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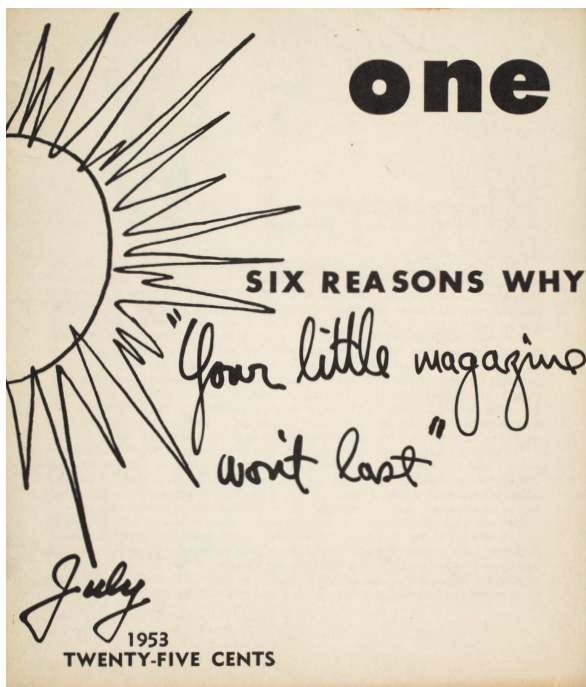
**"You
Can't
print
it!"**

—ONE'S

Legal

Counsel





The Supreme Court Case That Dared Not Speak Its Name

BY BOB WOLFE

NOT SURPRISINGLY, given Los Angeles' problematic legacy of historic preservation, the site of an "unprecedented legal victory that allowed the gay press to blossom"¹ is now a bleak parking lot in the heart of the city. No plaque marks the spot. But its significance merits memorialization for a U.S. Supreme Court decision that is "arguably *the* seminal gay rights case in America."² That decision "put gay people on the path to freedom."³

Blanchard Hall, at 232 S. Hill Street, was built in 1905 to house studios for musicians, artists and writers.⁴ A half century later, it had become quite rundown, housing garment sweatshops and other low-paying tenants. In late 1953, Dale Jennings, editor-in-chief of the first openly gay magazine in the U.S., moved the struggling publication's offices into cramped space on the third floor.⁵

1. Joyce Murdoch and Deb Price, *Courting Justice: Gay Men and Lesbians v. the Supreme Court*, New York: Basic Books, 2001, 27.

2. Jonathan Rauch, "The Unknown Supreme Court Decision That Changed Everything for Gays," *Washington Post*, Feb. 5, 2014.

3. David G. Savage, "Supreme Court Faced Gay Rights Decision in 1958 Over 'Obscene' Magazine," *L.A. Times*, Jan. 11, 2015, A1.

4. "Blanchard Hall Is To Be Enlarged," *L.A. Herald*, June 12, 1904, pt. II, 1.

5. C. Todd White, *Pre-Gay L.A.: A Social History of the Movement for Homosexual Rights*, Urbana: Univ. of Illinois Press, 2009, 52.

The magazine, simply named *ONE*, made its mark on history through the eponymous U.S. Supreme Court opinion, *ONE, Inc. v. Olesin* (1958) 355 U.S. 371. But the mark seems to have been written in invisible ink.

Here is the decision in full:

PER CURIAM [¶] The petition for writ of certiorari is granted and the judgment of the United States Court of Appeals for the Ninth Circuit is reversed. [Citation.]

There was no oral argument, no discussion of facts or law, no author, no concurrences, no dissents.⁶

Fittingly, the story of how this gay rights victory was achieved is as bizarre as its obscurity. "It is in many ways astounding that the Court, in 1958, was willing to recognize that a magazine dedicated to the needs and interests of lesbians and gay men had sufficient social value — despite containing some sexual content — to reverse the lower court's finding of obscenity."⁷

Strange that a landmark case about getting out of the closet has been so firmly stuck in one.

January–March 1952: The "Homosexual Trap"

The antecedents of this Supreme Court decision occurred at two public bathrooms at Echo Park and MacArthur Park, several miles from downtown L.A. During much of the twentieth century, gay men had few outlets other than such places to meet like-oriented people.⁸

Anti-homosexual policing tactics relied on ongoing surveillance of public facilities by plainclothes vice squad officers, reasoning if lawmen "watch enough people long enough some malum prohibitum acts will eventually be discovered."⁹ "After World War II, homosexual arrests — including those for sodomy, dancing, kissing or holding hands — occurred at the rate of one every ten minutes, each hour, each day, for fifteen years. In sum, one million citizens found themselves persecuted by the American state for sexual deviation."¹⁰

In January 1952, plainclothes police detective Ted Porter was assigned to the Echo Park bathroom as a decoy to trap homosexuals. He reportedly encountered five Latino "park bandits," who attempted to steal his wallet, badge

6. *ONE, Inc.*, *supra* 355 U.S. 371. By contrast, California does not permit such summary reversals. "Decisions of the Supreme Court and courts of appeal that determine causes shall be in writing with reasons stated." (Cal. Const., Art. VI, § 14.)

7. Carlos A. Ball, "Obscenity, Morality, and the First Amendment: The First LGBT Rights Cases Before the Supreme Court" (2015) 28 *Columbia J. of Gender & Law* 1, 49.

8. Eric Cervini, *The Deviant's War: The Homosexual vs. the United States of America*, New York: Farrar, Straus & Giroux, 2020, 7.

9. *Bielicki v. Superior Court* (1962) 57 Cal.2d 602, 609 [overturning conviction for oral sex in a public toilet because of hidden police viewing of bathroom stalls]. See Anna Lvovsky, *Vice Patrol: Cops, Courts & the Struggle Over Urban Gay Life Before Stonewall*, Chicago: Univ. of Chicago Press, 2021, 2.

10. Cervini, *The Deviant's War*, 7–8.

Chief Suspends Two in Brutality Quiz

Action on Vagrancy Squad Pair Ordered Pending Board Hearing

Two Los Angeles police officers were temporarily suspended Saturday by Police Chief William H. Porter after the police officers' actions during a recent patrol were reported to be brutal.

The officers, who were assigned to the Vagrancy Squad, were suspended for 30 days. Porter said the officers were "grossly negligent" in their actions.

The Vagrancy Squad is a unit of the Los Angeles Police Department that is responsible for dealing with the city's homeless population. The squad is often criticized for its harsh tactics.

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James L. Martin (top photo) and Ted Porter in L.A. Times article, April 9, 1952.

and gun. The gun was said to have accidentally discharged during the ensuing melee, hitting one of the youths in the chest.¹¹

A wildly different story painted Porter as the aggressor, boldly making homosexual moves toward a 17-year-old boy at a urinal. The others, responding to the boy's calls for help, did not realize they had fallen into an undercover police trap until they were shot at, beaten and handcuffed by Porter and another vice officer who arrived at the scene.¹²

Two months later, Porter was working alongside vice officer James L. Martin. Martin claimed that Ramón Castellanos, a 32-year-old candlemaker, had sexually solicited him at a MacArthur Park restroom. On March 21, Martin and Porter went to Castellanos' residence to arrest him. The encounter did not go well, and Castellanos was badly injured. Castellanos said the officers viciously beat him, warning, "if he did not get out of town after his case was disposed of, he would get more of the same." The officers claimed he was hurt while stumbling into a flower pot.¹³

A week later, on March 28, 1952, Martin returned to surveil the MacArthur Park restroom.¹⁴ There he encountered Dale Jennings, 36, a World War II veteran, aspiring playwright, and screenwriter. Jennings, a progressive and a libertarian, wanted "to work toward freedom of choice in sexual matters," viewing sexuality as a "spectrum of possibilities."¹⁵

The principals differed greatly about what happened. Jennings said he left the park restroom "having done

nothing that the city architect didn't have in mind when he designed the place." Martin, whom Jennings described as a "big, rough looking character who appeared out of nowhere," claimed that Jennings solicited him to commit a sexual act. Jennings said he had no interest in Martin, but that Martin followed him home, pushed his way in, unbuttoned his shirt, "grabbed my hand and tried to force it down the front of his trousers." Martin, later joined by Porter, arrested and handcuffed Jennings and booked him at the police jail.¹⁶

June 1952: Dale Jennings' Trial and Vindication

Gay men, as the California Supreme Court came to recognize, constituted the "overwhelming majority of arrests" for lewd-dissolute conduct.¹⁷ Jennings faced devastating consequences from a likely conviction on such a morals charge: a stiff jail sentence, fines, mandatory registration as a sex offender, severe social ostracism and familial estrangement.

Police and prosecutors routinely used such a parade of horrors to convince "respectable" arrestees like Jennings to plea bargain the charges down to disorderly conduct, disturbing the peace or trespassing.¹⁸ Jennings, however, had an unusual support network, a small group of men, calling themselves the Mattachine Society, who met in private homes to draw strength from one another.¹⁹

Jennings' fellow Mattachine members encouraged him to fight the charges by pleading not guilty in court. They organized a series of fundraisers, which netted about \$1,500 to cover his anticipated legal expenses. Most importantly, they arranged for politically radical Long Beach attorney George Shibley to assume his defense, at a fee of \$750 plus costs.²⁰

Shibley had a well-deserved reputation for taking on tough cases, especially the high-profile 1942 "Sleepy Lagoon" murder, the largest mass criminal trial in



Dale Jennings, undated photo.

11. "Nab 5 Youths in Beating of Policeman," *L.A. Daily News*, Jan. 28, 1952, 27; "Off-Duty Policeman Cuts 5 Tough Guys Down to Size," *L.A. Mirror*, Jan. 28, 1952, 6; "Youth Shot, Pals Held in Attack on Officer," *L.A. Times*, Jan. 28, 1952, 12; "Five Quizzed in Echo Park Gang Holdups," *L.A. Times*, Jan. 29, 1952, 2.

12. This version, based in part on statements by some of the youths, was circulated in the community by a group calling itself the Edendale Civil Rights Congress. Daniel Hurewitz, *Bohemian Los Angeles & The Making of Modern Politics*, Berkeley: Univ. of Calif. Press, 2007, 231, 259–60.

13. "Beating Case Trial Starts for 2 Cops," *L.A. Daily News*, Jun. 23, 1952, 3. Castellanos pleaded guilty to a morals charge and was sentenced to a six-month term at a county road camp. "Two Officers To Face Beating Trial," *L.A. Times*, Apr. 24, 1952, 2.

14. David Hughes, "Blown Cover: The Arrest of Dale Jennings" (Jan. 4, 2018), available at The Homosexual Information Center, Inc. <https://www.tangentgroup.org/blown-cover/> [as of Sept. 7, 2022].

15. C. Todd White, "Dale Jennings, ONE's Outspoken Advocate," in Vern L. Bullough, *Before Stonewall: Activists for Gay and Lesbian Rights in Historical Context*, New York: The Haworth Press, 2002, 83–84.

16. Dale Jennings, "To Be Accused Is To Be Guilty" (Jan. 1953) 1 *ONE* 11–12, <http://www.houstonlgbthistory.org/Houston80s/Assorted%20Pubs/ONE/ONE-5301-compressed.pdf> [as of Sept. 7, 2022].

17. *Pryor v. Municipal Court* (1979) 25 Cal.3d 238, 252. In 1949 alone, L.A. police arrested 1,319 men for lewd vagrancy and 351 men for sexual perversion. Gregory Briker, "The Right to Be Heard: ONE, Obscenity Law, and the Battle Over Homosexual Speech" (2020) 31 *Yale J. of Law & the Humanities* 49, 57.

18. Lvovsky, *Vice Patrol*, 99, 115–17, 123.

19. White, *Pre-Gay L.A.*, 18. The name "Mattachine" derived from that given to medieval troupes of itinerant performers who satirized the aristocracy while concealing their identities behind masks. Douglas M. Charles, *Hoover's War on Gays: Exposing the FBI's "Sex Deviates" Program*, Lawrence: Univ. Press of Kansas, 156.

20. Hughes, "Blown Cover," URL *supra* pt. II [Penetration].

U.S. history, at which 22 Latino defendants were jointly tried following the death of a teenager near a popular southeast L.A. swimming hole.²¹

Jennings and Shibley decided to admit that Jennings was gay — quite an admission to make in open court in 1952 — but deny that he acted in a lewd or dissolute manner.

The door to this novel strategy — to focus on conduct rather than status — was first opened by a landmark California Supreme Court decision the previous year. In *Stoumen v. Reilly*, the state revoked the liquor license for San Francisco's Black Cat bar based on police testimony that "many of the patrons of the Black Cat were homosexuals and that it was reputed to be a 'hangout' for such persons." Reversing the judgment, the Supreme Court unanimously held that homosexuals had as much right to patronize public establishments as other person so long as they "are not committing illegal or immoral acts . . ."²²

Significantly, Martin and Porter's credibility was called into question when the two officers were arrested and suspended from police service in April 1952 for assaulting Castellanos.²³

Jennings' trial began in mid-June 1952 and lasted 10 days. In his opening statement, attorney Shibley aggressively sought to turn the tables, identifying Martin as "the only true pervert in [the] courtroom." Shibley reminded the jurors that being gay did not make one guilty, and that the same presumption of innocence applied to Jennings as to Martin and Porter.²⁴ "The Castellanos case didn't prove Jennings's innocence, but the charges against Martin and Porter, and the specter of their suspension from the police force, worked in Shibley's favor. In entrapment trials, police testimony was considered unimpeachable; Shibley shook that assumption on day one."²⁵

21. Shibley "locked horns" with Superior Court Judge Charles Fricke, who repeatedly and unfairly rebuked him in front of the jury and refused to allow attorney-client consultations during trial, among other abuses of process. The convictions were reversed in a landmark appeal. *People v. Zammora* (1944) 66 Cal.App.2d 166. Shibley later represented Sirhan Sirhan, found guilty of first-degree murder in the assassination of Sen. Robert F. Kennedy. *People v. Sirhan* (1972) 7 Cal.3d 710.

22. *Stoumen v. Reilly* (1951) 37 Cal.2d 713, 715–16. "The separation of status from conduct . . . permitted [courts] to start recognizing the rights of sexual minorities as 'human beings,' which was the term used by the *Stoumen* court to refer to the Black Cat's patrons." Carlos A. Ball, *The First Amendment and LGBT Equality: A Contentious History*, Cambridge: Harvard Univ. Press, 2017, 63–64.

23. "Formal Charges Placed Against Two Policemen," *L.A. Times*, Apr. 16, 1952, A3.

24. Jennings, "To Be Accused Is To Be Guilty," URL to *ONE Magazine* *supra* 13.

25. Peyton Thomas, "Ordinary Person, Wild Radical" (2018) 80 *The Atavist Magazine* Act IV, available at <https://magazine.atavist.com/ordinary-person-wild-radical-mattachine-society-lgbt/> [as of Sept. 7, 2022].

Shibley's approach, although risky, paid off. After 40 hours of deliberation (most of it spent trying to convince the recalcitrant foreman), 11 of the 12 jurors voted to acquit. Several weeks later, the trial judge granted the prosecution's motion to dismiss.²⁶

January 1953: *ONE* is Born

Despite a concerted publicity effort by the Mattachine Society, no newspaper, radio or television covered Jennings' trial or his subsequent victory. Jennings and his circle of supporters concluded that they had to address this silence through public speech of their own.²⁷

Their chosen medium? A monthly magazine, frankly and provocatively addressing issues of concern to the homosexual community, including politics, short fiction, poetry, science, law and legislation. "In order to protest the issues that gay men and women faced daily — from entrapment to employment discrimination — homosexual rights groups first needed to wage a more fundamental battle for the ability to publish and disseminate pro-gay speech. The vanguard of this battle was *ONE Magazine* . . ."²⁸

The name, *ONE*, came from Scottish writer Thomas Carlyle: "The mystic bond of brotherhood makes all men one." Jennings served as *ONE*'s editor-in-chief and primary contributor. The magazine's first issue appeared in January 1953. It included Jennings' own account of his arrest and trial, as well as a detailed discussion of the law of entrapment.²⁹

On November 1, 1953, *ONE* mustered sufficient resources to move into the rundown Blanchard Hall in downtown L.A., using donated furniture and volunteer employees. "The office, with its beat-up creaky wooden floors and its ceiling-high orange-crate bookshelves, was as shabby as the neighborhood."³⁰

By the end of 1953, *ONE* had distributed nearly 30,000 issues throughout the country to newsstand purchasers (at a cost of 50 cents per issue) and to paid mail subscribers (\$2.50 per year, or \$3.50 for mailings in sealed envelopes with no return address).³¹ The *ONE* editors were

26. *Ibid.* In a separate jury trial, Martin and Porter escaped any criminal liability for beating Castellanos. "Charges Against Officer Dropped," *L.A. Times*, Jul. 8, 1952, A7. A police board of rights disciplined the two men for excessive force and false reports, but the punishment was relatively mild: 30 days suspension without pay for Martin and 90 days for Porter, followed by a return to duty. "Policemen Found Guilty of Using 'Undue Force,'" *L.A. Times*, Jul. 2, 1952, A3.

