what his positions were.

Where to start on Stanley? Stanley was a stickler for language. He was very careful with language. He wrote his own concurring and dissenting opinions. He didn't write very much of his majority opinions, at least not from scratch. I think Peter Belton did most of that. But he was careful with language and very good with language. One of the things I remember is that he wrote a concurring opinion to an opinion of the court involving sex discrimination in which the court had used the term "gender discrimination." Stanley did not like that term and felt that gender was something which went with nouns and not with people. He wrote a concurring opinion to criticize the court for having used the word gender. So, after I got on the court, I remember receiving an issue of the *Chicago Law Review* containing a symposium on gender discrimination. Chicago law school was Stanley's alma mater; at least he went there for part of his legal education. I took this symposium issue into Stanley's office with great glee, and there was Stanley sitting at his desk with this old typewriter that he used to bat out his letters and his opinions. He was writing a letter of complaint to the editor-in-chief of the *Chicago Law Review* [laughter] for having abused the English language in that fashion. So, if Stanley was on the other side of a case and you thought that he was going to dissent, that was always something that made you wary, because he could write a dissent that would be very, very pointed.

McGarrigle: Did he take particular pleasure in doing that, as well?

Grodin: Oh, I think he took particular pleasure in doing that. It was never anything personal. I mean, after the opinion was filed, you'd get together and have lunch and go on to the next thing. But there were times when it really stung, because he would pull no punches.

Stanley was very strong on the state Constitution and was certainly a principal leader within the California Supreme Court on that issue, although he, at times, lapsed on that issue too. He was very strong on individual rights, on privacy, on free speech, on the protection of consumers. He was not afraid to use an opinion to express thoughts about issues that were likely to arise as a result of the opinion that didn't necessarily have to be decided. I don't say that as criticism at all, although some might look upon that as being a form of activism. He thought it was incumbent upon the court, not just to decide the

particular case in the narrowest possible way, but to expand that into a framework that could be used by the lower courts for the decisions of other similar cases. On various occasions involving product liability and challenge to jurors, he went beyond the facts of the particular case to lay out a kind of architecture for the decision of future cases. While you might say it was sort of legislative in character, it was also very helpful.

McGarrigle: So he was able, then, also to anticipate, in some way, the direction of a trend?

Grodin: Yes, I think that's right. He had a political sense, which didn't mean that he acted as a politician, but he had a good sense for the political context in which the court was operating, and probably more so than any other justice. During the Traynor period, Traynor came to the court out of academia, and before that he was in the attorney general's office doing tax work. You might say he was a political innocent. Well, Tobriner was not a political innocent. He had been a political activist and was well aware of what went on in the real world. Mosk had run for statewide office as attorney general, and he had developed a lot of connections with newspapers, editorial boards, and such like. He had a good sense for what the likely reaction would be to an opinion, which is not to say that he held his finger up to decide which way to decide cases, but I think probably he took that into account.

McGarrigle: Would that be part of any discussion that you would have with him, this larger context, as well? Or, did he bring that to the table?

Grodin: No, I don't remember him or any judge ever saying in conference, or in connection with a case, we shouldn't do this because we're going to get excoriated for it.

McGarrigle: I don't even mean in that more negative connotation, but I mean just generally, as a contextual piece of information.

Grodin: I can't think of occasions in which it became an explicit part of the conversation, but contextual is the right word. He had a pretty

good notion of the relationship between the courts and the legislative process, and he had a pretty good idea of when the legislature was acting in a way that legislatures shouldn't act. He had a pretty good idea of what lay behind the vague language of a statute and that sort of thing. On most things, we agreed with one another. When it came to death penalty cases, I had the feeling at times that Stanley would dissent from the reversal of a case. I had the feeling at times that he wouldn't have been on that side of the issue if his vote had made a difference in the outcome. [aughter] But, Stanley was always open to discussion, and you could always go into his chambers and talk about a case and try to argue him out of a position, although generally that was a futile effort.

McGarrigle: I have brought to you the volume, which was recently published, of the [oral history] interview with Peter Belton, who was his law clerk, as you know, for thirty-seven years. What is your sense of what that working relationship was like, between Peter and Justice Mosk?

Grodin: Oh, they were intellectual symbiotic twins. Peter knew what Stanley's view was about everything, so, pretty much, I think—I was never in on the process—but I had the impression that all Stanley had to do was nod, and Peter would set out to write the opinion which he was sure that Stanley would want to have written. I think they had disagreements at times, but not significant ones. I think Stanley relied on Peter very heavily through the years.

McGarrigle: Well, one thing that comes through very clearly in this oral history with Peter Belton is his intense appreciation for language, distinction about language, and focus on correct use of language—that Peter has himself.

Grodin: Peter had himself. Yes, that's true. I think they were twins on that. They both had that, which is a good thing for a judge to have, because using language in a sloppy way is not a good way to make law.

McGarrigle: That was an unusually long relationship.

Grodin: Yes.

McGarrigle: I don't know if Stanley Mosk had the national record for time on a state supreme court, but it was—

Grodin: He had the state record. I don't know about the national record, either. It may very well be a record of longevity for law clerks too. Not very many law clerks are around that long. In fact, the whole idea of having permanent law clerks is a relatively new idea and now has led to the exclusion almost entirely of annual clerks in the state system, which I think is very unfortunate all the way around. I think it's unfortunate for the courts because they don't get that fresh blood, that fresh thinking. I think it's unfortunate for the students who don't get that opportunity. I think it's unfortunate for the legal profession that no longer has—at least in the state system—no longer has that view into how the courts operate. So our students are looking for jobs pretty much in the federal system when they graduate.

McGarrigle: It's quite limited, then, relative to what it would be if the state were open as well.

Grodin: Yes, right.

McGarrigle: Well, there was an extern program at the state supreme court.

Grodin: Well, the externs they have, and so our students go over there for a semester. But when they do that, they work primarily either at central staff or they work under the supervision of a staff person and seldom have much access to the judge. It's still a very valuable experience, but not as valuable as a clerkship to all concerned.

McGarrigle: Right. Well, why don't we stop here for today, and next time you can maybe speak to, if you'd like to, your staff at the supreme court, and your—

Grodin: We can also talk about some other members of the court if you want to do that.

McGarrigle: Yes. Shall we do that next time?

Grodin: Okay, fine. Good.

SESSION 5: December 10, 2004

McGarrigle: We're picking up where we left off last time, which is with your time on the supreme court.

Grodin: Yes, and we were talking about my colleagues. The colleague I was closest to was Otto Kaus. He lived nearby while he was on the court. We spent a lot of time together driving and back forth to the court, talking about cases and other things. Our views were very close on many things. He was a person of just unusual intelligence and insight. I found his companionship on the court to be very helpful to me.

Allen Broussard I had known for many years. We had been on the debate team at Cal Berkeley together. We were both students of [Jacobus] ten Broek, and he was an extremely bright guy, and refreshingly candid in expressing his views, sometimes during oral argument, where he would make very clear what his views were. That was often refreshing.

McGarrigle: In that, it was different somehow? That it stood out from some of the other styles?

Grodin: Yes, he just had no hesitation about expressing his thoughts and letting the attorneys respond to them, without being as coy as some of the others of us might have been [laughter], concealing our views until it came time to write the opinion. But, Allen's door was always open for talking about a case, as was [Otto] Kaus's, as was Cruz Reynoso's, as was [Stanley] Mosk's. It was a generally collegial court in that respect.

Chief Justice [Rose] Bird, as I indicated in my book, was at times a difficult person. She could be a bit abrasive. She could be opinionated. Her attitudes were no doubt affected by the ordeals that she had gone through in the attempt to remove her from office.

McGarrigle: Was that something that she ever discussed, her feelings about that?

Grodin: Well, she made clear that she was unhappy about the attacks

on her and thought that they were improperly motivated. But other than that, I don't recall discussing it with her. She tended to be a bit more reclusive when it came to discussing issues and cases. She tended to communicate through memos rather than in person, for example. Ed Panelli, on the other hand, with whom I frequently disagreed, was always open to discussion, and in fact, complained that there wasn't more discussion that went on among colleagues than did take place.

McGarrigle: You said just a minute ago, about Otto Kaus, about his insights specifically, important insights he had. Can you give us some examples of the kinds of things?

Grodin: Oh, if given enough time, maybe I could, but nothing comes to mind. It was just a—he had this continental, European background. He grew up in Vienna, went to England as a young boy to study, and so he had that kind of breadth of background and experience. He brought a sophisticated, nuanced view to questions, which added a dimension that I found very appealing.

McGarrigle: In terms of your own style, you mentioned several of the justices, Cruz Reynoso and Allen Broussard and Otto Kaus and [Ed] Panelli, who wanted more discussion? Was your door open, or what was your style?

Grodin: Oh, yes, everybody knew my door was open.

McGarrigle: I imagined, but I needed to ask you. [laughter]

Grodin: No, I liked to talk. [laughter] Their problem was getting away once they came in.

McGarrigle: You had said in an earlier interview about your time on the court of appeal, that you liked oral argument and that style of discourse.

Grodin: Yes. Yes. I continued to do that on the supreme court and probably dominated oral argument to an extent that I should not have done, just out of enthusiasm for the process.

McGarrigle: I don't know in terms of staffing what amount of permanent law clerks you had. Then you had student law clerks who came in as externs.

Grodin: Yes, the proportion changed. At some point, we had five clerks, and I think I had three permanent clerks and two annuals.

McGarrigle: Did you engage with them as well in this process, orally, of helping them—?

Grodin: First of all, we would have weekly meetings in which we would review all the cases on the Wednesday conference. I would get input from my staff and we would talk about the cases to the extent that I thought I needed input. Then, on the cases assigned to me for writing of opinion, I would assign that to one of my staff, and I would be in constant communication with him or her on the draft as it went along. Occasionally, I would ask the entire staff to confer on some issue or issues before we released the draft. When an opinion came through for my signature, drafted by some other judge, I would assign that to one of my staff for review and a memo suggesting what I should do on the case, knowing in advance what my general views were about the case, but what I should to do with respect to that draft. I would have conversations with that person as well, so there was just ongoing dialogue.

McGarrigle: I think you've said, either that or I've read, that you continued to meet with some of the people who were your staff at that time?

Grodin: Oh, I continue to meet with them regularly now.

McGarrigle: That's what I mean, and for lunch on a regular basis?

Grodin: Yes.

McGarrigle: Who are those people who you maintain contact with?

Grodin: Hal Cohen was my lead staff person after Otto Kaus left the court. He had been clerk to Otto. Jake Dear was a member of my staff, came to me after serving as an annual law clerk to Justice Mosk. Then

he went out into practice, and decided that he didn't like practice, and came back, and I hired him as a permanent law clerk. So the two of them I get together with. Beth Jay, who was sort of tangentially on my staff. She was a member of the carpool that Otto Kaus and I went over to San Francisco with, so she participated in discussion of the cases as well. So those three are the people I have lunch with mainly.

McGarrigle: Hal Cohen and Jake Dear are still with the court, and Beth [Jay]?

Grodin: All three of those are with the chief justice.

McGarrigle: Okay.

Grodin: But, we don't talk about cases.

McGarrigle: We were going to touch on the 1986 election, and just to make reference for the historical record to your book *In Pursuit of Justice*, published by University of California Press. I've relied quite a bit on your book in preparing for today. I don't want to necessarily repeat everything that's in your book, but I had read that Senator [Nicholas] Petris had campaigned for the court, and that otherwise the Democrats were more or less quite silent around the time of your—

Grodin: Yes, I'm sure there were more than Petris, but it is true that the Democrats didn't do very much to defend us. That was primarily because they had a pretty good idea that Rose Bird was going to go down in that election and they wanted to distance themselves from her. I don't think that anybody thought that Cruz and I were going to be defeated in that election until the very end. So they were mainly silent, as was the bar for that matter.

There's a bit of background to the book that might be of interest, and that has to do with Justice Brennan's preface. My wife Janet is indirectly responsible for that. I was going back to Washington for some meeting, and Janet urged me to contact Justice Brennan, who had by then resigned from the [U.S.] Supreme Court. I had met Brennan briefly when he was a Tobriner lecturer out here, and I had sat next to him. I was on the [California] Supreme Court at the time, and I sat

next to him at the table. We chatted, and we got along very well, but I thought it was a bit presumptuous for me to foist myself off on him in his chambers. But Janet encouraged me to do that. So, I wrote and said that I was going to be in Washington, and was there any chance that I might see him if I dropped by. He wrote back saying certainly, he suggested a time, and I came there.

He was just unbelievably warm and friendly, and in the course—I think it was of that first discussion, maybe a second one later, I don't recall—but in the course of that or a subsequent discussion, I mentioned that I was doing this book. He said, well, he'd be very interested in reading a draft of it, so I of course sent him a draft. By then, my courage had plucked up a bit, and I suggested to him that if he was interested in the book and wanted to write a preface, I would be most grateful. He wrote back and said, yes, he thought it was a wonderful book and he'd be delighted to write a preface. He was an extraordinary man. When I went back to see him next, which was about a year later, I walked into his chambers—and we had not been in communication at all—and he said to me, "Joe," he said, "I want you to tell me everything that's happened to you since you left my chambers." That struck me as an extraordinary thing for a person to say.

McGarrigle: Well, it really spoke to his great admiration and affection for you.

Grodin: Well, it spoke to his being one of the most warm and generous people I've ever encountered.

McGarrigle: Well, what a special anecdote.

Janet Grodin: You know, I'm crying now. He was such an unusual human being. He just was a light, he really was a light. When I think about him now, when he went, it was almost like a lighthouse going out. It just was the end of an era, really.

Grodin: You said it better. So, back to the book.

McGarrigle: So, that was beautiful. The book came out in 1989, I believe, so what year would that have been that you went back to

Washington and first met with Justice Brennan?

Grodin: Probably 1987.

McGarrigle: When did the idea for the book start to crystallize for you?

Grodin: Almost immediately after the election. I had made arrangements with a former law associate of mine by the name of Frank Morgan, who had left our firm to go practice in Indonesia. He was with a firm that represented American companies doing business in Indonesia. I knew that he had a vacation place in Bali, and when the election was going on, it occurred to me that—win or lose—it would be nice to have somewhere to go to recuperate. I wrote him suggesting that we might come to Bali, and he wrote back saying, "By all means, stay at my place." After the election—within a week I think it was— well, no, that's not true because I had to—I don't remember the timing. But at any rate, shortly after the election, Janet and I went to Bali, and we stayed for a week or so, and we stayed at his place on the ocean.

Janet Grodin: Five weeks.

Grodin: I brought along a tape recorder with the thought that I would record my reflections on what had happened and that this would be therapeutic if nothing else. But in the course of doing that, I conceived the idea of writing a book about it. So, then I started to do that when I came back.

McGarrigle: So the creative process that you used, using a tape recorder, how did that work?

Grodin: I don't know whether I ever listened to the tape. [laughter] It was the equivalent of having somebody to talk to. But it forced me to shape my thoughts, and be more reflective about some of the reactions I had had to the election. But then, part of the election was a battle over what the role of judges was, and in part I was defending against the suggestion that judges should be treated the same as legislators; and held responsible for the votes as if their votes represented their own political views—simply their own political views—rather than

any positions that were required by application of legal principles. So that caused me to reflect in a way that I had not previously reflected on the role of judges, and it seemed to me that that was really integral to the issues involved in the election and that that's what I would write about.

McGarrigle: You also have this wonderful historical context that you bring to each of these topics, where you go back in time to explain the common law, or to explain legal theory.

Grodin: I don't think you can understand anything if you don't understand history.

McGarrigle: It's very readable.

Grodin: Thank you.

McGarrigle: So once you came back and you had the tape, but that didn't necessarily create a written outline that you worked from.

Grodin: No, I started sitting at the computer and composing. This was before I went back to teach. I had a lot of time. At first I worked in the offices of the—what is that program adjacent to Boalt, the law and public policy program?

McGarrigle: The Institute of Governmental—no, not the—

Grodin: Law and public policy—whatever they call themselves. I had friends over there, and they made an office available to me and a computer, and I worked there and used their library, which was very helpful. Then I had a semester down at UCLA, where I was a visiting scholar—or regents scholar, I was called. I gave a course in the political science department on something or other and spent the rest of my time working on the book. By the time I went back to teaching, I was well into the book.

McGarrigle: At what point did you start discussions with the University of California Press about publication?

Grodin: After I was well into the book—at some point along the line, I told my friend Herb Morris down at UCLA that I was working on this book. I talked to him about some of the jurisprudential issues—he's a legal philosopher. He suggested certain things for me to read, and certain people for me to talk to, Richard Wasserstein, for example. At some point, he suggested that the UC Press might be interested in publishing it. He knew the editor and sent a draft or introduced me to him. At any rate, the editor said yes, they would be interested, so I went through the process of submitting drafts to committees, and they decided to publish it.

McGarrigle: When we first sat down today, before we started taping, you were talking some about the different response to the book when it came out and reactions to your presentation of what it was that happened in this election. How was it that people—what kind of feedback did you get?

Grodin: Oh, well, I mentioned to you that some of the feedback was from people who wished that I had been angrier in the book, wished that I had spent more time blasting the opposition to the court and their motives. That simply isn't why I set out to write the book, and it didn't seem to me that that would serve any useful purpose.

McGarrigle: You talk about retention elections in the book, and quite extensively, so I don't want to reiterate that. I wondered if you'd like to comment on the role of the media in the campaign. You talk some about the different campaign spots, or television spots, that you and the others had.

Grodin: Yes. Well, the media by and large exists on the basis of controversy and— what's the word? I'll think of one. But calm exploration of issues is not something that the media is very interested in, for the most part. Obviously, there are exceptions. There are some reporters who try to deal with the issues in a very thoughtful and in-depth manner. But, for the most part, and particularly the television media, they were interested only in a few seconds of spots that would attract public attention. For the most part, people who were sent around to interview me were people who had no background in the issues at all, had no

understanding of what they were, had been told by their editor to ask certain questions, which they did. I found it extremely difficult to communicate, in the course of that election, any sort of reasoned position.

McGarrigle: You discuss in the book the ways in which information was taken out of context. I guess that's putting it mildly.

Grodin: Yes.

McGarrigle: Of course, none of that fit into the thirty-second sound bites that were appearing on television.

Grodin: Well, the focus of the campaign, and therefore the focus of the media, was primarily on the death penalty issue. The backers of the campaign against us included people who were concerned about the court's record in death penalty cases and our reversal of the death penalty in so many cases. But, they also included corporate interests and other business interests that cared very little about the death penalty issues, but cared more about the other decisions of the court that went in the direction of protecting consumers, and protecting the environment, and protecting individuals, and such like. Those were not campaign issues, so those issues were more or less silent. I found it extremely difficult to stand up in front of an audience and suggest that the real source of the campaign against us was not the supporters of the death penalty, but rather these other folk who were unhappy with our other decisions, first of all, because it's very difficult to demonstrate that, and second because I knew that when the campaign was over, if I continued to sit on the court, I would be sitting on cases in which those interests would be represented. I thought it unseemly for a judge to rail against particular interests that he might have to decide about. So, that was an unfortunate aspect of the campaign.

McGarrigle: Well, you do lay out in the book your suggestions for how to do things—alternatives to the current system.

Grodin: Yes, I have no hope that any of them will be accepted. [laughter]

McGarrigle: What I really found most interesting was the way you

explained what happens to criminal cases on appeal, and how clear that makes this manipulation by groups like—I think there's—

Grodin: Victims for Court Reform.

McGarrigle: Yes. Their manipulation of the reality of what happens in a court.

Grodin: Yes.

McGarrigle: You also go on to explain, for example, the subjective determination in the penalty phase, and some of these particularly difficult cases where the rule of special circumstances came into play, that were sort of prime examples for groups like Victims for Court Reform to latch onto.

Grodin: Yes, if you have a particularly horrendous murder—and almost all of these cases involve particularly horrendous murders—and it is quite clear to everyone, including for that matter the court, that the defendant is guilty of having murdered the individual, and the only question is whether the death penalty is justified—to say that the death penalty should be overturned because the jury was not properly instructed on some issue is very difficult for people who are not lawyers to accept. The reaction is, "The guy's guilty. It was a terrible crime. Let's get on with it."

McGarrigle: You also say in the book that we would be better off as a society without the death penalty.

Grodin: That was a very mild statement. [laughter]

McGarrigle: Could you expand on that, since we have another opportunity to revisit that subject.

Grodin: Well, as time has gone on since I've been off the court, my aversion to the death penalty has increased. I think that the death penalty is corrosive of moral values. I think that for the state to be involved in killing a human being—because that's what the defendant did—is contrary to what we were all taught as kids, that two wrongs don't make

a right. On top of that are all the problems with the administration of the death penalty, its inherent bias against people who are poor, against people who can't afford topnotch representation, against people who are black or in other minorities. The sort of lottery character of the process that—who gets the death penalty and who does not—depends on a kind of roll of the dice; based upon how the jury is composed, how the case is presented, who is representing the defendant, what color the defendant is, and so on. Then on top of that is the fact that the death penalty imposes an enormous burden on our judicial process and the whole process of law enforcement. It adds a layer of cost that we could well do without, and it imposes on the supreme court a huge burden that I think, the public does not even begin to understand.

After the election the California Supreme Court, newly composed, began to affirm a majority of death penalties, and that has continued to be the case. Yet the number of persons on death row awaiting theoretical execution has continued to grow. Although the court has tried to expedite the decision of death penalty cases, that process is delayed in part by the fact that it's difficult to find competent lawyers who are willing to take those cases on for the kind of pay that they get and by the fact that the court has to have time to decide other cases. And so the cases continue to accumulate on death row faster than the courts can decide them. It's sort of like the national debt. We tend not to think about it, because when we ask ourselves how are we ever going to pay it off, nobody has an answer. The same is true of death row. If we ask ourselves how are we ever going to resolve all of those cases, nobody has an answer, least of all the supreme court. So, it's sort of like a continuing infection or disease within the legal system that I think debilitates the system, distorts it, makes it less effective in other respects. It seems to be incurable, as long as the death penalty exists.

McGarrigle: What really struck me in reading your chapters that address the topic of criminal cases and the death penalty—and you used the word today corrosive—what influence those cases must have on you as a justice, in terms of the rest of your work. The criminal cases were, at the time of your book, about half the caseload.

Grodin: Yes. Of course, the criminal cases other than the death penalty come to the supreme court through grant of review, like civil cases, so

the court has control over those, but it doesn't have control over the quantity of death penalty cases, because they come to the court automatically from the trial court. Although I and others have advocated that they go through the court of appeal before they get to the supreme court, that has never seemed to be a popular idea. Justice Mosk had the idea that we should have two courts, a civil court and a criminal court, like they do in Texas. I always thought that would be a terrible idea.

McGarrigle: Because?

Grodin: Well, for one reason because you then have a court specializing in criminal cases. The judges who come to that court are therefore likely to be either former prosecutors or former defenders. They will not have the diversity and breadth of legal experience that common law judges typically have. I think you only have to look at what has happened in Texas to see the results of that system. Texas kills more people through execution than any other state, and it does so under circumstances which have constantly been subject to scrutiny by the U.S. Supreme Court. The U.S. Supreme Court, as conservative as it generally is in criminal matters, has expressed its exasperation with the Texas courts for failing to follow even the fairly minimal guidelines that the U.S. Supreme Court has laid down in death penalty cases. I think the genius of our common law system is that we do not specialize and that we bring to the courts—we bring to the appellate courts—people from a variety of backgrounds who offer perspectives and bring a kind of humanist approach to the resolution of legal issues, as distinguished from a more technocratic approach that tends to be associated with specialized courts.

McGarrigle: I have on the outline Governor Deukmejian as attorney general, and we're talking about how the court changed, also, after you left, and his gubernatorial administration. Are there things you would like to add to that topic?

Grodin: Oh, I don't have any particular insights with respect to his gubernatorial administration, apart from the courts and the people he appointed to them. I see that Governor Deukmejian recently received an award from the Judicial Council for his contributions to the judicial

system. I have to say I found that a bit ironic. But by that, I don't mean to cast aspersion on the people he appointed to the courts, but rather his role in the recall election, in the retention election. I don't think I have any—unless you have some specific questions that you—?

McGarrigle: I don't specifically, no.

Grodin: Okay.

McGarrigle: Did you have any personal experience with Willie Brown or Senate President Pro Tem David Roberti?

Grodin: Well, Willie was a student in my labor law class when he was at Hastings and I was teaching there as an adjunct many, many years ago. Apart from that—when I've seen him since I've kidded him that I taught him all he knows about labor law—but apart from that, I've had very little dealings with him. He was an associate of Terry Francois, who was a member of the board of supervisors in San Francisco and one of the leading black attorneys in the early period of the civil rights movement. Terry and I worked together on a number of things, but Willie was still a young man, probably hadn't gone to law school yet. Roberti, I haven't had any contact with.

McGarrigle: About which year would that have been, that Willie Brown was in your class when you were teaching?

Grodin: Well, I taught as an adjunct in the late fifties and early sixties.

McGarrigle: How many minority students would there have been in a class at Hastings?

Grodin: Not very many, not very many. Two or three, maybe.

McGarrigle: Do you remember him in particular from that class, in terms of his being a student?

