

A Glimpse Into the Private Life of the Late Chief Justice Rose Bird

BY HON. ROBERT C. VANDERET

THE ROSE BIRD PAPERS at the University of California's Bancroft Library in Berkeley are extensive.¹ During her lifetime, the late chief justice appears to have kept every scrap of paper that passed through her hands — every Christmas card, note, letter, baby or wedding announcement, even copies of every letter and note she herself wrote to others. These papers provide a rare insight into the private life of a public figure who took great pains to maintain her privacy and reveal the challenges she faced first as a lawyer and then as the first female chief justice, in an era of pronounced gender inequality.

As anyone who knew her well could attest, the greatest influence on Rose Bird's life was her mother, Anne, with whom she lived her entire life — except for a brief two-year period when she began her undergraduate studies at Berkeley — until Anne's death in 1991. Anne Walsh Bird did not have an easy life. Married to a man plagued by alcoholism and tuberculosis, who abandoned the family (a fact Rose vehemently denied whenever it was noted), she struggled to raise her daughter and two sons, first in southern Arizona, where Rose was born, and then later on Long Island in New York, where the family moved when Rose was only a small child (with the endearing nickname "Fuzzyhead"). In the autobiography that Rose Bird was working on at the time of her death,² she poignantly recalled, "Some of my earliest memories are of her [mother] sitting at the kitchen table, her head encircled by her arms to ease her sobs so full of pain. It was as if she were crying for all the dreams that she left behind."

But the most revealing and poignant portions of the files relate to Rose Bird's college years. They are almost too painful to read. Contrary to her later image as a strong-willed, self-confident, forceful personality, the woman who emerges from her letters to her mother is plagued by self-doubt and despair. "I'm sorry if I upset you by using the term 'Old Maid,'" she wrote to her mother in

1. I would like to thank the staff of the Bancroft, and most especially Susan McElrath, for working with me for the better part of a year to secure access to these materials. Although I was arbitrarily limited to only a portion of the materials, ostensibly due to funding and staffing limitations resulting from the pandemic, I have reasonable confidence that I reviewed the most important of those documents. Those same restrictions, along with my court schedule, have prevented me from returning to the Bancroft to document the location of materials I have quoted in this article. As the pandemic eases, the public deserves full access to the Rose Bird archives, and the Bancroft has an obligation to devote the resources necessary to make that possible.

2. Bird's tentative title was *A Rose Blooms: A Life of Beginnings* — *The Autobiography of Rose Elizabeth Bird*.



Rose Bird, 1977. Photo: UCLA Digital Library Collections.

a 1959 letter from Berkeley, "but that is what I feel like. I thought it would be different when I came here, but as the French say, 'the more a thing changes, the more it stays the same.' It is difficult for me to

discover just what is wrong with me, but there must be something." She later confided to her mother in a letter from Sacramento about her "social life, which is nil. I begin to believe that I shall never marry." (Although Rose never did marry, she always longed to raise children. Her papers include a file on research she did about adoption. She sent letters of inquiry about adopting children from Asia and from Central America and corresponded with a group called the Committee for Single Adoptive Parents.)

Rose's expectations of college life clearly differed from the reality she encountered. When she went down to the television lounge at the International House where she lived her first year, hoping to catch a broadcast of Nikita Khrushchev's speech to the U.N., and twice encountered students watching "Gunsmoke" instead, she burst into tears. She also was taken aback by the open sexuality on campus, shocked to see couples necking in the back seats of cars. "Saturday, I went to my first big football game," she wrote to her mother. "Above us were a group of fraternity boys. They passed comments about the practically nude or scantily clad girls." And she expressed wariness when two different male students invited her to their apartments for dinner: "Maybe I wear my sweaters too tight."

Her mother was a stern critic. In one letter to Rose, she lectured, "To take care of yourself, you must have an occupation . . . You must make the most of your opportunities. You aren't doing so. . . . What do I expect from you? Well, I'd like to have you take hold! . . . When you go to work, you'll have plenty of competition. How can you meet it if you have never extended yourself, made any real effort?" Anne's long-distance management even extended to the personal: "Do you pick up your things, leave the bathroom straightened up and remember to make your bed every morning? Shower? Are you having trouble doing your hair?"