27. White, *Pre-Gay L.A.*, 29–38.

28. Briker, "The Right to Be Heard," *supra* 31 *Yale J. of Law & the Humanities* 49, 53.

29. Jennings, "To Be Accused Is To Be Guilty," URL to *ONE Magazine* *supra* 11.

30. Lillian Faderman and Stuart Timmons, *Gay L.A.*, Berkeley, Univ. of Calif. Press, 2009, 117.

31. Briker, "The Right to Be Heard," *supra* 31 *Yale J. of Law & the Humanities* 49, 66.

unabashedly fearless and trailblazing in their articles and editorials, offering cutting-edge discussion and debate.³²

August 1953–October 1953: *ONE* is Stillborn

Given its reliance on mail subscriptions, *ONE* was particularly concerned about running afoul of the Comstock Act of 1873, which barred from the U.S. mail “lewd, lascivious, obscene or filthy” publications.³³ For that reason, and despite a tight budget, *ONE* hired a newly admitted attorney, 29-year-old Eric Julber, on a \$75 monthly retainer to provide legal and editorial advice.

Jennings described Julber as a “professionally prudish attorney who looks askance at the mildest bawdiness.” Aptly so: Julber warned against cheesecake art, erotic photographs, promiscuous language (“orgasm,” “excitingly” and “physique”) and prurient descriptions of physical contact.³⁴ “But what the magazine lacked in raciness, it made up for in audacity.”³⁵

ONE’s August 1953 issue illustrates this tightrope. The cover story posed the then-unthinkable question: “Homosexual Marriage?” The accompanying article did not sugarcoat the “staggering” subject matter, calling it “one of the most important which *ONE* has published.” Still, following Julber’s guidance, the article framed homosexual marriage as promoting a societal good — reduced promiscuity — rather than solely encouraging gay sex. “What a logical and convincing means of assuring society that [homosexuals] are sincere in wanting respect and dignity?” it argued.³⁶

Hardly the stuff of pornography. Nonetheless, Los Angeles postal inspectors confiscated the August 1953 mailings pending further review by the solicitor general in Washington, D.C., as the postmaster general’s attorney. “Whether the postmaster truly felt that the magazine was obscene or whether he was rattled by the idea that two people of the same gender could form long-term and healthy relationships is unclear.”³⁷

Although postal officials released the issue for mailing three weeks later, *ONE*’s editorial board did not feel thanks were in order. The October 1953 cover read,

ONE is not grateful. *ONE* thanks no one for this reluctant acceptance As we sit around quietly like nice little ladies and gentlemen gradually educating the public and the courts at our leisure, thousands of homosexuals are being unjustly

arrested, blackmailed, fined, jailed, intimidated, beaten, ruined and murdered.³⁸

In March 1954, Jennings resigned as *ONE* editor following internal complaints that he had been too “bossy and headstrong,” in what author C. Todd White called a “closed-door coup.” Julber continued his retainer relationship as *ONE*’s counsel.³⁹

By the end of 1954, *ONE*’s national circulation numbers neared some 60,000 copies. But with increased circulation came heightened scrutiny. Wisconsin Sen. Alexander Wiley, who chaired the Senate Foreign Relations Committee, was outraged by what he saw when leafing through the March 1954 issue of *ONE* at a New York City newsstand. He demanded that Postmaster General Arthur Summerfield ban mailings of this “sexually perverse” publication.⁴⁰

Despite Wiley’s command, *ONE*’s editors believed the magazine could successfully maneuver its way through these suffocating legal restrictions. Julber’s lead article in the October 1954 issue, under the cover title “You Can’t Print It!,” took the guardedly upbeat view that a homosexual magazine “can become an accepted institution in American literary life (and this seems to be happening).”⁴¹

Unfortunately this optimism proved to be misplaced, and the cover title, “You Can’t Print it!,” all too prescient. On October 20, 1954, L.A. Postmaster Otto K. Olesen notified *ONE* that the post office was sequestering all mailed copies of the October 1954 issue as obscene.⁴²

Postmaster Olesen’s objection? One of the issue’s short fictional stories, “Sappho Remembered,” told of a 20-year old woman who dropped her male boyfriend (“a nice young man, good job, good prospects”) for her older lesbian lover, a nightclub singer. To make matters worse, the story had a happy ending, with the [young woman] exclaiming, “I don’t love him . . . like I do you.”⁴³

38. “ONE Is Not Grateful” (Oct. 1953) 1 *ONE* cover page, available at <http://www.houstonlgbthistory.org/Houston80s/Assorted%20Pubs/ONE/ONE-5310-compressed.pdf> [as of Sept. 7, 2022].

39. White, *Pre-Gay L.A.*, 58, 61.

40. Charles, *Hoover’s War on Gays*, 180–181; Wiley’s concerns dovetailed with those of Wisconsin’s junior senator, Joseph McCarthy, who embarked on a crusade to link homosexuality with Communism. Jason M. Shepard, “The First Amendment and the Roots of LGBT Rights Law” (Apr. 2020) 26 *Wm. & Mary J. Race, Gender & Soc. Just.* 599, 618.

41. Eric Julber, “The Law of Mailable Material” (Oct. 1954) 2 *ONE* 6, available at <http://www.houstonlgbthistory.org/Houston80s/Assorted%20Pubs/ONE/ONE-5410-compressed.pdf> [as of Sept. 7, 2022].

42. Briker, “The Right to Be Heard,” *supra* 31 *Yale J. of Law & the Humanities* 49, 90.

43. Jane Dahr, “Sappho Remembered” (Oct. 1954) 2 *ONE* 9–15, available at <http://www.houstonlgbthistory.org/Houston80s/Assorted%20Pubs/ONE/ONE-5410-compressed.pdf> [as of Sept. 7, 2022].

32. *Id.* 63–64; see also White, *Pre-Gay L.A.*, 48.

33. 18 U.S.C. § 1461.

34. Briker, “The Right to Be Heard,” *supra* 31 *Yale J. of Law & the Humanities* 49, 71–73, 88.

35. Jim Burroway, “Fifty Years Ago, A Supreme Court Victory” (2008) 15 *Gay & Lesbian Review Worldwide* 6.

36. E.B. Saunders, “Reformer’s Choice” (Aug. 1953) 1 *ONE* 10–12, available at <http://www.houstonlgbthistory.org/Houston80s/Assorted%20Pubs/ONE/ONE-5308-compressed.pdf> [as of Sept. 7, 2022].

37. White, *Pre-Gay L.A.*, 48.

Also objectionable was a satiric poem, “Lord Samuel and Lord Montague,” which rhymingly mocked the recent arrest of several British aristocrats on morals charges, e.g.: “Some peers are seers but some are queers — And some boys WILL be girls.”⁴⁴

1955–1957: *ONE* Suits Up

The post office’s action hit *ONE* at a financially precarious time. Although Julber agreed to represent the magazine pro bono, its available funds had dwindled to less than \$27. Julber delayed filing a lawsuit in federal district court until September 1955, when *ONE* was able to raise sufficient money to cover initial filing fees and court costs.⁴⁵

The lawsuit was assigned to newly appointed Federal District Court Judge Thurmond Clarke and came to trial in mid-January 1956, with the parties agreeing to resolve the matter by reciprocal summary judgment motions.

Before his federal appointment, Judge Clarke served as a state court judge. In December 1945, in the famous “Sugar Hill” case, then Superior Court Judge Clarke issued one of the first rulings anywhere in the U.S. invalidating restrictive covenants. The decision allowed famed Black defendants, blues singer Ethel Waters and actresses Hattie McDaniel and Louise Beavers, to remain in their homes.

As he wrote, “It is time that members of the Negro race are accorded, without reservations or evasions, the full rights guaranteed them under the 14th Amendment to the Federal Constitution. Judges have been avoiding the real issue too long.”⁴⁶

Regrettably, Judge Clarke did not similarly distinguish himself with respect to public discussions about homosexuality. In March 1956, Clarke issued his ruling in favor of suppressing *ONE*’s October 1954 issue because, he concluded, “Sappho Remembered” is “lustfully stimulating to the average



Eric Julber, photo ca. 1957, when Julber filed his cert petition with the U.S. Supreme Court.

homosexual reader.” Judge Clarke ordered *ONE* to pay the government’s costs: \$20.⁴⁷

In the meantime, high-ranking FBI officials were incensed by an article, “How Much Do We Know About the Homosexual Male?” in *ONE*’s November 1955 issue.⁴⁸ The article, written under the pseudonym “David Freeman,” suggested that homosexuals occupied the highest echelons in society, including the media, diplomatic corps, and “key positions” within the oil and gas industry as well as the FBI. The article highlighted the FBI linkage with the snarky parenthetical, “(it’s true!)”⁴⁹

FBI chief J. Edgar Hoover was fiercely protective of the bureau’s reputation and “especially sensitive toward, and sought retribution against, anyone suggesting . . . gays worked in the FBI.” In light of the Freeman article, Hoover scrawled “I concur” to a message by associate director Clyde Tolson that the bureau “should take this crowd on.”⁵⁰

In January and February 1956, at Hoover’s express directive, two “mature and experienced” FBI agents made unannounced visits to *ONE*’s office in Blanchard Hall. *ONE*’s business manager was present each time, but he refused to identify himself or the pseudonymous Freeman, or to answer any question about the article and its reference to homosexuals within the FBI. The unnamed manager (who was actually W. Dorr Legg, also known as “William Lambert”) referred all further inquiries to attorney Julber. The agents specifically warned the “strictly no good” Lambert/Legg “that ‘the FBI would not tolerate any such baseless statement in this or any other publication.’”⁵¹

The FBI thereupon redoubled its investigation through its “Sex Deviates” program, enlisting informants, covert surveillance, neighbor and former employer interviews and other techniques to unearth information about the magazine, its staff and associates (particularly Freeman, Lambert/Legg and Julber), and how the publication was financed, printed and mailed.⁵²

Ultimately, the FBI reasoned, the best way to shut down *ONE* was by a criminal prosecution for obscenity, which it optimistically recommended to the Justice Department, arguing, “We may well be able to make such a move should the pending appeal of the

44. “Lord Samuel and Lord Montague” (Oct. 1954) 2 *ONE* 18, available at <http://www.houstonlgbthistory.org/Houston80s/Assorted%20Pubs/ONE/ONE-5410-compressed.pdf> [as of Sept. 7, 2022]. Another example: “And if you wish to Pick a Dilly / When you’re strolling out at night / Just make sure it’s not a ‘Lilly’ / Or a male transvestite.” *Id.* 19.

45. Briker, “The Right to Be Heard,” *supra* 31 *Yale J. of Law & the Humanities* 49, 93.

46. “Negro Owners Win Contest on Occupancy,” *L.A. Times*, Dec. 4, 1945, A1. In another watershed order, Judge Clarke declared California’s 37-year-old Alien Land law unconstitutional because it was “directed solely against persons of Japanese ancestry because of race.” “Calif. Alien Land Law Ruled Illegal,” *L.A. Daily News*, Mar. 16, 1950, 54. The California Supreme Court affirmed the judgment. *People v. Masaoka* (1952) 39 Cal.2d 883.

47. Murdoch, *Courting Justice*, 33; Briker, “The Right to Be Heard,” *supra* 31 *Yale J. of Law & the Humanities* 49, 96.

48. Charles, *Hoover’s War on Gays*, 153, 181–82.

49. David L. Freeman, “How Much Do We Know About the Homosexual Male?” (Nov. 1955) 3 *ONE* 5, available at <http://www.houstonlgbthistory.org/Houston80s/Assorted%20Pubs/ONE/ONE-5511-compressed.pdf> [as of Sept. 7, 2022].

50. Charles, *Hoover’s War on Gays*, 182–83. “It is already illuminating that Hoover’s not fitting cultural expectations of masculinity inspired curiosity about his own sexuality (and he always quickly and quietly, but unsurprisingly, had such speculation quashed).” *Id.* 9.

51. *Id.* 183–84.

52. *Id.* 184–85.

magazine against postal authorities be found in favor of the Government.”⁵³

This bullishness was borne out by the U.S. Ninth Circuit Court of Appeals, which heard argument in November 1956 and issued a unanimous opinion in February 1957 affirming that *ONE*'s October 1954 issue was “obscene.”

Nevada Federal District Court Judge John Rolly Ross, sitting by designation, authored the opinion for the three-judge panel. As he saw it, the mere mention of a “young girl [who] gives up her chance for a normal married life to live with the lesbian” amounted to “cheap pornography calculated to promote lesbianism.” The presence or absence of explicit sexual references was irrelevant.⁵⁴

Applying a similar test concerning the effect on an ordinary reader, Judge Ross found only “filthy language” in the poem “Lord Samuel and Lord Montague.” The poem “contains a warning to all males to avoid the public toilets while Lord Samuel is ‘sniffing round the drains’ of Piccadilly (London),” Ross wrote. He deemed the poem “dirty, vulgar and offensive to the moral senses.”⁵⁵

January 1958: A Silent Victory

Faced with the Ninth Circuit’s unsparing language about “cheap pornography,” *ONE* saw no alternative but to petition the nation’s highest court, however uncertain the outcome. As it editorialized:

Appeal costs are heavy and the course is hazardous, but the issues at stake are enormous. . . . Will the homophile press be granted the same freedom to publish in the homosexual field as is now enjoyed by the nation’s press as a whole? Will homosexuality come to be regarded as an accepted form of socio-sexual behavior? . . . [The answers] hinge on the outcome of *ONE*’s appeal to the United States Supreme Court.⁵⁶

Julber, again acting pro bono, filed *ONE*’s certiorari petition in June 1957, asking the U.S. Supreme Court to determine whether “the mere depiction of homosexuals or homosexual problems in literature is ‘lustful’ or ‘stimulating’ in such a manner as to render the literary work ‘obscene.’ . . . [T]he question of the depiction or consideration of the problems raised by homosexuality among our population has never been considered by this Court or any Court of Appeals”⁵⁷



Within two weeks after the filing of *ONE*’s petition, the high court issued its decision in another pending case concerning the legal standards for obscenity under the Comstock Act. In the course of affirming the conviction of 64-year-old publisher Samuel Roth for mailing pornographic photographs, the court, in an opinion authored by Justice William Brennan, redefined the test for obscenity by focusing upon whether the challenged materials had even “the slightest redeeming social importance — unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion,” and concluded that “sex and obscenity are not synonymous.”⁵⁸

On January 13, 1958, the Supreme Court took up and decided *ONE*’s petition in one fell swoop. The court simultaneously granted certiorari and issued a *per curiam* decision, without seeking merits briefing or oral argument. The “decision” consisted of the disposition — “Reversed” — and a citation to *Roth v. United States*, without further explanation.⁵⁹

Despite its brevity, the import was clear: It allowed *ONE* to publicly discuss the role of sexual minorities in society “even if most Americans deemed same-sex sexual relationships and conduct to be morally reprehensible.”⁶⁰ The magazine’s unprecedented win “was a turning

53. *Id.* 193.

54. *ONE, Inc. v. Olesen* (9th Cir. 1957) 241 F.2d 772, 777.

55. *Ibid.*

56. “*ONE* & the U.S. Postoffice” (Mar. 1957) 5 *ONE* 19, available at <http://www.houstonlgbthistory.org/Houston80s/Assorted%20Pubs/ONE/ONE-5703-compressed.pdf> [as of Sept. 7, 2022].

57. Petition for Writ of Certiorari, *ONE, Inc. v. Olesen*, 1, 6, available at <https://mattachinesocietywashingtondc.files.wordpress.com/2020/05/16.3-appeals-petition-for-a-writ-of-certiorari-to-the-us-court-of-appeals.pdf> [as of Sept. 7, 2022].

58. *Roth v. United States* (1957) 354 U.S. 476, 484, 487.

59. The *per curiam* decision originally was thought to have been unanimous, but Justice William O. Douglas’ personal files subsequently revealed a narrower 5–4 vote, with Justices Clark, Douglas, Frankfurter, Harlan and Whittaker in the majority. Chief Justice Warren and Justices Black, Brennan and Burton would have denied certiorari. Briker, “The Right to Be Heard,” *supra* 31 *Yale J. of Law & the Humanities* 49, 113.