Grodin: No, I don't have any specific recollection, and I don't know what grade he got. You'd have to ask him. [laughter]

McGarrigle: [laughter] I wasn't going to ask about a grade. I thought it's supposed to be anonymous!

Grodin: It is until they're graded, and then I get sent a sheet of grades with names that always shocks me.

McGarrigle: We're moving into talking about your long career as a law professor.

Grodin: Well, teaching was always something I wanted to do. In fact, when I went into the practice of labor law, it was with the thought that I would practice, perhaps for a few years, and then go into teaching. Because it seemed to me then, in a field like labor law, it was important to have some practical experience. A few years lengthened out to something like seventeen, longer than I had anticipated. I always enjoyed teaching.

After the retention election of 1986, and I left the court in 1987, I considered various alternatives. I had some offers from law firms to go into practice. One of my colleagues at Hastings, who was then the academic dean, called me to say that my colleagues had voted unanimously to extend me an offer to come back to Hastings, and since the Hastings faculty seldom does anything unanimously, [laughter] I regarded that as very encouraging. I was honored by it, and on reflection I decided that that is really what I wanted to do. So, I went back to Hastings, and although when I was there before I taught only labor-related courses, I now began to teach constitutional law and later on law and literature. I made the mistake of telling the dean that I was willing to teach any first-year course—I thought that would be fun—and so, I agreed to teach the second semester of Contracts I to the first-year [students], and that was the last time I did that. I mean, I thought I knew something about contracts, and that was true, but really not enough to teach that subject.

McGarrigle: What does law and literature focus on?

Grodin: I had a seminar for several years in law and literature in which we would read, usually, short stories and plays, and talk about the relationship to the law. We usually started out with Greek tragedies,

and I liked to talk about *Antigone*, for example, or *Oedipus Rex*. Would we find Oedipus guilty of killing his father, murdering his father, and marrying his mother? Would we find him guilty of murder, and if so, of what degree, and would we find him guilty of incest? It raises very interesting questions about state of mind associated with definition of crimes. I would have them read *Measure for Measure* by Shakespeare, and talk about the very interesting issues that play presents. We used Dürrenmatt's *The Visit*, we used Kafka's *The Trial*, a whole variety of things. I found it a very useful way of getting students to talk about our jurisprudential issues— because it was really a course in jurisprudence in disguise—to talk about jurisprudential issues without having to read law cases, which by that time in their legal training they had had enough of and wanted to get away from.

McGarrigle: Was that a unique class in terms of the offerings at law schools?

Grodin: No, it came in the middle of what you might call a law and literature movement that was sweeping the country. It was, for a time, a very popular course. The explanation, I think, was that it came into being as a kind of counterpoint to law and economics, which was also becoming very popular. Law and economics focused upon a kind of mathematical approach to the law, or at least an approach which assumed that everything that you needed to make a decision was somehow quantifiable, ultimately quantifiable, and could be reduced to economic terms. Whereas the law and literature people resisted that notion and said, look, we're talking about a more humanistic enterprise here, involving values that can't be weighed in that fashion. When we're talking about whether Antigone was justified in refusing the order of her uncle Creon not to bury her brother—Polynices, I think was his name—after he'd been killed in an insurrection—that that posed moral questions that went beyond the ability of law and economics to deal with. Not that economics did not have important things to say to lawyers, but that it needed to be counterbalanced by different perspectives. There were law and literature courses all over the place before I got into the act.

McGarrigle: What has happened in the time since then, in terms of

trends where we are now, between these two topics that we're discussing, law and economics, and law and literature?

Grodin: In law school, law and literature continues to be taught in many schools. I haven't been teaching it for some time, not because I thought it unimportant, but just because I wanted to move on to teach something else. Law and economics has continued to propagate and particularly through the appointment to the federal circuit courts of people associated with the law and economics movement, most notably Richard Posner, but also [Frank H.] Easterbrook and others on the Seventh Circuit. It is still a lively movement that, at times, pushes the law in certain directions. It tends toward a kind of utilitarian approach to the law, which asks, for example, in the case of a disabled person who is seeking accommodation for her disability in order to be able to work—it places an emphasis on how much is this accommodation going to cost and is it worth it? The idea of whether it is worth it involves some evaluation of the interests of the disabled person in working in that establishment. But, it's a worthwhile perspective.

McGarrigle: So, you went back full time with the unanimous—

Grodin: I went back full time and I began to teach, as I say, constitutional law. I developed a course in state constitutional law, with my colleague Calvin Massey, and we taught that for a semester. But I've always enjoyed teaching. I've asked myself why this is so. Is it only for ego reasons, because I get paid to stand up in front of a class and be able to speak for fifty minutes without interruption if that's the way I want it. [laughter] I have no doubt that that's part of it, but it also feeds my desire for dialogue, just kind of a continuing dialogue. I just find the teaching of students very satisfying. I find it very satisfying to learn what happens to them after law school, and to know that in some way I have contributed to their careers or their thinking about the law. Whether in the long run what I'm doing is benefiting society, I have no idea. I mean, the argument can be made that society has enough lawyers, so the process of making more of them is not necessarily a social good! But, I have to assume it is. I have to assume that while there are a lot of lawyers out there, there are good lawyers and not-so-good lawyers, and my job is to try to produce good lawyers.

McGarrigle: I'm going to ask you a question and then change the tape afterward. But, we were off tape a little while ago, and you talked about the changes in the opportunities for public interest works. I'm going to just leave that with you and change tapes.

McGarrigle: We're talking about inflation relative to tuition costs—about changes in the opportunities for public interest work.

Grodin: Yes, well, if you were to read the application forms of students seeking to get into the law school as I have, serving on the admissions committee from time to time, they're asked to write essays about why they want to be lawyers. You would think from reading those essays that they're all going to go into some kind of public interest work and devote themselves to the legal problems of the homeless or the unemployed or whatever. Of course, they don't do that. For the most part, that's not because they were hypocritical in their essays, because as a matter of fact, it's my experience that most of the students do in fact see the law as a way of contributing to society in some fashion. The problem is that in order to go to law school, with the tuitions as high as they are, most of them have to take student loans, and those loans have to be repaid. It's very difficult to repay those loans on the salaries that starting lawyers get in public interest firms.

On top of that, the number of jobs available in public interest firms—or public interest law, to use that term broadly—has decreased because government funding has decreased, government funding of legal aid, to the point of being nonexistent. So, opportunities for law students to do public interest law has declined. I should also say that, although there are a number of law firms that continue to provide lawyers with the opportunity to do wonderful things pro bono, the economic pressures on law firms—the necessity for making a profit and the bottom line—has made it increasingly difficult for law firms to provide those opportunities. The upshot is that students who thought they might want to do public interest law end up, for one reason or another, in large law firms doing the kind of routine law work that most associates in large law firms do, and it makes me shudder.

McGarrigle: Is there something about the socialization process that they go through, as well, in their three years, that changes their per-

spective on wanting to go out and do public interest law?

Grodin: I don't know the answer to that. In terms of what they get in the classrooms, just knowing my colleagues at Hastings, my guess is that most of them are encouraged by what goes on in the classrooms to think about law as a way of contributing to society. But, they come up against reality when they seek jobs over the summer, and when they go to the interviews, because the firms that interview are largely large, corporate firms. Yes, I guess they're socialized by that process to think differently. I hope at least not in my classes that they're socialized against public interest law. [laughter] I tell students that they're in law school to think like lawyers, and to be taught to think like lawyers, and that there is a kind of distinctive way of thinking that lawyers have, and that it is important to learn that. But in the process, they shouldn't forget to think like human beings. That's part of the motivation for my law and literature seminar.

McGarrigle: Do you think that students are going to public interest work in greater numbers from different universities?

Grodin: I don't know the answer to that. I don't know.

McGarrigle: This certainly has changed overall, and at Hastings it's changed. Is there discussion among the faculty about ways to help?

Grodin: Yes, we talked about, for example, providing loans to students who go into public interest law, to help them pay off the loans that they've taken. We do that to some extent. But, it boils down to economics, as the law-and-economics people are fond of saying. There comes a time when a student who would like to go into public interest law starts to have children and has to feed them and clothe them, and it's very tempting to take these very high salaries that the big firms continue to offer.

McGarrigle: You were speaking earlier today about Willie Brown being in your labor law class in the 1950s, and I want to ask you about changes that you've seen among the students. Certainly the percentage of women in law school has gone, some years, to above fifty percent.

Grodin: Yes.

McGarrigle: And the numbers of minorities as well. Has that impacted your teaching? Or, has that made a change?

Grodin: Well, I think it has an effect upon what goes on in a classroom. I do believe that diversity, the idea of diversity which gets tossed around as a kind of shibboleth, has a practical meaning in the context of a classroom, at least a law school classroom. Whether it adds anything to the education of medical students or engineering students, I don't know. But, in a law school class where issues come up that involve gender and race, there's simply no question, but that the presence of people who can bring to the discussions more than abstract observations enlivens the discussions and adds dimensions that would not otherwise exist. Just as the presence of women or minorities on an appellate court, I think, affects the way the court deliberates. People become more sensitive to issues that they might otherwise be insensitive to.

McGarrigle: In terms of the faculty at Hastings, what kinds of changes have you seen in your time there?

Grodin: Well, when I started teaching at Hastings as an adjunct, the faculty was all white and all male, and almost all old, because the rule was that you had to be sixty-five in order to teach full time at Hastings. It changed gradually over time, with the abolition of that rule, and then through aggressive deliberate policies of seeking out women and minority faculty members. So we have a very diverse faculty, and there's no doubt in my mind that that affects, and in a desirable way, the way that we teach students and what it is that we teach them.

McGarrigle: Another major topic for discussion is labor law and the way that it's changed. We were looking earlier at an article from this last week's *New York Times*. The title is "Between union leader and his protégé, tension over direction of labor movement." It happens to be about Andrew Stern and John Sweeney.

Grodin: I tell my students that I went into labor law as a lawyer at a

time when unions represented about a third of the private sector work force. After I got through being a labor lawyer for unions, and I got through teaching labor law for a number of years, and I got through being a judge, and I came back to the teaching of labor law, the percentage had dropped to somewhere around twelve. I like to think that that wasn't because of anything I did. [laughter] There are a number of factors that contributed to that. Leaving those factors aside, there's no question that the labor movement is in very difficult shape in this country and that, as a consequence of that, labor law—well, what's happened to labor law is to some degree an offshoot of that and to some degree independent of that.

What's happened to unions is that their percentage of organization has declined in the private sector. In the public sector it continues to increase. Labor law is probably one of the contributing factors to that decline, although probably less of a factor than other economic factors. Labor law has become progressively less progressive, you might say. The manner in which it is interpreted and applied has made life increasingly difficult for unions to organize and to negotiate good agreements. The current National Labor Relations Board is pulling back on precedents that had been established long ago, and the courts, dominated by appointees of Republican presidents, have moved in that direction as well.

Then, in the last election, unions put themselves on the line in terms of money and resources to an extent, I think, that surpassed any prior election. And they lost. So they're left with a government consisting of a president and members of Congress whom they have been opposed to and who are not particularly friendly to them. So, they're going to have to do something. Whether Andy Stern is right in the remedies that he proposes, I don't know. But, they may be worth trying. He's saying that the labor movement needs to consolidate, it needs to have fewer international unions, it needs to have more centralized control, it needs to move toward national bargaining. I think those are probably all good things. Whether they would have the kind of effect on labor's situation in the world, I'm not so sure.

I continue to have fifty students in my labor law class now. Students continue to be interested in the subject. Although it is a sad fact that, except at Hastings, labor law is not a subject that is taught at any of the major law schools anymore by permanent faculty. It is

taught by adjuncts, for the most part. That's true at Boalt. That's true at Yale. That's true at Harvard. That's true, I believe, at UCLA. At Stanford, Bill Gould is gone, and I don't think there's anybody left. And yet, students seem to regard it as a subject worth taking.

McGarrigle: What has happened on the part of law school administrations that they're not pursuing permanent faculty in labor law?

Grodin: I think two things. One is that there's a perception that labor law has declined as a field of opportunity for lawyers, as indeed it has, at least statistically and nationwide, although in areas like the San Francisco Bay Area, it continues to be a very active field of law. The second is that labor law tends to be heavily doctrinal in an era in which academic interests seems to run toward the more theoretical. There's a whole generation of academics who seem to have an aversion toward the teaching of legal doctrine on the ground that it is largely irrelevant and that one has to focus on teaching, or at least writing, about other things that are more theoretical. Labor lawyers don't tend to write about theoretical things. [laughter] They tend to write about decisions that affect the relationships between unions and employers, and unions and their members. So, it has somehow become a less sexy subject, whereas employment law, and particularly employment discrimination law, has become much more significant.

McGarrigle: So their courses continue—I know you teach employment discrimination law—but in the major law schools as well?

Grodin: Oh, yes. We teach employment discrimination law as an option in the first year, and next semester we're going to have two sections of employment discrimination law. I'll be teaching one of them. Employment law, including employment discrimination law, I understand, is going to be on the bar [exam] in Pennsylvania. I suspect that may be a movement in other states as well. Because it's a very strong area of practice right now, on both plaintiffs and defense side. There are lots of jobs out there for those people.

McGarrigle: What are your thoughts on that development?

Grodin: Well, I think it's wonderful that we have developed employment discrimination law and, more broadly, regulation of the workplace. I fear that we're doing it to the exclusion of any reforms to labor law that would improve the situation, because I think that the existence of unions is extremely important in collective bargaining, extremely important, and not just to workers. I think they're important to society. I think that it's important to have unions as a countervailing economic and political force in society. I think that it has been a loss to our society generally that unions have declined in significance.

There are things that we could be doing. For example, we could be adopting a legal regime in which employers would have an obligation to deal with unions on behalf of those employees whom the union has been successful in organizing, even if it hasn't been successful in organizing a majority of employees. Those systems exist elsewhere, in Europe, and might help bridge the gap in this country. But, the political situation is such that we're far from doing that. I think, on the whole, the employment laws that we have adopted, not only employment discrimination, but the Occupational Safety and Health Act, and ERISA [Employee Retirement Income Security Act], and the Warren Act, and other regulations of the workplace, are healthy steps. Otherwise, in the absence of unions, the regulation of the workplace reverts to the power of the employer, which generally means a kind of unilateral control over the workplace.

McGarrigle: To get back to something you said just a little bit ago, the change to a more theoretical focus in law schools—does that translate into the classroom as well? This may not be true in your classroom, from what you say.

Grodin: It does translate into classrooms insofar as casebooks that students read contain that kind of material. For example, there's a lot more economic material that finds its way into contracts law and torts law casebooks these days. But there is, to some extent, a disconnect between what professors do in the classroom and what they write about. What professors get kudos for is what they write about, because students may appreciate what they do in the classroom, but nobody else really knows what goes on in that classroom. We sit in on classrooms when we evaluate faculty members for advancement before they get

tenure. But apart from that, nobody knows what goes on in my classroom, and I don't have very much of an idea what goes on in anybody else's classroom. So whether we are good teachers or lousy teachers is a matter of reputation, and the grades that we get from students, the evaluation forms at the end of the semester. But, professors make their reputations, by and large, through what they write in the law reviews. The pressure there tends to be toward theoretical writing. It also tends to be toward writing on national subjects, which accounts for the fact that state law, state constitutional law, for example, tends to be relegated to a kind of secondary status.

McGarrigle: Is this a subject that you approach on the different committees which you serve, and in the setting at the law school?

Grodin: Well, yes, my colleagues have heard about this, but there's not much that is likely to be done about that through committees. What it takes is law professors who decide that they want either to teach courses that focus on state constitutional law, or that they want to include state law in courses that otherwise have a national focus. Take employment discrimination as an excellent example. There is scarcely any respect in which California law is not superior to federal law when it comes to employment discrimination. This is particularly true in the area of disability discrimination, but it is true across the board. A plaintiff's lawyer would be guilty of malpractice if he failed to consider and file under the California statute and simply filed under federal law. And yet the casebooks are written exclusively, or almost exclusively, from a federal perspective. The students who study employment discrimination law in California are being fed Title VII law, and disability act law, and age discrimination law unless the professor gives them state law as well. I do that, and I hope that other professors who teach the subject will do that, but I have no control over that. Although I have a project in mind, which is producing a little supplemental casebook, or materials on California employment discrimination law, which professors in California can use to supplement their material.

McGarrigle: Are you ready to embark on that?

Grodin: As soon as I finish my other projects, which I haven't fin-

ished. [laughter]

McGarrigle: Well, let me ask you something. I've asked you this before, but more in our personal discussions. Given all of these difficulties, these challenges—and not being specific, but some of the things we've spoken about today—what keeps you from being cynical?

Grodin: I don't know. Obstinacy or stupidity. [laughter]

McGarrigle: I don't think that's true. I don't personally believe that. I think it's an important area because people such as yourself who are continuing to do good in the public in the face of all of this are extraordinary.

Grodin: Well, I really don't know what the answer is to that. I mean, it isn't a matter of doctrine or argument. I don't really have any good arguments against people who are cynical. I think it's perfectly rational to be cynical, [laughter] particularly after the last election. I think the outlook for people who want to do good things in society is somewhat bleak. But, I don't see that as a particularly good reason for not trying.

McGarrigle: I asked Bill Coblentz that question, something similar to that, several years ago. He said, "I wake up in the morning. I read the paper. I'm infuriated by what I see, and I go out and I do something about it."

Grodin: Yes, that's right.

McGarrigle: In the beginning of our series of interviews, when we were talking about your courses at Cal and then at Yale, you talked about the lifelong problem of grappling with the subjectivity of values. In your book, you talk about the essay "The Hedgehog and the Fox," and the tension between several truths and one big truth. I wondered if there is any way you would like to address any of those areas.

Grodin: The question of subjectivity of values continues to perplex me, plague me. I think it's central to almost everything that we do as lawyers. It's central, for that matter, to almost everything that we

do as human beings—the question of how we make the choices we make, and whether or not there is room for rational argument between people of differing views. There are people who I at least have heard on television who I think I would have a very difficult time arguing with, because they are so certain of their conclusions that argumentation would be impossible. But, more broadly than that, if you really think that value choices, policy choices, come down ultimately to individual preferences which cannot be further explored than simply saying, "That's the way I feel," then dialogue has no point. You start with the assumption that there's no way you're going to persuade anybody else to your opinion, and so why bother. Talk about something else. Talk about baseball.

I cherish the thought that there is room for rational persuasion among human beings or at least room for understanding that may lead to change of positions. If it's not entirely rational or logical maybe it's empathetic, but at least there is room for communication, which may lead people to have different views than the ones that they started with. If I didn't believe that, I wouldn't be a law teacher, and I wouldn't be having conversations with people about things where we disagree; because it's no fun having conversations with people that you agree with everything about. I think that question is central, and it then becomes an issue of what sorts of arguments can count as persuasion? What kind of appeals can be made to another human being to try to persuade them toward your way of thinking. It may be rational argument. It may be facts that are discernible. It may be emotion and understanding of feelings that drive other people. It may be reasoning from moral principles, so that you ask, "Well, if you feel this way about killing a fetus, how do you feel about killing a human being, a full-grown human being, in a gas chamber?" I don't think the answer to that question is easy at all, but I think that people can have meaningful discussions around the question.

"The Hedgehog and the Fox" is [Isaiah] Berlin's famous essay comparing the views of those who tend to see some overall—he would say— "totalitarian" answers to problems, because he was really talking about communists there, ideologues, or ideologues of any variety as opposed to people who approach issues more pragmatically and empirically. I think I may have mentioned in an earlier interview my attraction to Morris Cohen's definition of liberalism, which at its core,

Cohen says, is a skepticism about the truth of one's own positions and a willingness to entertain the possibility that one may be wrong. If one is a hedgehog and one starts with certain basic ideological premises from which everything else flows, then it becomes very difficult to pierce those syllogisms in order to discuss meaningfully particular issues. That's not to say that I don't have hedgehog tendencies. I think a lot of people do. I confess that I do.

I once gave an introduction to one of the Tobriner lectures, which is always preceded by someone talking about Justice Tobriner. I had the privilege of doing that at one of the early sessions. I said that this tension between being a hedgehog and a fox was a tension that Tobriner displayed, that his approach tended to be that of the fox, but he really would have liked to be a hedgehog. That is to say, he really would have liked to find sort of general themes and ideas and propositions which would explain—one big theory to explain everything. All of us, I think, at least many intellectuals, are kind of attracted to that idea. I just think we have to be wary of it. It may be helpful to have those ideas, but we have to be wary of their dominating our thinking about particular problems because the minute they become dominant, then thinking stops and analysis doesn't go any further. So, I think—who was the writer, the former longshoreman who coined the phrase—well, I can't think of it at the moment. I'll think of it. Let's go on to your next question.

McGarrigle: I'm just struck as you're talking by your unique perspective, having served on the court of appeal and on the California Supreme Court, to enter into dialogue with people of differing views. As you've spoken about your colleagues and the kinds of discourse—those who enjoyed and were open to discourse—how you were able to sometimes persuade them and sometimes be persuaded by them? That's a unique opportunity that most of us don't have in a professional setting.

Grodin: You have that in other settings. You have it in dinner parties or social events or just having lunch with people.

McGarrigle: That's true. In social settings. It is a unique perspective, I think, at the level that you were doing that. I asked you earlier, maybe

two or three sessions back, about your role as a father, and you spoke to that a little bit. Now is the time when I like to ask people about family. Now you have two daughters who are grown. My neighbor hears your daughter, the musician, at the Philharmonia Baroque.

Grodin: Philharmonia Baroque. Yes, we do, too.

McGarrigle: I hear about her. Maybe you'd like to tell me about your grandchildren.

Grodin: Well, our grandchildren are, of course, very special and above average [laughter], unlike most people's grandchildren, I'm sure! We have a granddaughter who is now fourteen who has matured over the last few years in remarkable ways. She has become interested in a variety of things, but the most important asset she has, I think, is something that she's learned along the way—from her mother, from her school, from wherever, her father, too, no doubt—of being very outgoing, being very empathetic, being very tolerant of other kids, being very nonjudgmental, and in a way that I think is rather unusual for a teenager. In any event, we're just thrilled with her.

McGarrigle: What is her name?

Grodin: Her name is Anya. We have two grandsons, one age twelve and the other nine, who are equally amazing. The older one is, like Anya: very gentle, very understanding of other people, has wonderful social skills and artistic skills. The younger one is a little bit scary. He has very strong aptitudes for a lot of things, but I think at the present time for science. He declared at the beginning of last year that he had decided he was going to devote his childhood to science. He learns things at a very rapid rate. He claimed to us, not long ago, that he was familiar with every bird in Northern California, and we discounted that until we heard him talking to a ranger down in Yosemite about birds. I went with him to the Natural History Museum in San Francisco, where he was able to identify not only the names of birds, but their habitats and habits as well. So, I don't know what he's going to be, but whatever it is, it's pretty awesome.

McGarrigle: [laughter] It will include ornithology!

Grodin: He may be. He has said that he wants, right now, he would like to be an ornithologist.

McGarrigle: Sounds like it.

Grodin: That may change.

McGarrigle: What are their names, the grandsons?

Grodin: The older one is Evan and the younger one is Michael. He's named after my father.

Janet Grodin: Michael's middle name—is it Michael Soren?—named after his Danish great grandfather.

Grodin: Yes, a Danish relative.

McGarrigle: How do you spell that?

Grodin: S with a slash through it—I mean, S-O with a slash through it R-E-N, Søren. Evan's name is Evan Bjorn Thomas Cohen.

Janet Grodin: Bjorn is bear, and "little bear" in Danish. Bjorn.

Grodin: But the name Bjorn Thomas is some Danish relative of his father. His father's mother is Danish.

McGarrigle: Anya is Grodin? No.

Grodin: Anya is Rome. She uses the last name Rome.

Janet Grodin: Her middle name is Grodin.

Grodin: In school, she's Anya Rome.

McGarrigle: And Rome is spelled—?

Grodin: R-O-M-E.

McGarrigle: R-O-M-E. Okay, just like it sounds.

Grodin: With regard to children and grandchildren, if you want to do that a little more?

McGarrigle: Yes, I'd love to.

Grodin: One of the things that we've always done as a family is hiking and backpacking, and we did that with our daughters. Now Janet is beyond backpacking, has graduated from backpacking to other activities! But I still enjoy very much going backpacking with the grandchildren, and I've done that. Anya and I went off a couple of years ago just by ourselves for a trip, and I've gone a couple of times with the boys with one or both of their parents. Those are special occasions for me.

McGarrigle: How many days did you and Anya go?

Grodin: Oh, two nights.

McGarrigle: In the Sierras?

Grodin: We went up to Desolation Valley. We hiked in a short distance, and camped, and then hiked in the next day and toured the valley.

Janet Grodin: Joe's written another book, which—did he tell you about that book?

McGarrigle: I know about the one you wrote with your daughter.

Grodin: Yes, that's what Janet's referring to.

Janet Grodin: We took our girls—I'm not supposed to be on this tape—but, we took them to Switzerland when they were in high school, and we did a loop where we went from place to place.

Grodin: That's right. We did day to day hikes around the Lechtal Valley, which is truly wonderful. We had a lot of wonderful experiences with our kids in the outdoors. We also took them a lot on trips, many, many trips. We took them a couple of times to Europe and many times

to various parts of this country, national parks and such.

McGarrigle: The book that you co-authored with your daughter, is that the daughter who is an attorney?