Not satisfied that Rose could manage on her own to her mother's satisfaction, Anne Bird moved west to live with her after her daughter's first year at Berkeley and would remain living with her until Anne's death.

Following her graduation from law school, Rose went to work at the Santa Clara County Public Defender's Office, under the leadership of Sheldon Portman, who became one of Bird's strongest supporters. She soon made

her mark as one of the most effective and forceful litigators in the office, as I can personally attest, having spent a summer as a law clerk for her. Working in the county at that time was not easy for a female attorney, because the bench in Santa Clara County was then known for its conservative judges. She endured many misogynistic and condescending comments from the bench when she would appear, accompanied by student law clerks. “Here comes Rosie, with her little chickens trailing behind her,” was a favorite from judges such as Bruce Allen, a former Republican state legislator. When Bird was named to the Supreme Court, Allen opposed her nomination and wrote to the confirmation panel that she was disqualified by her lack of prior judicial experience. He also falsely claimed in his letter “that while she was employed as a Santa Clara County Public Defender, there were proceedings within that agency to fire her.”

In 1974, Jerry Brown ran his first campaign for governor. It was a tough, bruising Democratic primary, with Brown facing Assembly Speaker Bob Moretti and former San Francisco Mayor Joseph Alioto. Rose Bird volunteered for the campaign and ended up working as Brown’s driver for his appearances in the Bay Area. Always quick to spot talent, Brown came to recognize great potential in his overqualified driver. When he won the election, he named Bird as his agriculture secretary.

My wife and I had the pleasure of having Rose as a guest in our Santa Monica apartment shortly after she was nominated for the post. Rose asked me to come to Sacramento to serve as her chief aide in the new position. As flattered as I was at the offer, I told her I would have to decline. I had just begun my career as a lawyer at the Los Angeles law firm of O’Melveny & Myers, and my wife was finishing her graduate degree in special education and planning to begin her teaching career. Rose even offered to help find her a position in the California Department of Education, but Sharon’s passion was in the classroom, not the state bureaucracy.

The Bird papers I was able to review did not, unfortunately, include any relating to her stormy tenure as agriculture secretary, where she went head-to-head with the United Farmworkers Union, the powerful growers, and Bishop Roger Mahony, who would become a lifelong foe. But her combative spirit did impress at least one important person: Jerry Brown. In February 1977, Brown nominated Bird to be California’s chief justice. It was a bold move, and a highly controversial one. Associate Justice Mathew Tobriner (who would become Bird’s closest ally on the court) had urged Brown (who had served as his law clerk) to first nominate her as an associate justice and then later elevate her to the chief’s position. But



Interior, Bancroft Library, U.C. Berkeley.
Photo: Claire Machado.

Brown would have none of it. He enjoyed alienating the establishment bench and bar — and also believed Bird’s nomination would strike a blow for progressivism and for the advancement of women in the legal profession and the judiciary.

The reaction from the bar and from the public was predictable. Bishop Mahony, in a letter to Justice Tobriner, stressed his strong opposition to the nomination based on her

questionable emotional stability and her vindictive approach to dealing with all persons under her authority . . . She has a personal temperament which enables her to lash out at people who do not agree with her. Her normal approach is to be vindictive, then to transfer her feelings to a long phase of non-communication. I am gravely concerned that the future chief justice of our state Supreme Court be a person of balanced emotional stability, of judicial temperament, and of responsible collaboration with the other Justices. In my experience and opinion, Ms. Bird fits none of those requirements.³

There was clearly an organized opposition letter campaign underway, as evidenced by the number of letters that repeated the phrase “only 12 years as a lawyer.” But those were the mild opposition letters. Bird’s papers reflect the volume of vituperative hate mail she received . . . and kept: one addressed to “Nigger Whore Rose Bird”; others containing comments such as, “Death to all commie queers,” “Death to this Pig” (with crosshairs drawn), “Up your Ass!” and “Drop Dead, Bitch!” (Even after her confirmation, the abuse continued. A letter to the justice in June 1978 warned that if the court overturned the death penalty, “there will be a BOMB waiting for you, and members of your family are in danger also.”)