60. Ball, “Obscenity, Morality, and the First Amendment,” *supra* 28 *Columbia J. of Gender & Law* 1, 49.

point for homosexual America that would be crucial to the gay movement that was to come: No homosexual publication could ever again be declared obscene merely because it was about homosexuality.”⁶¹

The significance was not lost on *ONE*. “Victory!” trumpeted an article in the February 1958 issue, “By winning this decision *ONE Magazine* has made not only history but law as well and has changed the future for all U.S. homosexuals. Never before have homosexuals claimed their rights as citizens. . . . *ONE Magazine* no longer asks for the right to be heard; it now exercises that right.”⁶²

Both the Post Office and the FBI recognized the sea change resulting from the Supreme Court’s action. “On March 31, 1958, Hoover told his L.A. office that, because of the court’s ruling and the Justice Department’s refusal to prosecute, there was no need to keep sending him *ONE*. If the Supreme Court had not protected *ONE*, Hoover and Tolson likely would have found a way to put it out of business.”⁶³

The Supreme Court decision went unnoticed in the mainstream media. The *New York Times* January 14 issue simply listed the case name, without explanation, among 30 other Supreme Court dispositions. The *L.A. Times*, *ONE*’s hometown newspaper, never mentioned the decision until a retrospective piece in 2015 — 57 years after the event.⁶⁴

ONE’s Number is Up: Aftermath

In May 1962, *ONE* was evicted from Blanchard Hall due to earthquake risk. The magazine moved a few miles to the west to 2256 Venice Blvd, just south of today’s Koreatown.⁶⁵

Three years later, a legal struggle of a different kind ultimately did in *ONE* as a magazine. In 1965, *ONE*’s staff broke into factions in a bitter dispute over the organization’s goals. Litigation ensued, ultimately resolved by a settlement.⁶⁶ *ONE* split into two separate organizations, each of which continues to gather and disseminate archival material today.⁶⁷

The magazine itself ceased publishing in 1967. By that time, it is estimated to have distributed more than 500,000 copies, widely shared in social networks and among friends. Historians regard the publication as “the most visible, widely read gay and lesbian publication in the United States” during an “acutely repressive” period for that community.⁶⁸

Eric Julber continued to actively practice law until he retired in 2010 at age 85, although never again in the area of LGBTQ rights. As he later explained, “[I]’m not gay. Never have been. Really, my only association with them has been in this case.”⁶⁹

Dale Jennings went on to a career as a successful writer with three published novels. One of his books, the *The Cowboys*, was made into a film in 1972, with John Wayne and Bruce Dern. Jennings died of respiratory failure in May 2000 at 82. The *New York Times*’ obituary lauded his “courage” at the lewd-vagrancy criminal trial for making him a “permanent icon — and the infant movement’s first hero. . . . No one had ever been known to fight such a charge.”⁷⁰

In the years since Jennings’ arrest and trial, the California Supreme Court has gradually expanded the protections for gay men and women against vague and discriminatory laws that, as Jennings learned, depended

in the world.” “About *ONE*,” <https://www.onearchives.org/about/> [as of Sept. 7, 2022]. The Homosexual Information Center (HIC) “was founded in the late 1960s by the Tangent Group, which in 1965 formally split from *ONE*, Incorporated . . .” Its archives are housed at California State University, Northridge. Online Archive of California, “Guide to the Homosexual Information Center Subject Files Collection,” https://oac.cdlib.org/findaid/ark:/13030/c8765gnz/entire_text/ [as of Sept. 7, 2022].

68. Craig M. Loftin, *Masked Voices: Gay Men and Lesbians in Cold War America*, Albany: SUNY Press, 2012, 18, 20.

69. Mason Funk, “Full Interview Transcript With Eric Julber” (Jan. 21, 2015), <https://theoutwardsarchive.org/subjectdetail/eric-julber> [as of Sept. 7, 2022]; see also Briker, “The Right to Be Heard,” *supra* 31 *Yale J. of Law & the Humanities* 49, 119. Julber did gain some notoriety in a civil rights case that occupied a different lane. In March 1976, Julber brought a state court lawsuit against the California Department of Transportation and its new director, Adriana Gianturco, for setting aside the two fast lanes on the Santa Monica Freeway (the so-called “Diamond Lane”) for bus and carpool use. Julber alleged an unlawful taking of his private property rights “by the state’s attempt to force him to share his 1973 Alfa Romeo with other persons without paying him compensation.” Ray Hebert, “Suit Seeks to Stop Diamond Lane Project,” *L.A. Times*, Mar. 30, 1976, C1. After “nearly five months of turmoil,” Caltrans halted the project following an injunction issued by federal judge Matt Byrne in a separate environmental lawsuit (not involving Julber). Ray Hebert, “Diamond Lane Goes Out Like a Lamb,” *L.A. Times*, Aug. 14, 1976, B1.

70. Dudley Clendinen, “William Dale Jennings, 82, Writer and Gay Rights Pioneer,” *N.Y. Times*, May 22, 2000, B7. When told in January 1958 of the U.S. Supreme Court ruling, Jennings had reacted, “Look, don’t joke. The year 2000, yes. But not today . . . I’m supposed to be an old man before this happens!” Murdoch, *Courting Justice*, 47.

61. Faderman, *Gay L.A.*, 120.

62. “Victory! Supreme Court Upholds Homosexual Rights” (Feb. 1958) 6 *ONE* 16–17, available at <http://www.houstonlgbthistory.org/Houston80s/Assorted%20Pubs/ONE/ONE-5802-compressed.pdf> [as of Sept. 7, 2022].

63. Murdoch, *Courting Justice*, 49–50; see also Charles, *Hoover’s War on Gays*, 199.

64. “United States Supreme Court,” *N.Y. Times*, Jan. 14, 1958, 54; Savage, “Supreme Court Faced Gay Rights Decision in 1958,” *supra* *L.A. Times*, A1.

65. “*ONE Magazine*’s New Office,” <https://one.usc.edu/story/one-magazines-new-office> [as of Sept. 7, 2022]; see also White, *Pre-Gay L.A.*, 110–111.

66. White, *Pre-Gay L.A.*, 133, 136–174.

67. ONE Archives Foundation describes itself as “the independent community partner that supports ONE National Gay & Lesbian Archives at the University of Southern California (USC) Libraries, the largest repository of [LGBTQ] materials

“upon the moral views of the judge or jury”⁷¹ “The aims of the struggle for homosexual rights, and the tactics employed, bear a close analogy to the continuing struggle for civil rights waged by blacks, women, and other minorities.”⁷²

This slow but inexorable movement reached its apo-gee in the California Supreme Court’s decision recognizing a state constitutional right to gay marriage.

California has repudiated past practices and policies that were based on a once common viewpoint that denigrated the general character and morals

of gay individuals, and at one time even characterized homosexuality as a mental illness rather than as simply one of the numerous variables of our common and diverse humanity. This state’s current policies and conduct regarding homosexuality recognize that gay individuals are entitled to the same legal rights and the same respect and dignity afforded all other individuals⁷³

What the California Supreme Court made possible in 2008 had been advocated in *ONE*’s gay marriage issue 55 years earlier. If the struggles by sexual minorities to gain equal rights have a historical locus, the likeliest candidate is the parking lot on South Hill Street in downtown L.A. ★

71. *Pryor v. Municipal Court*, *supra* 25 Cal.3d 238, 256–57 [acknowledging discriminatory enforcement of California’s lewd-dissolute statute]; *see also Vallerga v. Dept. of Alcoholic Beverage Control* (1959) 53 Cal.2d 313 [invalidating statute allowing liquor license revocation for taverns serving “sexual perverts”]; *Bielicki v. Superior Court*, *supra* 57 Cal.2d 602 [recognizing personal privacy rights of public bathroom occupants]; *Morrison v. State Board of Education* (1969) 1 Cal.3d 214 [homosexual conduct does not in itself necessarily constitute immoral conduct or demonstrate unfitness to teach]; *People v. Triggs* (1973) 8 Cal.3d 884 [overturning conviction based on clandestine observation of doorless toilet stall].

72. *Gay Law Students Assn. v. Pacific Tel. & Tel. Co.* (1979) 24 Cal.3d 458, 488 [barring discrimination by public utility against gay job applicants].

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73. *In re Marriage Cases* (2008) 43 Cal.4th 757, 821–22.

The Keeper of Los Angeles’ Lost Buildings

DOWNTOWN LOS ANGELES today is thick with the glass and steel towers typical of other urban centers. But look closely and you might also find stories of buildings now gone.

Bob Wolfe, appellate attorney and CSCHS Board member, is also an architectural archeologist, unearthing and illuminating the role of those lost buildings in L.A.’s legal history. Although Blanchard Hall (right) no longer stands, from 1953 to 1962 it housed the offices of *ONE Magazine*, which, as Bob documents, was the subject of a 1958 U.S. Supreme Court summary disposition regarded as pivotal to the eventual legal recognition of gay rights.

Bob discovered *ONE*’s story as he put together the most recent in his series of legal history “walking tours.”¹ For two decades, Bob has led Public Counsel’s staff, volunteers and board members around downtown Los Angeles. Last year’s tour, online,² focused on cases that originated in the buildings surrounding downtown’s Pershing Square.

In October, Public Counsel, the nation’s largest provider of pro bono legal services, recognized Bob’s work with one of its Pro Bono Awards. “Bob has crafted deeply researched CLE trainings and walking tours,” the group noted, “specifically designed to educate the legal community about important geographical sites and events in Los Angeles that are linked to our city’s history of racism and evolving system of justice.”

— Molly Selvin, *CSCHS Review* Editor



Blanchard Hall, 232 S. Hill Street, 1910. (Public domain)

1. Portions of those tours have been published in this publication. *See* Bob Wolfe, “A Legal Site-Seeing Tour of Downtown Los Angeles, Part 1” (Fall/Winter 2017) *CSCHS Newsletter* 1–6, 25; Bob Wolfe, “A Legal Site-Seeing Tour of Downtown Los Angeles, Part 2” (Spring/Summer 2018) *CSCHS Newsletter* 15–22; Bob Wolfe, “A Legal Site-Seeing Tour of Downtown Los Angeles, Part 3” (Fall/Winter 2019) *CSCHS Newsletter* 10–17.

2. www.dropbox.com/s/lig5lyzlg5a7gj9el/LawWalk-PershingSquare-2022-07.08.mp4?

Chief Justice Cantil-Sakauye's Mission to Bring Order From Chaos

BY DAVID A. CARRILLO

CHIEF JUSTICE TANI CANTIL-SAKAUYE ends her 12 years as California's judicial branch leader at the close of 2022, completing a term defined by intentional initiatives and unexpected challenges. The chief justice focused her policy agenda on efforts to expand access to justice and civics education, and on a quiet campaign to foster greater consensus in the court's decisions. Yet two daunting crises came to define her term, forcing her to contend with the dual black swan events of judicial branch budget cuts and the coronavirus pandemic. Having confronted and overcome adversity, while keeping a focus on her access and education initiatives, the chief justice leaves the state's high court and judicial branch in good order for her successor, incoming Chief Justice Patricia Guerrero.

The Path to the High Seat

Although there is no typical path to the chief justiceship, much of Cantil-Sakauye's career will sound familiar, even obvious in hindsight. Degrees from the University of California, time as a prosecutor, and service to Governor George Deukmejian managing his legal and legislative affairs. Appointment by Deukmejian to the Municipal Court, by Governor Pete Wilson to the Superior Court, and by Governor Arnold Schwarzenegger to the Court of Appeal. She gained substantial statewide judicial branch experience after Chief Justice Ronald M. George appointed her to the Judicial Council, and he supported her appointment as his replacement. In 2010 Schwarzenegger appointed her as California's chief justice, and she assumed office in January 2011.

That career arc broadly resembles those of many previous chief justices: public service followed by a rise through the courts to the high seat. This made it disappointing to read that Governor Schwarzenegger had "surprised many state Supreme Court watchers" by appointing Cantil-Sakauye, with some calling her "little known outside legal circles."¹ Only those who did not view a minority woman as a likely candidate could be surprised about an appellate justice with her record being appointed to lead the judicial branch.

On the Numbers

Majority opinions authored is one measure of any justice's success or influence. As of November 2022, Chief Justice

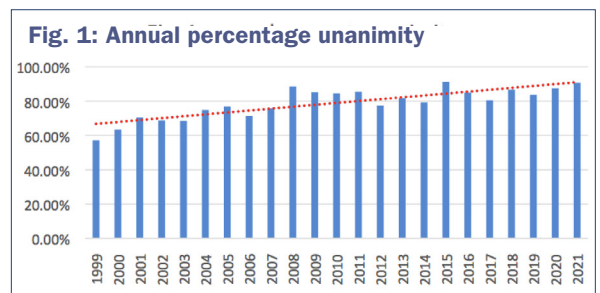


Chief Justice Cantil-Sakauye (center) at State of the Judiciary address, Mar. 17, 2014. Photo: California Courts.

Cantil-Sakauye authored 138 majority opinions, an average of 11.5 each year in her 12 years as chief justice. Justice Carol Corrigan, the court's only current member who overlaps with Chief Justice Cantil-Sakauye's entire tenure, authored 148 majority opinions in the same period, an average of 12.33 per year. By comparison, Chief Justice Ronald M. George in the equivalent period authored 183 majority opinions, an average of 15.25 majorities per year.²

The facts that Justice Corrigan and Chief Justice Cantil-Sakauye have similar outputs in the same period, and that the court's overall opinion output declined in the past decade, likely flow from a combination of internal changes at the court and external forces. Internal court norms may have changed in the past decade: perhaps the court's justices and staff now devote even more effort (compared with the already rigorous internal review that characterized the George era) to reconciling the justices' disparate views to arrive at consensus and minimize the need for separate opinions. This would have the benefit of generating more unanimous opinions, but at the cost of leaving fewer resources for producing calendar memoranda and opinions. And the pandemic surely contributed to reducing the court's overall output in 2020–22.

If consensus on the court is an indicator of a chief justice's leadership, comparing the court's vote splits during Chief Justice Cantil-Sakauye's tenure with an equivalent period under Chief Justice George shows that the court's unanimity rate has increased over time, and that consensus was greater under Cantil-Sakauye.



1. Paul Elias, "Gov. Nominates First Filipina-American Chief Justice," *NBC Los Angeles*, July 21, 2010, <https://www.nbclosangeles.com/news/politics/justice-tani-cantil-sakauye/1896120/> [as of Oct. 19, 2022].

2. These figures result from Westlaw searches in the California Supreme Court database.

As Figure 1 shows, the average annual unanimity percentage increased over time. That figure first reached into the 80th percentile in 2008 (toward the end of George’s tenure) after which it remained close to or above that range.

Figure 2 shows that all nonunanimous vote splits decreased over time — both individually, and relative to the proportion of total annual unanimous decisions.

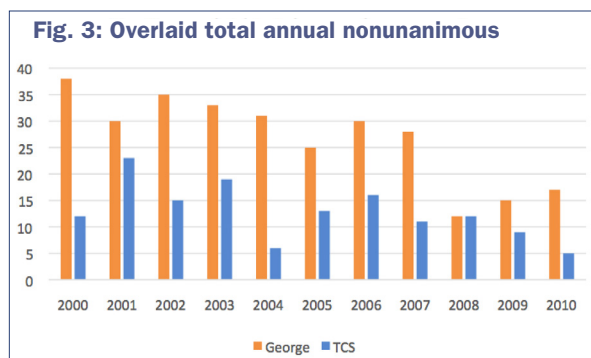
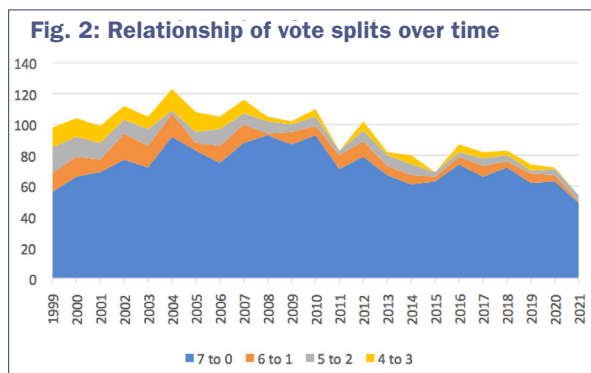


Figure 3 shows a year-to-year comparison, revealing that in every year but one the George court had more nonunanimous opinions than during Cantil-Sakauye’s tenure.

That these trendlines show consistent slopes suggests that in the whole period greater consensus has been a trend over time. And to be fair, both Cantil-Sakauye and her predecessor Chief Justice George devoted considerable energy to achieving consensus. Yet Chief Justice Cantil-Sakauye was more successful at doing so. Two related factors may have contributed to that distinction: evolution of the court’s internal review process, and different justices in the seats.

Those factors interrelate because changing the justices alters both their individual and interactive processes. If individual seat turnover were the sole cause, the year-over-year figures would show sharp transitions. Instead, the graphs show random peaks and valleys that gradually converge in a downward trend. The most significant transition is in 2008 — the highest-consensus year on the George court in this dataset — but there were no seat changes in 2007, 2008, or 2009. And the George court included some frequent dissenters: Justices Mosk, Brown, and Kennard. The correlation of their departure

with increased consensus suggests the obvious: that changing multiple seats can affect the unanimity rate if the replacements are disinclined to frequently dissent.

Overall, comparing the two periods shows a clear contrast: the court produced more opinions and had fewer unanimous opinions under Chief Justice George, and produced fewer opinions and more unanimous opinions under Chief Justice Cantil-Sakauye. The apparent upside is that this chief justice benefited from a table set with more “team players,” with the possible downside that the court’s internal review and drafting practices may be slowing production. Regardless, this chief justice played the hand she was dealt, and played it well.

Twin Furies Arrived

Chief Justice Cantil-Sakauye confronted two principal challenges in her tenure: dramatic funding cuts and the coronavirus pandemic. As described below, she responded to both crises by mobilizing her colleagues to take effective action. The budget crisis required difficult decisions on internal cuts, and the chief justice marshaled her allies to press a public campaign to restore the funding needed to provide public access to justice. During the pandemic the courts deployed emergency authority to good advantage, building and implementing new remote-appearance systems. Both crisis responses had relatively good outcomes: the funding was ultimately restored through lobbying and improved state finances, and the pandemic stresses faced by the judicial system are now in the process of fading. Those crises leave the judiciary leaner, and with better resources for online access.