Grodin: Yes, although she no longer practices law. I don't know whether you're aware, but she had breast cancer, and that made her stop practicing. She went through a long period of treatment, which seems to have stabilized her condition. She's been symptom-free for quite some time now, many years now. She gave up law practice, and she does knitting, and teaches knitting, and has become very active on the board of her local synagogue. So, that's how she spends her time.

McGarrigle: That's great.

Grodin: Our sons-in-law: Sharon's husband is a psychologist who went into treatment of pain, pain therapy, and is with a group that includes physicians and physical therapists in the treatment of chronic pain.

McGarrigle: What is his name?

Grodin: His name is Howard Rome. Our other son-in-law, Adam Cohen, is a very versatile, entrepreneurial fellow who is involved in the computer world in ways I don't understand.

Janet Grodin: It has to do with the environment, something like that.

Grodin: Well, partly they were doing an environmental network on computers, but that's only part of what he does.

McGarrigle: Well, I want to take the opportunity to formally, for the record, thank you both, for having me all these sessions and making the time available.

Grodin: Well, it's been very pleasant. I mean, Janet would say that any time I get to talk about myself—

Janet Grodin: I always tease him.

Grodin: —is an opportunity I won't turn down!

McGarrigle: Well, thank you.

Grodin: You've been great.

McGarrigle: Thank you both very much.

Janet Grodin: Thank you.

Preventive Tax Policy: Chief Justice Roger J. Traynor's Tax Philosophy

Mirit Eyal-Cohen[*]

Roger J. Traynor was appointed to the Supreme Court of California in 1940 and served as its Chief Justice from 1964 to 1970. He is best known today for his judicial innovations in the fields of conflict of laws, product liability, and civil procedure.[1] His decisions on miscegenation, divorce, police searches and product liability were ahead of his time, and led California's legal system into the future. His most significant opinions included rejecting the legal prohibition of inter-

[*] Mirit Eyal-Cohen is an S.J.D. Candidate at the University of California, Los Angeles. This article was the winning entry in the California Supreme Court Historical Society's 2007 Student Writing Competition.

[1] Adrian A. Kragen, *In Memoriam: Roger J. Traynor: Chief Justice Traynor and the Law of Taxation*, 5 HASTINGS L.J. 801, 802 (1984).

racial marriages, adopting no-fault divorce, restricting police searches and applying a strict standard of liability in product defect cases.[2]

However, few would trace Roger J. Traynor's roots to the field of tax law, where he developed, through academic, administrative, and judicial service, valuable principles that still prevail today. At the University of California, Berkeley, Traynor discovered his passion for tax law and inspired his students to take this path in their professional careers. As an administrator, Traynor served California's tax system tremendously by shaping some of today's most important local tax acts, which were adopted by other states and countries. Later, Traynor became an expert consultant to the Treasury Department and participated in drafting major federal tax legislation. As a Supreme Court judge, Traynor wrote decisions in the field of taxation that remain good law and provide guidance for complicated issues including, for example, computing estate tax marital deductions and the earnings and profits of corporations. What was most unlikely, however, was that Traynor would partner with Stanley Surrey, our nation's foremost authority on federal tax law and the leading proponent of tax reform during his life.[3]

As a Harvard law dean and tax professor once said, Stanley S. Surrey was a *"True Public Servant."*[4] In 1933 he joined the New Deal administration and established himself as a highly ranked legal counsel at the Treasury Department.[5] In 1951, he joined the Harvard Law School faculty, where he remained an active member for 30 years[6] while continuing to serve as a consultant to the United States

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[2] Ben Field, Activism in Pursuit of Public Interest: The Jurisprudence of Chief Justice Roger j. Traynor, xiv (2003).

[3] The Townsend Harris Medal at: http://www.ccny.cuny.edu/townsend_harris/awards/s_z.htm

[4] Erwin N. Griswold, *In Memoriam: Stanley S. Surrey*, 98 Harv. L. Rev. 329, 331 (1984).

[5] Surrey worked in the National Recovery Administration in Washington from 1933 to 1935 and at the National Labor Relations Board from 1935 to 1937. In those positions, Surrey found a meaningful outlet to improving government policies. On the influence of the New Deal on Surrey from his brother, *see* Walter Sterling Surrey, Stanley S. Surrey 1910-1984, Harvard University (1984), a Memorial Service Held Oct. 3, 1984 at Memorial Church, Harvard University.

[6] At Harvard, even as professor emeritus, Surrey continued to participate in many projects, such as the Income Tax Project of the American Law Institute. He

government and as an advisor to the United Nations on international tax projects.[7] However, his best known and most important work was formulating the tax expenditure concept. As assistant secretary for tax policy in the Treasury Department, Surrey promoted the legislation establishing today's tax expenditures section of the government's budget, which enumerates incentives and subsidies granted through the tax system, thus emphasizing their oversized component of the income tax system. His aim was to raise public awareness of the extent to which government subsidizes certain activities. After his retirement, Surrey continued to update and publish volumes of his famous textbooks on taxation, such as "Federal Income Taxation—Cases and Materials" and "Federal Wealth Transfer Taxation—Cases and Materials," books

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organized the International Program in Taxation at Harvard, produced the World Tax Series, and published various tax books and articles. He was the president of the National Tax Association in 1979-1980 and through it published major tax articles. Surrey wrote 20 books and 97 articles, not including legislative records. James Vorenberg, Stanley S. Surrey 1910-1984, Harvard University (1984), a Memorial Service Held Oct. 3, 1984 at Memorial Church, Harvard University.

[7] Surrey's contribution to the development of international tax systems was vast. He was instrumental in formulating tax treaties between developed and developing countries, and in developing the new tax system that evolved after World War II. For example, he was responsible for the adoption of Resolution A.3 adopted at the conference of Punta del Este in 1961 by which member governments of the Organization of American States explicitly endorsed a program to reinforce tax systems. The Resolution was adopted by The Pan American Union, the Economic Commission for Latin America and the Inter-American Union, Economic Commission for Latin America and the Inter-American Development Bank, in cooperation with the Harvard University Law School International Program of Taxation in August 1961. Milton Katz, Stanley S. Surrey 1910-1984, Harvard University (1984), a Memorial Service Held Oct. 3, 1984 at Memorial Church, Harvard University. Between 1949 and 1950, Surrey participated in planning and developing a new tax system for Japan, as a member of the American tax mission to Japan. Surrey reported his mission was most importantly to devise a simple and progressive system, which was later acclaimed for bringing Japan "dazzling economic performance and rapid growth since World War II." Erwin N. Griswold, In Memoriam: Stanley S. Surrey, 98 Harv. L. Rev. 329, 331 (1984). In 1960, he joined his Harvard colleague Oliver Oldman in a research project on the tax system of Argentina for the government of Argentina through the auspices of the Ford Foundation. Report of a Preliminary Survey of The Tax System of Argentina; Prepared for the Government of Argentina through the auspices of the Ford Foundation by Stanley S. Surrey and Oliver Oldman (Cambridge, Mass., Harvard Law School, 1960).

that are known to every law student as the building blocks of tax education.

Little is known about the strong bond between Traynor and Surrey, who commenced their careers in the field of tax law. Less is known about their enduring mutual impact on the American tax system. Traynor collaborated with Surrey during President Roosevelt's second term, toward the end of the Great Depression, when the top marginal tax rate rose again to its World War I-era maximum of 78 percent.[8] The high marginal tax rates intensified the friction between taxpayers and the government, boosted litigation and multiplied the number of tax disputes.

At this crucial juncture in the late 1930s, Traynor and Surrey called for a substantial transformation of existing mechanisms for settling tax disputes. Traynor and Surrey criticized the inefficient adjudication of tax matters and proposed ways to minimize litigation through what they called a "preventive" tax policy "designed to prevent controversies from arising," and where they cannot be prevented "to reduce the areas in which they occur."[9] Their idea of preventive tax policy entailed reducing the complexity of the tax code and improving the administrative resolution of tax cases, thereby minimizing disputes over tax matters. "Too much law,"[10] they said, caused taxpayers to seek out expensive legal advice in order to "thread their way through the complicated maze of tax law."[11]

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[8] In 1918 the top marginal tax rate was 78 percent, and between 1919 and 1921, it was 73 percent. In the post World War I period the maximum rates declined gradually and their lowest level was 24 percent in 1929. During the Depression period that followed the stock market crash, the top marginal tax rate increased rapidly to 79 percent in 1936 and continued this trend during the Second World War to a top rate of 94 percent in 1945.

[9] Roger J. Traynor & Stanley S. Surrey, *New Roads Toward the Settlement of Federal Income, Estate, and Gift Tax Controversies*, 7 Law & Contemp. Probs. 336, 352 (1940).

[10] *Id.* at 351 (1940). This exact phrase was also used by Justice Robert H. Jackson. He claimed that the elaborate tax system was "too much law, and too many kinds of law, and from too many sources, for tax administration to be simple, or the law clear." Kirk Stark, *The Unfulfilled Tax Legacy of Justice Robert H. Jackson,* 54 Tax L. Rev. 171, supra 97 at 187 (2001).

[11] Roger J. Traynor & Stanley S. Surrey, *New Roads Toward the Settlement of Federal Income, Estate, and Gift Tax Controversies*, 7 Law & Contemp. Probs. 336,

Ultimately, Traynor became Chief Justice of the Supreme Court of California, while Surrey blossomed in Harvard's academy and the executive branch as assistant legislative counsel to the United States Treasury. However, when they proposed their preventive tax policy, they were both Treasury consultants. This paper will explore the joint project of these extraordinary men in its historical context and its implementation in Roger Traynor's understanding of tax adjudication. Through legal-historical analysis, the paper also examines the taxpayer-government relationship in view of changes in politics, economics, and culture in the interwar years.

Following this brief introduction, part II provides a historical overview of the development of the tax system and the administrative problems at that time, as a background for Traynor and Surrey's work. Part III tells the story of Traynor's tax education and how he met Surrey, along with an outline of their proposal to improve the interwar tax system. Part IV describes the success of implementing preventive tax policy in the U.S. tax system, specifically in Traynor's decisions. Finally, Part V summarizes the importance of preventive tax policy at a turning point in history and its effect on today's tax system.

I. INCOHERENT FISCAL PRACTICES AND TOO MUCH LAW

Taxing the income of individuals in the United States began during the Civil War, and appeared inconsistently in various forms until it was constitutionalized in 1913. The first income tax bill was modest, imposing graduated rates with a maximum rate of seven percent and large exemptions.[12] However, wartime expenses associated with World War I turned the government to income tax as an immediate revenue source. In just a few short years the maximum individual tax rate reached 77 percent.[13] From then on, tax policy became a major issue in public and political discourse. Tax legislation became more frequent, contributing to the development of the tax code, as well as

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351 (1940).

[12] Revenue Act of 1913, ch. 16, II.B, 38 Stat. 166-167 (1913).

[13] Scholar John F. Witte aptly summed up the atmosphere of the period when he said, "the need for revenue ruled the discussion over progressive arguments." John F. Witte, The Politics and Development of the Federal Income Tax 83 (1985).

the growing complexity of the tax system.

As tax rates increased, the stakes became higher, escalating the friction between taxpayers and the government. This led to higher rates of tax evasion and multiplied the number of tax disputes between individuals and the government. The growing number of tax disputes underscored the need for reform of administrative and judicial settlement procedures. It was clear at that time that compliance levels had declined, and the relationship between taxpayers and the government had deteriorated. This spurred a shift in tax legislation; whereas previously officials had cited a need to raise revenue or a desire to make the tax system more progressive. The tax acts of the late 1930s marked the beginning of complex and frequent tax revisions enacted in response to tax evasion. As a result, taxpayers increasingly sought advice from tax lawyers, and the courts were faced with a high volume of tax disputes.

Incoherent fiscal practices as well as inefficient institutional structures overloaded the interwar tax system and created substantial delays in resolving disputes. Those delays weakened the efficiency of the tax system, created uncertainties and confusion, and threatened the Treasury's ability to raise the necessary revenue.

A first attempt by the Treasury to reduce tax disputes came with the establishment of the Board of Tax Appeals ("Board") in 1924 as an independent agency within the executive branch of the government.[14] The Board was composed of seven members who were tax experts appointed by the president. It had parallel jurisdiction with the District Courts and the Court of Claims in suits for refund and it was subject to appellate review by the Circuit Courts of Appeal.

Among the Board's weaknesses was the fact that taxpayers could choose from three courts that possessed original jurisdiction over

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[14] Revenue Act of 1924, Pub. L. No. 68-176 §900, 43 Stat. 336 (1924). Theodore Tannenwald described the circumstances surrounding the decision to establish the Board as a period of general public discomfort with the Bureau of Internal Revenue, which experienced difficulties coping with administrative problems produced by the relatively new broad-based income and profits tax. Theodore Tannenwald, Jr., *The United States Tax Court: Yesterday, Today and Tomorrow: Erwin N. Griswold Lecture before the Annual Meeting of the American College of Tax Counsel, San Antonio, Texas, January 23, 1998,* 15 Am. J. Tax Pol'c 1, 4 (1998).

tax cases,[15] which led to forum shopping. Many taxpayers opted for the Board of Tax Appeals because, as opposed to other courts, it did not require prepayment of tax liability. Moreover, although the Board of Tax Appeals was based in Washington D.C., it had jurisdiction throughout the United States.[16] Therefore, it had to accumulate enough cases to justify visiting a certain location, creating huge delays. As a result, the Board faced serious overload.[17]

When the parties finally attended their long-awaited Board hearing, they were often surprised to learn about new issues not mentioned in the initial deficiency letter. Taxpayers' inability to provide complete details in the petition to the Board and the failure of the Bureau of Internal Revenue to demand full disclosure of the facts created further delays in the judicial branch, which now had to waste time compiling the necessary information. The constant delays in resolving tax disputes impaired tax collection, increased the likelihood of taxpayer default, and resulted in a substantial revenue loss for the government.

The interwar tax system also produced high levels of confusion and uncertainty. Typically, six years passed between the date of the return and the decision of the Board of Tax Appeals. Further complicating matters was the fact that the Board's decision-making lagged behind the legislative code. For example, when Congress solved problems from previous tax acts and enacted the revenue act of 1939, the judiciary was still interpreting the revenue acts of 1932

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[15] The taxpayer had the liberty to file a refund claim through the District Court or the Court of Claims, or a petition with the Board of Tax Appeals.

[16] A study in 1934 showed that over 90 percent of the Board cases were outside of Washington; seven states accounted for 59.5 percent of the cases, another seven states accounted for 16.9 percent, and the remaining 23 percent accounted for 34 other states, which emphasized the geographical spread of tax disputes before the Board. Roger J. Traynor, *Administrative and Judicial Procedure for Federal Income, estate, and Gift Taxes- a Criticism and A Proposal,* 38 Colum. L. Rev. 1394, 1405 (1938).

[17] In fiscal year 1937-1938 the percentage of cases closed by Board decision after trial was only 19.1 percent (1,108 cases out of 5,799). At the close of fiscal year 1938-1939 there were 7,864 pending tax cases involving $456,974,846. By the end of fiscal year 1938-1939, there were 6,574 cases before the Board of Tax Appeals. Roger J. Traynor & Stanley S. Surrey, *New Roads Toward the Settlement of Federal Income, Estate, and Gift Tax Controversies*, 7 Law & Contemp. Probs. 336, 338 (1940).

and 1934.[18] Many cases continued appellate litigation in the Circuit Courts for another two years, while others made it to the Supreme Court for another year. That meant it could take up to nine years for a tax dispute to finally be settled. In the meantime, both taxpayer and government remained uncertain of the tax consequences.[19] Before his appointment to the United States Supreme Court and while serving as general counsel at the Bureau, Traynor's friend and supporter Robert H. Jackson criticized the interwar tax system, stating: "Some of the complexity, conflict and confusion in the tax law is due to the number of cooks who make the broth. . . ."[20]

With those problems in mind, Traynor partnered with Surrey and prepared a comprehensive reform proposal. Its principles are described in the next section. However, in order to understand Traynor's influence in the field of taxation, first we have to understand how he came to the study of tax law and to collaborate with Surrey. An outline of Traynor's life story and his acquaintance with Surrey will be presented, followed by a detailed discussion of their idea of preventive tax policy.

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[18] Roger J. Traynor, *Administrative and Judicial Procedure for Federal Income, Estate, and Gift Taxes- a Criticism and a Proposal*, 38 Colum. L. Rev. 1394, 1398 (1937).

[19] Id. For similar criticism of the interwar tax system see Theodore Tennenwald, The Tax Litigation Process: Where It Is and Where It Is Going, 44 Rec. Ass'n B. City of N.Y. 825, 827 (1989). An example of the confusion inherent in the system was the inverted pyramid of multiple appellate reviews that produced opposite opinions in similar federal tax matters. Taxpayers filing a tax claim could choose among the Board of Tax Appeals, the District Courts, and the Court of Claims. While the Board was the most popular choice, the other tribunals had equal precedent power and were subject to an appellate review by 11 Circuit Courts that sometimes issued contradictory decisions, causing vagueness until the Supreme Court settled the matter (if at all). Taxpayers and their counsels used this lack of uniformity in devising tax schemes. They reviewed the latest decisions in each tribunal, and chose to litigate in a specific tribunal if they thought it would rule in their favor. The Bureau was not free from those considerations, and there were situations in which the main reason for its assertion of a deficiency was to foster a circuit split.

[20] Robert H. Jackson, *Equity in the Administration of Federal Taxes*, 13 Taxes 641, 643 (1935).

II. PREVENTIVE TAX POLICY

A. Traynor's Tax Education and His Encounter with Stanley Surrey

"There is no sounder currency in the courts across the country than a Traynor opinion."[21]

Roger J. Traynor was born on February 12, 1900, the son of Irish immigrants who settled in the small town of Park City, Utah.[22] He received both his Ph.D. in political science and J.D. in the spring of 1927.[23] While studying law, Traynor discovered his passion for tax law and, soon thereafter, received an appointment as a tax law professor at Boalt Hall. Traynor taught a course called "Principles of Income and Inheritance Taxation," using a unique method of combining "dry law" with complex tax policy and jurisprudence considerations, exposing students to both the practical and philosophical aspects of taxation. His influence over his students encouraged many of them to pursue careers in the field of taxation.[24]

As a man of many interests, Traynor enjoyed putting his practical knowledge of tax law to use in the public service. In 1932, Traynor advised the California State Board of Equalization on devising methods of local taxation to raise additional revenue. He helped in drafting the retail sales tax, the use tax, the Bank and Corporation Franchise Tax Act and the Personal Income Tax Act of 1935. Those state taxes survived battles challenging their constitutionality, and served as mod-

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[21] Walter V. Schaefer, *A Judge's Judge*, 71 Calif. L. Rev. 1050, 1051 (1983).

[22] He nostalgically described his small-town life as like being in a melting pot that accommodated immigrants from all over the world, enriched by noble teachers who inspired him to choose the academic path. Traynor loved this environment of provincialism, "land of Bohunks and Micks and Krauts and Cousin Jacks" surrounded by mountain landscape, which he later compared to the path of a judge. Elizabeth Roth, *The Two Voices of Roger Traynor,* 27 Am. J. Legal Hist. 269, 288 (1963).

[23] His academic life began in 1919, when Traynor received a scholarship for undergraduate studies at the University of California, Berkeley, and continued his graduate studies for a Ph.D. in philosophy in the political science department. Inspired by Thomas Reed Powell, his constitutional law professor, Traynor decided to pursue a law degree while working on his dissertation and teaching in the political science department.

[24] Adrian A. Kragen, *In Memoriam: Roger J. Traynor: Chief Justice Traynor and the Law of Taxation*, 5 Hastings L.J. 801, 802 (1984).

els in many states and countries as central sources of local revenue. In 1937, while Traynor was a tax counsel to California's Board of Equalization, he was appointed consulting expert in the federal Office of the Secretary of the Treasury.[25]

During his federal service, Traynor met Stanley Surrey, then a young and eager tax professor and assistant legislative counsel at the Treasury Department, and chose him as a reliable co-author and collaborator. One of their mutual projects was to review the effort to prevent taxpayers' misuse of the statute of limitations on deficiencies and refunds.[26] Their recommendations were incorporated in section 820 of the 1938 Revenue Act,[27] as the two continued to develop a critical analysis of contemporary tax problems. Their goal was to create what they called a "preventive tax policy," that is, tax policy aimed at both preventing tax disputes from arising and reaching the judicial system by improving the predictability, clarity and unity of the tax code (ex ante prevention), as well as producing a more effective administrative and judicial procedure for the swift resolution of those that do arise (ex post treatment).

B. Ex Ante Preventive Tax Policy

As a first step toward avoiding tax disputes, the two urged making the tax code clearer. Complex regulations without proper guidelines or clarification force taxpayers to construe them at their peril. Predictability of the law is essential for society, they declared, as taxpayers who are overwhelmed by the scope of the law cannot act according to

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[25] Since there were provisions of the Executive Order of 1873 prohibiting federal employees from holding office under any state, territorial or municipal government, President Roosevelt had to use his vested authority and sign a waiver to permit Roger Traynor to hold this position. Exec. Order No. 7708, 2 Fed. Reg. 2167, (Sept. 16, 1937).

[26] Traynor collaborated with Professors John M. Maguire and Stanley S. Surrey and proposed a complete revision of the administrative provisions of the income tax system. The three professors wrote a series of articles explaining this reform and the remaining loopholes that needed to be closed. John M. Maguire, Stanley S. Surrey & Roger J. Traynor, *Section 820 of the Revenue Act of 1938*, 48 Yale L. J. 509 (1939); Maguire, Stanley S. Surrey & Roger J. Traynor, *Section 820 of the Revenue Act of 1938*, 48 Yale L. J. 719 (1939).

[27] Revenue Act of 1938, Pub. L. No. 75-554, § 820, 52 Stat. 447, 581-83.

it. Moreover, as new circumstances arise over time, complicated tax rules create greater difficulties. Taxpayers seek certainty when planning their business and family affairs; any vagueness results in tax litigation.

The next step, Traynor and Surrey emphasized, is to improve the function of preliminary administrative negotiations between the taxpayer and the local revenue agent. The two stressed the need for competent and fair handling of initial negotiations in order to provide the taxpayer with an informal, non-judicial and inexpensive opportunity to settle the matter. If necessary, a case of particular importance could be further clarified by a conference of tax experts at the Bureau of Internal Revenue. If the matter was not settled in the conference, the commissioner would notify the taxpayer regarding the proposed deficiency, and the taxpayer could reply by filing a detailed protest to the commissioner. Traynor and Surrey suggested using the protest letter to demand taxpayers' full disclosure of the facts and provide a statement of all the transactions involved. Failure to file would result in a deficiency letter. The proposed protest should be in writing, they said, under oath, and it should contain all the information and documents relevant to the case. The two emphasized that the purpose of this statement was to make clear all factual issues and to restrict any remaining controversy to legal questions.

Further thinking on ways to improve dispute resolution between the government and taxpayers led Traynor and Surrey to propose the practice known today as the private letter ruling. The proposal suggested forming an agreement between the commissioner and the taxpayer, approved by the Secretary of the Treasury, which would end all disputes related to the fact at hand. The agreement should relate to either a particular transaction at present or future tax consequences, whether an issue of fact or law. This mechanism would not only inform taxpayers of the Bureau's position on certain tax issues, but also would allow them to rely on this binding agreement, and to plan ahead whether to take the risk of litigating this matter.

C. Ex Post Tax Policy

After a tax matter had already reached the doorstep of the judicial branch, reducing the time required for a resolution was the primary

concern for Traynor and Surrey. When given the choice between two identical procedures, taxpayers opted for the one that deferred their tax liability and did not involve prerequisite payment. Subsequently, Traynor and Surrey recommended the unification of the deficiency procedure and the refund procedure or at least requiring a bond to secure the collectibility of the tax. An additional method of lowering the volume of tax litigation as a preventive tax policy, suggested Traynor and Surrey, was adopting the exhaustion-of-remedies doctrine in tax matters, which would require certain administrative procedures be initiated and followed before taxpayers could seek relief from the courts.

As for appellate review, multiple appellate reviews of the Board of Tax Appeals' decisions created conflicting decisions and uncertainties in the interwar period. In order to eliminate such uncertainties and to achieve uniformity in tax adjudication, Traynor and Surrey suggested passing the exclusive authority to decide cases of income, estate and gift tax to the Board of Tax Appeals. This proposal aimed to transfer the review of tax disputes to professional tax experts who were better qualified than the average court judge.

The two also recommended establishing a single Court of Tax Appeals, which would have the sole appellate jurisdiction over the board's decisions. Appeals from the Court of Tax Appeals would have required a certiorari from the Supreme Court. If certiorari was denied, both parties had to settle for the Court of Tax Appeals decision, constituting a binding resolution, and not an invitation to litigation, as was the case in 1939.

Traynor and Surrey's proposals to improve the interwar tax system were not fully accepted. While trying to put their innovative philosophy into practice, they encountered political limitations. Their philosophy of preventive tax policy, specifically its normative aspect,

aroused a storm of criticism.[28] Nevertheless, parts of their proposal were adopted later, contributing greatly to the development of the U.S. tax system. The next section will present the practice of preventive tax policy in Traynor's decisions, along with historical review of the implementation of Traynor and Surrey's proposal, then and today.