There were, of course, voluminous messages of praise and support for the nomination, and Bird was confirmed in the end on a 2–1 vote. (The drama is captured in my earlier piece for the *Review* on the nomination and confirmation process.⁴) The governor attended Bird’s swearing-in as chief justice in a public ceremony at the original court headquarters in Old Town Sacramento. The newspapers ran a picture of Brown kissing Rose at the ceremony, and a friend sent the photo to Bird with a

3. Letter, Bishop Roger Mahony to Justice Mathew Tobriner, Feb. 12, 1977.

4. Robert Vanderet, “Becoming Chief Justice: A Personal Memoir of the Confirmation and Transition Processes in the Nomination of Rose Elizabeth Bird” (Spring/Summer 2021) *CSCHS Review* 20–23.

handwritten inscription: “Before you meet a handsome prince, you have to kiss a lot of toads.”

There is much material in the papers relating to the infamous *Tanner* hearings into allegations that the court had delayed release of a controversial opinion until after a judicial election date, though little that has not already been made public through Seth Hufstедler’s thorough investigation of the affair. Still, it was moving to have in my hands the original documents, including Bird’s blistering memo of December 20, 1978, to Justice William P. Clark Jr.:

You state that it must be clear to all on the court that the *Tanner* case was signed up and ready for filing well in advance of November. I am appalled at this statement. It is untrue. Moreover, as Justice Tobriner told all of us in conference today, it is directly contrary to your own statements to him and to Hal Cohen on November 28th, in which you assured Justice Tobriner that you in fact believed that the court had followed the normal procedure in that case.

Her assertions to Clark are confirmed by her staff member’s memo concerning a discussion with Bird two months earlier, in which Justice Clark suggested: “Maybe the *Tanner* case should not be gotten out until after November, lest there be any suggestion that Younger’s statement influenced the court,” to which Bird replied, “No, it goes out when it’s ready to be filed — no earlier and no later . . . I do not dodge political brickbats.” Clark: “I noticed.”⁵ Bird: “We’ll file *Tanner* when it’s ready to be filed, whether that’s before the election or after.”

The stormy relations between Chief Justice Bird and Justice Stanley Mosk are well-known. When she was appointed to the position, Mosk (who had hoped to be named to the spot himself) said to Bird, “I accept the fact that you are physically here. But I do not respect the Governor for putting you here.” In 1981, while Bird was serving as chief justice, she began hearing of rumors circulating about her health — that she “was dying,” that “treatments [were] being administered and that she’s not sitting all the time”; “that her resignation letter is on the governor’s desk”; “that [she] wanted to resign, but the Judicial Council won’t let her.” All these rumors were passed on to her and attributed by the senders to Justice Mosk. (They are contained in a file Bird kept titled “Rumor Mill.”)

The irony is that as a college student, Bird was a great admirer of Mosk. Enclosing an article from *The Daily Californian* campus newspaper, she wrote to her mother, “As you can see, Attorney General Mosk is speaking here today. It will be interesting to finally see him in the flesh.

5. See the extensive discussion of the *Tanner* affair in Kathleen A. Cairn’s *The Case of Rose Bird: Gender, Politics and the California Courts*, Lincoln, NE: Bison Books, 2016. See also, Paul D. Fogel, “Rose Bird’s ‘Case’: Anomalous Confluence of Unique Circumstances or Lasting Damage to Judicial Independence?” (Spring/Summer 2018) *CSCHS Newsletter* 27–29.

As far as I can see, he is the most promising Democrat here.” She added, “However, I am not sure whether he is Jewish — which unfortunately, would limit his chances for higher office.”