First Crisis Response: the Budget

California’s economy cratered along with the nation’s in 2008, creating a long tail of annual state budgets that experienced major revenue shortfalls and consequently imposed painful funding cuts. In an ordinary year the judicial branch budget is just 1.5 percent of California’s general fund outlays, and the Legislative Analyst’s Office cheerily described the pre-crash 2008–09 judicial branch budget as proposing total appropriations from all fund sources of about \$3.7 billion, with “a decrease of \$14 million, under one-half percent below revised current-year expenditures.”³ The governor’s post-crash 2008–09 budget, by contrast, slated the judicial branch for \$245.9 million in general fund cuts — despite the fact that the judicial branch was absorbing a 7.6 percent average annual increase in costs, partly due to trial court consolidation.⁴

3. “Analysis of the 2008–09 Budget Bill: Criminal Justice, Judicial Branch (0250),” California Legislative Analyst’s Office, https://lao.ca.gov/analysis_2008/crim_justice/cj_anl08003.aspx [as of Oct. 19, 2022].

4. “Proposed budget detail 0250 Judicial Branch,” California Governor’s Budget 2008–09, https://www.ebudget.ca.gov/2008-09-EN/StateAgencyBudgets/0010/0250/mission_statement.html [as of Oct. 19, 2022].

And when Cantil-Sakauye assumed the chief justice role in 2011, that year's budget imposed \$350 million in ongoing cuts from the judiciary and raided another one-time \$310 million from the court construction fund. All that after the judiciary had absorbed \$652 million in cuts in the preceding four years. The upshot is that within the new chief justice's first months on the job the judicial branch needed to find means to survive a cumulative \$1 billion funding cut, or about a third of its overall budget. After years of fighting for gradually restored funding, budget cuts arrived again in 2020, when Governor Gavin Newsom slashed \$200 million from the judicial branch to help close a \$54 billion shortfall caused by the COVID-19 pandemic.⁵

But the economy quickly shifted gears again with improved state revenues as the pandemic receded. In 2021 Governor Newsom signed a budget that includes \$1.2 billion in new funding for the judicial branch. That new funding (which largely restored a decade's worth of cuts) resulted from tireless lobbying and cheerleading from the chief justice. And from a new strategy: Cantil-Sakauye deployed an innovative solution of working with the governor to include the judicial branch budget in the governor's January draft budget, thus enlisting the governor to defend the funding. Long an advocate of positioning the judiciary in its rightful place as a co-equal branch of state government — with the funding it deserves — the chief justice hailed the restored resources. "This year's budget represents an unprecedented investment in our judicial branch," she said, noting that it "will fund significant investments in technology, provide critically needed judgeships and court-houses, and expand remote access to court proceedings that played a key role during the pandemic."⁶

Second Crisis Response: The Pandemic

The coronavirus pandemic upended everything in spring 2020, and the courts proved to be an institution ill-suited to the new paradigm. Long used to doing things in person and on paper, ancient custom and legal requirements presented major barriers to change when emergency stay-at-home orders arrived. The key change agent that made adaptation possible was an emergency order Governor Newsom issued that delegated significant new discretionary authority to the chief justice to adapt the state's courts to the crisis and to suspend the operation of the many statutes that would have prevented a shift to online

judging.⁷ California's high court also benefited from an existing pilot program for electronically filing petitions for review, which provided a ready basis for quickly shifting to all-electronic filing.

Chief Justice Cantil-Sakauye seized the opportunity to motivate the ponderous judicial branch to adopt a more nimble, flexible model that could keep dockets moving without unnecessary infection exposure. She rallied her colleagues to collectively identify solutions and respond to urgent needs. And the chief justice deployed her new emergency authority to good effect, ordering the entire judicial branch to expand its existing partial online options to include everything — from external filings to internal deliberations. Remote access proved to be impractical for some operations (it's awful for jury trials), but experience showed that most functions worked well enough online, as the California Supreme Court itself found in conducting its own first-ever remote oral arguments. The judiciary's crisis response was as imperfect as every pandemic initiative, but it was overall a success: the courts stayed in operation through more than two years of a pandemic.

Although those emergency measures ended in June 2022, Governor Newsom signed legislation that extended authority to hold civil and criminal proceedings remotely.⁸ As the courts emerge from the crisis phase of the pandemic, the pandemic-imposed shift to remote judging may accelerate an existing trend of increasing remote access, making it a regular feature of routine court operations. That fits with Chief Justice Cantil-Sakauye's long-standing goal of seizing opportunities to expand access to justice. And that result seems likely: in August 2021 the Chief Justice's Workgroup on Post-Pandemic Initiatives found that remote hearings spurred case resolutions in juvenile cases and child support hearings.⁹ This experience leaves the Judicial Council poised to adopt future remote-process reforms that will both increase access and reduce public burdens.

Seasons of Change

Chief Justice Cantil-Sakauye's tenure was marked by turnover among her colleagues; as she commented, "I have only ever known change on this court."¹⁰ The California Constitution Center confirmed this, observing that although the overall average service of the court's

5. Merrill Balassone, "What to Know About the Judicial Branch Budget," *California Courts Newsroom*, June 30, 2020, <https://newsroom.courts.ca.gov/news/what-know-about-judicial-branch-budget> [as of Oct. 19, 2022].

6. Merrill Balassone, "What to Know About the Judicial Branch Budget," *California Courts Newsroom*, June 28, 2022, <https://newsroom.courts.ca.gov/news/what-know-about-judicial-branch-budget-1> [as of Oct. 19, 2022].

7. See Jennifer King, "What Did We Learn from the California Courts' Response to the Influenza Epidemic of 1918–1919?" (Spring/Summer 2021) *CSCHS Review* 1–2.

8. Cal. Stats. 2021, ch. 214 (S.B. 241); Cal. Stats. 2022, ch. 57 (A.B. 199).

9. Merrill Balassone, "Report: Remote Proceedings Increased Access for Court Users During Pandemic," *California Courts Newsroom*, Aug. 16, 2021, <https://newsroom.courts.ca.gov/news/report-remote-proceedings-increased-access-court-users-during-pandemic> [as of Oct. 19, 2022].

10. Chief Justice Cantil-Sakauye either related or confirmed to the author her quoted statements in this article.

justices is nine years, the court experienced 100 percent turnover in the past decade: Mariano-Florentino Cuéllar left in 2021, Ming Chin in 2020, Kathryn Werdegar in 2017, Marvin Baxter and Joyce Kennard in 2014, Carlos Moreno in 2011, and Ronald George at the end of 2010.¹¹ By comparison, the George court saw groups of justices serve together for comparatively lengthy stretches. Chief Justice George and Justices Chin, Werdegar, Baxter, and Kennard each served over 20 years on the court, and they served together for about 15 years. And the court saw long stretches between vacancies in George's time: five years 1996–2001, four years 2001–06, and five years 2006–11.

Given the nine-year average service, the George court looks anomalous for its longer terms and stable membership, and the Cantil-Sakauye period of high turnover is equally unusual for its ever-changing roster. Reflecting on this, the chief justice observed that both dynamics have distinct benefits. Stability in membership fosters familiarity, which can make opinion production somewhat more efficient. And although the membership instability she experienced lacks that familiarity, the benefit of new and more diverse perspectives brings a distinct richness to the court's opinions. New colleagues or old friends, the fact remains that the justices of the Cantil-Sakauye era formed a tight-knit group, which she described as close colleagues who enjoyed teasing each other as they went about their work.

Major Opinions

As David Ettinger observed, like her predecessors this chief justice often assigned major opinions to herself.¹² This is a standard practice on California's high court: in making opinion assignments the chief justice considers things like fair work distribution among the chambers, a justice's ability to craft a majority in a given case, relevant subject matter expertise, and the backlog of uncirculated calendar memos in each chambers.¹³ And the chief justice often made herself the public face of controversial decisions that commanded the greatest public interest, which Ettinger calls "the buck stops here" factor. This section reviews a few of those cases.

In *Perry v. Brown* the court considered whether a ballot measure's proponents have standing to defend the measure if the public officials ordinarily charged with that duty fail or refuse to defend it.¹⁴ The measure at issue was 2008's Proposition 8, which amended the

California constitution to ban same-sex marriage — certainly a matter of great public interest. Answering a certified question from the U.S. Court of Appeals for the Ninth Circuit, the chief justice wrote for the court that a ballot measure's proponents do have standing: "In a postelection challenge to a voter-approved initiative measure, the official proponents of the initiative are authorized under California law to appear and assert the state's interest in the initiative's validity and to appeal a judgment invalidating the measure when the public officials who ordinarily defend the measure or appeal such a judgment decline to do so."¹⁵

Difficult moral questions about a person's nature, how the law defines that nature, and the legal requirements for becoming a lawyer were implicated in *In re Garcia*.¹⁶ As an undocumented immigrant, Sergio Garcia confronted an apparent federal-law prohibition on joining the legal profession — but he was otherwise qualified for admission to the bar. The case also featured an unusual factor: California's legislature enacted a law (while the case was pending) expressly to authorize his admission.¹⁷ The United States Department of Justice notified the court that, in light of the new state law, issuing Garcia a law license would no longer be precluded by federal law. The chief justice's opinion for the court granted the motion for admission, holding that "the fact that an undocumented immigrant is present in the United States without lawful authorization does not itself involve moral turpitude or demonstrate moral unfitness so as to justify exclusion from the State Bar, or prevent the individual from taking an oath promising faithfully to discharge the duty to support the Constitution and laws of the United States and California."¹⁸

The decision in *Dynamex Operations West, Inc. v. Superior Court* concerning worker classifications sparked an ongoing saga of voter action and court challenges.¹⁹ The chief justice's unanimous opinion noted the "difficulty that courts in all jurisdictions have experienced in devising an acceptable general test or standard that properly distinguishes employees from independent contractors."²⁰ This distinction is particularly difficult in industries where businesses have economic incentives to classify their workers as one or the other.²¹ The court adopted a formula (known as the "ABC test") that presumes that all workers

15. *Id.* at 1127.

16. (2014) 58 Cal.4th 440.

17. See Cal. Stats. 2013, ch. 573 (A.B. 1024), amending Cal. Business and Professions Code § 6064 to "authorize the [California] Supreme Court to admit to the practice of law an applicant who is not lawfully present in the United States, upon certification by the committee that the applicant has fulfilled those requirements for admission, as specified."

18. *In re Garcia*, *supra*, 58 Cal.4th 440, 460.

19. (2018) 4 Cal.5th 903.

20. *Id.* at 927.

21. *Id.* at 913.

11. California Constitution Center, "SCOCA year in review 2019," *SCOCABlog* Feb. 28, 2022, <http://scocablog.com/scoca-year-in-review-2021/> [as of Oct. 19, 2022].

12. David Ettinger, "The Chief Justice often writes the big opinions," *At the Lectern*, Mar. 7, 2019, <https://www.atthelctern.com/the-chief-justice-often-writes-the-big-opinions/> [as of Oct. 19, 2022].

13. California Supreme Court, Internal Operating Practices and Procedures of the California Supreme Court, section VI(c).

14. (2011) 52 Cal.4th 1116.

are employees and permits classification as an independent contractor only if all three conditions of the test are met. California's legislature later codified this decision.²² But the issue remains in play: by adopting Proposition 22 in 2020 the voters exempted certain workers from *Dynamex* and the legislative action — and a challenge to that measure is currently on appeal.

In *Patterson v. Padilla* the chief justice wrote for a unanimous court to hold that a statutory requirement that required presidential candidates to disclose their tax returns violated the California constitution.²³ The decision held that the constitutional provision was intended to ensure that the voters within each qualifying political party could choose among a complete array of candidates found to be “recognized candidates throughout the nation or throughout California for the office of President of the United States.”²⁴ The statutes at issue purported to make the appearance of a “recognized” candidate for president on a primary ballot contingent on whether the candidate made the required disclosures. The court found that this additional requirement conflicted with the California constitution's specification of an inclusive open presidential primary ballot.²⁵ Consequently, the court held that a “recognized” candidate cannot be forced by statute to release tax returns as a condition of appearing on the ballot; only the voters may decide whether refusing to make such information available to the public “will have consequences at the ballot box.”²⁶

In her decisions for the court, Chief Justice Cantil-Sakauye displayed thoughtful analysis, employed a measured tone, and wrote the kind of precise and understandable opinions that provide clarity in the individual decision and in the law at large. Recognizing that the tasks at hand were to resolve the litigants' dispute while reconciling the specific question within the broader legal context, this chief justice made her analysis efficient and focused. It takes a disciplined thinker to write only what's needed, and a book of concise opinions like hers is a grand legacy.

Access to Justice — and Civics

Some chief justices had policy or administrative agendas; others seemed more interested in deciding cases.

For example, Chief Justice Roger Traynor made major doctrinal contributions to tax and tort law. And Chief Justice George's “seemingly boundless appetite for judicial administration and attendant politics was well known.”²⁷ At times circumstances forced issues onto a chief justice's agenda: Chief Justice Rose Bird served during a period when capital punishment was a flash-point, and it became a key feature of her time on the court.

Civics education was the key initiative for this chief justice. Cantil-Sakauye focused on access to justice and made it her mission to improve civics learning and engagement in California. In 2017 she battled the federal government over immigration arrests in California courthouses, telling those authorities that “enforcement policies that include stalking courthouses and arresting undocumented immigrants, the vast majority of whom pose no risk to public safety, are neither safe nor fair.”²⁸ She wrote in the *Washington Post* to argue for enforcement policies consistent with due process, fairness, and access to justice:

You don't have to read the federalist papers or be fortunate enough to get a ticket to the musical “Hamilton” to recognize the elegant weave of checks and balances set up by our Founders. Our three branches of government are co-equal; our local, state and federal governments have overlapping authority. Each branch and each entity should take care not to act in a way that undermines the trust and confidence of another branch or entity.²⁹

Concerned that too little time was devoted to teaching civics in California public schools, in 2013 Cantil-Sakauye launched several programs as part of a broad new civics learning initiative.³⁰ She created the Power of Democracy campaign as a blueprint for revitalizing civics education, a program supported by statewide partners to help revitalize democracy and promote access to justice in California. She partnered with the Superintendent of Public Instruction to establish the California Task Force

22. See Cal. Stats. 2019, ch. 296 (A.B. 5), amending Cal. Labor Code § 3351, adding § 2750.3, and amending Unemployment Insurance Code §§ 606.5 and 621 (“This bill would state the intent of the Legislature to codify the decision in the *Dynamex* case and clarify its application”).

23. (2019) 8 Cal.5th 220. See Cal. Stats. 2019, ch. 121 (S.B. 27), amending various Elections Code provisions to “enact the Presidential Tax Transparency and Accountability Act, which would require a candidate for President, in order to have the candidate's name placed upon a primary election ballot, to file the candidate's income tax returns for the 5 most recent taxable years with the Secretary of State, as specified.”

24. *Patterson v. Padilla*, *supra*, 8 Cal.5th 220, 223.

25. *Id.* at 224–25.

26. *Id.* at 225.

27. Scheiber (Ed.), *Constitutional Governance and Judicial Power — The History of the California Supreme Court*, Berkeley: Berkeley Public Policy Press, Institute of Governmental Studies, 2016, 566.

28. California Courts Newsroom, “Chief Justice Cantil-Sakauye Objects to Immigration Enforcement Tactics at California Courthouses,” *California Courts Newsroom*, Mar. 16, 2017, <https://newsroom.courts.ca.gov/news/chief-justice-cantil-sakauye-objects-immigration-enforcement-tactics-california-courthouses> [as of Oct. 19, 2022].

29. Tani G. Cantil-Sakauye, “California chief justice: The courthouse is not the place for immigration enforcement,” *The Washington Post*, Apr. 19, 2017.

30. “State Approves More Civic Learning,” *California Courts Newsroom*, July 19, 2016, <https://newsroom.courts.ca.gov/news/state-approves-more-civic-learning> [as of Oct. 19, 2022].



Top left: As part of the California Supreme Court’s ongoing outreach and education efforts, the court welcomed students and teachers from Sacramento’s C.K. McClatchy High School’s Law and Public Policy Academy. *Center left:* Chief Justice Cantil-Sakauye “swears in” student judges in the mock courtroom at El Camino Creek Elementary School. *Bottom left:* Chief Justice Cantil-Sakauye visits Eastman Avenue Elementary School in Los Angeles. *Top right:* Chief Justice Cantil-Sakauye with students and teachers at John Marshall Fundamental Secondary School, with the Civic Learning Award of Excellence plaque. *Center right:* Chief Justice Cantil-Sakauye attends an event paying tribute to Filipinos and their role in helping Mexican farmworkers organize the Delano Grape Strike. *Photos: California Courts.*

on Civic Learning, a joint statewide entity that recommends actions for elevating the status of civics in California K–12 schools. And her final project addressing this issue is a new Judicial Learning Center for the public and court personnel, which incoming Chief Justice Guerrero intends to maintain.

Conclusion

In her closing remarks at a conference shortly before her retirement, Chief Justice Cantil-Sakauye said that of all her duties, it was the policy brief she enjoyed most and would have liked to spend more time on. And her wish is granted: in September 2022 the Public Policy Institute of California chose her as its new president and chief

executive officer to replace its longtime leader Mark Baldassare.³¹ California benefited from a steady hand in troubled times during the Cantil-Sakauye era, and she will continue to serve the state’s interests in her new policy role. As a true public servant, no one expected her to just retire quietly to a tropical island — the work goes on. ★

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31. Public Policy Institute of California press release, Sept. 28, 2022, <https://www.ppic.org/press-releases/tani-cantil-sakauye-named-new-president-and-ceo-of-ppic/> [as of Oct. 19, 2022].