III. PREVENTIVE TAX POLICY: DEFEATED?

A. Traynor's System of Tax Adjudication

Traynor's nomination to the Supreme Court of California did not mark the end of his legacy of preventive tax policy, but rather the beginning of its practice. In 1940, Traynor was appointed to the Supreme Court after a public debate over an earlier appointee.[29] Appointed at 40 years of age, Traynor was the youngest member of the Supreme Court of California, and, between 1964 and 1970, he served as its Chief Justice.

In the beginning of the 1930s, jurisprudential ideas of Legal Realism emerged as an anti-formalist reaction and later attracted many New Deal jurists. To some, Roger Traynor seemed typical of many liberal New Dealers in his belief in administrative expertise and judicial passivity. However, a closer look at his jurisprudence reveals a more complex outlook on law, reform, and the role of the judge as policy-

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[28] Angell B. Montgomery, *Procedural Reform in the Judicial Review of Controversies under the Internal Revenue Statutes; An Answer to a Proposal*, 34 Ill. L. Rev. 151(1939); G. Aaron Youngquist, *Proposed Radical Changes in the Federal Tax Machinery,* 25 A.B.A. J. 291(1939); Seidman, *Proposed Procedural Changes in Federal Tax Practice,* 67 J. of Accountancy 221 (1939); Barrett E. Prettyman, *A Comment on the Traynor Plan for Revision of Federal Tax Procedure,* 27 Geo. L. J. 1038 (1939); William A. Sutherland, New Roads to the Settlement of Tax Controversies: A Critical Comment, 7 Law & Contemp Probs. 359 (1940).

[29] Governor Culbert Olson had nominated Max Radin, Traynor's old Berkeley colleague, to the state Supreme Court, but the State Qualifications Committee rejected this appointment fearing Radin's radical tendencies. Olson called Radin to ask his advice on a substitute nominee, and Radin recommended Traynor. Ben Field, Activism in Pursuit of Public Interest: The Jurisprudence of Chief Justice Roger J. Traynor (2003) note 25 at 5.

maker.[30] Exposed to the ideas of Realism by his Berkeley professor, Thomas Reed Powell, Traynor believed judges should look beyond the mere facts of the case and consider "legislative facts" and "environmental data."[31] He resented the phrase, "judicial activism," and joined the Realists' protest against judges who abused their power to overrule precedents too quickly.

Nevertheless, unlike Legal Realists, Traynor's decisions involved a process of inquiry similar to the Pragmatists' concept of scientific method.[32] Furthermore, Traynor, far from holding a belief in judicial passivity, objected to it and promoted creative legal reasoning. Judicial creativity occurs, he theorized, when the judge succeeds in persuading the involved parties and the legal community of the necessity of modifying standing law. Legal changes, he believed, develop through those judicial innovations that bridge the law with reality and social changes, and venture "new answers to old questions."[33]

During Traynor's tenure on the California Supreme Court, he promoted these ideas and practiced his philosophy of preventive tax policy. For instance, he maintained the consistency of the law by following the legislative intent. In order to determine the Legislature's state of mind, Traynor tracked the legislative history of the bill and applied cautious reasoning using textual interpretation of the statute. The case

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[30] Neil Duxbury contended that realist jurisprudence was never a "revolt against formalism" and that the movement away from formalist legal thinking was very slow and hesitant. In his opinion there was no realist movement, but rather an inteletual mood and "a complex array of messages, some of which seemed rather feeble once placed in an institutional context." Neil Duxbury, Paterns of American Jurisprudence 4 (1995). For an intellectual history of New Deal legal thinking *see* Laura Kalman, Legal Realism at Yale 1927-1960 (2001); and Peter H. Irons, The New Deal Lawyers (1982). For a comprehensive analysis of American Legal Realism *see* Morton Horwitz, The Transformation of American Law, 1870-1960: The Crisis of Legal Orthodoxy (1992); William Nelson, The Legalist Reformation, Law, Politics, and Ideology in New York 1920-1980 (2001); and Lawrence Friedman, American Law in the Twentieth Century (2002).

[31] Roger J. Traynor, *Better Days in Court for a New Day's Problem*, 17 Vand. L. Rev. 109 (1963).

[32] Ben Field, Activism in Pursuit of Public Interest: The Jurisprudence of Chief Justice Roger j. Traynor (2003) 9-14.

[33] Robert B. McKay, *Constitutional Law; Ideas in the Public Forum*, 53 Cal. L. Rev. 67 (1965).

of *Roehm v. Orange County*[34] is an example of this form of interpretation. In this case, Traynor had to decide whether a liquor license is taxable intangible property. In reversing the lower court decision, Traynor examined the history of Article XIII §14 of the California Constitution and the legislative intent of its amendments. He concluded that this history showed liquor licenses were not intended to be taxed as personal property subject to ad valorem taxation. Traynor demonstrated how the framers of the amendments of Article XIII and generations of Supreme Court decisions sustained the view that only intangibles listed in the Constitution were taxable property.[35] Foreseeing the administrative problems of future taxation of intangible property, Traynor noted that among the absurdities of such taxation would be taxation of life insurance policies, which would result in increasing tax avoidance by exchanging taxable intangible assets for tax-free intangible assets.[36] To be cautious, Traynor added that in case the Legislature was not satisfied with his ruling in this matter, it had the vested power to amend the law. True to his administrative roots, Traynor concluded that it is up to the Legislature and not the local subdivisions of the administration to make such a change.[37]

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[34] Roehm v. Orange, 32 Cal. 2d 280; 196 P.2d 550; 1948 Cal. LEXIS 223 (Cal. 1948).

[35] *Id.* at 285.

[36] "Intangible assets are often interchangeable so that exemption of some and taxation of others at high rates would induce taxpayers to convert highly taxable intangibles into tax-free intangibles or to conceal them. Thus, subjection of patents or copyrights to such taxes would lead to the transfer of such rights to foreign corporations in exchange for corporate stock specifically exempted from property taxation by section 212 of the Revenue and Taxation Code*." Id.,* at 290.

[37] *Id.* at 291. Another example of Traynor's purposive interpretation seeking legislative intent was the case of Golden State Theatre & Realty Corp. V. Johnson (21 Cal. 2d 493; 133 P.2d 395; 1943 Cal. LEXIS 274. (Cal. 1943)). The taxpayer challenged the taxation of dividends received from its subsidiaries under the Bank and Corporation Franchise Tax Act. The taxpayer claimed that the dividends are deductible from its gross income since they were declared from income arising out of business done in the state. Traynor ruled in favor of the taxpayer by interpreting the legislative text and holding that the corporation was not a holding company because it was actively doing business in the state and not only receiving dividends from its subsidiaries. Traynor interpreted the language of the Bank and Corporation Franchise Tax Act in light of its legislative intent and the purpose of the 1933 modifications. He interpreted the term "doing business" by looking at the legislative history of the act

Influenced by the Realist mood and, while trying to prevent unnecessary adjudication of an already complex tax code, Traynor used his stage to call for judicial restraint and warn fellow judges against erroneous interpretation of the law in conflict with its original intent.[38] He stressed the necessity of judicial restraint to preserve American democracy and legal ordering.[39] Activist judges, he thought, undermine the law by making too many changes that impair its stability. He claimed that the Legislature's silence is not a rejection of a rule nor a green light for activist judges to alter it, but a sign of its acceptance.[40] His judicial

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and held that following the decision in the lower court the Legislature amended the definition of doing business and added the provision that holding companies should not be regarded as doing business. Traynor's definition of "doing business" was affirmed by later cases.

[38] Being one of the architects of the Bank and Corporations Franchise Tax Act, Traynor rejected the taxpayer contention that it was necessary to amend it to specify that a trustee in bankruptcy conducting the business of a corporation should be subject to tax as if he were a corporation. District Bond Co. v. Florence Pollack, 19 Cal. 2d 304; 121 P.2d 7; 1942 Cal. LEXIS 364 (Cal. 1942).

[39] Judicial restraint and employing purposive interpretation of the law were at the core of Traynor's decisions. For example, Traynor was faced with a political attack over the use of municipal funds. In this case, he had set the limits on judicial criticism of municipal discretion by requiring the exhausting of remedies before the court could interfere in the administrative and legislative branches' actions. He stated: "In the absence of constitutional or statutory limitations the amount of revenue necessary for the needs of a municipality is within the sole discretion of the legislative authorities and this discretion is not subject to judicial interference. The power of courts to interfere in matters of taxation, except as permitted by statute, is limited. The courts cannot pass upon the question of the policy of a tax law or the expediency of the exercise of the taxing body or the wisdom or fairness of the method of distributing the burden of taxation where no provision of the constitution is violated." The importance of this decision is in its prevention of future litigation of political issues under the pretense of misuse of tax money. Rancho Santa Anita v. Arcadia, 20 Cal. 2d 319; 125 P.2d 475; 1942 Cal. LEXIS 279 (Cal. 1942).

[40] Garvey v. Byram, 18 Cal. 2d 279; 115 P.2d 501; 1941 Cal. LEXIS 363; 136 A.L.R. 1137. (Cal. 1941) In another case Traynor commented: "The foregoing statement is particularly applicable here, where it is contended that the silence of the Legislature in 1945 establishes the intention of the Legislature that enacted the provision some eight years previously, even though administrative construction antedating the Green case and in contradiction with it was followed by reenactment of the section without change. It would be as logical to contend that the Legislature thereby adopted the administrative construction. Although legislative silence may

philosophy was that, when a rule is long engrained in public policy, it must be presumed that the Legislature took it for granted rather than sought to alter it. Traynor emphasized that it is for the Legislature and not the courts to formulate such policy. In his opinion, the role of the judge was significant in preserving the consistency, predictability, and unity of the code. Inconsistent decisions puzzled both taxpayers and the administration, and created incentives to litigate in order to receive different results.

Nevertheless, Traynor also sought to forewarn the judiciary not to ignore cases that misinterpreted the law. Therefore, when confronted with a case of erroneous interpretation of the law that created bad precedent, he maintained it is the obligation of the judge to overrule it.[41] The power of precedents is not complete and immutable, he asserted, for erroneous interpretation of the law by the court defeats the purpose of legislation not only for the past, but also for the indefinite future.[42]

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sometimes give a clue to legislative intention, it is by no means conclusive….In short, although recognizing that by silence Congress at times may be taken to acquiesce and thus approve, we should be very sure that, under all the circumstances of a given situation, it has done so before we so rule… Just as dubious legislative history is at times much overridden, so also is silence or inaction often mistaken for legislation." Rosemary Properties v. McColgan, 29 Cal. 2d 677; 177 P.2d 757 (Cal. 1947).

[41] An illustration of such preventive tax policy is found in Traynor and Surrey's second project concerning section 820 of the Revenue Code of 1938. Section 820 sought to reduce litigation by mitigating the hardships of erroneous tax returns produced by applying the statute of limitation on tax returns. Their mutual project with Professor John Maguire commended this new provision in order to reduce litigation related to tax readjustments between taxable years, but also offered criticism of the remaining loopholes. John M. Maguire, Stanley S. Surrey & Roger J. Traynor, *Section 820 of the Revenue Act of 1938*, 48 Yale L. J. 509 (1939); Maguire, Stanley S. Surrey & Roger J. Traynor, *Section 820 of the Revenue Act of 1938*, 48 Yale L. J. 719 (1939). At that time, several court decisions disallowed refunds for erroneous overpayments made in previous years by applying the statute of limitation. The newly enacted section 820 in the Revenue act of 1938 (Pub. L. No 75-544 §820) was designed to offer relief where the tax results of an earlier year and a later year combined to present an inequitable burden or avoidance. The writers protested against not carrying out the exact recommendations of the House Committee on Ways and Means Subcommittee on Internal Revenue Taxation and the Senate Finance Committee, which aimed to repair inconsistent and erroneous tax treatment while preserving the essential function of the statue of limitation.

[42] Texas Co. v. L.A. County ,52 Cal. 2d 55, 64; 338 P.2d 440; 1959 Cal. LEXIS

Accordingly, in *Texas Company v. Los Angeles County*[43] Traynor advised taxpayers against thinking the law is fixed and inflexible. There are cases where innovation in the law requires reconsideration of the current legal convention. The judge has to identify this critical juncture of the law and reject outdated precedents. Taxpayers have no constitutional right to prevent future changes in the law, as it is the constitutional obligation of the legislature to change the law when needed. Legislation, he thought, has to be flexible in order to withstand the changes of time and reality.[44] He viewed the role of the judge as bridging the gap between law and the realities of everyday society.

In the case of *Sutter-Yuba Inv. Co.*[45] Traynor employed "judicial creativity" to avoid an undesirable reality. Although this seemed to be a straightforward redemption of property case, it had significant consequences for the overall process of calculating the tax liability on delinquent property. In this matter, the taxpayer contended he should not have to pay taxes imposed on delinquent property for the years

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180. (Cal. 1959). Roger J. Traynor, *La Rude Vita, La Dolce Giustizia; or Hard Cases Can Make Good Law*, 29 U. Chi. L. Rev. 223, 229-230 (1962).

[43] Texas Co. v. L.A. County, 52 Cal. 2d 55, 64; 338 P.2d 440; 1959 Cal. LEXIS 180. (Cal. 1959).

[44] In the case of Von Hamm-Yong Co. v. San Francisco, 29 Cal. 2d 798; 178 P.2d 745; 1947 Cal. LEXIS 267; 171 A.L.R. 274. (Cal. 1947) Traynor realized that the answer to the case in front of him was not stated in the law, but in practice. Justice and tax policy prevailed in this case over strict application of case law. In this matter, the city of San Francisco challenged a refund of personal property taxes levied on the corporation's property. Traynor denied the city's appeal holding that movement of goods from the place of purchase to the warehouses was due to the fact that they could not have been delivered directly to the carriers under the wartime emergency regulations, and thus had to be considered a movement in interstate commerce just as it would have been had the goods been delivered directly to the common carriers and held under their control until shipped. In this case, it was clear to Traynor that the shipper had done everything possible to deliver the goods. He had never sold the goods locally and did not have the authority to divert the goods into local trade. So although under the "dry law" the corporate merchandise was subjected to property taxes, Traynor recognized that reality dictated different results and the shipper "should not be penalized because wartime emergency regulations have prevented him from following the normal practice of the business in delivering the goods directly to the common carriers that will carry them to their ultimate destination."

[45] Sutter-Yuba Inv. Co. v. Waste , 21 Cal. 2d 781; 136 P.2d 11; 1943 Cal. LEXIS 310 (Cal. 1943).

it was held by the local government. Traynor had to bridge between the "dry law" and the new reality by which local governments held delinquent property for a long period until this property was finally sold. A tax policy issue was at stake that could seriously affect the redemption process of tax delinquent property. Traynor decided to reject the taxpayer's contention, and stated that taxes for that period must be included in calculating the redemption cost. He considered the inevitable repercussions of a decision to accept the taxpayer's interpretation of the law. If the county did not require that redemption prices take into account the taxes that would have been imposed if the property not had been deeded to the state, owners would find it advantageous to allow their property to be deeded to the state with the intention of delaying redemption as long as possible to escape taxes that attended ownership. Although the right of redemption until disposal of the property serves the taxpayer's convenience, he stated, it does not enable him to escape taxes for that period while others pay their taxes conscientiously year by year.

Twenty years later another tax redemption case came to Traynor's desk.[46] This time Traynor believed that a wrong judgment might give taxpayers an incentive to loot their tax-deeded property before its seizure by the government. The defendants in this case sold timber cut from tax-deeded land. After being required to pay their taxes, they claimed the amount they paid to redeem the property included taxes on the value added to the land by the timber before it was removed. They asserted that by paying a redemption price based on the value of the land including the timber, they would in effect have paid the state for the timber. In rejecting their contention, Traynor was concerned that owners of tax-deeded property would extract its natural resources and then argue that the harvest should be excluded from the tax deed on the property. It was a substantial matter of tax policy, he claimed, to prevent tax delinquency and speculation as to whether the proceeds from the harvest made it worthwhile to redeem the land or sell it under the tax deed.[47]

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[46] People v. Lucas, 55 Cal. 2d 564; 360 P.2d 321; 11 Cal. Rptr. 745; 1961 Cal. LEXIS 237 (Cal. 1961).

[47] **"**To permit defendants to retain the proceeds from the sale of the timber would be to condone a brazen trespass to property that section 3441 makes a crime

Acting as the ultimate professor, Traynor's opinions employed a lean, analytical style of policy analysis.[48] Like other pragmatist judges, he framed his opinions with a scientific approach, which portrayed his decisions as objective analysis of the facts and the inevitable result of public interest. Moreover, he wrote explanatory judgments providing details and examples, in the hope that his judgments would guide taxpayers, Bureau agents and fellow judges in future cases, thus preventing further litigation.

Law's Estate[49] is one example of a Traynor opinion containing details and examples of how to compute marital deductions in estate tax. In this case, the decedent's will provided that his estate tax should be paid out of the residuary estate. The controller subtracted all the allowable deductions including federal estate tax from the fair market value of the estate. Then the controller declared half of the remainder of the estate as marital deduction. The executor of the will objected to this calculation, arguing that the marital deduction should have been subtracted from the fair market value of the estate *prior* to the deduction of the federal estate tax. Traynor affirmed the controller's computation, holding that the marital deduction was properly determined. He detailed the way to compute the marital deduction by first subtracting federal estate taxes to ascertain the clear market value of the estate. Only then and from that clear market value, Traynor stated, should the marital deduction be determined. This decision appeared to be more a "class exercise" than a traditional judicial opinion and involved a deep understanding of accounting. It was important to Traynor to explain and demonstrate his calculations so it would be

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and would encourage the stripping of timber and the removal of minerals from tax-deeded lands. It would also encourage tax delinquency, for it would permit the former owner to speculate as to whether the proceeds from the property would be sufficient to justify his redeeming it and would permit him to collect such proceeds until the state took steps to compel an accounting and payment and then defeat the rights of the state by redeeming the property before judgment could be obtained. As the Maxfield case makes clear, the statutes are plainly drawn to preclude such maneuvers." *Id.* at 571.

[48] Ben Field, Activism in Pursuit of Public Interest: The Jurisprudence of Chief Justice Roger j. Traynor, 126 (2003).

[49] Estate of Law v. Kirkwood, 50 Cal. 2d 345; 325 P.2d 449; 1958 Cal. LEXIS 161 (Cal. 1958).

clear for future estate executors how to administer the convoluted law. Similar to a textbook solution, Traynor constructed a table comparing the controller's computation to the executor's computation, followed by a detailed explanation of their differences, supported by relevant sections of the Revenue Code.

Another example of Traynor's academic opinions came a few years later, in the dissent opinion of *Rosemary Properties v. McColgan*.[50] At issue was the matter of deductibility of dividends received by a corporation under section 8(h) of the Bank and Corporation Franchise Tax Act. The majority opinion in this case agreed with the plaintiff, holding that any dividend paid from earnings and profits would be a dividend paid out of income included in the measure of the tax and, as such, the dividend was exempt from franchise tax in the hands of the recipient corporation.

In a long and detailed dissenting opinion, Traynor traced the legislative purpose of the dividend allowance as designed solely to prevent double taxation of corporate income by the state, and limited only to dividends declared out of taxable income. In this opinion, Traynor incorporated an illustration of the differences between "income" and "earning and profits"; the latter included a deduction of federal taxes. Next, Traynor provided a mathematical example to demonstrate the differences between net income and earning and profits. His opinion detailed the majority's mistake of allowing the plaintiff to declare a dividend out of "earning and profits" in excess of the "net income" although no tax was paid on this excess.

Having advised on and crafted the Bank and Corporation Franchise Tax Act, Traynor had a thorough and detailed understanding of this legislation. During his academic career, he wrote several articles on the constitutional basis of this act.[51] While referring to its legislative intent, Traynor held that the plaintiff's interpretation of section 8(h) was not only "administratively unworkable, but is inconsistent with

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[50] Rosemary Properties v. McColgan, 29 Cal. 2d 677; 177 P.2d 757 (Cal. 1947).

[51] Roger J. Traynor, *National Bank Taxation in California,* 17 Calif. L. Rev. 83-119, 232-57, 456-528 (1929); Roger J. Traynor & Frank M. Keesling, *Recent Changes in The Bank and Corporation Franchise Tax Act,* 21 Calif. L. Rev. 543; 22 Calif. L. Rev. 499 (1933).

the basic structure of the act."[52] He protested against the majority's acceptance of the taxpayer's contention, citing error after error, which in fact, changed the provisions of the act so as to be radically different from what the Legislature had sought to adopt.[53] Finally, Traynor criticized the complexity and lack of unity of the Bank and Corporation Franchise Tax Act as mystifying taxpayers, judges, and tax officials, resulting in wrongful judicial interpretation and administrative application.[54] Traynor's opinion was later affirmed by the Supreme Court of California.[55]

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[52] "Rules of statutory construction are at best only aids in ascertaining the legislative purpose. One of those aids has here been seized upon, in disregard of the plain signposts within the statute and the basic concepts underlying it, to establish administratively unworkable conditions, accord unequal treatment to dividends, and open the way to a more extensive deduction than necessary to achieve the legislative purpose of avoiding double taxation." Rosemary Properties v. McColgan, 29 Cal. 2d 677, 706; 177 P.2d 757 (Cal. 1947).

[53] "How can the Legislature state in plainer terms that "net income" is the measure of the tax? ... In light of this language how can it be seriously contended that the measure of the tax is "gross income subject to taxation by the state?" "The opinion in the Green case, however, contains so many errors fundamentally at variance with many provisions of the act that the Legislature cannot reasonably be presumed to have adopted the construction of the act in that case." *Id*. at 772. This opinion was affirmed by Robertson v. Health Net of California, Inc., 132 Cal. App. 4th 1419, 1427, 34 Cal. Rptr. 3d 547 (Cal. App. 2005) and County of Orange v. Flournoy, 42 Cal. App. 3d 908, 912, 117 Cal. Rptr. 224 (Cal. App. 1974).

[54] "A comprehensive tax statute such as the Bank and Corporation Franchise Tax Act exemplifies intricate draftsmanship; it evolves out of the painstaking deliberations and studies not only of public officials but of others interested in tax legislation. Such a statute, wrought from a consideration of many conflicting interests, cannot long retain unity and coherence if one section or another is refabricated by the courts without regard for the structural whole. The technical concepts of the statute, its express provisions, should not lightly be vitiated by facile phrases such as "gone through the tax mill" or "flailed by the taxmaster" that denote a lack of insight into the legislative purpose that binds together the provisions of the statute. If the express words of the statute are overridden by such phrases neither taxpayers nor tax officials can look to the written word of the statute for its authentic meaning, and the already difficult task of understanding the revenue acts becomes hopeless." Rosemary Properties v. McColgan, 29 Cal. 2d 677, 700; 177 P.2d 757 (Cal. 1947).

[55] Safeway Stores, Inc. v. Franchise Tax Board, 3 Cal. 3d 745, 91 Cal. Rptr. 616, 478 P.2d 48 (Cal. 1970); Security-First Nat'l Bank v. Franchise Tax Board, 55 Cal. 2d 407, 11 Cal. Rptr. 289, 359 P.2d 625 (Cal. 1961).

In an effort to prevent tax litigation ex post and advance administrative settlement of tax controversies, Traynor established a judicial rule by which taxpayers should avail themselves of full information and properly communicate with the tax administration; otherwise they cannot receive remedies from the court. While sitting in the case of *West Pub. Co. v. McColgan,*[56] he established a requirement that taxpayers provide the Bureau with the necessary information prior to filing a lawsuit with the court.

In this case, the taxpayer was a Minnesota corporation engaged in the business of selling law books and other publications. The corporation shipped its books to California from orders taken in California by its employees. However, it refused to file returns under the California Income Tax Act or to furnish any information requested by the commissioner, claiming that the tax levied under the Bank and Corporation Income Tax Act was unconstitutional since California could not impose a tax on a foreign corporation engaged in interstate commerce. Without the information, the commissioner had no choice but to acquire data from the State Board of Equalization and to estimate the company's income. Traynor rejected the corporation's claims and held that it cannot call upon the court's help to determine whether agencies acted properly when it refuses to submit issues of fact to such agencies. He concluded that a tax on the net income from interstate commerce did not violate the commerce clause of the Constitution, but more importantly, that taxpayers could not complain of errors in the computation of their tax liability if they refuse to avail themselves of administrative remedies to prevent or correct such errors.

In the case of *Star-Kist Foods v. Quinn,*[57] Traynor continued to implement this idea establishing a rule by which taxpayers could not receive remedies from the court unless they had exhausted their remedies with the tax administration. The issue in this case was erroneous assessments. Although the taxpayer had the option of applying to the Board of Equalization for the correction of his return, he instead filed a claim in court seeking a writ of mandate against the tax assessor to

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[56] West Pub. Co. v. McColgan, 27 Cal. 2d 705; 166 P.2d 861; 1946 Cal. LEXIS 348 (Cal. 1946).