Rose had an endearing penchant for penning doggerel. When rumors of a relationship with San Francisco columnist Herb Caen began circulating, claiming that the chief justice shared inside information on cases with the columnist, Bird playfully wrote the following poetic note to him:

Dear Herb, your article, suitably clipped from the [Sacramento] Bee,
Has recently been sent to me.
I, too, mourn the fate of our brief love affair,
Made as it was, of whole cloth and thin air.
How can one take a vow and say an “I does”
To a was-to-be that never was?
But don’t worry about our mealtime chatter,
A judge can’t discuss a pending matter.

After a dinner at which she omitted introducing a judge among the many she identified as attending, she wrote to Judge Alban Niles:

There was no intent to exclude you, Judge Niles
It’s clearly a case of some incomplete files
Let the record reflect you were there at the dinner
That’s the last time I’ll count on a list from Jack
Tenner

Rose Bird was truly an outstanding writer, not only of witty verse, but of well-crafted judicial opinions.⁶ In her concurring opinion in *Committee to Defend Reproductive Rights v. Myers*,⁷ Bird joined in the majority’s holding that the state must provide funding to indigent women seeking abortions, but urged that any limitation on a woman’s access to such fundamental constitutional rights required review under a “strict scrutiny” test:

It is important to note that this is *not* a case in which this court must decide whether abortion is the best alternative to pregnancy or whether abortion is morally justifiable. Under the California Constitution, the people of the state have decided that those value judgments must be reserved to the individual citizens whose lives are affected by such decisions. Neither legislators nor judges may constitutionally impose their system of values on a woman who must decide how to deal with procreation.

A woman who faces an unplanned pregnancy confronts a critical and uniquely important decision, the consequences of which will follow her

6. In addition to her concurring opinion in *Myers*, discussed below, see also Bird’s concurring opinion in *Gugliemi v. Spelling-Goldberg Productions* (1979) 25 Cal.3d 862, 867–71, quoted in my earlier *Review* piece on the Bird confirmation, *supra*.

7. (1981) 29 Cal.3d 252, 286–87, 296–97 (citations omitted).

throughout her life. Because her value system, her life, and her relationships with others are all involved in any determination she makes, a woman's right to decide for herself without the interference of the state is central in a free society

The Budget Act limitations are all the more troublesome because they result in increased health hazards to the indigent. By disallowing the funding for most abortions, the state leaves the pregnant woman to carry an unwanted pregnancy to term or encourages her to abort without medical assistance. Thus, the funding restrictions inject a coercive financial incentive that forces the individual to accept the state's choice of either contraception or childbirth. It forces the indigent woman to exercise her choice in the fashion advocated by the state.

The Budget Act restrictions impermissibly limit the constitutionally protected choice of our female citizens. The state's attempt to justify these limitations as noncoercive is illusory. "When we take our seats on the bench we are not struck with blindness, and forbidden to know as judges what we see as men [and women] . . ." As judges and as citizens, we cannot fail to see that if the state is allowed to restrict the exercise of choice for the poor alone in this intimate area, indigent women

in our society are forced to become second class citizens.

Rose Elizabeth Bird lived a paradoxical life. A deeply private person, she was thrust into the glare of the public spotlight. Her public persona was strong and self-assured, but internally she was plagued by self-doubt and feelings of inadequacy. She seemed to personify the ideal of an independent single woman professional, yet she longed for a conventional family life. But one thing is certain: she will, and should be remembered and celebrated for the champion of justice and equality, and of fidelity to precious constitutional liberties, that she embodied.⁸ ★

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8. One final note: During Rose Bird's tenure at the Agriculture & Services Agency and at the California Supreme Court, her closest aide, confidante, and friend was Steve Buehl, another former student of hers at Stanford Law School. Following her death, Steve has worked tirelessly to protect her legacy. I admire and thank him for those efforts. My commitment here, however, has been to the open truth and all its ramifications, whether positive or negative. To the extent that anything I have written causes him offense or sadness, I sincerely apologize.