Above: The Chief Justice with her staff attorneys (and externs) meeting in their conference room after oral argument in San Francisco on Nov. 2, 2022: Chief Justice Tani Cantil-Sakauye (at the head of the table, in gray), and, to her left (then clockwise around the table): Sunil (Neil) Gupta, Michael Rhoads, Erin Rosenberg, Matt Scarola, Elizabeth Reinhardt (extern), Kyle Graham (out of the view), Howard Knapp (extern, back to camera), Gervilyn Mae Cadimas (extern), Todd Thompson, Vuong Nguyen, Jake Dear (mostly obscured). Photo: Martin Novitski, Judicial Council Staff.

Personal Reflections About Working for and With Chief Justice Tani Cantil-Sakauye

BY JAKE DEAR

MOST ENVISION THAT “the Chief” runs the California Supreme Court. In that capacity, it’s generally understood, she presides over her own staff (and, to some extent, the other six associate justices and their own staffs), three central staff directors and their scores of attorneys, as well as clerical, administrative, and ancillary internal entities. At the same time, in her role as one of seven justices, the Chief shoulders the same substantial obligations as her judicial colleagues to decide petitions for review and writs, and to produce calendar memos and eventually opinions, in “review-granted cases” and automatic (capital) appeals.

Yet under the article VI, section 6 of the state Constitution, the Chief simultaneously holds a related and equally demanding job that would itself qualify as a more-than-full-time undertaking: Presiding over the 21 appointed voting members of the Judicial Council. That constitutional body, assisted by its own 700-plus employee staff, is the policymaking body of the California courts. It’s responsible for ensuring the consistent, independent, impartial, and accessible administration of justice, guiding the state’s judicial branch — including

more than 1,700 trial court judges and many thousands of staff, as well as 106 Court of Appeal justices and many hundreds of staff. By most measures, California’s judicial branch is by far the largest in the western world,

This broad oversight responsibility imposed on the chief justice is why the official title is “Chief Justice of California” — and not just “Chief Justice of the Supreme Court.”

much bigger than our federal court system. This broad oversight responsibility imposed on the chief justice is why the official title is “Chief Justice of California” — and not just “Chief Justice of the Supreme Court.” As that position has evolved over the past three decades, carrying out the role of Chief is a gargantuan task, requiring a person of special focus and drive.

And that’s what this Chief has been, and shown — confronting challenges from the start with steely determination. As described in David Carrillo’s accompanying article, upon taking office she immediately faced daunting ongoing budget challenges brought on by the Great Recession. A few in the branch greeted her by continuing and escalating conflicts that threatened to undermine her efforts to undertake judicial branch reforms. They, along with some legislators, initially underestimated her, but later came to understand her full measure. Employing grit and natural rhetorical elegance, the Chief persisted, steering the

branch though challenges that have included the enormity of a global pandemic. In the process, she made the judiciary stronger and more unified. Some, but hardly all, of this history is generally known. Let's hope she will shed some light when, as is anticipated, she will be interviewed for her oral history.

In the meantime, I'll highlight a few things about internal workings within the court that are even less generally known.

Consensus building: The lead article focuses on the Chief's consensus building. Those of us on her staff have experienced this firsthand. Countless times over the past dozen years I've been copied on email threads by other staff members, discussing with the Chief, in depth, proposals to adjust this or that in a pending draft order or opinion. Should we modify so as to narrow, broaden, or recast this phrase, passage or section? Should we accept the suggestion of the "X" chambers to alter one of our own proposed orders or draft opinions? The conclusion, often reached after considerable back and forth (and typically in after-hours or weekend emails, when it seems she's been more able to focus on court legal work), has frequently been yes, we can live with that — and the further adjustment is even an improvement. This has long been the ethos of the Chief's chambers (as it was in the Chief Ronald M. George era). It reflects the difficult and attentive work necessary to build and maintain consensus. And thanks to the court's ongoing internal culture, a version of it can be found in all chambers.

Post-argument discussions: After the justices meet, following oral argument, to vote on the disposition of a case and to confirm who will prepare a draft majority opinion, the Chief convenes with her entire attorney staff. Most recently, we gather via video. Before the pandemic we met in person amidst the old-school hardbound case reports that line, floor to high ceiling, our staff conference room, while seated around our huge oak table. The Chief debriefs us concerning each case. She usually starts by asking the staff attorney who tracked any case that was circulated by another chambers — or who, on our own staff, prepared the Chief's draft calendar memo — for candid thoughts about the argument. And she gets them. She responds and then describes, in considerable detail, the key aspects of counsel's arguments and the various justices' post-argument comments. She briefly foreshadows the expected opinion, including any anticipated separate opinion. Her recitation is typically a master class in extemporaneous exposition.

No written speech text: Relatedly, and alone among recent chief justices, she's eschewed formal speechwriting.

Except for her annual "State of the Judiciary" address, which she commits to memory and delivers to the Legislature without written text, the hundreds of other speeches and similar presentations she's given during her tenure have all been unscripted. She simply reviews a few key main points on which she's determined to focus, and off she goes. Well, it's true that she was a rhetoric major in college. But few can pull this off, and communicate so eloquently and effectively.

The "court family": Our staff conferences with the Chief are primarily, yet not exclusively, focused on our serious legal work. But these meetings have also provided occasions to talk about matters occurring outside the court, providing context to subjects of statewide and judicial branch concern. And at regular quarterly social



At the Judicial Council Meeting on Sept. 20, 2022, Chief Justice Tani Cantil-Sakauye (*standing, in light gray suit*) administered the oath of office to new and reappointed council members. This was the second time the council had met in person since March 2020. Photo: California Courts.

meetings to celebrate staff birthdays and such, we've enjoyed lunches around our conference table, consumed amidst banter, laughter about personal and family matters, and shared hopes and frustrations concerning current events. Likewise, the Chief and other justices have encouraged regular courtwide social get-togethers and professional growth programs — most recently via video, but increasingly (we hope) again in person.

The Chief has often referred to the court staff generally, and our own chambers staff in particular, as "court family." I can safely say, on behalf of the present staff and others who have retired in the intervening 12 years: It has been an honor to be a family member, while working with the Chief and doing our part to further the important work of the California Supreme Court. ★

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The 1944 Port Chicago Mutiny and the Legacy of Racism in the U.S. Military

BY JOHN S. CARAGOZIAN

ON JULY 17, 1944, a ship being loaded with bombs and ammunition near San Francisco Bay exploded, instantly killing 320 men and wounding hundreds more. People as far away as Boulder City, Nevada heard the blast. Its legal and racial consequences echoed even further.

During World War II, the U.S. Navy was responsible for supplying aerial bombs, ammunition, depth charges and mines to overseas theaters. Mare Island Naval Shipyard near Vallejo served as one of the bases from which these munitions were loaded on Pacific-bound ships. However, Mare Island soon lacked space to handle the increasing volume, and the Navy looked for additional Bay Area sites.

The Navy chose the Contra Costa County town of Port Chicago on Suisun Bay. It could accommodate ocean-going ships and had connections to three major railroads that could bring the munitions. By November 1942, the Navy had constructed a pier, railroad sidings, barracks, mess halls and offices.

The Navy needed additional personnel to unload the railroad cars and load the ships. Mare Island used unionized civilian stevedores, but at Port Chicago the Navy decided on enlisted men to reduce costs and enhance security.

At the time, the U.S. Navy was rigidly segregated by race. The Navy trained African-Americans in segregated facilities and then assigned them only to segregated units for mess or labor duties. The Navy barred African-Americans from combat roles. By 1943, the Navy had more

than 100,000 African-American enlisted men, but zero African-American officers.¹

Damage resulting from the July 17, 1944 ammunition explosion. This view looks south from the Ship Pier, showing the wreckage of Building A-7 (Joiner Shop) at the right. There is a piece of twisted steel plating just to left of the long pole in left center. Photo: U.S. Naval History and Heritage Command.

than 100,000 African-American enlisted men, but zero African-American officers.¹

All 1,431 of Port Chicago's laborers were African-American. White officers supervised them, and white U.S. Marines guarded them. The entire base was strictly Jim Crow, with segregated barracks, mess halls and recreation. For example, African-Americans were allowed to eat only after whites had finished.² Too, the town was hostile to African-Americans.³

The base's African-Americans resented being relegated to menial labor and denied promotions and combat roles. Further, they repeatedly warned officers of the dangers of their duties: The men received no training for munitions loading; they often loaded "hot cargo" (bombs with fuses attached); and, worst of all, the Navy sacrificed safety for around-the-clock speed.⁴

1. Leonard Guttridge, *Mutiny: A History of Naval Insurrection*, Annapolis, MD: Naval Institute Press, 2002, 211.

2. Joseph Bruton, "Port Chicago — The most solemn memorial you'll never visit," Apr. 19, 2019, https://www.army.mil/article/219936/port_chicago_the_most_solemn_memorial_youll_never_visit [as of July 12, 2022].

3. Robert Allen, *The Port Chicago Mutiny*, Berkeley: Heyday, 1993, 30–38, 42–43, 46.

4. *Id.* at 32, 41, 45, 50–52. Originally, the U.S. Coast Guard helped to supervise loading at Port Chicago, but reported it found unsafe procedures and recommended improvements. See Christopher Bell & Bruce Elleman, *Naval Mutinies of the Twentieth Century: An International Perspective*, London: Routledge, 2003, 201. When the Navy rejected the Coast

On July 13, 1944, the 440-foot-long cargo ship *E. A. Bryan* moored at the Port Chicago pier for munitions loading. This loading was particularly difficult: Fused bombs had been wedged so tightly in railroad cars that men had difficulty removing them; a steam winch lacked a brake; and bombs were accordingly subjected to rolling, dropping and other rough treatment.

Still, by July 17, the laborers had stacked more than 4,600 tons of munitions in the *Bryan's* five 40-foot-deep holds. An additional 430 tons of explosives were in railroad cars on the pier, and the *Bryan* had been fueled with 5,292 barrels of bunker oil.⁵

That night at 10:18, as loading continued, an explosion occurred, followed within a few seconds by a second, massive explosion of the entire *Bryan*, including the munitions. All 320 men on the ship or pier — two-thirds of them African-American enlisted men, plus guards, officers and civilian railroad and ship crews — were instantly killed, most of them vaporized. The wounded amounted to an additional 390 men, again, two-thirds of them African-American.

The explosion obliterated the *Bryan*, pier and railroad locomotives. It also created a fireball three miles in diameter and flung chunks of molten metal 12,000 feet skyward. It wrecked base barracks and other buildings and damaged almost all businesses and houses in the town of Port Chicago. Damage extended to San Francisco, 25 miles away.

Surviving enlisted men and officers rushed from their barracks in rescue efforts, but, with the ship and pier gone, little could be done.

The Port Chicago explosion was the deadliest state-side disaster of World War II, accounting for fully 15 percent of the entire war's African-American naval casualties.⁶ To that time, it was the largest single man-made explosion in world history.⁷

On July 21, the U.S. Navy convened a court of inquiry. After 39 days of testimony from 125 witnesses, the court



A boxcar-load of live bombs: Loading the deadly cargo from railway to pier was not only “hard, back-breaking work,” but fraught with an obvious potential for catastrophe. Photo: U.S. Naval History and Heritage Command.

issued a 1,200-page report.⁸ It failed to pinpoint the explosion's cause but exonerated all (white) officers from any wrongdoing. Although the report acknowledged that the Navy had not trained African-American enlisted men, it blamed those men for lacking capacity to be trained. The report also criticized the men as “unreliable, emotional . . . and . . . inclined to . . . make an issue of discrimination.”⁹

In Congress, U.S. Representative John Rankin, a white supremacist from Mississippi, opposed a proposal to pay \$5,000 to the family of each person killed, because most of the beneficiaries were African-American.¹⁰ Consequently, Congress reduced the payments to \$3,000.¹¹

Some of the African-American enlisted men requested survivors' 30-day leaves, which the Navy often gave after a major loss or other disaster. The Navy denied all of these requests, but granted such leaves for white officers.¹² Instead, the Navy moved the enlisted men to Mare Island and, on August 4, 1944, ordered them to resume loading munitions.

Initially, 258 African-Americans refused the loading order, citing the danger. The Navy confined them to a

Guard's recommendations, the Coast Guard withdrew from the Port Chicago base. See Allen, *The Port Chicago Mutiny*, 45–46. Similarly, the International Longshore and Warehouse Union offered to assist training of the Port Chicago men in loading, but the Navy also rejected this offer. See Bell & Elleman, *Naval Mutinies of the Twentieth Century*, 201.

5. Robert Allen, *The Port Chicago Mutiny*, 56–57.

6. John Boudreau, “Blown Away,” *Washington Post*, Jul. 17, 1994, <https://www.washingtonpost.com/archive/lifestyle/1994/07/17/blown-away/le64797d9-ae0a-4c33-b6ef-50e6cf7a60a1/> [as of July 12, 2022]; Erika Doss, “Commemorating the Port Chicago Naval Magazine Disaster of 1944: Remembering the Racial Injustices of the ‘Good War’ in Contemporary America,” 59 *American Studies Journal*, 2015, at <http://www.asjournal.org/59-2015/commemorating-port-chicago-naval-magazine-disaster-1944/#> [as of July 12, 2022].

7. See, e.g., Thurgood Marshall, Jr. and John Lawrence, “The Port Chicago 50 at 76: Time for Exoneration,” National World War II Museum, Jul. 17, 2020, <https://www.nationalww2museum.org/war/articles/port-chicago-exoneration-thurgood-marshall-jr-john-lawrence> [as of July 12, 2022].

8. *Court of Inquiry Appointed by the Commandant of the Twelfth Naval District To Investigate the Facts Surrounding The Explosion of 17 July 1944*, Oct. 30, 1944, <https://www.history.navy.mil/research/library/online-reading-room/title-list-alphabetically/p/port-chicago-ca-explosion/online-documents/court-of-inquiry.html> [as of July 12, 2022]. This Court of Inquiry report included “Findings of Facts,” and a photocopy of the Findings, with the original pagination, is at <https://www.jag.navy.mil/library/investigations/PORT%20CHICAGO%20EXPLOSION.pdf> [as of July 12, 2022].

9. “Findings of Fact,” 1203, 1254–55. The Court of Inquiry acknowledged that the U.S. Coast Guard's safety recommendations had been rejected, *supra* note 4, but claimed that such recommendations would have unacceptably slowed loading. See “Findings of Fact,” 1256.

10. Allen, *The Port Chicago Mutiny*, 67; Boudreau, “Blown Away.”

11. *Ibid.*

12. Joseph Bruton, “Port Chicago,” Reese Erlich, “Navy Reopens WWII Black Mutiny Case,” *Christian Science Monitor*, Apr. 10, 1992, <https://www.csmonitor.com/1992/0410/10121.html> [as of July 12, 2022].



A photo of the largest mass-mutiny courts-martial in U.S. Navy history shows the 50 accused Port Chicago sailors seated behind their defense team. Photo: Courtesy Robert L. Allen.



Thurgood Marshall in 1957. Photo: Library of Congress.

Marshall (*left*) represented the defendants on appeal to the Judge Advocate General's office. Marshall highlighted the Navy's pervasive racism, but the appeal was denied. Civil rights groups and First Lady Eleanor Roosevelt also raised questions, though to no avail. The secretary of the Navy did ask the panel of judges to reconsider the matter without relying on hearsay evidence; the panel did so but reaffirmed the verdicts and punishments.¹⁷

During the defendants' imprisonment at Terminal Island in Los Angeles Harbor, the Navy began to desegregate — though at least part of the motivation was to end all-African-American units that had given rise to organized opposition to racism.¹⁸ By 1946, the Navy ended formal segregation.

In January 1946, all but three of the Port Chicago 50 were released from prison. Still, the men's continuing hardships included being denied G.I. Bill benefits, such as college tuition and low-interest home loans.¹⁹ The mutiny convictions also remained on their records.

Half a century after the court martial, President Bill Clinton's secretary of defense resisted a blanket pardon on the ground that "sailors are required to obey orders . . . even if . . . subject to life-threatening danger."²⁰ Any future pardons will have to be posthumous, as all 50 convicted men are now dead.²¹

Today, the Port Chicago base and town have been absorbed into the U.S. Army's Military Ocean Terminal Concord. A memorial to the Port Chicago victims has been erected there. Visits require advance reservations. ★

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barge and replaced them with civilian stevedores. The Navy then moved the 258 to Camp Shoemaker near Dublin in Alameda County, where the Navy interrogated them without counsel and in the presence of armed guards.

Eventually, 208 men agreed to return to loading, but 50 were steadfast in refusing. The Navy charged the 50 with mutiny, defined as a concerted revolt against military authority. The maximum wartime penalty for mutiny was death.¹³

The court martial for the 50 began on September 14, 1944, at Treasure/Yerba Buena Island in San Francisco Bay. The panel of judges consisted of seven naval officers.