[57] Star-Kist Foods v. Quinn, 54 Cal. 2d 507; 354 P.2d 1; 6Cal. Rptr. 545 (Cal. 1960).

cancel the assessments. Traynor was familiar with this issue as he had written extensively on the problem of taxpayer's choice according to the affordability of the dispute resolution mechanism. He claimed that taxpayers often chose the less-expensive option of filing a court claim before exhausting other appellate mechanisms and thus overloading the court system with unnecessary litigation. Reversing the trial court judgment, Traynor held that as a matter of law the taxpayer was not required to file with the Board of Equalization before it sought a judicial determination. However, as a matter of tax policy, the taxpayer had a plain, speedy, and adequate remedy in the ordinary course of law by paying the tax under protest and seeking recovery thereof.[58]

B. Today's Implementation of Preventive Tax Measures

Although the idea of creating a single tax tribunal was suggested earlier, only by the late 1930s had the idea gained momentum, primarily due to Traynor and Surrey's proposal.[59] Their proposal differed in the administrative and judicial authority this court would hold. However, Traynor and Surrey's proposal for a single Court of Tax Appeals was not executed because of objections by members of Congress who did not want to grant life tenure and judicial power to the Board members. Many articles have been written on the need for final judicial authority in tax matters,[60] but the idea has continuously been rejected

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[58] "Star-Kist, however, could have obtained relief by paying its taxes under protest and suing for recovery thereof …Mandate is ordinarily denied when the petitioner has a plain, speedy, and adequate remedy in the ordinary course of law…. In more recent cases, however, the adequacy of such remedies has been considered and mandate has been denied.… The fact that Star-Kist filed its petition for mandate before the assessment was complete, however, does not affect the adequacy of its remedy by payment of taxes under protest and suit for recovery thereof." *Id*. at 511.

[59] Justice Robert H. Jackson also recommended the establishment of a centralized tax tribunal as a final appellate tax review, stressing its retrospective character as interpreting tax cases in light of tax changes over the years. He suggested that the members of the congressional committee would sit on this court, with a notion of harmonious interpretation on the tax court. Kirk Stark, *The Unfulfilled Tax Legacy of Justice Robert H. Jackson,* 54 Tax L. Rev. 171, 188 (2001).

[60] Stanley S. Surrey, *Some Suggested Topics in the Field of Tax Administration*, 25 WASH. U.L.Q. 399, (1940); Erwin N. Griswold, *The Need for a Court of Tax Appeals*, 57 Harv. L. Rev. 1153 (1944); Caplin & Brown, *A New U.S. Court of*

by the legislative branch.[61]

A few years later, the Revenue Act of 1942 changed the name of the Board to the Tax Court of the United States. Although it seems this was only a cosmetic change, in fact, the act elevated the status of the Board to a judicial body and its members to judges. Two decades later, the Tax Reform Act of 1969 removed the court's description as an agency within the executive branch and elevated its status to a court under Article I of the Constitution, as suggested by Traynor and Surrey. This act also created a category of small tax cases, which were decided by special trial judges, and removed the burden of small tax matters from the Tax Court.

Yet, today's Tax Court appellate review has not changed, and it is still in the hands of the various Circuit Courts. Throughout the years, the principle by which appeals from the District Courts are confined to "clearly erroneous" cases was also applied to appeals from the Tax Court, thus limiting appellate review to unusual matters.[62] However, there is still no requirement for prepayment of tax liability of any bond in order to file with the Tax Court. For those reasons and more, Traynor and Surrey's proposals still have merit today. Their goals of lowering the incentive to litigate tax matters, standardizing tax decisions and minimizing the current tax uncertainties remain relevant.

One of Traynor and Surrey's successes was enacting a binding taxpayer-government agreement. For years, the Bureau of Internal Revenue refused to apply the idea of a "closing agreement" to future transactions. Its caution originated in the notion that the determination of a commissioner in one case cannot bind his successor or other taxpayers outside the agreement. Traynor and Surrey used their influence in the Treasury and incorporated this mechanism of taxpayer-government agreement in the Revenue Act of 1938.[63] They also added

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Tax Appeals: S. 678, 57 TAXES 360 (1979); Martin D. Ginsberg, *Making Tax Law Through Judicial Process*, 70 A.B.A. J. 74 (1984). For historical overview of this idea *see* Todd H. Miller, *A Court of Tax Appeals Revisited*, 85 YALE L.J. 228 (1975).

[61] The proposal for federal judicial reform in 1997 rejected the idea of a separate court of tax appeals and suggested it be centralized in the federal circuit system. Commission on Structural Alternatives for the Federal Courts of Appeals, Final Report 73 (Dec. 18, 1998). PL 105-119, 1997 HR 2267.

[62] Id. at 4 (1998).

[63] Revenue Act of 1938, Pub. L. No. 75-544, § 801, 52 Stat. 447, 573 (amending

a requirement that taxpayers show a bona fide motive in seeking the ruling. This measure was necessary to prevent the Bureau from becoming a huge information authority abused by tax avoiders. The idea of a private letter ruling as we know it today originated in Traynor and Surrey's concept of a "closing agreement" designed to apply to future transactions. Its extensive use today as a preventive mechanism for tax disputes is no doubt by virtue of Traynor and Surrey's project.

Today's most challenging problem in international taxation is addressing the implications of Cross-Border Tax Arbitrage, such as transfer pricing transactions. The use of these types of transactions as a form of tax avoidance and income allocation among different taxing jurisdictions became widespread with the development of multinational organizations. "Transfer pricing transactions" refers to the pricing of goods and services between a parent company and its foreign subsidiary, or between various divisions of a multinational corporation. Given that the parties in this transaction are clearly related, this mechanism is used to affect the profits of different divisions in the company, along with the company's overall tax liability.

In conjunction with traditional mechanisms for confronting this phenomenon, such as enacting laws and regulations, the U.S. government, followed by other governments around the world, developed Advance Pricing Agreements (APA's) to prevent future tax litigation over international transactions.[64] An APA is an agreement between the taxpayer and the government relating to a future transaction, by which the parties agree upon the price and time period of a specific transaction. This mechanism prevents future litigation and guarantees that the taxpayer is acting in good faith. Today we witness bilateral and multilateral APAs that involve taxing authorities in other countries relevant to the transaction, and protect the taxpayer from double taxation and assessment procedures.

Revenue Act of 1928, Pub. L. No. 70-562, § 606, 45 Stat. 791, 874). The reform added that a closing agreement may be related not only to a past tax year already closed, but also to a present tax year not yet terminated, or to a future tax year not yet commenced.

[64] For more on the emergence of APAs, see Diane M. Ring, *On the Frontier of Procedural Innovation: Advance Pricing Agreements and the Struggle to Allocate Income for Cross Border Taxation, available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=235275*

This procedural innovation is preventive tax policy *per se,* which had originated in the 1940s with Traynor's and Surrey's clever idea of using a closing agreement for future transactions. It demonstrates that preventive tax policy can serve as a model for reducing litigation and preventing controversies in other areas of the law and, most especially, how 1940s public policy continues to shed light on future developments in the legal system.

Traynor and Surrey's innovative idea of preventive tax policy is especially timely today as the government is struggling to improve the effectiveness, integrity and fairness of our tax laws. Various proposals have been drafted suggesting the transformation to a tax system based on a consumption tax. Some of those proposals have suggested enacting a value-added tax, a national sales tax, or a broad individual and business postpaid consumption tax.[65] Those proposals may revive the need to reconsider changing the Tax Court's status to a National Court of Tax Appeals, simplifying the tax code and unifying deficiency and refund litigation, as Traynor and Surrey proposed nearly 70 years ago.

IV. CONCLUSION

> There is something basically wrong in a procedure which enables so many cases to travel the long, expensive and futile route up to the threshold of a judicial settlement only to retrace their steps at that point to an administrative settlement or to be abandoned altogether by the taxpayer or the government.
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> —Roger J. Traynor and Stanley S. Surrey[66]

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[65] For consumption tax proposals see Robert E. Hall & Alvin Rabushka, The Flat Tax (1995); David Bradford, Untangling the Income Tax (1986); The Armey-Shelby Flat Tax, H.R. 2060 and S.1050; Laurence S. Seidman, USA Tax, A Progressive Consumption Tax (1997); S. 722 The Nunn-Domenici USA Tax; Simple, Fair & Pro-Growth: Proposals to Fix America's Tax System, President's Advisory Panel on Federal Tax Reform, 21-22 (Nov. 2005).

[66] Roger J. Traynor & Stanley S. Surrey, *New Roads Toward the Settlement of Federal Income, Estate, and Gift Tax Controversies,* 7 Law & Contemp. Probs. 336, 339 (1940).

Between World War I and World War II, the United States tax system underwent a dramatic change with the evolution of the individual income tax. In about 20 years, the income tax was transformed from a novel measure that generated very little revenue into a major source of income for the federal government. One of the consequences of that development was that the tax code became very complex. Public discontent with the system grew and tax litigation increased, along with tax evasion.

Some can predict the consequences of changes in present legal treatment by deriving the resolution of old problems from current studies. Very few can foresee entirely new problems and predict the effect alternative reform proposals will have on a different set of circumstances.[67] The transformation of the tax system from "class tax" to "mass tax" marked the end of the "innocent" era and the evolution of tax avoidance, followed by complicated tax legislation. It reflected the genesis of sophisticated tax avoidance schemes commonly endorsed today by accounting firms and tax lawyers.

In 1938 and 1939, two relatively unknown tax administrators came together to propose a major overhaul of the tax system. One was Roger Traynor, who would go on to be recognized as one of the most accomplished and brilliant state judges in U.S. history.[68] The other was Stanley Surrey, who later would be called the greatest tax scholar of his generation.[69] Traynor and Surrey were among those who not only identified the shift in public dislike of the convoluted tax system, but also predicted the proper way to halt the progression of this development.

Traynor and Surrey's preventive tax policy sought to prevent disputes from arising by decreasing the friction between taxpayers and

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[67] On the ability to predict legal changes see: Robert Charles Clark, *The Morphogenesis of Subchapter C: An Essay in Statutory Evolution and Reform*, 87 Yale L. J. 90 (1978).

[68] American legal historian Harry N. Scheiber wrote of him, "[i]n any list of the most admired and influential state judges in the nation's history, Traynor stands at the very top level." Ben Field, Activism in Pursuit of the Public Interest: The Jurisprudence of Chief Justice Roger j. Traynor, ix-xi (2003).

[69] Erwin N. Griswold, *In Memoriam: Stanley S. Surrey*, 98 Harv. L. Rev. 329, 331 (1984).

the government.[70] Creating a coherent and simple tax code enables taxpayers to comprehend the correct tax treatment. Obtaining full and accurate information from the taxpayer in a protest letter is the next step for the executive branch to dispose of cases that otherwise would block the system. Then the judiciary could focus on legal, rather than factual, questions, ensuring taxpayers fair and fast application of the law to their case. By implementing their proposals one might hope to "return to innocence" and reduce the uncertainties that surround tax matters, while restoring the trust between taxpayers and the government.

Throughout their careers, Traynor and Surrey continued to promote their philosophy of preventive tax policy. As professors, consultants, and state supreme court judges, they no doubt influenced the tax system.[71] Traynor's administrative experience established his reputation as a tax expert and an architect of California's tax system. His insights on tax policy and his experience from both the academic and the government side echoed through his tax opinions.[72] His reputation allowed him to continue and advance his philosophy of preventive tax policy from his prestigious stage.[73] In 1970, Traynor retired from the Supreme Court and returned to Berkeley, where he taught and wrote dozens of articles until his death in 1983. Although he is mostly known

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[70] Id. *supra* note 7 at 344..

[71] On Sept. 9, 1952, while continuing to suggest improvement of the tax administration, Surrey published a paper supporting the separation of the Bureau of Internal Revenue from the Treasury Department, placing it in the executive branch of the government. The paper was delivered in the 1952 meeting of the National Tax Association, in Toronto, Canada. Stanley S. Surrey, *A Comment on the Proposal to Separate The Bureau of Internal Revenue From the Treasury Department*, 8 Tax L. Rev. 155 (1953).

[72] Don Barrett, Traynor's clerk and friend, called the period from 1945 to 1956 the "Long Court" for its long and unchanged composition. During this period Traynor became a "leading state court judge in the nation" who set a high literary standard for judicial writing. Donald P. Barrett, *The Supreme Court of California, 1981-1982 In Memoriam- Roger John Traynor: Master of Judicial Wisdom*, 71 Calif. L. Rev. 1060 (1983).

[73] Traynor wrote 892 opinions and 75 law review articles. Ben Field, Activism in Pursuit of the Public Interest: The Jurisprudence of Chief Justice Roger j. Traynor, 121 (2003). In the field of taxation, Traynor wrote about 25 majority opinions and over 20 dissenting opinions. For a list of Traynor's tax decisions *see* Kragen, at 813. On the judicial philosophy of Traynor *see* John W. Poulos, *The Judicial Philosophy of Roger Traynor,* 46 Hastings L.J. 1643 (1995).

for his non-tax adjudication, his legacy of preventive tax policy continues to contribute to today's tax debate.

"Shall Law Stand for Naught?": The Los Angeles Chinese Massacre of 1871 at Trial

Paul R. Spitzerri[*]

In the space of a few hours on an October night in 1871, the town of Los Angeles, with a population of under 10,000 persons, was the scene of a night of horror, which was unprecedented and one of the most sordid moments in the city's history.

After a dispute internal to the Chinese community went awry and led to the death of an American bystander and the wounding of a city policeman, a frenzy of hatred and destruction centered on an older area of town along the short lane known as *Calle de Los Negros* led to the death of eighteen Chinese, all but one of them innocent in the affair that led to the tragedy. In the confusing aftermath of the incident, one hundred fifty persons were named in indictments secured after an exhaustive coroner's inquest and the convening of a grand jury. Even-

[*] Paul J. Spitzerri is Collections Manager at the Homestead Museum and a Director of the Historical Society of Southern California. He is working on a book-length treatment of criminal justice in Los Angeles from 1850 to 1875.

tually, however, only seven men were tried at the Los Angeles District Court for their involvement in the murder of a single victim. While convictions on a lesser charge of manslaughter were secured and sentences ranging from two to nine years imposed by Judge Robert M. Widney, an appeal to the California Supreme Court led to a reversal of those convictions and the matter was remitted back to Widney's court. District Attorney Cameron M. Thom, however, decided not to retry the case and the seven men were freed in the late spring of 1873.

While there have been many references to the Massacre in the historical literature, few make use of surviving court records, haphazardly arranged and jumbled as they are, to fully flesh out the incident, which serves as one of the significant signposts of a tumultuous era in the frontier town.[1] This essay mines existing court materials and newspaper coverage of inquest and trial proceedings to provide a greater understanding of the role the criminal justice administration system played in the sad affair.

I. Summarizing the Chinese Massacre

The immediate proximate cause of the Massacre is generally recognized as the flaring up of fighting between members of two Chinese *tongs* over claims to a woman named Yit Ho. Rivals of the two companies exchanged gunfire on both Monday, the 23rd and Tuesday, the 24th, the latter of which brought at least one Los Angeles police officer, Jesus Bilderrain, and others, including bystander Robert Thompson to the scene.[2] Though the factual sequence of events varied in the reporting, the gist of it was that Bilderrain was wounded and Thompson killed in the resulting gunfire.

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[1] The most comprehensive published treatments of anti-Chinese sentiment and of the Massacre by historians are William R. Locklear, "The Celestials and the Angels: A Study of the Anti-Chinese Movement in Los Angeles to 1882," *Historical Society of Southern California Quarterly*, 42:3 (1960): 240-41, 244 and Paul M. De Falla, "Lanterns in the Western Sky," *The Historical Society of Southern California Quarterly* 42:1-2 (March and June 1960): 57-88, 161-185. The topic is also extensively covered in Paul R. Spitzzeri, "The Retirement of Judge Lynch: Justice in 1870s Los Angeles," unpublished Master's thesis, California State University, Fullerton, 1999.

[2] All of the following descriptions of the Thompson and Chinese inquests,

Within minutes, as darkness descended on the town, a large crowd of persons gathered around the Coronel Block, the adobe building on Sanchez Street adjoining *Calle de Los Negros*, where the activity was centered. Estimates of the rapidly enlarging mob vary from several hundred and up and the indiscriminate slaughter included several shootings and more than a dozen hangings, these latter occurring in at least three locations nearby.

Among the significant incidents attendant to the massacre were reports that some individuals made efforts to calm the crowd and prevent the murders of the Chinese. Among these was Robert M. Widney, the man who would, in December, win election as District Judge and preside over the trials of the seven men charged with involvement in the Massacre. Meanwhile, the *Los Angeles Star* claimed that crowds at both Los Angeles Street where it met Negro Alley, and at Main Street "were addressed by parties who called attention to the fact that a Vigilance Committee was still in existence, and suggested that those members present repair to the headquarters of the organization." There had last been a vigilance committee in the town in December 1870 for the lynching of Michel Lachenais, but it is unknown to what extent any such committee was involved in the Chinese Massacre.

According to news reports, the last of the murders were committed at about 9:30 p.m. or not long afterward. Sheriff James F. Burns and other community members rounded up enough support by then, though it was some four hours or longer since the Massacre started, to secure the scene, disperse the mob, and put a guard around the area overnight. From here, the criminal justice administration system, which was completely ineffective in preventing the Massacre, began its operations to try to sort out the factual details and seek to secure some measure of justice for a heinous blot on the town's history.

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as well as those of the scenes of carnage at the Coronel Block and the burial of the Chinese victims are from the Los Angeles *News* and Los Angeles *Star*, October 26, 1871.

II. The Coroner's Inquest

The next step, in the legal sense, was the coroner's inquest, which covered an extraordinary four days, from October 25th through the 28th, and involved the interviewing of dozens of witnesses.[3] Unfortunately, there are no records from the inquest that have survived, known to date, and newspaper reporting is the only source. There were two proceedings: the first was over the body of Robert Thompson and lasted about two hours, which was quite typical in length and scope. Only one witness, Constable Bilderrain, was questioned and his version of the incident was matter-of-fact and concerned only the fact that Thompson was shot as he came to the constable's assistance.

The inquest over the nineteen dead Chinese, however, included the testimony of dozens of witnesses, many of whom recalled specific actions, but provided little or no identification of perpetrators, while others were able to give names. Ultimately, there were one hundred persons that the jury identified as participants. Of these, there seemed to be a few who were notable in the minds of witnesses. These included shoemaker Alexander R. Johnson, railroad depot employee Norman L. King, blacksmith J. Clement Cox, cemetery sexton Jesus Martinez, Charles Austin, Ramon Dominguez, Refugio Botello, Adolfo Celis, Edmund Crawford, D. W. Moody, Andres Soeur, A. L. Crenshaw, Samuel Carson, Enoch Griffin, Louis Mendel. Many of these accused were interviewed at the inquest and, naturally, all denied being involved in any lynching, though Johnson claimed that intoxication clouded all memory of the evening, even as he cited examples where he tried to help maintain order. Austin, Cox, King, Moody, Carson and Dominguez also testified that they joined the citizen posse to try to cordon off the Coronel Block. Moody even had a jury member provide an impromptu character reference during his testimony. Cox, who had been identified by King as a participant, admitted to throwing a lit ball dipped in alcohol into the Coronel Block and to being on the building's roof with Carson, though only to put out the fire. Moreover, he claimed that he offered assistance to a wounded Chinese man and

[3] J. Albert Wilson [alternate author, Thompson and West], *History of Los Angeles County, California (1880),* 85, states that seventy-nine witnesses were questioned at the inquest.

thwarted looting.[4] There were suggestions that *Los Angeles Daily Star* reporter Henry M. Mitchell, who received acclaim for his role in the 1874 capture of *bandido* Tiburcio Vasquez near Los Angeles, openly cheered the lynchings and that City Council member George M. Fall may have participated in an attempt to use a city water hose to flush Chinese out of the Coronel Block. Nothing came of these insinuations, though Fall was not reelected to office in the December 1871 election, if that had any connection to the Massacre's aftermath.

An interesting sidenote to the inquest concerns the possible presence of a vigilance committee, one that had organized a lynching in December 1870, and the association with it of prominent citizen Robert M. Widney. The significance is that Widney was appointed District Judge in December after the death of Judge Murray Morrison and presided over the trials that stemmed from it. After testifying to his role in preventing further lynching, Widney told the inquest jury that despite the comment of one of the rioters that they were all vigilantes, he wanted to make it clear "that none of the Old Vigilance Committee were engaged, except in rescuing Chinese from the mob" and that the aforementioned rioter was definitely not from the Committee that participated in the December 1870 lynching.[5]

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[4] Los Angeles *News* and Los Angeles *Star*, October 28, 1871.

[5] Widney's son-in-law, Boyle Workman, wrote that the judge "was president of the Law and Order party, which substantial citizens had recently organized to suppress crime and violence. He sent word for members of the part to collect at the Arcadia Block, which stood on Los Angeles Street [at Arcadia Street], near the beleaguered adobe." This seems to verify Horace Bell's accusation about Widney's involvement in the lynching of Lachenais. See Boyle Workman, *The City That Grew* (1935), 145. Horace Bell claimed that he attended the inquest and "that every one summoned as a witness was a person that had participated in the affair on the side of the attackers. There were but a few examined that volunteered their testimony who were not of the active mob." What proof there was for this statement is as hard to find as most of his statements about the Massacre. For example, he quoted John M. Baldwin as stating "As I passed Mr. Hicks' store he was dealing out rope," but the statements by Baldwin in the newspapers make no mention of this. See Horace Bell, *On the Old West Coast; Being further Reminiscences of a Ranger, Major Horace Bell;* edited by Lanier Bartlett (1930), 174. Some of the men identified as participants appeared in the Los Angeles County enumeration of 1870 federal census, including: J. Clement Cox, a thirty-five year old plasterer from Pennsylvania with a wife and three children; Enoch Griffin, an eighteen year old laborer and California native; Alexander R. Johnson, a thirty-six year old boot maker, born in Ireland; and Norman

On Saturday the 28th, the Coroner's inquest concluded, undoubtedly one of the longest, most intricate and fascinating of these proceedings ever to be held in the city. Foreman Henry T. Baker and his eleven colleagues, all of whom appeared to be Americans and Europeans, rendered the verdict that

> We find the mob consisted of all nationalities as they live in Los Angeles, and find that we have sufficient evidence to accuse the following persons as having taken part in the destruction of the lives and property of the Chinamen. And we further direct the attention of the Grand Jury to the reported testimony in which they will find many names of such persons who seemed to have encouraged the mob by their sympathy with them in their expressions.[6]

As the *News* expressly stated, the reason it and the *Star* ended their accounts with a statement that the names of the accused were attached to the verdict, but not printed in their pages was "so as not to defeat the ends of justice."[7] Unfortunately, because the inquest file was lost, it will never be known who the over 100 persons were who were identified by the jurors as direct or supporting participants in the Massacre.

III. The Grand Jury and Indictments

In the aftermath of the coroner's inquest, the next legal action appears to have been a complaint filed on November 4 in the Justice Court by Tong Yu, widow of Chinese doctor Gene Tong, murdered in the Massacre, accusing *tong* leader Yo Hing of "inciting and participating" in the riot that killed her husband. Yo was eventually charged, but, in early December, the Grand Jury failed to find a true bill against him and he was released.[8]

L. King, age twenty-four from the District of Columbia, whose occupation was "Works at Depot." There were five men named Jesus Martinez in the 1870 census old enough to have been possible participants.

6 Los Angeles News, October 29, 1871; Los Angeles Star, October 30, 1871.

7 Ibid.

8 Ibid., November 6, 1871 and Los Angeles *Daily News*, December 4, 1871.

On November 8, County Court Judge Ygnacio Sepulveda convened a special Grand Jury to investigate the Massacre.[9] The jury included long-time resident Juan Jose [Jonathan Trumbull] Warner; building contractor William Perry; merchant Kaspare Cohn; saddle maker, councilman and future mayor and city treasurer William Henry Workman; and only one juryman who was not American or European, farmer Martin Sanchez. Referring to the city's often violent past, Judge Sepulveda noted, "Lawlessness has again raised its monster head in our midst, and in the most inhuman manner has satiated its barbarous instincts." Employing the metaphor of a book of history, Sepulveda correctly identified the Massacre as "a page . . . marked . . . forever indelible, making the name of this community a reproach to humanity and civilization." Invoking verbatim the language he used to the grand jury in the aftermath of the December 1870 lynching of Michel Lachenais, regarding the primacy of law and "constituted authority" over "injustice, cruelty, dissension, anarchy, and immorality," the Judge plainly stated "that Grand Jury saw fit not to act in the matter. Will you do likewise in this instance? . . . Will you challenge the vengeance of Divinity by violating your oath? Shall law stand for naught, and immorality and crime have high carnival in our community?" Sepulveda further implored the jury to "be true to your manhood, to morality, and to mankind" and do their legally constituted duty in bringing Massacre participants to justice. He concluded, "[I]n this way only can you satisfy an offended God, violated law, and outraged humanity."[10]

Whether Sepulveda's stirring plea moved them to action or whether the horrid circumstances of the Massacre were more than enough of an imperative, the Grand Jury set about their work. On December 2, after twenty-three days in session, the jury issued its report, which included the full statement of affairs, aside from the Massacre inquiry. Appended to the report were forty-nine indictments, about half for murders and the others for a variety of felonies, most likely a record for any such jury to date, and these contained over 150 names.[11] Some of the persons were in custody and the ones known to be so

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[9] Los Angeles *News*, October 27, 1871.

[10] Los Angeles *News* and Los Angeles *Star*, November 9, 1871.