The defendants had counsel, and trial was open to the public and media. The defendants moved to substitute the less serious charge of individual insubordination for mutiny, but the judges denied the motion. The judges also allowed the prosecutor to introduce hearsay (such as an unidentified person urging the defendants to refuse the order to load) on the theory that such evidence proved a conspiracy to revolt against military authority. The prosecution primarily argued that the danger of loading munitions did not excuse disobedience.¹⁴

The defense included testimony from various defendants that they (a) never received a direct order to resume loading munitions, (b) were unaware of any conspiracy to revolt against military authority and acted on their own, and (c) were coerced by officers or armed guards at Camp Shoemaker to sign incriminating affidavits.¹⁵

After hearing from 80 witnesses over 32 trial days, the judges deliberated for 80 minutes and found all 50 defendants guilty of mutiny. The judges imposed prison sentences ranging from eight to 15 years.¹⁶

NAACP Legal Defense and Education Fund counsel and future U.S. Supreme Court Justice Thurgood

13. Allen, *The Port Chicago Mutiny*, 92. See also 10 U.S.C. § 894(b).

14. Allen, *The Port Chicago Mutiny*, 94–98, 121–23.

15. *Id.* 103–16, 124.

16. The other 208 African-American men who had initially refused to resume loading but resumed were summarily court martialed for insubordination. All were found guilty, and their punishment included forfeiture of three months' pay. *Id.* 127.

17. *Id.* 133.

18. *Id.* 134.

19. See, e.g., John Boudreau, "Breaking the Silence: Military: Were 50 Black men wrongfully convicted of mutiny after a 1944 explosion that killed 320 men? Some of them say yes — and they want their names cleared," *L.A. Times*, Jul. 16, 1991, <https://www.latimes.com/archives/la-xpm-1991-07-16-vw-2465-story.html> [as of July 12, 2022]; Reese Erlich, "Navy Reopens WWII Black Mutiny Case."

20. William Glaberson, "Sailor From Mutiny in '44 Wins a Presidential Pardon," *N. Y. Times*, Dec. 24, 1999, <https://www.nytimes.com/1999/12/24/us/sailor-from-mutiny-in-44-wins-a-presidential-pardon.html?searchResultPosition=1> [as of July 12, 2022].

21. See, e.g., Jill Cowan, "How a Bay Area Explosion Pushed the Military to Desegregate," *N.Y. Times*, Jul. 17, 2019, <https://www.nytimes.com/2019/07/17/us/port-chicago-navy-desegregation.html> [as of July 12, 2022].



Exhibit display case, “Expanding Justice for All,” Archives Room, the Ronald M. George State Office Complex, San Francisco. Photo: Jake Dear.

Expanding Justice for All: The Supreme Court of California in Times of Change

BY MARIE SILVA

SINCE THE CREATION of the Supreme Court of California in 1849, ordinary Californians have sought justice through the courts with extraordinary determination, pressing for recognition of their rights as the state and its judiciary grappled with rapid social, political, economic, and environmental change. California’s highest court has rendered far-reaching decisions that reveal dramatic collisions of private lives with public institutions and laws. These interactions — asymmetrical yet often surprising — have helped transform the meaning of justice in California.

A new exhibition, currently on display in the Archives Room on the first floor of the Ronald M. George State Office Complex in San Francisco’s Civic Center, features primary source materials that illustrate the struggles of diverse Californians to obtain justice before the high court in traumatic and transformative times. For much of the state’s history, large numbers of Californians were deprived of basic rights, including the right to vote. Despite these exclusions, immigrants, Native Californians, Latinos, African Americans, Asian Americans, women, and LGBTQ people have played an active role in the judicial history of the state, bringing suits before California’s highest court that challenged slavery, segregation, anti-Asian legislation, and discrimination. The historical cumulation of these efforts has helped expand the legal interpretation of “justice for all” in California and across the nation.

The exhibition, organized by the California Judicial Center Library and the Supreme Court of California (which are headquartered a few floors above), features 12 landmark cases decided by the California Supreme Court and four decided by the Court of Appeal, First Appellate District, spanning the history of modern California from 1850 to 2008. Each case is described in an illustrated panel, supplemented by primary source materials (in original and facsimile) on display. This article

focuses on three cases that reveal the Janus-faced nature of California history: its painful legacies of genocide, racism, and anti-immigrant hostility, on the one side, and its hopeful traditions of diversity, idealism, and civil rights activism on the other.

People v. Smith (1850) 1 Cal. 9

The first case heard by the new supreme court concerned California’s original sin: genocidal violence against the region’s Native peoples. Before European colonization, California was home to approximately 300,000 Native Americans speaking more than 100 different languages.¹ The Spanish and American conquests of the eighteenth and nineteenth centuries devastated indigenous communities and after the American takeover in 1848, violence against Native Californians increased. This violence was often overlooked or sanctioned by local, state, and federal authorities.

In February and March 1850, white settlers attacked the Coast Miwok, Pomo, and Wappo communities in the Napa and Sonoma region. Multiple witnesses attested that the men killed unarmed people, burned their homes, and drove them from their villages. Seven men were arrested and held by the Sonoma County sheriff. Represented by attorneys Charles Semple and future United States Senator and California Governor John B. Weller, the men petitioned the newly established California Supreme Court to be discharged from the sheriff’s custody. The court, in the first case it heard, denied the request but did permit the prisoners’ release on bail. None of the men ever stood trial for the massacres.² Historian Benjamin Madley argues that “the court’s failure to prosecute the accused amounted to a grant of judicial

1. Benjamin Madley, *An American Genocide: The United States and the California Indian Catastrophe, 1846–1873*. New Haven: Yale Univ. Press, 2016, 23.

2. *Id.*, 120–27; *People v. Smith* (1850) 1 Cal. 9.

Peter Barry, called and sworn. Deposed.
Lives at Nicholas Higuera's. Capt. Smith
— this gentleman — come up to the ranch and says to
Don Nicholas that he would have to drive the
Indians to the mountains. So Don Nicholas
called me to interpret, and he say if the
Indians not out in one quarter of an hour they
should be shot. Don Nicholas want time. He
said No! if they are not all gone when I come
back, I shoot them and the old man too. I tell
Don Nicholas, and he said that he would be shot
first, that his Indians had been with him 20
years. Then the rest of the people quit, and went
and set fire to the Indians houses. Witness was
in the blacksmiths shop about 20 yards from the

Report of testimony in case *People v. S. Kelsey* as noted in footnote 5 below, March 1850. Supreme Court of California Records, California State Archives.

impunity for large-scale California Indian killing by vigilantes.”³

Associate Justice Nathaniel Bennett’s opinion in the case does not convey the horror of the crimes of which the vigilantes, led by “Captain Smith,” were accused. However, witness testimony held at the California State Archives as part of the case file for *People v. Smith* provides a vivid and disturbing narrative of the attacks. A reproduction of Peter Barry’s testimony is included in the exhibition. Barry gave the following account, describing the unsuccessful efforts of an elderly *Californio*⁴ ranch owner, Nicolás Higuera, to defend the Native people who lived and worked on his lands.

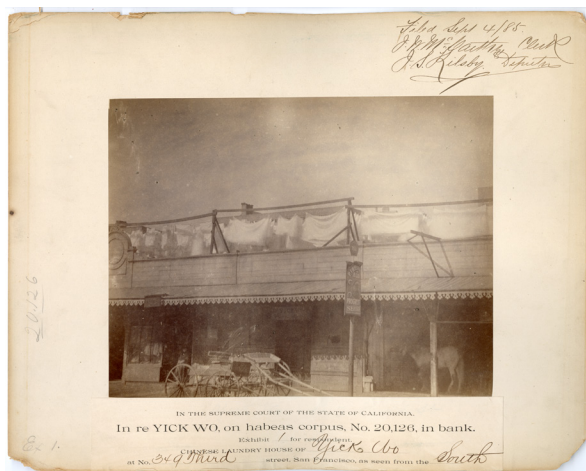
Capt. Smith — this gentleman — come up to the ranch and says to Don Nicholas that he would have to drive the Indians to the mountains so Don Nicholas called me to interpret and he say if the Indians not out in one quarter of an hour they should be shot. Don Nicholas want time. He said No! if they are not all gone when I come back, I shoot them and the old man too. I tell Don Nicholas, and he said that he would be shot first, that his Indians had been with him 20 years. Then the rest of the people quit, and went and set fire to the Indians houses. Witness was in the blacksmiths shop about 20 yards from the house. The loss to Don Nicholas was more than \$3000. All his barley and provisions for the Indians was burned. When

Mr. Smith saw the houses burning he went down to the other rancheria and drove them too out to the mountains.⁵

Barry’s testimony serves as a tragic example of the reality experienced by indigenous Californians and *Californios* after 1848. At the same time *Californios* struggled to defend their lands from legal and extralegal attacks, Native people faced overwhelming violence in a new and radically unfamiliar cultural, political, and legal landscape.⁶ The endurance of Native Californian communities, traditions, and languages into the present day is “a testament to their tenacious defiance and intelligent survival strategies against overwhelming odds.”⁷

***In re Yick Wo* (1885) 68 Cal. 294**

By 1853, approximately 25,000 Chinese people had immigrated to California as part of the Gold Rush.⁸ Chinese people in California faced an onslaught of discriminatory laws, cultural opprobrium, and mob violence. Yet Chinese Californians did not suffer oppression with “helpless stoicism.”⁹ Rather, they actively resisted discrimination, making significant contributions to the civil rights movements of the nineteenth century. Chinese immigrants formed protective associations, or



Chinese laundry house of Yick Wo *In re Yick Wo* filed January 22, 1886. Supreme Court of California Records, California State Archives.

3. Madley, *An American Genocide*, 138.

4. *Californios* were a diverse group of Spanish-speaking people who immigrated to California from Mexico in the late eighteenth and early nineteenth centuries or were descended from these early settlers. Some *Californio* families received large land grants from Spain and, after 1821, from the new republic of Mexico. After the secularization of the California missions in the 1830s, many indigenous Californians found work as agricultural laborers on lands owned by *Californios*. See *Californio Society*, retrieved July 30, 2020 from *Calisphere*, <https://calisphere.org/exhibitions/6/californio-society/#overview> [as of June 22, 2022].

5. Report of testimony in case *People v. S. Kelsey*, March 1850, Supreme Court of California Records, California State Archives.

6. See Miroslava Chávez-García, *Negotiating Conquest: Gender and Power in California, 1770s to 1880s*. Tucson: Univ. of Arizona Press, 2004.

7. Madley, *An American Genocide*, 348.

8. Amy K. DeFalco, *Consuming Identities: Visual Culture in Nineteenth-Century San Francisco*. New York: Oxford Univ. Press, 2018, 57.

9. Charles J. McClain, *In Search of Equality: The Chinese Struggle against Discrimination in Nineteenth-Century America*. Berkeley: Univ. of California Press, 1994, 3.

tongs, which advocated for their members' rights in and out of the courts. Because Chinese people were barred from practicing law in California, tongs hired some of the state's best white attorneys, including the famed lawyer Hall McAllister.

In 1880, the city of San Francisco passed two ordinances designed to effectively outlaw Chinese-owned laundries. Laundry owners were required to obtain permission from the Board of Supervisors to operate out of wooden buildings, yet the board always denied Chinese laundry owners' applications. In 1885, longtime laundry owner Yick Wo, also known as Yick Wo Chang, was arrested for operating a laundry in a wooden building without a permit. With financial support from the Chinese laundry workers' tong, Wo sued for relief.¹⁰ Although the California Supreme Court upheld the city ordinances in 1885, the United States Supreme Court ruled in Wo's favor the following year. This landmark decision held that a neutral-seeming law enforced in a discriminatory way — "with an evil eye and an unequal hand" — is unconstitutional.¹¹ Since 1886, the U.S. Supreme Court's opinion in *Yick Wo* has been cited nearly 3,000 times, including in the court's decision in *United States v. Wong Kim Ark*, which upheld birthright citizenship.¹²

Despite the historical and legal significance of Wo's case, there are no surviving photographs of or first-person accounts written by Yick Wo. This large-format photograph of Wo's laundry was used as evidence in both the California Supreme Court and United States Circuit Court cases. The case file held at the California State Archives includes photographs of other Chinese-owned laundries in San Francisco, providing rare visual documentation of these lost monuments to civil rights.

James v. Marinship Corp. (1944) 25 Cal.2d 721

African Americans have played an outsized role in the struggle for civil rights in California, beginning in the 1850s when Black abolitionists organized legal challenges to slavery, racist testimony laws, and segregation in the new state.¹³ During World War II, large numbers of African Americans migrated to California from the South as part of the Second Great Migration, finding work in the state's booming wartime industries. Although African Americans found economic opportunity in California, they faced discrimination in housing, education, and employment, from employers and unions alike.

In 1939, African American singer Joseph James immigrated to California with a Federal Theatre Project troupe to perform at the Golden Gate International Exposition



African American boiler makers' strike, Marin shipyards, Sausalito, 1943. *San Francisco News-Call Bulletin*, Bancroft Library, U.C. Berkeley.

(GGIE) on Treasure Island.¹⁴ In 1942, he found work as a welder at the Sausalito shipyard Marinship. According to the company's newsletter:

No one at Marinship is better known, or better liked, than the author of this article. Joe James came to Marinship on August 1, 1942, and is now a journeyman welder, a member of the select "Flying Squadron" of expert stinger welders who are sent wherever they are most needed. As a concert baritone, Mr. James is known to musical circles from coast to coast . . . He has been heard often at yard programs and at launchings, where he is a popular favorite. In addition, he is a leader of progressive thought among Bay Area Negroes.¹⁵

One week before this article was published in *The Marin-er*, the International Boilermakers' Union chartered a segregated auxiliary for African American workers, requiring that James and his fellow Black co-workers join or face discharge. On behalf of Marinship's approximately 1,000 African American workers, James filed suit against Marinship and the International Boilermakers' Union.¹⁶ James' legal team included the head of the NAACP Legal Defense Fund and future U.S. Supreme Court Justice Thurgood Marshall.¹⁷ In a groundbreaking opinion by Chief Justice Phil Gibson, the California Supreme Court ruled in James' favor, holding that racial discrimination against union membership violates "a definite national policy against discrimination because of race or color."¹⁸

10. *Id.* 115–25.

11. *Yick Wo v. Hopkins* (1886) 118 U.S. 356.

12. (1898) 169 U.S. 649.

13. See *Gold Chains: The Hidden History of Slavery in California*, retrieved June 25, 2020, from <https://www.aclunc.org/sites/goldchains/index.html> [as of June 22, 2022].

14. Mark Brilliant, *The Color of America Has Changed: How Racial Diversity Shaped Civil Rights Reform in California, 1941–1978*. New York: Oxford Univ. Press, 2010, 15.

15. Joseph James, "Marinship Negroes Speak to Fellow Workmen," *The Marin-er*, Aug. 21, 1943, San Francisco History Center, San Francisco Public Library.

16. *James v. Marinship Corp.* (1944) 25 Cal.2d 721.

17. Brilliant, *The Color of America Has Changed*, 15.

18. *James v. Marinship Corp.* *supra* 25 Cal.2d 721.

This ruling was cited in subsequent civil rights decisions by the Gibson Court over the next two decades, including *Perez v. Sharp*,¹⁹ which nullified California's ban on interracial marriage; and *Sei Fuji v. State*,²⁰ which invalidated the state's anti-Asian Alien Land Law.

Primary source materials documenting these and 13 other significant California Supreme Court and Court of Appeal, First Appellate District cases are on view now, with an accompanying exhibition booklet available online.²¹ As California and the nation face a daunting present and an uncertain future, these histories remind us that the legal struggles of the past were not in vain.

Cases Featured in *Expanding Justice for All: The Supreme Court of California in Times of Change*

People v. Smith (1850) 1 Cal. 9. In the first case heard by the new California Supreme Court, the court permitted release on bail of white settlers charged with the massacre of unarmed Native Californians in the Napa and Sonoma region. None of the men charged were ever tried.

Lin Sing v. Washburn (1862) 20 Cal. 534. Chinese merchant Lin Sing successfully challenged the so-called "Chinese Police Tax."

In re Archy (1858) 9 Cal. 147. With aid from California's African American community, the fugitive slave Archy Lee escaped his enslaver, Charles Stovall. The California Supreme Court's ruling ordering Lee's return to Stovall's custody was widely scorned; Lee was later freed by a federal commissioner and immigrated to British Columbia.

People ex rel. Kimberly v. De La Guerra (1870) 40 Cal. 311. The California Supreme Court ruled that the Treaty of Guadalupe Hidalgo guaranteed citizenship rights to *Californios*.

Foltz v. Hoge (1879) 54 Cal. 28. Suffrage activists and lawyers Clara Foltz and Laura de Force Gordon sued Hastings Law School after they were denied admission because they were women. The California Supreme Court ordered Hastings to admit Foltz.

In re Yick Wo (1885) 68 Cal. 294. Business owner Yick Wo challenged the discriminatory San Francisco ordinances that effectively barred the operation of Chinese-owned laundries. Although the California Supreme Court upheld the city ordinances in 1885, the United States Supreme Court ruled the ordinances unconstitutional the following year.

In re Mooney (1937) 10 Cal.2d 1. The California Supreme Court heard the case of accused Preparedness Day

Parade bomber and labor activist Tom Mooney three times, twice in 1918 and again in 1937.

James v. Marinship Corp. (1944) 25 Cal.2d 721. Shipyard welder Joseph James challenged a requirement that he join a segregated African American auxiliary of the International Boilermakers' Union or face discharge. The California Supreme Court ruled in James' favor, citing national policy against racial discrimination.

People v. Oyama (1946) 29 Cal.2d 164. Japanese American teenager Fred Oyama appealed to the California Supreme Court after the State of California confiscated his family's property while the Oyamias were interned during World War II. Although the California Supreme Court ruled in the state's favor, the United States Supreme Court reversed the state court's ruling, striking down key provisions of California's Alien Land Law.

Perez v. Sharp (1948) 32 Cal.2d 711. In a pathbreaking ruling, the California Supreme Court overturned the state's interracial marriage ban, allowing an African American man and a Mexican American woman to marry.

Mulkey v. Reitman (1966) 64 Cal.2d 529. The California Supreme Court struck down Proposition 14 — a ballot initiative that overturned the Rumford Fair Housing Act — as discriminatory and unconstitutional.

In re Marriage Cases (2008) 43 Cal.4th 757. The California Supreme Court affirmed marriage rights for LGBT people.

Escola v. Coca-Cola Bottling Co. of Fresno (Cal. App. 1943) 140 P.2d 107. The Court of Appeal, First Appellate District, ruled that Coca-Cola was not responsible for an injury to a waitress caused by an exploding soda bottle. However, it was Presiding Justice Raymond Peters' dissent that would have a lasting influence on tort law. In 1944, the California Supreme Court agreed with Justice Peters, holding Coca-Cola responsible for the waitress' injury.

Bayside Timber v. Board of Supervisors of San Mateo County (1971) 20 Cal.App.3d 1. The Court of Appeal, First Appellate District, struck down the 1945 Forest Practice Act, transforming forest management in California.

Pugh v. See's Candies, Inc. (1981) 116 Cal.App.3d 311. The Court of Appeal, First Appellate District, ruled in favor of a former longtime See's Candies employee, setting limits on employers' right to terminate "at-will" workers.

Home Builders Assn. v. City of Napa (2001) 90 Cal.App.4th 188. The Court of Appeal, First Appellate District, upheld the city of Napa's inclusionary zoning ordinance requiring that developers set aside ten percent of all newly constructed housing units as affordable housing. ★

19. (1948) 32 Cal.2d 711.

20. (1952) 38 Cal.2d 718.

21. See http://library.courtinfo.ca.gov/special_collections_archives/exhibits/ [as of June 22, 2022].

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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 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

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



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

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*.

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 ★

ROBERT VANDERET is a Los Angeles Superior Court judge assigned to the Foltz Criminal Justice Center in Los Angeles. He was appointed to the bench by Governor Arnold Schwarzenegger in 2008.

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.

California's Newest Supreme Court Justice: Kelli Evans

ON NOVEMBER 10, the Commission on Judicial Appointments confirmed Kelli Evans as an associate justice on the California Supreme Court. A graduate of Stanford University and UC Davis Law School, Evans has broad legal experience with a focus on civil rights and social justice.

Prior to her appointment to the Supreme Court, Justice Evans served as an Alameda County Superior Court judge. Before joining the bench in 2021, she was Governor Gavin Newsom's chief deputy legal affairs secretary.

Evans had been associate director of the ACLU of Northern California, where she earlier served as an attorney. In addition to experience in private practice, Justice Evans practiced in the Civil Rights Division of the U.S. Department of Justice and as an assistant public defender at the Sacramento County Public Defender's Office. She also served on federal court-appointed monitoring teams for the Oakland and Cleveland police departments.

"Throughout her career, Judge Evans has dedicated herself to helping all Californians have an equal chance at justice," Governor Newsom said when announcing her appointment in August. "Raised by her grandmother in public housing, Judge Evans was inspired from a young age to find ways to help expand justice and opportunity for everyone, especially marginalized and vulnerable communities."

Evans fills a vacancy created by Newsom's promotion of Associate Justice Patricia Guerrero to chief justice.

Evans and her wife, Terri Shaw, have a daughter in college and live in Oakland. The *Review* will publish a personal profile of Evans in the Spring/Summer issue. ★

— Molly Selvin, *Review* Editor



California's New Chief Justice: Patricia Guerrero

BY HON. JUDITH MCCONNELL

WHEN JOSH GROBAN, then Governor Jerry Brown's judicial appointments secretary and now Justice Joshua Groban, called me in 2011, he wanted to talk about Patricia Guerrero, who had applied for appointment to the San Diego Superior Court. We chatted about her great academic credentials and her success as a partner at a major law firm, but Josh was interested in learning more about her participation in the diverse bar associations in San Diego. I had never met her but was happy to have lunch with her and we met at a downtown restaurant.

Known as Trish, she was dignified and reserved but very engaged. Because Jerry Brown was highly interested in an applicant's participation in the legal community, I suggested she become more active in both the feminist bar association, Lawyers Club of San Diego, and La Raza bar association. Not long afterward, Lawyers Club announced a program on the importance of diversity in the legal profession and Trish was one of the panelists. Little did I know she had long engaged in substantial community service, working as an advocate for immigrants who needed legal assistance. She served on the Advisory Board for the ABA's Immigration Justice Project to promote access to justice at all levels of the immigration and appellate court system. She also was part of a task force that planned and participated in the Women's Resource Fair to assist underprivileged members of the community. And she provided extensive pro bono services through Casa Cornelia Law Center, overseeing junior attorneys who assisted in immigration matters. She was and is a woman of action and dedication.

I have had the privilege of getting to know Justice Guerrero well over the past five years while working with her as a colleague on the Court of Appeal, Fourth Appellate District, Division One. I was asked by this publication to write about her shortly after she was confirmed as an associate justice on the California Supreme Court. Now that she has been confirmed yet again — this time as the next chief justice to succeed our beloved Tani Cantil-Sakauye — Justice Guerrero's role in the California legal system has become even more significant.

Justice Guerrero is proud to be a child of the Imperial Valley. She grew up in the small town of Imperial, where all three schools she attended were within walking distance of her home. Her paternal grandfather came to California to work odd jobs in the United States while her father and his eight siblings stayed at home in Mexico with their mother. Her father started farming in Mexico to help support the family. When he was 19, his father



Justice Patricia Guerrero at her confirmation hearing for Chief Justice of California, San Francisco, Aug. 26, 2022. Photo: AP Photo/Eric Risberg, Pool.

arranged for him to become a lawful permanent resident of the United States and he came to live in Imperial County. Despite his age, he was placed as a freshman in high school because he didn't speak English and there, he met Trish's mother.

Her mother was born in Tepic, in the western state of Nayarit, Mexico, and was raised in Mexicali. Although she was able to attend Trish's 2017 confirmation hearing after her appointment to the Court of Appeal, she recently passed away. She was one of 11 children. She met Trish's father and married at a young age without finishing high school. But she loved to read and taught her daughters the importance of being strong and independent and to treat others with respect. Both of Trish's parents worked hard — her father cleaned the gym at his school and worked in the fields on weekends. Neither parent was able to finish school — each struggled financially to help their respective families.

Trish's father went on to become a foreman at a local feedlot in Imperial and on weekends he competed in rodeos when he could get sponsors to pay his entry fees. Her mother stayed home to care for her two daughters and to provide childcare for neighborhood children. She stressed to her children the importance of education. After her mother died, Trish found in her mother's belongings her citizenship test, which she had passed with a perfect score. She had never told her children about her achievement. Trish's parents inspired her to believe she could accomplish anything and that looking beyond oneself to the needs of others was simply a way of life.

Trish graduated from her high school as co-valetorian and went to UC Berkeley. She supplemented her scholarship with earnings from her job at a grocery store. Her success in college led her to Stanford Law School, where she excelled in, among other things, legal writing.



Justice Patricia Guerrero being sworn in to the Fourth District Court of Appeal, Division One (San Diego) on Dec. 14, 2017. Left to right: Chief Justice Tani Cantil-Sakauye, then-Attorney General Xavier Becerra, Justice Guerrero's son, husband, and Justice Guerrero. Photo: *California Judicial Council Staff*.

Upon graduation, she went to work at a major law firm where she had held a summer clerkship. She found her colleagues supportive of her professionally and personally, even when she needed extra time to attend to family. She left the firm at one point to gain criminal trial experience as an assistant U.S. Attorney but returned after a year and a half and soon became a partner.

Appointed to the superior court in 2013 by Governor Brown, she soon became known as an expert in family law, a field that was new to her but which she quickly learned, and soon she was named supervising judge of all the family courts in San Diego. Newly enrobed, Judge Guerrero became active in implementing a more formal training program for judges new to family court. She was regarded as an excellent writer with a great capacity to learn new areas of the law, a hard worker with an analytic mind, collegial and even tempered. She received the highest honors from the family law bar. She always sought a creative way to solve problems. But, of equal importance, she regularly had time for her colleagues, for whom she invariably had an open door. I often saw her at lunch with them in local restaurants, taking a break from their difficult calendars.

When an opening occurred on the Court of Appeal, Trish was the first person I thought of as a possible candidate. After she submitted her application to Governor Newsom and had been vetted by the local committee, I recall meeting with her for snacks after work and discussing her prospects and strategizing.

Not surprisingly, she was quickly elevated to the Court of Appeal, having been found exceptionally well qualified by the State Bar. She was an immediate success. Not only is she smart and hardworking, Justice Guerrero is able to collaborate with people of differing

viewpoints and craft an opinion where there had previously been disagreement. She has a great sense of humor and a talent for picking beautiful shoes — something many of her former colleagues in the Fourth, Division One, appreciate. She loves doughnuts and, despite her obvious skill with the computer, likes to have many documents in paper form.

She also continued her community outreach and has been an active participant in the Judges in the Classroom program, established to help teach students K-12 about the role of courts in our democracy. Justice Guerrero rarely declines an invitation to speak at a school. One of the many students whose lives she has touched said, “I had a wonderful experience and hope to see you again soon. I might want to be a judge too! You inspired me about things I might not have known.” In recognition of her outstanding leadership skills, the chief justice and her colleagues on the Supreme Court chose her to chair the

Blue Ribbon Commission on the Future of the California Bar Exam, an assignment acknowledged as challenging.

In 2021, when a seat opened on the California Supreme Court because of the departure of Justice Mariano-Florentino Cuéllar, there was widespread interest in the appointment of another Latino or Latina. Many looked to Justice Patricia Guerrero. She had distinguished herself on the Court of Appeal, crafting cutting edge opinions in both civil and criminal law cases. Her appointment as the first Latina on the California Supreme Court came as no surprise to me or her other colleagues at the Court of Appeal. All of us are big fans.

When I recently asked how the work at the Supreme Court differed from that at the Court of Appeal, Justice Guerrero commented on the voluminous docket of petitions for review as well as the different way the justices exchange views at the Supreme Court — in the form of detailed written memos.

Now she will have the challenge of leading the largest court system in the United States. Her experiences in leadership — at the superior court as well as on various committees and commissions — have prepared her for this new role. Her advice to new attorneys and judges has been to treat all with respect and civility, an art she has perfected. California and all who come to our courts will be in good hands.

Like most parents, Justice Guerrero juggles work and family obligations. Although two teenage boys are a handful. She fortunately has the loving support of her husband, a school psychologist who is also from the Imperial Valley. ★

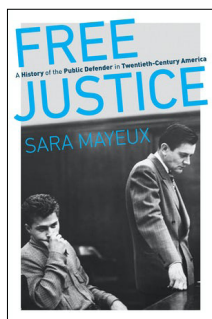
JUDITH MCCONNELL is Administrative Presiding Justice of the Court of Appeal, 4th Appellate District.

Public Defenders: The Antidote To Communism

BY HON. MARIA E. STRATTON

Sara Mayeux

FREE JUSTICE: A HISTORY OF
THE PUBLIC DEFENDER IN
TWENTIETH-CENTURY AMERICA
Durham, NC: University of
North Carolina Press, 2020



MY CONCEPT OF the attorney-client relationship is based on what I learned as a young public defender. I was taught there are four decisions the client alone must make: whether to plead guilty or not guilty; whether to go to trial; whether to testify at trial; and whether to file an appeal. I was taught I must follow my client's instructions for each decision. So I was stunned to discover, in Professor Sara Mayeux's book *Free Justice*, serious proposals raised in past years to abrogate this client-centered approach to the attorney-client relationship in criminal cases.

Mayeux has written a fascinating account of our nation's tumultuous road to, but ultimate acceptance of, publicly funded defender offices. *Free Justice* is not simply about the birth of public defender offices in early twentieth century America, but how the very idea of state-funded defender organizations overcame great opposition to become a national tradition by the 1960s and 1970s. The book is well-researched, and its sparkling prose and conversational tone make it an easy read, even for non-public defender buffs. Mayeux has brought to life the quirky personalities and philosophies of the bar leaders who pushed for and against the concept of publicly funded defense counsel. She also presents the dramatic stories of defendants — both guilty and not guilty — who exemplify the need for, benefits of, and broken promises attendant to state-funded appointed counsel.

Given this impressive work, recall the old adage, "Don't judge a book by its cover." Well, do not judge *Free Justice* by its unappealing cover, a Dorothea Lange black-and-white photograph of counsel and defendant, both looking like they would rather be anywhere else — and not together. Who wants to read a story about public defenders if the result is this miserably disconnected attorney-client duo pictured on the cover? In reality, Mayeux's book tells a rich history of passionate proponents and defenders, including Wilbur Hollingsworth, chief counsel of the Boston Voluntary Defenders, whom Lange pictured with his client, 16-year-old Richard LaPlante. LaPlante's acquittal of arson, with Hollingsworth as his "free" lawyer and despite a false confession, illustrates many of the major themes in Mayeux's book: the idea of

"worthiness" in client selection, questions about funding for defender services, and, more broadly, the very role that public defenders should play in America.

Don't judge a book by its title, either. "Free Justice" may have been a rallying cry for publicly financed defense counsel, but the slogan does little to convey the complicated issues generated when the United States embraced the concept. And that is the truly delicious part of this book.

Mayeux's thesis is based on the seemingly crazy notion that after decades of struggle to establish publicly funded defense, we as Americans finally accepted the idea in reaction to the advent of Communism. She makes a strong case for the connection. But in my view, this solid explanation extends only so far. For example, Mayeux does not offer a satisfactory explanation for the chronic and universal underfunding of public defender offices that started from day one and continues to this day.

Mayeux begins *Free Justice* by describing the genesis of the idea of public defense: the proponents of public defender organizations, their opponents, the debate over funding, and the social forces operating in the background. She points out that most of those pushing the idea of public defenders were elite white men. For example, Mayer Goldman, a Manhattan lawyer and social reformer, tried to sell the chieftains of the New York bar, mostly white male Wall Street lawyers, on publicly funded defense by comparing it to publicly funded prosecution. There was also Reginald Heber Smith, a prominent Boston lawyer who wanted local bar associations to incorporate criminal defense into civil legal aid societies where bad lawyers would be "weeded out" and good lawyers would be expertly trained. Author Edward Bellamy, who penned the bestseller *Looking Backward*, was also a proponent of public defenders who would purvey the same "free justice" for rich and poor alike.

I find it ironic that these three privileged men are considered by many to be the pioneering founders of the idea of publicly funded defense. Their interest in the subject seems to be borne of their distaste for and desire to control "bottom feeder" criminal defense attorneys and "ambulance chasing" personal injury counsel, both types of lawyers they viewed as corrupt. No doubt corruption was a problem among some members of the bar, which was largely unregulated at that time. But there is more to the story. Unlike today, white shoe law firms did not foster robust criminal defense practices, and most firms discriminated in hiring based on race, religion, and gender. How interesting that these founders wanted to control a practice area they were "too good" to engage in themselves. Were they genuinely interested in the welfare of the clients or were they out to control criminal defense from afar because it was often practiced by minority and immigrant lawyers shut out of established law firms?

One outlier was Clara Shortridge Foltz, the first female admitted to the California Bar, who endorsed public defenders as a way to raise the quality of criminal defense practice. As a criminal defense practitioner herself, Foltz assessed the situation pragmatically: you get what you pay for. And if the scales of justice were to be balanced, practitioners needed steady and reliable resources and training that only a publicly funded office could provide — and that prosecutors already enjoyed. Foltz went on to start the first public defender's office in Los Angeles County in 1914, despite being roundly criticized for her beliefs.¹

Foltz and her legal colleagues could not have been more different in style, experience, and philosophy, yet all were profoundly invested, for different reasons, in raising the quality of criminal defense. Parity with the prosecution, elimination of the profit motive, better advocacy, and control of the legal profession all combined as good reasons to support publicly funded criminal defense.

Mayeux then moves into the rise of the Progressive Era, which, along with new social sciences in sociology and criminology, ushered in new notions about crime and criminal justice reform. Progressives saw crime not as an individual failure but as the collective failure of society to care for poor, young, and unruly immigrant and minority defendants. Public defenders would be thrown into the mix as “helpers” who would work alongside other state actors in a cooperative effort to shield the innocent and justly punish the guilty. Truth and justice would be the goal of the public defender, not adversarial advocacy on behalf of a client. In this way, opposing parties would come together to reach the “right” result.