[11] Thompson and West, 85, indicated that 111 witnesses were examined by the Grand Jury and that the 150 indicted persons represented all nationalities.

detained included Charles Austin, Charles [Edmund is the name that appears in the trial record] Crawford and A. R. Johnson [Johnston in the court case file], who appear to be the first three arrested. Subsequently, five more were held: Jesus Martinez, Louis Mendel, D. W. Moody, Patrick McDonald and Andreas Soeur. Perhaps the last arrest was made in late December when David Thompson, arrested for robbing the Episcopalian church, also confessed to being involved in the Massacre and the stealing of a watch from one of the lynched victims. Yet, it appears that Thompson was never tried for this self-confessed action.[12] In late October, it was reported that three Chinese and two whites, all unnamed, were also held on lesser charges. It seems that Soeur was released for a short time, as he and Carmen Lugo, another scion of a prominent Californio family, were arrested for the assault on Gene Tong. Additionally, Carmen Sotelo (who was likely the Romo Sortorel identified in the early press reports in the papers) was reported as arrested in mid-November.[13] Yet, the majority of those indicted were still free and most of these were never apprehended and held for trial.

Judge Sepulveda praised the jury for its work and made the interesting decision that he would not call any of the twelve back for service "during the time he occupied the bench," a rather remarkable action since he served as a judge for thirteen more years.

IV. The Trials: *People v. Kerren*

The earliest case among those extant in the criminal court files is *People v. Kerren,* brought as an assault with a deadly weapon case before the County Court, which concluded on January 5, 1872. Kerren was charged with shooting at two Chinese women, whose names were

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[12] Los Angeles *Star*, December 20, 1871. The case file in *People v. David Thompson*, Case 1108, January 24, 1872, Los Angeles County Court, Los Angeles County court records, Huntington Library, makes no mention of the Chinese Massacre.

[13] Los Angeles *News*, November 13-14, 1871. Soeur, according to inquest testimony, was seen in a saloon waving a queue in his hands. The paper reported that Lugo, another of those arrested who hailed from prominent Californio families, like Sotelo, was held for stealing the herbalist's watch and chain. Bell falsely claimed that, among the indicted and charged rioters "all of them were against poor Mexicans without influence, and a lone Irishman, a shoemaker [Johnson]," Bell, 175.

given in the file as Cha Cha and Fan Cho, during the Massacre. An indictment was filed on November 29 by District Attorney Cameron E. Thom, and Kerren was released on December 5 on $1000 bail.

The file seems incomplete with two indictments, jury instructions, a verdict, bail recognizance and what seems to be only partial testimony. Surviving witness statements are marked by continuous objections by both defense counsel (who are not identified in the case files) and District Attorney Thom on the grounds that the questions were irrelevant, calculated to mislead the jury, and based on hearsay. When witness Benjamin McLaughlin was called by the people, for example, he was asked if Constable Kerren was by legal authority stationed at hay scales near the Coronel Block to guard the area during the riot. When the defense objected on the grounds that the question was irrelevant and calculated to mislead the jury and as not the best evidence because of hearsay, Judge Sepulveda sustained the objection and McLaughlin was asked to step down.

Sheriff Burns was called for the defense and the first question was simply whether or not there was a riot. To this, Thom objected as a leading question, because a riot was a matter of a legal proposition, could not be proved or disproved by the witness and was irrelevant. Asked to rephrase the query, the unknown lawyer asked Burns why he was at Arcadia and Los Angeles streets on the night in question. This also brought an objection from Thom that this was also leading and irrelevant, but was overruled by Sepulveda. Burns then started to answer: "I was informed by two parties . . . ." upon which Thom objected on grounds of hearsay. The question was rephrased to ask what Burns did that evening, a question which finally allowed for a fuller answer. Yet, when Burns concluded his statement that he placed men around the Coronel Block with orders to remain there through the night and that Kerren was ordered to proceed to a nearby street to call Mayor Cristobal Aguilar, Thom moved to strike out this testimony, but was overruled. Another defense question was, "In the summoning of a posse to your assistance did you not do so as much with the purpose of preventing a riot as to preventing Chinamen from escaping?" Thom objected yet again and this was sustained. A query to Burns on cross-examination was whether he authorized anyone to shoot a Chinese woman. The defense objected as irrelevant and misleading, but was overruled. Burns's response was a terse "No, sir." When asked if he

saw anyone other than a Chinese person commit a felony that night, this brought another objection on irrelevance, but this was overruled. Burns elaborated slightly by answering "Yes, sir, I saw a good many."

Next to the witness stand was Constable Bilderrain who was asked what brought him to the Coronel Block, to which Thom's seemingly obligatory objection was overruled. The officer's banal answer was "I was there in the discharge of my duty as a policeman." The next question regarded Robert Thompson's role in the attempted arrest the two were in the process of making and, still again, Thom's objection was struck down, yet there was no record of an answer. Nor was there a recorded response to the last question regarding how much of a crowd had gathered around the Block, which, of course, brought an overruled objection by the District Attorney. Not surprisingly, Thom moved to strike Bilderrain's testimony and this was also overruled.

Marshal Baker was also on the stand and one question's answer survives: What brought him to the scene of the Massacre? He answered that he had been in front of his nearby soda factory, when he heard a shot and ran to Negro Alley. There he saw Constable Sanchez trying to arrest a Chinese man, who was shooting. There was a crowd present, but not Sheriff Burns. Unfortunately, this is all that survives in the case file. Others who testified included Constables Bryant and Harris, Mike Madigan, Ed Huber and the defendant, but none of their testimony is in the file.

The instructions by Judge Sepulveda were that possible verdicts included guilty as indicted, a lesser finding of assault and battery or not guilty. He also stressed that, as an officer, Kerren must have felt "there was an apparent necessity for assaulting the Chinawomen" and that a "reasonable necessity for the violence" must be demonstrated if he were to be found not guilty. It is not known how long they deliberated, but Kerren was acquitted.[14]

V. The Trials: *People v. Quong Wan and Ah Yeng*

In February, there were two trials relating to the Massacre. The first, which does not have a surviving case file, but was reported on in detail by the *Los Angeles Daily News*, was conducted on the 14th,

[14] *People v. Richard Kerren*, Case 1101, Los Angeles County Court, January 5, 1872, Los Angeles County Archives, Huntington Library.

involving Quong Weng and Ah Yeng, said to be "the originators" of the riot and charged with the murder of Ah Coy on the day of the Massacre. Ah Coy was the man shot in the neck in the later afternoon and this action brought Jesus Bilderrain to Negro Alley. In his testimony, Bilderrain stated that he was stationed "at Higby's saloon . . . because I had been informed by some Chinamen that there was going to be a row among the Chinese that afternoon." Moreover, after Constable Gard and he went to *Calle de Los Negros* after Justice Gray adjourned court, Bilderrain stated that he went to Samuel Caswell's store and was told by the proprietor that "he had sold a large number of pistols during the last few days," though Bilderrain did not state, at least by the transcript published in the *News*, who were the buyers of the weapons. Rumors in the papers at the time of the Massacre were that Chinese were buying guns in large amounts in the preceding days. Another interesting, if undocumented, statement by the constable, upon a redirected question, was that "I had been informed that a party of Chinese were expected from San Francisco to do some fighting." Yet, Bilderrain, however, could neither identify Quong Wan or Ah Yeng as present at Justice Gray's court the afternoon of the Massacre or recall that he had ever seen them before, though he did admit that he was "somewhat familiar with the Chinese in this city." The vagueness as to the culpability of the defendants in the death of Ah Coy was repeated in the testimonies of Officers Sanchez, Harris and Gard. Others who were present at the time of the shooting also were unable to identify the killers and were only able to say that there were many Chinese milling about *Calle de Los Negros* at the time. For example, Ventura Lopez, who was in a bakery, saw Ah Coy fall after being shot and noticed a Chinese man running from the scene. Although he knew the defendants, Lopez could not identify them as present at the time of the shooting.

A notable occurrence in this trial was the calling of Ah Ling as a prosecution witness. When he was brought to the stand, the defense objected, claiming that

> [H]e is incompetent to testify in any case where the People of the State of California are a party; and further, because he does not believe in the Christian religion; does not understand the nature of an oath or the responsibilities thereunder according to our laws, customs and civilization; he does not

> believe in God, nor in the form of any religion prescribed and practiced by civilized nations, and that he is not sworn according to the forms prescribed by heathen or uncivilized nations.[15]

In spite of this all-encompassing motion, Widney allowed the testimony to continue, because the relevant 1863 statute stated that the Chinese could not testify against a white person and, therefore, the other defense claims were not legally at issue. It is also interesting that it was the defense counsel who objected to Ah Ling and on grounds that were racist, but were ostensibly intended to protect the Chinese defendants, although precisely how is not revealed in the case file. Ah Ling was called because he told one of the constables that Quong Wan shot Ah Coy. Yet, he also stated that he was told this by an unidentified person, not through his own observation of the incident. Further, Ah Ling testified that, although he saw both defendants at the scene, he did not see weapons in their hands.

With Ah Ling's testimony on the stand concluded and other equally flimsy prosecution witnesses finished, District Attorney Thom stated the obvious and admitted "that the prosecution having signally failed in establishing their case, he would proceed no further with it, as he had to depend entirely upon unreliable Chinese testimony." Unless the defense wished to offer evidence, Thom stated, he would submit the case to the jury. Naturally, the defense waived the right of presenting witnesses or evidence and Judge Widney ordered the jury to bring in a verdict of not guilty "as there was nothing in the evidence adduced that could possibly justify conviction." After a few minutes away to write out the verdict, the jury returned as ordered and the prisoners were discharged. The *News,* in concluding its coverage, offered the obvious editorial comment that "[t]he trial itself was a complete farce, and resulted in an utter failure on the part of the prosecution to establish the guilt of the accused."[16]

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[15] Los Angeles *News*, February 15, 1872.

[16] Ibid.

VI. The Trials: *People v. Crenshaw*

Meanwhile, the matter of the indicted rioters began to coalesce in February as well, although trying to follow the proceedings is somewhat complicated. Initially, there were separate trials pursued for nine men accused of aiding and abetting the murder of one victim, Gene Tong, and Judge Widney set several court dates in the middle and later parts of the month. First, however, he had to deal, on the 8th, with a defense demurrer to the indictments of Austin, McDonald, Johnson and Celis. The *News*, citing "the interest manifested in all the proceedings," presented the entire texts of the demurrer and Widney's overruling statement. It is fortunate that the latter was reprinted in its entirety, because, while the case file contains the demurrer, it does not include Widney's statement.

The three objections to the indictment were: non-conformity with the provisions of the Criminal Practice Act, that more than one offense was charged, and that the facts of the case did not constitute a public offense. Widney's reply was in the form of three main points concerning the forms and rules of pleadings, and the judge addressed the sections of the Criminal Practice Act that the demurrers referred to, regarding indictments and pleadings, especially as to the acts committed, the manner in which they were committed and the form used to describe them. A main point of issue for the defense was that the indictment did not actually say that Gene Tong was dead, only that the accused were charged with encouraging others to kill and murder him. Widney, however, pointed out that the section of the Act concerning language only stated that "[t]he words used in an indictment shall be construed in the usual acceptance in common language, except such words and phrases as are defined by law, which are to be construed according to their legal meaning." To the judge the language in the indictment sufficiently indicated that Tong was dead, even if not explicitly stated. Regarding the fact that the actual murderers in the case were not known and that the men charged in the indictment were accessories, the judge used precedent in California case law to show that, even if charged murderers were found innocent, an accessory could be found guilty, as per section 6 of the Act. Citing other sections that prohibit a distinction between an accessory and a principal, that the crime of the latter be made the crime of the former, who aids, abets and

encourages him, Widney addressed section 246 of the Act which stated that language in an indictment shall be enough "to enable a person of common understanding to know what is intended." Concluding, the judge stated that "[i]f the Court had any reasonable doubt as to the sufficiency of the indictment, it would not put the county to the expense of a trial, but would remand the defendants to await the action of a new Grand Jury." It is important to recall this technical challenge in the light of what the state Supreme Court ruled on appeal in 1873.[17]

By request of defense counsel, A. L. "Curly" Crenshaw was tried separately from two other rioters originally indicted with him for the murder of Gene Tong, and separate trial dates were granted for each, with Crenshaw's beginning on February 16th. Once again, the *News* devoted significant coverage to the case and claimed that, "the whole country has been looking forward to this event. The progress of the trials, step by step, will evidently be keenly watched by the entire civilized world, and it will no less anxiously await the result." Further, the case was cited as unique, with questions "that have never before appeared in any criminal proceeding on record, and that have never occupied the attention of any tribunal." While this hyperbole is certainly questionable, the paper was correct that "we may reasonably anticipate a long and tedious trial because of the great publicity of the strangling itself," at least by the standard of the short trial lengths usually experienced at the time.

Especially notable on the first day was the questioning of jurors, some of whom sat on the Quong Wan and Ah Yeng trial, which was concluded three days previously, about any affiliation with vigilantism. For example, when one of Los Angeles's wealthiest citizens, rancher, banker and businessman F. P. F. Temple, was called and examined, he stated "that he was not a member of any secret organization known as a Vigilance Committee; [and] never have been." Pursuing the matter, the defense asked Temple "if not a member of such organization on the 24th of October, 1871, are you now, or have you ever sympathized with such or a like organization?" After an objection from the prosecution as a repetitive question "which catechised the witness and juror as to

[17] Los Angeles *Star*, February 9, 1872.

his association, affiliation and sympathy with all concealed classes of organization and committees," the objection was sustained, exceptions taken and Temple was accepted and sworn in as a juror.

Several other panelists, including Louis Duror, George Gerkins, T. C. Campbell, William McKee, and Henry Wartenberg, the last a former city councilman, admitted to having been members of vigilance committees. In each case, pointed questions by the defense about the ability of these men to impartially try the defendant were objected to by the prosecution and generally sustained, which is interesting given that Widney was sometimes accused, notably by memoirist Horace Bell, of participating in the lynching of Michel Lachenais in December 1870.

Duror was released when he answered "I don't know" to the question of whether he could hear the case impartially, while Gerkins who answered affirmatively was impaneled. Even though the prosecution objected to further consideration of McKee, Widney overruled, although the defense issued a peremptory challenge to release him.

Wartenberg was released to a peremptory challenge after his less-than-convincing "Yes, I think so" answer to his impartiality was offered. Campbell, who offered that he "would frame my opinion from the evidence adduced" in the case, was recommended by the defense to be subject to a panel of three triers to determine his potential bias, when the prosecution withdrew any objection and Campbell was set aside. After the next juror was accepted, the panel was complete and trial proceeded.

Although there was one question posed to one juror about a bias against or in favor of Chinese, the obsession by defense counsel regarding the sympathies or allegiances of jurors toward vigilance committees is significant, as is the number of those who responded as having been vigilantes in the past. While there had been, as above mentioned, rumors of vigilante involvement in the Massacre (questions about the judge and his alleged involvement in vigilantism in late 1870), the questioning of jurors in the Crenshaw case is the only significant indication that it was even tangentially related, if only in the minds of the attorneys for the defense.

Witness testimony for the prosecution began soon after the impaneling of the jury and the first person on the stand was Henry M. Mitchell. After the *Star* reporter gave his version of the early events of the Massacre, the defense objected to further questions not

related to the charge in the indictment. District Attorney Thom argued that the line of questioning was to demonstrate that there was a mob that gathered at *Calle de Los Negros* and that this mob, including the defendant, summarily executed Gene Tong. Mitchell concluded his testimony by stating that he witnessed the first hanging at Tomlinson's corral and stated that he heard many threats against the Chinese (recall that Mitchell was identified at the coroner's inquest as one such vocal supporter of violence against them.) Yet, nothing in his statement dealt directly with Gene Tong, other than that Mitchell saw him dead in the jailyard the next morning when he did his report for the *Star*.

Similarly, although Andrew J. King, former assemblyman and one-time proprietor of the *News*, gave testimony on general events at the Massacre and identified Samuel Carson as saying he killed three Chinese, he provided no information about the hanging of the herbalist. Coroner Joseph Kurtz could only identify Gene Tong as one of the men who was lying in the jailyard the morning after the Massacre and did not see him killed. With Kurtz's testimony concluded, the first day of the trial concluded.[18]

The second and last day of the Crenshaw trial continued with the testimony of prosecution witnesses, starting with Constable Kerren, who was the only law enforcement officer not questioned at the coroner's inquest and who was six weeks removed from his acquittal of the charge of assault on Chinese women at the Massacre. Yet, again, although Kerren heard Norman King give an oration against the Chinese and recognized Alexander Johnson as among those who seized the first Chinese victim from Harris and Kerren, he swore that he heard no one say they had shot or hanged any Chinese and did not know who killed Gene Tong.

Indeed, the problem of identifying Tong's killers was encapsulated in the testimony of attorney Henry Hazard, who stated that the herbalist's office was the target of indiscriminate firing (his estimate was fifty to one hundred shots) by many in the mob and he did not witness Gene Tong's hanging or whether Crenshaw took part. Even Constable Emil Harris, who saw a crowd of men seize the herbalist and his wife between 7 and 8 o'clock and instructed them to take him to jail, did not see him murdered and could only state that he saw Crenshaw on

[18] Los Angeles *News*, February 17, 1872.

the roof of the Coronel Building when a group was hacking holes into the roof and shooting in the house and the rear yard. Harris could not say, although, whether Crenshaw was armed and if he did any of the shooting, but did say that, when a fire broke out in one of the rooms, he instructed Crenshaw and another man to put out the fire, which they did immediately. One witness, however, Benjamin McLaughlin, implicated Crenshaw by testifying that "'Curly' was there; he said he had killed three; he talked considerable about shooting Chinamen for some time."

The last witness in *People v. Crenshaw* was the defendant. His story was simple. Watching from the sidelines as the mob gathered around the Coronel Block, he said he heard the cry of fire and rushed up to the roof of the adobe behind George Gard and held the constable's gun when both were atop the Block. After following Gard down from the structure, Crenshaw testified that the constable grabbed a Chinese woman from one of the buildings and handed her over to Crenshaw with instructions to take her to jail. After completing his errand, he went over to Billy Rapp's saloon "took a couple of drinks and went to supper; then went to bed." Though he had a gun, given to him by Jesus Martinez, another of those identified with being on the roof and one of the defendants in the next rioters case, he did not use it, nor did he use Gard's weapon when he was on the roof of the Coronel Block with the constable. Furthermore, Crenshaw denied telling Benjamin McLaughlin that he killed three Chinese.

Even though McLaughlin was the only witness who directly identified Crenshaw as involved in violence during the Massacre, the *News* decided not to publish the arguments by the prosecution and defense nor Judge Widney's instructions. After merely reporting that there were arguments and instructions, upon which the jury retired for twenty minutes of deliberation, a verdict of guilty on the charge of manslaughter was found. Although the indictment was for murder, the *News* reported that the original verdict stood eleven for guilty as charged and one for acquittal. Therefore, a compromise was made, by which the charge was reduced to manslaughter and all agreed to the lesser offense. The defense offered a motion of appeal, while Widney set sentencing for February 20.[19]

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[19] Los Angeles *News*, February 18 and 20, 1872. A short biographical sketch

VII. The Trials: *People v. Mendel et al.*

Crenshaw's sentence, however, was delayed because his attorneys, Chipley and Wilson, were replaced at the end of the trial by Volney E. Howard and E. J. C. Kewen, who issued motions for an arrest of judgment and a new trial. As it turned out, Crenshaw was not sentenced until the trial of the rest of the rioters, *People v. Mendel, et al.,* was completed and determined in late March. What had happened in the meantime was that the ten other indicted rioters were combined in one case with Volney Howard and E. J. C. Kewen retained as defense counsel, fresh from the Crenshaw case. The Mendel trial jury selection began on February 20 and, a few days later, "counsel for defence [sic] proposed to join in one trial defendants Moody, Mendel, Martinez, Johnson, Austin, McDonald, Botello, Celis and Scott, reserving the right to unite with these defendants, defendant Alvarado." This was pending the notification of this last "reservation" to District Attorney Thom. In the meantime, jury selection for the Mendel case occupied a considerable amount of time with several venires calling for a few hundred prospective jurors. Once more, the *News* did cover the initial phases of jury selection in detail and, on March 15 a trial jury was obtained, after five venires and 255 panelists went through the impaneling process.[20]

Now that the case of the Chinese Massacre rioters had been combined into one, the trial continued until the early morning hours of Wednesday, March 27.[21] At twelve days, it was much longer than the ordinary trial, and, as the proceeding neared its conclusion, it seemed that, contrary to the opinion expressed in the *News* in February that the

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on Crenshaw, the only such of the rioters, was published in this paper the day of his sentencing. He appeared in Los Angeles in the months before the Massacre, working as a groom and teamster at the Bowman stables. According to the *News* "his associations have been of the lowest character. His favorite resort was the rendezvous of lewd women, pickpockets and cut-throats."

[20] Ibid., February 21, 24 and 27 and March 13 and 16, 1872.

[21] Nadeau claimed that the jury was guarded by police when taking their meals, because reprisals from riot sympathizers were feared. This is no corroboration or source for this statement, however. See Remi A. Nadeau, *City-Makers: The Men who Transformed Los Angeles From Village to Metropolis during the First Great Boom, 1868-76* (1948), 52.

entire civilized world watched with baited breath for the outcome of the trial, the long jury selection process had its effects. On the 22nd, the paper reported that, though some fifteen witnesses had been examined, "the trial attracts but little interest and Judge, jury, counsel, witnesses and prisoners exhibit more than ordinary weariness."[22] Yet, the next day, it noted that an additional ten or fifteen witnesses were examined and that the prosecution planned to conclude that day with the entire proceeding expected to conclude the following week. After reporting on the "strict surveillance" of the jury by Sheriff Rowland, the paper said that "we fully agree with the wife of one of those jurors who says that it is a great hardship that her husband should be a prisoner while the accused are enjoying their liberty on bail."[23] On the 25th, it was reported in the next day's court report in both the *News* and the *Star*, that the defense made several motions. First, "[t]he defence [sic] withdrew the testimony by them offered on Saturday last, as to [the] previous character of defendant Moody." Next, the defense attorneys "moved to strike out all the evidence already offered by the prosecution as to the acts of the so-called mob . . . on the ground that no evidence has been adduced by the prosecution to show any conspiracy," and that any violence was not premeditated. Another motion by the defense was to strike all testimony because "of failure to establish the *corpus delicti*." Further, Kewen and Howard also asked that all testimony from Constables Harris and Gard and that of Coroner Kurtz be struck from the record on the ground of inadmissible hearsay from Chinese sources. Finally, the defense asked the judge to instruct the jury to acquit the defendants "on the ground that the evidence on the part of the prosecution is insufficient to warrant a conviction." After a midday break, Widney resumed and denied the defense's requests. At this, the defense "declined to produce any testimony" and court was adjourned until 1:00 a.m. on Wednesday, March 27, the early morning session a reflection, no doubt, of the desire to get the case completed as quickly as possible.[24]

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[22] Los Angeles *News*, March 22, 1872.

[23] Ibid., March 23, 1872.

[24] Los Angeles *News* and Los Angeles *Star*, March 26, 1872.

According to the *News*, despite their dour assessment of the lack of interest in the case two weeks previously, "the Court-room was thronged with a curious crowd, who apparently manifested great interest in the argument of the respective counsel" as closing arguments were presented over a stretch of nine hours. It was further reported, although details were not given, that District Attorney Thom asked Judge Widney to ask the jury to leave the courtroom, because "he desired to make a statement from information that he had just received." When Widney denied the request, Thom "made a private statement to the counsel for the defence [sic] and to the Court." The *News* speculated that Thom's "information" must have been something "which will require further investigation, and that fact is some way or another connected with the jurors."[25]

Despite this, the next report was that "[t]he jury in the Chinese riot case rendered their verdict at 2 o'clock this morning," indicating that deliberations were probably forty-five minutes or less, although the *News* reported that the proceeding lasted five hours. Found guilty on charges of manslaughter, probably a nod to the defense's contention that there was no premeditation, were Louis Mendel, A. R. Johnson, Charles Austin, Patrick McDonald, Jesus Martinez, Refugio Botello and Esteban Alvarado. Acquitted on these charges were D. W. Moody and Adolfo Celis.[26] Botello, it was reported, was released on $5,000 bail, pending an appeal to the Supreme Court, but it appears that he joined his appeal with that of his fellow convicts, because there is no case in the California Reports under his name.[27] With this, the report concluded that sentencing was to be pronounced by Widney on Saturday the 30th. The *News* had, however, issued a cautionary and prescient statement that "it can scarcely be expected that it [the verdict, which was not yet in] be in any way final; for, if it be a verdict of guilty, there is no doubt, but what [that] it will be appealled [sic] to the Supreme Court." If, however, the verdict was innocent, it was expected that the next Grand Jury would be asked to find another indictment against the accused.[28]

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[25] Los Angeles *News* and Los Angeles *Star*, March 27, 1872.

[26] Nadeau, 52, incorrectly stated that all nine were convicted.

[27] Los Angeles *News*, March 28, 1872.

[28] Ibid., March 26, 1872.

Analyzing the decision the day after the verdict was delivered, the *News* stated, "it has been the universal belief of the entire country that a conviction" could not be obtained and that "the press has not been slow in giving expression to this belief." Yet, the decision of the jury "will at least convince them of the prematureness of that opinion and will do much toward appeasing the indignation aroused by the committal of the outrage." While manslaughter might not have been the desired outcome, the paper opined, it was important to remember that "there are others equally as guilty—the men who reaped the spoils. These men the law cannot reach unless they [in]criminate themselves, and they will evidently escape the punishment they so justly merit."[29] The reference to "spoils" hints at those who looted Chinese homes and businesses. The *News* did report that "there are, we believe, quite a number remaining to be tried, but it is exceedingly doubtful now as to whether any attempt will be made to have them tried in this county, as it may prove impossible to obtain a jury." This was because, the paper claimed, prospective jurors, even if they had not formed an opinion in the matter, would probably claim they had "to avoid the possibility of being compelled to stand a long siege in the jury box." Yet, the writer concluded by wondering if a change of venue to a neighboring county might not be the way to pursue further justice.[30]

Despite the contentious nature of competition between the two daily papers, the *Star* largely echoed its rival in its analysis of the case. Noting that "the long and tedious case was brought to a close," the paper highlighted "the difficulty of obtaining competent jurors—men who were not disqualified on account of having expressed no opinion, and free from knowledge of the affair and that bias which proscribed them according to statutory stipulations, it was thought by many that none of the parties accused would be convicted." Yet, it was also reported that, as testimony continued and "had become exceedingly voluminous . . . it was evident that quite a change had taken place in public opinion, and the verdict of the jury was pretty generally anticipated" to be guilty. Having alluded to public opinion, though, the paper claimed that the "trial appears to have elicited very little interest on the part of our citizens." But, once more changing course in interpretation, the

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[29] Ibid., March 28, 1872.

[30] Ibid.

Star felt that the trial's result "will doubtless have a very salutary effect in restraining the lawless class in the city who have heretofore been so ready to set the law in defiance." The case, finally, proved "that juries can be obtained in our midst to punish evil-doers," despite the above enumerated difficulties in this very process.[31]

On March 30th, after the motions for the arrest of judgment and a new trial were duly denied, Widney passed sentence on the convicted men to the state penitentiary at San Quentin as follows: L. F. Crenshaw, three years; A. R. Johnson, six years; Louis Mendel, six years; Charles Austin, five years; Patrick M. McDonald, five years; Jesus Martinez, five years; and Refugio Botello, two years. A motion to suspend execution of sentence for twelve days in all cases, except that of Botello, pending his appeal to the Supreme Court, was left open until Monday. The short piece concluded with the statement that "[the prisoners], with the exception of Mendel, declared their innocence. Johnson made a vain attempt to 'ape' insanity but signally failed."[32]

Although the case file is, like other Massacre-related files, incomplete, the following is a summation of its contents. First, there were many indictments handed down on November 28, 1871 for the deaths of six Chinese: Gene Tong, the herbalist; Day Kee; Ma Sin Quai; Tang Wan; Lung Quai; and Ah Choy. Twenty-one persons were named as the accused in these indictments, including the nine men above and others including J. G. Scott, J. C. Cox, Ambrosio Ruiz, Francisco Pena, Norman King, Andres Soeur, Samuel Carson and a variety of unidentified men with commonly-used names like John Doe, Dick Roe, Dick Doe, John Roe, Bob, John, Sam, and Dick Styles, and Peter, John, Joe and Bill Dix. The common charge in the several indictments is that the accused "did in a riotous, violent, tumultuous and illegal manner and countenance and encouraged many other persons, whose names are to the jurors unknown, on the execution of the following stated acts to evil on the acts of unlawfully assaulting, beating, and strangling a human being known by the name of . . . ." Another feature was that on each of the indictments, the names of exactly one hundred witnesses were provided, though the names varied from one to the other. While seven indictments have alphabetical or numeric identifiers, two did not. One

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[31] Los Angeles *Star*, March 28, 1872.

[32] Los Angeles *News*, March 31, 1872; Los Angeles *Star*, April 1, 1872.

of these, for the murder of Gene Tong (and for which, strangely, there was a separate alphabetical indictment) were for seven John Doe-like unknowns, while the other was for Chang Wan and was much in form like the aforementioned indictments.

Also included in the case file are some forty witness subpoenas, as well as a document that appears to be a draft of testimony giving some detail of the questioning of witnesses, but with the word "Insert" where text on indictments, demurrers, testimony, judge's instructions and other matters should have been. Unfortunately, such important information as actual testimony, the judge's instructions, demurrers and their various arguments, is not only missing from this document, but from the record entirely. At the bottom of this document, which may have been preliminary to a final summary of the proceedings, is the statement that defendants were found guilty of manslaughter. The *News*, in its reporting after the verdict, stated that "the manuscript report comprises two hundred and twelve closely written pages of legal cap," which has, evidently, disappeared.[33]

Other documents include a statement of appeal filed on behalf of the seven convicted men, but this document is undated. A demurrer from the beginning of the trial on behalf of the accused was filed and noted as overruled with the added comments that the defendants accordingly pled not guilty.

A lengthier document is a motion for a new trial, filed on March 30, likely just before or after the sentencing of the guilty by Judge Widney. In it, the defense attorneys offered the standard claims that Widney misdirected the jury in his instructions in matters of law, that the verdict was contrary to law and evidence, and in not sustaining the demurrer to the indictments, although this last was a central point in the Supreme Court's consideration of the case. Further, the defense alleged that there was no proof of how Gene Tong died and none of a conspiracy; that no proof connected the defendants to the riot and there was none "of any agency" of the defendants in the death of the herbalist, and, finally, that "[t]he verdict was an impossible one. There can be no verdict of manslaughter as to an accessory where principals are charged with murder." This is an interesting and essential question: if the charge was for murder in the indictments, how did Widney allow

[33] Ibid.

for a guilty verdict by the jury on lesser charges of manslaughter, as opposed to second-degree murder? When the defense moved for an arrest of judgment and a new trial, it was noted in the case file that these were denied by Widney. Therefore the record shows, "Defendants adopt upon their appeal the assignment of errors contained in their motion for a new trial . . . [and] by their counsel tender the above as their statement and bill of exceptions for signature and approval of the judge." The signatories were Kewen, Howard, and Frank Ganahl, who was a junior partner in the firm of the former two.[34]

On the 7th of April, a steamer departed San Pedro with all of the convicts, with the exception of Refugio Botello, who was still out on bail pending his appeal. Interestingly, another item in the *Star* noted that "E[dmund] Crawford, one of the alleged rioters, who has been confined in jail for the past five or six months, has not been tried yet. He says he is going to demand a trial in the course of a few days. Like all the rioters, he says he is innocent." Crawford evidently never received a trial, as a search of the case files in the existing records yielded nothing.[35]

VIII. The Trials: Chinese Merchants Sue the City of Los Angeles

Although the convicted rioters received their sentence and were transferred to San Quentin, there still remained a few court cases, civil and criminal, concerning the Massacre. One civil case of note was *Fong Yuen Ling, Sam Yuen, Yin Tuck and Ah Ying v. The Mayor and Common Council of the City of Los Angeles*, which concerned the owners of the Wing Chung store, primarily Sam Yuen, suing the city for damages to the store during the Massacre. Although the city won a decision in the District Court, the appellants' counsel, Glassell, Chapman and Smith, argued that "the firing upon the officers in the Wing Chung store and the alleged participancy of Sam Yuen, occurring about 5 o'clock can, under no view of the law, be held to be a justification of the outrages of the mob committed five hours afterwards." The

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[34] *People v. Louis M. Mendell* [sic]*, et al.*, March 3, 1872, Case 1115, Los Angeles District Court, Los Angeles County court records, Huntington Library.

[35] Ibid., April 8, 1872.

respondents were represented by City Attorney Frank Howard and the firm of H. K. S. O'Melveny and Henry Hazard. The decision of the high court keyed on this point:

> Persons whose goods are destroyed by a mob, in a riot in a city, are not entitled to recover from the city the value of the goods destroyed, unless such persons, if they had knowledge of the impending danger, use reasonable diligence to notify the mayor or sheriff of the threatened riot and the apprehended danger to their property; nor are they entitled to recover if they instigate or participate in the riot.

An *idem* to this point was that:

> If the Court rules out testimony that, during the riot, the plaintiff could not have gone on to the street to notify the Mayor, the error, if any, is immaterial, provided that, before the riot commenced, the plaintiff knew of the impending danger, and had ample opportunity to notify the Mayor.[36]

As explained in the opinion of Justice Crockett, one of the main defenses was that the third section of the Act of March 27, 1868, prescribing property damage liability for cities, required owners of property "to notify the Mayor or Sheriff of the threatened riot" and that the wording of the section specified that no awarding of damages be made if such destruction "was occasioned, or in any manner aided, sanctioned, or permitted by the carelessness or negligence of such person or corporation, nor . . . unless such party have used all reasonable diligence to notify the Mayor of such city, or Sheriff of such county, or any threat or attempt to commit such injury to his property by any mob, and of the facts brought to his knowledge." To Crockett, it was clear that no such warning was offered by the owners of the Wing Chung store.

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[36] *Fong Yuen Ling, Sam Yuen, Yin Tuck, and Ah Yung v. The Mayor and Common Council of the City of Los Angeles*, 47 Cal. 531, No. 3,434, January 1874 term.

Even though the District Court jury acquitted Sam Yuen of complicity in the killing of Robert Thompson, Justice Crockett found that "it appears from the uncontradicted testimony of the policeman [Esteban Sanchez], that when the shooting first commenced in the street, the plaintiffs' store and the 'corral' in the rear of it were filled with armed Chinamen, who immediately fired on the officers when attempting to preserve the peace." Furthering his interpretation of Yuen and his men's complicity, Crockett felt "it is in the highest degree improbable that this large body of armed men could have assembled in the plaintiffs' store and in a sheltered place in the rear of it, without their knowledge and privity." Sam Yuen and his "clan" offered themselves as bail for the assailants of Yo Hing and his rival faction. The arming of Yuen and his men surely meant an impending conflict between the companies and the plaintiffs clearly "had ample opportunity to notify the Mayor, and to summon the police before the shooting commenced." According an officer, Crockett continued, Yuen "resisted the interference of the police, and himself fired at the officer." Disregarding the jury in *People v. Sam Yuen* and stating erroneously that Sanchez's testimony was accepted because "it was for the jury to decide upon the credibility of the witnesses," Crockett opined that "on these facts the plaintiffs are not entitled to recover."[37]

IX. The Trials: *People v. Sam Yuen*

People v. Sam Yuen was heard before Judge Widney in the District Court. On March 29, 1872, the *News* reported that a warrant was issued for the arrest of Yuen on the charge of shooting Jesus Bilderrain the night of the Massacre. In an article the following day, the paper made reference to a complaint taken out by Bilderrain against Yuen on November 28, 1871, before Justice Court Judge Trafford. In that document, the constable charged that Yuen "did willfully, deliberately, feloniously and of malice aforethought, aid, abet, assist, counsel and encourage one John Doe—a Chinaman—to willfully, deliberately, etc., one Robert Thompson, then and there, to kill and murder." Evidently, Trafford issued an arrest warrant to Bilderrain, but Yuen could not be located. In mid-March 1872, however, he returned to Los Angeles

[37] *Ibid.*

"but the warrant was not served by the officer holding it; in fact, it is said that he claims to have lost it." Further insinuations were that, while Trafford issued a second warrant,

> [I]t is alleged that neither the officer who swore out the complaint [Bilderrain] nor those officers who were recently recipients of presents from the company of which Sam Yuen is a member, have made any effort whatever to assist in bringing the accused to justice, but are, to the contrary, exhibiting a suspicious disinclination to do so. If this be true, such men are utterly unworthy of the badges they wear, and ought to be immediately dismissed from the force. The matter, at all events, needs investigation, and the sooner the better it is done.[38]

The next day, however, the *News* reported that Constable Frank Hartley, a post-Massacre addition to the force, arrested Yuen, "the alleged murderer of R. Thompson on the evening of the riot." In the afternoon, it was further noted, Yuen's counsel attempted to secure his release by petitioning for a writ of habeus corpus with Judge Widney.

Adolfo Celis, recently acquitted in *People v. Mendel, et al.,* testified that, just prior to the gunfire that precipitated the Massacre, he saw Yuen running behind another Chinese man, both with pistols in their hands, into the Coronel Block. Celis (who appeared to have no official police role) ran to the building and caught the unidentified man, who fired at him, sending a bullet through Celis's coat. Letting go of the man, Celis said he looked toward the Coronel Block, where Yuen stood, calling out "Here!" and then pointing his gun at him. When Constable Bilderrain said "Catch him!" Celis headed toward Yuen, who fired a shot over his head. After this Bilderrain followed Yuen into the Coronel Block and received his wound to the shoulder, but not before Samuel Caswell, owner of the store across the street, told Celis, "Go in Celis, they are killing Bilderrain." Starting to go through Gene Tong's shop, Celis met Bilderrain fleeing "tumbling over chairs" and calling to him, "Keep out Celis, or they will kill you." Bilderrain stumbled to a post for support and blew on his whistle. At

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[38] Los Angeles *News*, March 30, 1872.

this, Celis testified, Yuen and the other man emerged from the Coronel Block and fired three more shots at Bilderrain, with Yuen hitting the constable before he retreated into the building. By this time, the account continued, Esteban Sanchez and Robert Thompson came on the scene. Significantly, Celis recalled that Thompson fired a shot through the glass pane in the door, a fact not mentioned in earlier statements, although neither was the statement that Yuen and his cohort emerged from the building to fire three more shots at Bilderrain. Celis then testified that he told Thompson to wait for him and they would check the room together. At this, they saw Yuen and other Chinese pointing guns at the door. Celis said he sprang back and warned Thompson to beware, but the latter "went to the doorway and rested his breast against the glass door, putting his arm inside." Thompson and the Chinese fired simultaneously and the former yelled out, "I'm killed," and said he was shot in the breast.

Amazingly, on cross-examination, Celis stated that he had no gun while in these dangerous situations of chasing and catching the unnamed Chinese man and peering into the Coronel Block with Thompson. Moreover, at one point, Sanchez held a gun over his shoulder, as if Celis was a shield. Another important emendation to his story was that, when the two Chinese were fleeing toward the Coronel Block and Celis caught the unnamed man, the two were running from Bilderrain, who had his pistol drawn in pursuit.

After Celis concluded his testimony, the prosecution stated that there were many witnesses to bring forward, but they "could not then be found, and he would rest for the present." In response, the unnamed defense counsel "said he could introduce an abundance of Chinese testimony denying the allegations" of Celis. When District Attorney Thom protested that this was inadmissible, a long discussion ensued. The defense then requested another cross-examination of Celis, which was allowed over the objection of the prosecution. The question was: "Have you ever been to serve a term in the penitentiary of the State?" Celis had served a short stint at San Quentin for manslaughter before evidently receiving a pardon, so clearly the question was an attempt to

show character, but when District Attorney Thom objected to the question as irrelevant, Judge Widney sustained the objection. Thom asked for a continuance until the next Monday and the court adjourned.[39]

On Monday, April 1, testimony resumed. Esteban Sanchez was sworn in and gave his account in Spanish, with Sheriff Rowland translating. Sanchez stated when he first approached the area, he was told by Bilderrain to arrest a Chinese man standing near a horse. Then, another Chinese man fired a shot at Bilderrain, followed soon after by another Chinese shooting at both Bilderrain and Sanchez. Four Chinese then ran into the Coronel Block, at which time Bilderrain and Sanchez reached the portico outside. At this, Sanchez said, he and Cyrus Lyons, another bystander, ran toward the corral in back of the Block and were fired upon there. When they returned to the front of building, Celis told Sanchez that Bilderrain was wounded. Running toward where this activity had taken place, Sanchez said he saw Yuen through the doorway. Then, "when I was at the point of speaking to him he raised his pistol and I did likewise both firing simultaneously. Thompson then showed up and was warned by Sanchez not to approach the door and to wait while the constable loaded his pistol. While Sanchez retreated a short distance to do this and was given a gun by someone, Thompson was shot. Sanchez estimated that there were some fifteen or twenty men firing at he and Bilderrain from the building, which seemed a very high number.

When asked if the Chinese were firing indiscriminately at Americans—a question that was sustained on objection—Sanchez answered a modified question by stating, "They seemed to be shooting at the people in the street after Bilderrain and myself arrived there." Asked from where the Chinese fired, Sanchez indicated from several different doors, not just the one that Yuen and others were hiding in.

On cross-examination, Sanchez was asked how many rounds he fired and he replied, after an overruled objection, that he shot three rounds in the corral and fired at Yuen in the store, but at no other time. Sanchez was asked about Celis and where he was and answered that he did not recall holding a gun over his shoulder as Celis testified the previous day. He also indicated that, while Thompson was "swinging his pistol to and fro in the doorway," he did not shoot and was sure on this

[39] Los Angeles *News*, March 31, 1872.

point when asked again about it. Yet, the prosecution wanted to know how Sanchez could tell the Grand Jury a few months earlier than he did not recognize any of the Chinese and "how he now recognized the prisoner as being one of them." In the meantime, the defense followed Sanchez's statement with evidence of Adolfo Celis's conviction for manslaughter as grounds for his impeachment as a witness, to which Thom replied that he would produce proof of his pardon.

After this exchange, Jesus Bilderrain took the stand and told a story quite a bit more detailed than the one he related in the trial of Quong Wan and Ah Yeng. He repeated the story of coming upon two Chinese shooting at each other in front of the Beaudry Block on the east side of *Calle de Los Negros* and that he directed his horse between the two to separate them. Confronting a Chinese man with a pistol aimed toward him, Bilderrain told him not to shoot and went to follow the Chinese who fled into the Beaudry Block. Here he found a wounded man (this was Ah Choy, who died a few days later) and arrested one Chinese man there with the assistance of Ventura Lopez and Juan Espinosa. The four men then walked along the front of the Coronel Building "as far as Sam Yuen's store" and saw a Chinese man inside with his pistol drawn. Bilderrain entered and grabbed the gun, with the Chinese pulling the trigger and the hammer coming down on the constable's thumb. Bilderrain was readying himself to strike this man in the head with his own pistol when he was shot by another Chinese man in the structure. Four or five others fired at him and the constable stated,"I thought I was mortally wounded and was anxious to die outside." Reaching the outdoors and followed by some Chinese, Bilderrain encountered Juan Jose Mendibles, who was then shot and wounded in the leg. After blowing his whistle, Bilderrain met Refugio Botello and also saw Thompson shot. Although Bilderrain stated that he knew Yuen for several years and often had his lamp filled with oil from his store, he did not recognize him or any of the other Chinese during the aforementioned events.

Confronted on cross-examination about his changing story regarding Yuen, Bilderrain admitted that he once "thought so strongly" about his guilt "as to make an affidavit to that effect." Now, however, he could only state that the firing from Yuen's store, which was dark, was from unidentified Chinese. Moreover, he did not know that Yuen

was hiding in Justice Gray's court for several days after the Massacre, which might possibly be a reflection on the judge's relations with the defendant. At this, the matter was continued until the next day.[40]

The third day of the habeus corpus hearing included testimony from a recalled Bilderrain. When the constable retook the stand, he stated that he did not see Yuen for several weeks after the Massacre, because of his convalescence. Most of this cross-examination consisted of his denials of the accuracy of Celis's testimony, especially the identification of Yuen as one of the Chinese Bilderrain was chasing. Moreover, the constable could not recall if Yuen was one of the Chinese holed up in his store, from which the wounding of Bilderrain and Mendibles and the killing of Thompson took place.

After a recess, resumption of testimony continued in the evening with Pedro Badillo. The witness stated that he first saw Yuen the day of the Massacre tending to a wounded man in a room of the Beaudry Block. From Higby's saloon across Arcadia Street, Badillo saw the action at Sam's store and stepped forward to support and assist Bilderrain when the constable emerged from the Coronel Block with his shoulder wound. But, Badillo did say that he saw Thompson ride up, approach the door of Yuen's store, and fire a shot into it immediately. When Sanchez and Celis advanced toward the door, Badillo saw Thompson fire a second time into the building, at which return fire struck him in the chest. More importantly, Badillo stated that Yuen was not one of the three men who entered his store from the outside. Strangely, Badillo responded that not only was he unsure of the date of the Massacre, although he supposed it to be the 24th of October, but that "[I] am not aware of my own knowledge [of] the date of to-day" and that "[I] don't know what is the present year."

After this bizarre conclusion, District Attorney Thom, who had done so during his questioning of Badillo, once more asked Widney to decide what his role was in the hearing. After some argument, the matter was continued to the next day, at which more wrangling took place about whether Yuen could be issued a writ without examination

[40] Los Angeles *News*, April 2, 1872.

before a magistrate, Thom arguing strenuously that Widney did not so qualify. Widney, however, decided to deny the writ and called for a continuance of the examination under his jurisdiction.[41]

Finally, on April 6, the examination concluded with prosecution examination of Ventura Lopez, Cyrus Lyons and Ambrosio Ruiz. Ruiz corroborated Celis's version of events, while Lyons stated that he saw Yuen inside his store, as well as in the corral at the back of the premises just previous to Thompson's shooting. At this, Widney decided to hold Yuen to answer before the Grand Jury and set bail at $3,000.[42]

The last account in the *News* mentioned that an attempt to lower Sam's bail would be made and, on the 8th, a bail bond was issued for Yuen, charged with manslaughter, in the amount of $1,500. His sureties were City Councilman William H. Workman and Chung Yang. An indictment, however, was not handed down by the Grand Jury until May 9. Signed by foreman James R. Toberman, cashier at the Farmers and Merchants Bank and a future mayor of Los Angeles, the document alleged that Yuen "did feloniously, willfully, deliberately, premeditatedly and of his malice aforethought stand by and aid, abet, and assist one John Doe, whose true name is to the jurors unknown, to feloniously, willfully, deliberately, premeditatedly and of his malice aforethought one Robert Thompson then and there to Kill and murder." Among the witnesses listed on the indictment was Constable Emil Harris, who did not appear at the habeus corpus hearing. Curiously, the names of Constables George Gard and Thomas Gates were crossed out. A week later, on May 16, two writs of recognizance for Yuen were filed for $1,500 bail each a week later. Here again, Workman and Chung were sureties on one of the documents and Ah Young and Sam Lee on the other. All of these items are found in the case file and, because the next documents in chronology are from October and November 1872, it appears that the Yuen trial was continued for a few terms. Jury selection ran the final two weeks of October and a subpoena survives from mid-November. Unfortunately, there is no witness testimony surviving in the file. Instructions to the jury from the plaintiff include the statement that

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[41] Ibid., April 3-4, 1872.

[42] Ibid., April 7, 1872.

> [I]f the jury believes from the evidence that Sam Yuen was in the room from which Thompson was shot and that the firing from that room was general & that the parties in the room over whom he had influence and control [did the shooting], the burden of proof is on him to show what he was doing there—the presumption of law being that he was aiding, abetting or assisting the party who did the killing.[43]

Judge Widney rejected this instruction, though he allowed ones that stated

> [I]f the jury believe from the evidence that Thompson was killed by a chinaman [sic] who was in the pursuit of an unlawful act and that the defendant was present aiding, abetting, or assisting the party who fired the fatal shot then he is guilty although there was no especial intent to harm Thompson
>
> and,
>
> If the jury believe from the evidence that the person who killed Bob Thompson was engaged in a felonious attempt to murder any one and that the defendant was present aiding, abetting, assisting, advising or encouraging the perpetrator of the crime or not being present did advise or encourage the perpetrator of the crime then he is guilty.[44]

By contrast, the defense offered the idea that, to be an accessory, "there must be a participation by him in the act committed." Also, "although a man be present whilst a felony is committed[,] if he take no part in it and do[es] not act in concert with those who commit it, he will not be an accessory," unless he was present for the purpose of assisting if needed—this last portion of the instruction added by Judge Widney. Another significant instruction by the defense was that

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[43] *People v. Sam Yuen*, Case 1164, Los Angeles District Court, November 19, 1872, Los Angeles County court records, Huntington Library.

[44] Ibid.

> [I]f the jury believe that the house in which Robert Thompson is alleged to have been killed, was the house or store of the defendant, the defendant had a right to be and remain there, even if infested for the time with outlaws and armed men and under such circumstances the mere fact of his being there in company with such men when they fired on persons outside or inside the store-is-of-itself no evidence of aiding or abetting by the defendant of such men in such unlawful act.[45]

Curiously, another instruction, written in pencil, whereas the others were in pen, and unnumbered, asked the judge to instruct the jury that

> On a trial under an indictment for murder or for aiding, abetting or assisting in the committing of such crime—the Jury can make no distinction between a Chinaman and a white man—as to all the rights and privileges and presumptions in favor of the accused.[46]

All of the above instructions were approved by Judge Widney. Among the four defense instructions refused were statements that: (1) unless the jury believed that the killer of Thompson was guilty of murder, they must acquit Yuen; (2) that if the jury believed that the killer was guilty of murder, but had a reasonable doubt about whether Yuen was aware of his intentions, then he must be acquitted; (3) that there cannot be an accessory to manslaughter and that, if the jury believed the killer committed manslaughter, then Yuen must be acquitted; and (4) that "it is not every intermeddling in an affray from which death ensues that constituted an aiding and abetting to the murder," with an example provided of spectators cheering on two fighters (one might also say those onlookers who voiced support for the lynchers at the Massacre, as well).

Consequently, Judge Widney's instruction to the jury was as follows:

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[45] Ibid.

[46] Ibid.

> If the jury believe from the evidence that a body of Chinese [sic] were engaged in a fight between themselves in or about Negro Alley, and were endeavoring to kill each other; and that the defendant was a participant in said street fight; and that the police force and others attempted to suppress said street fight and arrest the offenders; and that thereupon said Chinese fired on the police and the others assisting them; and that part of the Chinese engaged in the fight and in firing on the police and those assisting them, retreated into the store of the defendant; and that the defendant retreated there with them; and that said Chinese were pursued by a police man Bilderraign [sic] endeavoring to arrest them; and that they, or other Chinese cooperating with them fired on the police man and wounded him; that he sounded his whistle for help and that immediately thereafter Robert Thompson came to the scene of conflict and was killed by some one of said Chinese, who shot Thompson, having fled there from the fight in the street and from the police, then the jury are justified in finding the defendant guilty as accessory before the fact; and the burden of proof is on the defendant, to prove though present that he was in no way party to the killing of Thompson, unless the proof on the part of the prosecution sufficiently manifests that the killing of Thompson amounts only to manslaughter or that the killing was justified or excused. If you have a reasonable doubt on any of the above points you will acquit the defendant.[47]

Widney's instructions to the jury may be the most succinct and generally accurate statement about the events preceding the mob attack on the Chinese that exists. As to what happened afterward, there probably is no way to know what exactly happened in the dimly lit scenes of chaos around the Coronel Block. Yet, the jury found that there was reasonable doubt about at least one of the points in Widney's instruction. On November 19, 1872, the jury, headed by foreman Juan Jose Warner, who had been foreman of the Grand Jury investigating the Massacre a year earlier, returned a verdict of not guilty and Yuen

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[47] Ibid.

was freed.[48] His case showed that, whatever one might read into the process and method of the operation of the court, Chinese like Sam Yuen were not bereft of the possibility of a fair trial, even while it might be argued that only partial justice was served in the earlier conviction of the eight rioters.

X. Justice Denied? The Rioters Are Freed

Yet, even this "partial justice" was short-lived and subject to the ineffectiveness of "process and method." Over a year after the seven convicted Chinese Massacre rioters were sent to San Quentin, the California Supreme Court ruled, on appeal from Kewen and Howard, that the case be remanded back to the District Court for retrial "as a test case of the Chinese riot indictments" or that the seven men be released. The attorneys had targeted the indictment for the death of Gene Tong during the original court proceeding and they found the higher court agreed with their assessment. With this news, the *Star* sourly noted, "This will bring all that disgraceful business again before the courts."[49]

This was only slightly true. On June 10, with the remittur from the Supreme Court in his hands reversing his judgment, Judge Widney heard a motion from defense attorney James G. Howard (no relation to Volney E. Howard, one of the original defense counsel), which was not objected to by D. A. Thom, asking for the release of the seven prisoners from San Quentin and the judge so ordered the discharge. A summary of the Supreme Court's decision noted that the indictment "is fatally defective in that it fails to allege that Chee Long Tong [Gene Tong] was murdered." Actually, the article went on to say, the indictment specifically stated that the seven men "did stand by, aid, abet, assist, advise, counsel and encourage one John Doe and Richard Roe" in their murder of the herbalist. Moreover, the opinion went, "Admitting that the defendants did all these things, still it does not follow, by necessary legal conclusion that after all any person was actually murdered." For the *Los Angeles Daily Star,* "to this 'most lame and impotent conclu-

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[48] Ibid.

[49] *People v. Crenshaw, et al.*, 46 Cal. Reports 65, California State Supreme Court, No, 3,419, April 1873 term; Los Angeles *Star*, May 22, 1873.

sion' has come the great Chinese riots . . . The convicted parties escape full punishment for their crimes by a quibble, justice is complacent, and the eagle roosts high. Thus it goes."[50]

Indeed, what did happen? Why did the seven men convicted of manslaughter in the deaths of several Chinese and Gene Tong, in particular, find themselves free men in June 1873 after serving a little more than a year in prison? Did the Chinese Massacre really lead to a "salutary effect" in the diminution of crime in Los Angeles, as the *News* and the *Star* believed it would?

First, the issue of the faulty indictment is one of process that does not, of course, mean that the convicted men were innocent of the crimes of which they were accused. No witness testimony from the trial has survived, but the coroner's inquest proceedings and, to a certain degree, the trial testimony in the cases of Quong Wan and Ah Yeng and A. F. Crenshaw, as published in the press, provide statements from many witnesses that placed all of the accused at the Massacre, and several witnesses heard incriminating statements or saw some of the accused engaged in the assaulting of Chinese. Yet, even Alexander Johnson, who was seen and heard by so many that night in his drunken revels and rantings, does not appear to have been specifically identified as seen in the process of hanging or killing anyone. He was overheard saying he had, and of advocating the murder of Chinese. He was seen at the head of a procession of lynchers. But, no one, it seems, actually saw or chose to identify Johnson or any other of the accused and convicted rioters, engaged in the act of murder. Why this is so will never be known. Surely, there must have been dozens and dozens, perhaps hundreds, of persons who saw the actual acts of shooting and hanging, but none, it appears, came forward to say anything more than circumstantial accusations about the convicted men.

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[50] Ibid., June 11, 1873. Thompson and West, 85, echoed these comments in stating that justice "failed utterly" in the case, but did not mention the release of the seven convicted rioters. Bell, stating "that the Supreme Court held that the real estate agent [Widney] had proved to be a very poor judge" and that "[t]he prisoners all came home and some of them were immediately appointed to office" was either unaware of or chose to ignore the fact, in his obvious contempt for Widney, that the Supreme Court cited the errors in the indictment, which reflected as harshly on District Attorney Thom as on Judge Widney. Moreover, there is no evidence that any of the freed men became officeholders, Bell, 176.

Why, then, was the verdict found to be manslaughter? Clearly, the District Attorney hoped that the circumstantial evidence that was offered was enough to secure convictions for first-degree murder. Yet, Cameron Thom was sloppy, at least in the minds of the justices of the state Supreme Court. In his filing of many indictments on November 28, 1871, Thom forgot to be very clear that Gene Tong was murdered and, because of this, the higher court sent the case back to Widney.

So, why did Widney and Thom acquiesce to James Howard's motion for discharge? If anything, Widney was as careless as Thom at the trial. Surely, he had seen the indictments and knew that they were faulty. Did the judge ignore this in his zeal to see the nine men before him, including Alexander Johnson whom Widney confronted at the corner of Main and Temple streets the night of the Massacre, convicted; so that Widney could put an end to the matter with at least some measure of justice served and a few of the estimated 500 rioters convicted for their roles of the affair? Did both Widney and Thom realize in June 1873 that too much time, about twenty months, had elapsed since the Massacre, that there was no hope of retrying the men and securing a conviction, and that finding a jury without a preconceived opinion on the matter was nearly impossible? Did they realize that there was no hope of getting anything more from the available evidence as presented at the first trial and there simply was no more they could do? This would appear to be the conclusion.

XI. Assessing the Chinese Massacre and the Law

We might also highlight the trial of Sam Yuen as an illustrative example of the treatment of minorities in the Los Angeles criminal court system. Despite the obvious prejudice that existed against the Chinese, Yuen went through a detailed habeus corpus hearing and a trial continued through several terms of the District Court. A jury that saw race first might have easily convicted Yuen, especially reading Judge Widney's precise and clear instructions to them. Yet, the jury, undoubtedly considering the contradictory testimony of key witnesses, many of them law enforcement officers, including the puzzling rever-

sal of Jesus Bilderrain's version of events, acquitted Yuen. This would seem to indicate that there was some measure of justice in the courts for minority defendants.[51]

What did the Chinese Massacre do for ethnic relations in Los Angeles? What did it do to lessen crime? These two questions do not have clear and measurable answers. There is no question that anti-Chinese sentiment did not die out. It flared up within weeks after the Massacre and continued to be an issue in Los Angeles until the 1882 Anti-Chinese Exclusion Acts, even if there was no further violence anywhere near the scale of the Massacre and even if the passionate and racially-charged rhetoric of Denis Kearney and the Workingmen in the latter part of the decade did not stir the emotions of Angelenos like it did in San Francisco. While one may conclude that overt violence against the Chinese was rare after the Massacre, one may also state that anti-Chinese feelings certainly remained, if expressed in different, more passive ways.

It is simply not verifiable whether crime decreased significantly after the Massacre. Even if there was a drop, one may attribute this to many other factors, such as the professionalization of the criminal justice administration system, further segregation of ethnic populations, and others. Given the fragmentary nature of legal records of the period in today's archives, it is questionable if even a rudimentary statistical study can be developed to see what the crime rate was before and after October 24, 1871. Moreover, statements by later analysts, like Remi Nadeau, who wrote that the event "did shame Los Angeles into a belated cleanup" and that Sheriff Burns's efforts left the County safe for future settlers and Robert G. Cleland, who stated that Los Angeles "was sufficiently shaken out of its lethargy" and that "[t]he Chinese massacre and the death of Vasquez marked the end of the era of violence in the south," are unsupported suppositions.[52]

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[51] The author's article, "On a Case-by-Case Basis: Ethnicity and Los Angeles Courts, 1850-1875," *California History*, 83:2 (2005), 26-39, analyzed every known extant criminal court case from the period and found that, in sum, Spanish-surnamed defendants were convicted at rates about 6% higher than their American or European counterparts, suggestive of little, if any, identifiable bias in verdicts for assaults, homicides, and larcenies. By contrast, Chinese defendants were very few, most being women suspected of prostitution at two very specific occasions.

[52] Nadeau, 52. While he correctly identified the Massacre as constituting the

What we do know, however, is that "law did stand for naught," in the matter of seeking justice for the eighteen dead Chinese, most certainly completely innocent of any complicity in the shootout that preceded the Massacre. Seven men, whether absolutely guilty or not, were convicted by citizens in a local court. The decision of the state Supreme Court essentially rested on a technicality of process, an omission in the indictment that Chee Long (Gene) Tong had been murdered. Moreover, it seems obvious that there was nothing in the District Court decision that led the high court to believe the seven convicted rioters were innocent. District Attorney Thom and Judge Widney, whose grievous errors in not seeking new indictments, apparently felt, by the summer of 1873, that it was not practical and feasible to seek new trials. Sadly, the matter ended there.

For years afterward, the Chinese community conducted special services at the city cemetery near today's Elysian Park each October 24 for the dead in the Chinese Massacre tragedy. While these ceremonies were occasionally noted in the press, they are a little-remembered footnote in the historical record and are a telling and poignant coda to one of, if not the, darkest moments in the history of the City of Angels.[53]

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city's last lynching, there remained the hanging of Jesus Romo in 1874 as the county's last, so perhaps Burns's legacy was not quite as strong as suggested. Cleland accepted the story of an indemnity, but added that it was paid "to the families of the murdered foreigners," a level of specificity not corroborated elsewhere. See Robert Glass Cleland, *The Cattle on a Thousand Hills: Southern California, 1850-1880* (1951), 227-28.

[53] In the papers of William H. Workman, a surety for the bail bond of Sam Yuen, is an invitation by the Chinese community to be an official dignitary, as mayor of Los Angeles, at the 1887 commemoration ceremonies, titled "Ah Dieu" in the printed invitation. Workman Family Papers, Loyola Marymount University, Los Angeles.

The Development of Los Angeles City Government: An Institutional History

edited by Hynda L. Rudd et al.

(Los Angeles City Historical Society, 2 vols., 2007)

Reviewed by Volker Janssen[*]

A decade in the making, this massive collection of focused institutional histories and historical overviews seeks to fill a serious gap in the steadily growing literature on Los Angeles: the lack of a contemporary examination of both structure and development of the city's government. Following an introduction by senior editor Tom Sitton and a prologue by Doyce B. Nunis, Jr. on the history of Los Angeles government before its incorporation in 1850, the essays are grouped into five sections. The first three include contributions on

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[*] Volker Janssen, Ph.D., is assistant professor of history at California State University, Fullerton, where he specializes in the social, economic, and institutional history of California. He is currently on assignment as a postdoctoral fellow at the USC-Huntington Institute for California and the West.

organization and core function, infrastructure and land use, and social welfare. The essays in the last two sections leave the departmental focus behind and put the city into spatial, demographic, economic, and local and global political context.

Readers may want to start with Tom Sitton's introduction and Raphael Sonenshein's epilogue, which offer a handy synopsis of the overarching themes in the city's governmental history: the perennial effort at reform and insulation from "special interests," but also the city's systemic conservatism; the weakness of political parties; the lack of grassroots pressures despite the popularity of direct democracy; the importance of departments over that of charismatic politicians; the importance of a business-driven growth policy; and last but not least: the long-time abhorrence of racial diversity. Between Sitton's and Sonenshein's bookend essays lies a plethora of detail: The first section on organization and core function includes James W. Ingram's description of the city's relentless efforts at perfecting its charter. In the process, he provides some fine examples for the persistent progressive quest of "structural" and "developmental" reformers for purifying city governance from undue political influences such as the Southern Pacific Railroad (pp. 8-9). Following a similar trajectory, Marc and Paul Girard tell a story of progress in the city's efforts at efficiency and economy in the public sector by modeling itself on the ideal of a private business. In contrast, Shauna Clark's essay on city finances is a history of the rise and fall of financial self-determination between the "Home Rule" charter of 1890 and Proposition 13 in 1978. Entrusted with the rather broad topic of "Justice in Los Angeles," Gordon Bakken dips into the city's experience with water rights, liability and tort, the power of the city attorney, the role of women in Los Angeles courts. While Todd Gaydowski's essay on the fire department, focuses on the importance of technological and personnel change, the history of the Los Angeles Police Department, as told by Sandra Bass and John T. Donovan, perfectly illustrates the pitfalls of the city's quest for protection from corruption and special interests. The political independence and professionalization of the police force also insulated them from the communities they patrolled, the consequences of which—Watts in 1965, South Central in 1992—we are all familiar with.

The contributions on infrastructure and land use in city

government shift the attention from government organization and public safety to water and power, the harbor and the airport, other public works, city planning, housing, transportation, and community redevelopment. In contrast to other public services, water has of course long been a favorite among Western historians. Instead of getting mired in a historiographical debate, Paul Soifer offers a strict institutional chronology of the Department of Water and Power. Steven P. Erie, Thomas P. Kim, and Charles F. Queenan's history of the Los Angeles harbor and airport cover not just familiar ground, but also bring both infrastructural institutions into a broader context of economic changes in the nation and the Pacific Rim and environmental, labor, and neighborhood politics. Like many other contributors, Patricia Adler-Ingram's history of the department of public works—which over time included everything from water and sewer facilities to garbage disposal, road construction and maintenance—deals with the relationship between a tax thrifty electorate and growing demands for public service. Greg Hise and Todd Gish seek to counter the cynical condemnation of Los Angeles as an "unplanned city," while at the same time acknowledging the many failures of community planning to increase successful redevelopment and public participation and to improve social relations. Similarly, Harold Beckman's essay on housing in Los Angeles highlights the importance of laissez faire real estate development, the resistance to subsidized housing, and social reformers' reliance on public-private partnerships. Closely related to this topic, Mara A. Cohen Marks's essay on Los Angeles's Community Redevelopment Agency (CRA) describes CRA's emergence in the postwar years as an economic growth rather than a public housing agency in part because of local anti-social[ist] hysteria, and in part because of the fiscal constraints of Reagan's new federalism. Like Cohen Mark, Matthew W. Roth in his essay on transportation confirms Max Weber's old dictum that a capitalist market economy requires the order and stability of a bureaucratic state (p. 441).

Most historians will be drawn to the essays by Philip J. Ethington, Leonard Pitt, and Lawrence B. De Graaf first, as they put the "City in Context." With the aid of detailed maps, charts, and chronologies—useful features most of the contributions are lacking—Ethington tells the story of the spatial making of the city. Los Angeles's

exercise of political power through its water monopoly drove much of the annexation. After the incorporation of Lakewood in 1954, a wave of postwar suburban municipal incorporation signaled the limits of city expansion, and not incidentally a racial demographic change from "Anglo-Apartheid" to "Segregated Diversity" and, presumably, white flight. When it comes to matters of race, De Graaf points out in an excellent essay, the history of Los Angeles city government is "as much one of things not done as of positive policies" (p. 729). This mix—segregationist and oppressive policies on the one hand and equal access on the other; political participation and de facto disfranchisement through government neglect now and city hall leadership later—remind us that figuratively speaking, Los Angeles, like the American West more generally, is the place where the North, the South, and the Pacific meet. Looking deeper into local and ethnic enclaves, Leonard Pitt's essay on the search for community empowerment in Los Angeles highlights the tension between the city as a political and territorial giant on the one hand and the struggle for local self-governance and urban democracy on the other, resulting in the city's notoriously weak public culture and lack of civic pride. The history of Bunker Hill and Chavez Ravine certainly lend support to Carey McWilliams's charge that Los Angeles "has shown the incompetence of an idiot giant in dealing with its affairs"—an estimate many of the contributors seek to counter (p. 706).

Jennifer L. Koslow, Frances Loman Feldman, Michael Eberts, Gloria Ricci Lothrop, and Judith R. Raftery add institutional histories of public health, human services, recreation and parks, the public library, and, of course, city schools. They share an overall narrative of progress, acknowledge the steady importance of race in the unequal access to service, suggest a frequent reliance on private charities and philanthropy, and describe today's challenges in social services in the context of increasing urban diversity and tax restraints. Like many of the other contributions, these essays are best read in combination with De Graaf's, Ethington's, and Pitt's contextual essays, as well as with Alan Saltzstein's, Robert A. Bauman's, and Suzanne Borghei's essays on "external influences" beyond city hall: joint powers authorities and intergovernmental relations, the connections between economic changes and the demand for public services, and globalization. In

contrast to the micro-perspective of the first three groups of essays, these articles place Los Angeles within state and county, at the center of an industrial globalizing economy, and on the Pacific Rim. To this reviewer, however, these dimensions are less externalities than essential dimensions that provide the universe in which Los Angeles government operates.

Written by historians, political scientists and public administrators, the contributions vary widely in style and quality, can overlap considerably, and—with some significant exceptions—tend to prize detail and narrative over analysis and interpretation. Much of this lies in the nature of a documentary institutional history and in no way limits the value of this compendium for the future research and study of Los Angeles. Adding to the value of this collection as a reference is a long appendix by Hynda L. Rudd, James Ingram, Robert Freeman and Irene Tresun that includes a list of Los Angeles mayors and council members, a chronology of Los Angeles's city halls, city government organization charts of the past 150 years, an index, and a particularly useful introduction to the Los Angeles city archives and documents. With two elegantly bound, but hefty volumes of almost 1000 pages total, *The Development of Los Angeles City Government* will be most useful on library reference shelves for serious students of California history and cities of the American West.

The Enigma Woman: The Death Sentence of Nellie May Madison

By Kathleen A. Cairns

(University of Nebraska Press, May 2007, 295 pages)

Reviewed by Richard McFarlane[*]

A few minutes before midnight on March 24, 1934, the residents of the Stirling Arms, an apartment house in Burbank, near Los Angeles, heard five gunshots. Most residents thought the shots came from the nearby Warner Brothers movie lot where a gangster picture was being filmed. However, the shots came from Apartment 123 where one of its residents, Eric Madison, was dead. His wife, Nellie May Madison, was missing. A few days later Nellie would be arrested at a remote mountain cabin and charged with the murder. Her trial would

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[*] Richard A. McFarlane is an attorney in private practice in Orange, California. He is also a doctoral student in history at the University of California, Riverside.

excite public attention, especially in the *Examiner* and *Herald and Express*, two papers owned by William Randolph Hearst. *The Enigma Woman: The Death Sentence of Nellie May Madison* by Kathleen A. Cairns is the true crime account of Eric Madison's murder, and Nellie May Madison's trial, conviction and death sentence for the crime. Nellie was the first woman sentenced to death in California. After her conviction, Nellie would avoid the gallows by belatedly confessing to killing Eric and claiming to be the victim of spousal abuse. Governor Frank Merriam would commute her sentence to life imprisonment. She would be paroled in 1943, and die a free woman in 1953 of a stroke and with a new name.

The Enigma Woman, which takes its title from one of the nicknames pinned on Nellie by the press because of her stoic demeanor during her trial, is a good book, but not a great book. It is little more than a biography of a young woman who came to the big city of Los Angeles from rural Montana and got into trouble. Whenever Cairns gets close to addressing the wider issues that would make *The Enigma Woman* a great book, she turns away. For example, Cairns writes that of the two hundred women incarcerated in California in 1934 "one-third of the women had been convicted of murder—half of them of first-degree murder—although none had received the death penalty" (p. 163). Why Nellie was sentenced to death, and none of the others were, the author does not fully explain. In chapter eleven, Cairns suggests that Nellie's belated confession and accusations of spousal abuse were keys to her commutation and eventual parole. Did the thirty or so other women convicted of first-degree murder in California in the 1930s confess and accuse their victims of spousal abuse in order to avoid the noose? Cairns does not explore the issue of spousal abuse—which existed, of course, even if it was not recognized by the psychological community or known by that name until the late 1970s. Cairns mentions in passing that three women were sentenced to death in California before 1940, all for killing their partners. Cairns does not provide any details of the other two, nor does she provide any conclusions or analysis to assess the questions *The Enigma Woman* raises.

Cairns poses three "intriguing" questions in the introduction to *The Enigma Woman*, "What drove Nellie to make life choices so different from those of her female contemporaries, ones that brought her, and her family such pain and tragedy? What was it about her that

led the legal establishment of Los Angeles County to choose her out of a line-up of female murderers—some much more cunning and ruthless—to receive the states's 'ultimate penalty'? What did their treatment of her say about society's views of women who failed to conform to deeply entrenched ideas about women's roles?" Cairns answers the first question by painting a picture of a young woman bored with life on a Montana ranch, who yearned for glamour and adventure and who would do anything to become someone else. Sadly, the last two questions are not so adequately answered. Cairns makes a good case for Nellie's conviction being partly the result of the incompetence of her trial counsel, but Cairns offers no evidence or analysis of why Nellie was singled out for the "ultimate penalty," a decision made by the prosecution. Cairns implies that the answer must be Nellie's reputation as a "much married woman," but offers insufficient evidence for this implication. Cairns needed to present at least statistical evidence, and preferably narrative evidence, of the other women who committed murder and were or were not sentenced to death, and were or were not executed, in order to answer the second question she proposes. Cairns offers some brief discussion of the crimes of Ethel Juanita Spinelli and Louise Pette, the two women sentenced to death and actually executed during Nellie's lifetime, but the discussions are too brief to draw any conclusions other than that they were different. Finally, how did Nellie's contemporaries, especially her jurors, view "women who failed to conform to deeply entrenched ideas about women's roles?" Cairns denies that Nellie was a femme fatale as found in the noir fiction of Raymond Chandler and Dashiell Hammett, but the press clearly thought she was, describing her as "The Enigma Woman," "The Iron Widow," and "The Sphinx Woman." To what extent did noir fiction influence the public? What influence did the florid prose of Hearst's newspapers have on the public? And what effect did Harry Chandler, owner of the *Los Angeles Times*, have on the newspaper coverage, the public opinion it created, and the outcome of the trial? Cairns never addresses these questions. Whenever Cairns gets close to discussing these really interesting questions, she demurs, "We will never know."

The Enigma Woman concludes with an excellent bibliographic essay that is a fine piece of historiography in its own right. However, while reviewing the literature of women who commit crimes and battered women syndrome, this bibliographic essay highlights the

weaknesses in *The Enigma Woman*. For example, Cairns mentions Ann Jones's *Women Who Kill* and Vickie Jensen's *Why Women Kill: Homicide and Gender Equality*, and these two authors' conclusion that "women murder for different reasons than men ... women tend to nurse grievances or murder intimates under stress and often physical abuse" (p. 270). "Nellie Madison's behavior," writes Cairns, "does and does not conform to this model" (*Ibid.*). How? Why? These questions are not addressed. Whatever the strengths and weaknesses of *The Enigma Woman* as a whole, the bibliographic essay is worth studying.

The book is well researched from newspaper accounts, as all the local newspapers covered the trial. Agness Underwood, the grand dame of Los Angeles journalists in the 1930s, took a personal interest in Nellie and her case. She alone was permitted to interview Nellie after her arrest and after her conviction. Underwood's reports in the *Evening Post-Record* are the only source for certain aspects of the crime, and offer a counterpoint to the coverage of the *Los Angeles Times* and the Hearst papers. Later, when working for the Hearst-owned *Evening Herald and Express*, Underwood would play a key role in Nellie's eventual commutation and parole. Unfortunately, the original Los Angeles Superior Court files of Nellie May's trial are lost, and the files in the appellate court and the governor's commutation file are incomplete.

The Enigma Woman is a good book for anyone interested in Los Angeles in the 1930s. It is a useful place to start for anyone interested in studying women criminals, women and the death penalty, or battered women's syndrome, before moving on to more complex and sophisticated literature.

Cairns denies that *The Enigma Woman* is a noir, but it is. Nellie May Madison's story could have been written by Raymond Chandler or Dashiell Hammett—it lacks only their characteristic use of language. It has the advantage of being true.