The problem with the Progressive Era reformers is that they defined the “right” result as helping those who admitted their guilt. They turned a system intended to fairly adjudicate an individual's culpability into a way to solve the societal problem of crime. In doing so, the procedural protections of the Bill of Rights were lost in the shuffle of purported do-gooders insisting that the guilty plead guilty.

Indeed, this controversial Progressive Era approach completely undercut the fundamental and elegant precept under our law that a prosecutor must carry the burden of proving guilt beyond a reasonable doubt to a unanimous jury. The approach would have instead turned defense counsel, prosecutors, and bench officers into a team of cooperative social workers, dedicated to finding the objective truth. Such a model ignores notions of loyalty to the client and adversarial fact-finding. If the client is guilty, he or she should plead guilty, whether or not an adversarial trial might result in a failure of proof. The debate concerning the proper function of the prosecution and defense was temporarily dampened by the introduction of “voluntary defenders,” which were privately funded

defense organizations. Although these organizations had enormous success in East Coast cities, as Mayeux notes, they also came with two serious problems.

First, voluntary defenders cherry-picked the clients they wanted to represent — and guilty defendants were not their clients of choice. For some organizations, geography dictated who was represented. With others, it was the distinction between the deserving and the undeserving poor. The “deserving” were generally young men with no criminal history, while the “unworthy” were “habitual criminals” or those who were guilty but would not plead guilty. Race strongly influenced these notions of worthiness — common stereotypes painted African Americans as particularly prone to criminality, while white children were viewed as pure and innocent. So, for example, the Pittsburgh voluntary defenders had a policy: if the client was guilty, he must plead guilty or the association would refuse to represent him. This idea of providing assistance to only the “worthy” client is the antithesis of ensuring a fair system for every charged defendant, regardless of guilt. It also meant that without legal counsel, the “unworthy” were left to fend for themselves, easing the prosecution's burden of proof.

The second problem arose from private funding. Private donors held sway during the first half of the twentieth century. If, for example, donors did not want to fund the defense of certain types of crime, those charged defendants were out of luck. If donors had a financial downturn, so did the organizations. Caprice generated by the power of private donors to designate case types or turn the funding spigots on and off made it impossible for private defender organizations to plan responsibly for expansion and growth. Nonetheless, these private philanthropic organizations seeded the notion of publicly-funded defenders that germinated during the next few decades while Americans worried about the Communist threat.

Mayeux dedicates an entire chapter to the cultural zeitgeist of the Cold War. As the result of anti-Soviet sentiment, Americans in the 1950s and 1960s frequently contrasted themselves with Communist regimes, championing the primacy of individual rights over the totalitarian state. A paradigm shift occurred regarding public defense — the individual defendant was no longer the target of government intervention, but someone to be protected from the government, Mayeux explains. The corporate bar and the American Bar Association stopped decrying public funding of criminal defense as socialism and embraced it as the only way to ensure victory over tyranny. Public defender organizations became symbols of the American way, an antidote to totalitarianism, not a gateway to socialized legal services and socialism. I found this part of *Free Justice* incredibly compelling.

Unwittingly, the public now embraced the primacy of the procedural protections set out in the Bill of Rights that Progressive Era reformers had all but abandoned. The importance of protecting individuals against

1. For more on Foltz, see Barbara Babcock, *Woman Lawyer: The Trials of Clara Foltz*, Palo Alto, CA: Stanford Univ. Press, 2011, and Babcock, “Dedicating the Clara Shortridge Foltz Criminal Justice Center” (Spring/Summer 2003) *CSCHS Newsletter* 8, 13.

overreaching government authority during the Cold War cannot be overstated. This was the issue of the day. Because public defenders were all about the individual fighting the state, they fit the zeitgeist perfectly. But the zeitgeist still needed legal footing, which the Supreme Court supplied with *Gideon v. Wainwright*,² requiring the states to provide legal counsel to criminal felony defendants unable to afford their own.

As Justice Hugo Black patriotically penned in *Gideon*: “The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours.”³ With the pro-democracy gloss on public defense created by American Cold War ideology, *Gideon* was never second-guessed or rolled back by the public or other court decisions, as were other criminal procedure opinions of the Warren Court. The right to appointed counsel meshed perfectly with anti-Communist sentiment.

Yet a critical question loomed: would *Gideon* be implemented? Six months after the decision, U. S. Attorney General Robert F. Kennedy publicly hinted he did not think it would happen, given Southern defiance to *Brown v. Board of Education*⁴ and the bar’s general malaise in leading any charge for integration. Indeed, in the same year *Gideon* was decided, the ABA was still fostering segregation. In 1965, Anthony Lewis wrote *Gideon’s Trumpet*,⁵ a bestseller glorifying the opinion and the public’s reaction to it. But the decision did not instruct the country on how — or how fast — the right to counsel should be implemented. And there was no *Gideon II*, like *Brown II*,⁶ which mandated desegregation “with all deliberate speed.”

Consequently, Mayeux chronicles jurisdiction after jurisdiction, during the 1960s, thumbing their collective noses at *Gideon* and taking brazen steps to avoid its mandate. Some of this recalcitrance was strictly economic; counsel costs money. Some was unfamiliarity with how defense counsel would improve the administration of criminal justice or an unwillingness to hold the prosecution to its burden of proof. And some, make no mistake, was race-based: the criminal justice system in most jurisdictions was used as a tool to control minority and immigrant populations. Then as now, many minorities and immigrants were arrested and charged with offenses overlooked in white communities. Many young minority men, then as now, were stereotyped as criminals and stopped and arrested more often than similarly situated white men.

Although the Supreme Court and the public may have thought the idea of public defense for indigent defendants was a badge of honor, celebrating the American way of life, many local courts and city councils were not so

aligned. The uneven implementation of *Gideon* resulted in an overwhelming workload for public defenders, who were paid a pittance compared to prosecutors and not given the resources to provide competent representation.

The War on Drugs, declared in the 1970s, worsened these problems. Mayeux paints a vivid picture of ballooning caseloads due to the increased funding of law enforcement to prosecute individuals involved in drug possession and trafficking. Yet no parallel increase funded the defense of these additional cases. States and the federal government (which opened its first three federal public defender offices in 1971) were aware that more drug prosecutions necessitated more funding for the defense. Yet it was not forthcoming. Why? My hypothesis is that the War on Drugs turned public defense from a patriotic, American, anti-Communist symbol into a scorned obstacle to a drug-free and crime-free society. In other words, voting to fund public defenders became a partisan issue: it was equated to being soft on crime, the worst epithet one could level against a politician in the 1970s, 80s and 90s. Legislators feared their vote to adequately fund public defense could be used against them in future elections. So defense counsel represented their clients without adequate funding while juggling overwhelming caseloads. Legal representation did not seem that much better than it was before *Gideon*.

Mayeux fittingly concludes the book with a chapter entitled “Local Injustice” that beautifully frames her ultimate question: Is it possible to create and guarantee “equal justice” within a larger society infiltrated by interlocking forms of social, political, and economic inequality? Here Mayeux’s crisp writing sums up the problem, one that transcends inadequate funding and overworked lawyers:

Too much policing, perhaps, of the wrong kind.
Too many lawyers of the wrong kind, white lawyers in Massachusetts who did not really know their place in the communities they served and white lawyers in Mississippi who knew it all too well.

One can read this passage two ways: either Mayeux is indicting public defenders for not being sufficiently sensitive to the issues of the communities they serve, or she is indicting us for expecting public defenders to correct a system that is stacked against their clients in ways that transcend their immediate criminal case. Mayeux segues into a discussion of how some public defender offices have tried to become more relevant to the communities they serve by hiring more diverse staff, offering social services, and engaging in additional types of civil advocacy on their behalf.⁷

I do not abide Mayeux’s argument that public defenders are insensitive or naïve about how societal racism

Continued on page 35

2. (1963) 372 US. 335.

3. *Id.* 344.

4. (1954) 347 U.S. 483.

5. New York: Vintage Books, 1989 ed. (1964).

6. *Brown v. Board of Education of Topeka* (1955) 349 U.S. 294, 301.

7. Funding for defense services is still problematic, as the Ninth Circuit recently pointed out in *Rogers v. Dzurenda* (2022) 25 F.4th 1171, 1196–97.

REMEMBERING ELLIS HORVITZ

BY DAVID ETTINGER

ELLIS HORVITZ LOVED TO ARGUE in the California Supreme Court. During a bar association program a year before he died this past March at age 94, Ellis said, “If I had been independently wealthy, I would have paid the client to let me argue.”¹

Paying for the privilege of arguing would have been quite a costly proposition. Ellis appeared more than 50 times in the high court. Yet, despite a prodigious career that would lead Ellis to be routinely dubbed the “Dean of California’s Appellate Bar,” it was happenstance that put him on the path to litigating before reviewing courts.

Ellis said that when he graduated from Stanford Law School, which he attended at the same time as future United States Supreme Court Justices Sandra Day O’Connor and William Rehnquist, “I knew for a certainty that I would never set foot in a courtroom.” Instead, his interest was working in administrative law for the federal government and, in fact, he was hired by the Atomic Energy Commission.

However, a federal hiring freeze postponed his Washington career. Hearing of Ellis’s predicament, Stanford’s placement director pushed him to apply for an opening on the staff of Phil Gibson, then California’s chief justice. Stanford’s dean cautioned Ellis that Gibson was very difficult and demanding, but Ellis interviewed for the position anyway and was hired on the spot.

The dean’s warning proved accurate. Ellis said about his first work meeting with the chief justice, “I’d never had a conference like that before. He took a memo that I’d worked very hard on and simply tore it to shreds.” But, Ellis remembered, Gibson was never “demeaning or insulting. He just gave me a detailed, clinical analysis of my work.”

The demanding atmosphere of the chief justice’s chambers did not deter Ellis. To the contrary, although Ellis worked for Gibson for only a year and a half, the chief was a major, lasting influence on Ellis, probably the most important one of his professional life. Most people who spent any substantial time with Ellis were bound to hear him tell Gibson stories, always of the reverential type.

Ellis wrote that the clerkship “would determine the course of my career.”² He said, “I really became a lawyer when I worked for Chief Justice Gibson.” Gibson told his law

clerks, “My job is to undo the way you learned to think in law school and to train you to think like lawyers.”³

Gibson’s impact extended beyond the professional. About the chief’s relationship with his staff, Ellis remembered, “He was interested in our lives and families; he concerned himself with our

well-being; when trouble or misfortune beset any of us, he somehow found out about it and came forward to express his concern and to help; when tragedy struck, he wept.”⁴ Ellis said that Gibson “had great ambitions for those of us who worked for him.” Ellis certainly fulfilled those expectations.

Ellis was a pioneer in developing appellate law as a distinct practice area. So many of us who were fortunate enough to practice with Ellis owe our careers directly to him, but all appellate specialists are at least indirectly indebted because of his pathbreaking innovations in creating a firm-based, collaborative approach to appellate litigation. Also in his debt are the bench and bar, for he contributed greatly to raising the quality of lawyering at California’s reviewing courts.

In his typical understated way, Ellis said the formation of an appellate law firm was not particularly strategic. He began hiring young attorneys because he had more appeals than he could handle. His rationale was straightforward: “I would rather hire lawyers and take the cases that came in than remain a solo practitioner.”

As his appellate skills became widely known, Ellis and his firm became much in demand. Retired Supreme Court Justice Ming Chin said that Ellis “was the gold standard” and that “whenever I saw the name of his firm on any of the court papers, I knew we were going to hear good sound legal arguments without a lot of fluff.”⁵

Credibility with the courts was key to Ellis. “Credibility is everything,” he said, explaining, “if you are credible, you’re halfway home. If you’re not credible, you’re in deep trouble from the beginning.”

Clients came to trust Ellis with their most important institutional issues. He generously shared a secret with junior attorneys in the firm that clients often came away from a



Ellis Horvitz.
Photo: Horvitz & Levy.

1. The virtual Beverly Hills Bar Association program was part of its “War Stories” series and took place on February 22, 2021. Video of the event is here: <https://www.youtube.com/watch?v=d-bOoPT0p0Zk> [as of Aug. 14, 2022]. This article includes Ellis’ reminiscences about his life from the program. Quotations without citations are from the program. Ellis also gave an extended podcast interview to the *Daily Journal* in 2018: <https://www.dailyjournal.com/articles/349649-the-dean-of-the-california-appellate-bar> [as of Aug. 14, 2022].

2. Ellis J. Horvitz, “A Personal Note” (1984) 72 *Cal. L. Rev.* 503, 503.

3. *Ibid.*

4. *Id.* 505. Ellis’ descriptions of Gibson are not an aberration. A former staff attorney for the chief justice wrote that Gibson was “a hard taskmaster” with a “stern and forbidding” public demeanor, but a “marshmallow at heart” and who “treated his staff almost like family.” Olga Murray, *Olga’s Promise* (2015) pp. 66–67. For more about Phil Gibson, see “Chief Justice Phil Gibson,” 5 *Cal. Legal Hist.* (2010) 1–62.

5. MacLachlan, “Ellis J. Horvitz, 1928–2022: Litigator, raconteur is credited with creating the appellate law firm,” *Daily J.*, Mar. 29, 2022.

meeting impressed when all he did was listen. He said this in a humble way, with a hint of surprise. But his ability to listen to clients, co-counsel, and judges, and to distill what he learned into a winning theme, was one of his greatest talents.

Whether Ellis realized it or not, many of the traits that he admired in Chief Justice Gibson were ingrained in Ellis himself. If he benefited from Gibson's demanding but empathetic mentoring, he certainly paid it forward.

Ellis was a superb mentor, requiring that attorneys meet the highest standards of analysis, writing, and ethical lawyering — and teaching them how to do so. Justice Chin said Ellis “was not only an incredibly effective appellate lawyer, year after year he trained legions of effective appellate lawyers.”⁶ And he cared personally for his colleagues. As one of his former partners said at his funeral, Ellis made his firm not just a pleasant place to work, but more like a home.

Ellis' ego was much smaller than his well-deserved reputation. He would always say that the clients weren't his clients, but the firm's clients. Also, as much as he loved appellate arguments, Ellis would not commandeer court appearances, even those in the California Supreme Court. Rather, the general firm rule was — and still is — that the attorney who read the record and took the lead in drafting the briefs is the one who will argue the case.

By the time Ellis retired, the firm he started had become the largest appellate specialty law firm in the nation. He was a founding member and early president of the prestigious California Academy of Appellate Lawyers. He coauthored the leading treatise on California appellate law, the Rutter Group's *Civil Appeals and Writs*. He was on the board of directors of the California Supreme Court Historical Society in the 2010s. And in 2018, Ellis was the first to be inducted into the Appellate Lawyer Hall of Fame by the California Lawyers Association.

Ellis' efforts were not limited to private practice. His relationship with the courts was more than just as an advocate. Among other things, Chief Justice Rose Bird

6. *Ibid.*

appointed Ellis to the Advisory Committee for an Effective Publication Rule; he served on a committee chaired by Supreme Court Justice Allen Broussard that revised the rules regarding the manner of Supreme Court review; and Chief Justice Malcolm Lucas appointed him to the Judicial Council's Appellate Advisory Committee while it was chaired first by Supreme Court Justice Marvin Baxter and then by Supreme Court Justice Joyce Kennard.

Ellis' training of legal minds was not limited to those at his law firm. For more than two decades, he taught at the University of Southern California's law school.

Ellis was a special person — a great legal talent, a wise advisor to clients, a courteous and ethical opponent, and a kind and loving man. During Ellis' Supreme Court clerkship, Chief Justice Gibson wrote the decision for a divided court striking down California's alien land law that barred Japanese people from owning real property in the state.⁷ Ellis recalled that, when he read that opinion, he said to himself, “Boy oh boy, I'm working for a great man.”

Ellis was pretty great, too.



DAVID S. ETINGER has been with Horvitz & Levy — as an associate, partner, and now of counsel — since 1982. He serves on the board of the California Supreme Court Historical Society and is the primary writer for Horvitz & Levy's *At The Lectern* blog, which covers the California Supreme Court.

7. *Sei Fujii v. State of California* (1952) 38 Cal.2d 718, 737–38 (“The California alien land law is obviously designed and administered as an instrument for effectuating racial discrimination, and the most searching examination discloses no circumstances justifying classification on that basis [T]he alien land law is invalid as in violation of the Fourteenth Amendment.”). Sixty-five years later, the court posthumously granted membership in the State Bar to the plaintiff in the case, who, despite being a law school graduate, was prohibited from practicing law because of his race. (*Administrative Order 2017-05-17* (Cal. 2017) 217 Cal.Rptr.3d 730.)

ON THE BOOKSHELF *cont'd from pg. 33*

impacts their clients. In my experience, sometimes the only persons in the courtroom consciously living that reality are the defendants *and* their public defenders. That said, I do not subscribe to the notion, as hinted at by Mayeux, that public defender offices should also don the mantle of social worker. The primary task of the optimal public defender's office is to train and retain excellent trial lawyers whose skills outstrip those of opposing counsel so the client can obtain every advantage. And, of course, this primary task can be accomplished, no matter how sensitive an attorney is, only with adequate funding to wring out of the criminal case all there is to get.

Mayeux's book is food for thought for everyone practicing in the criminal justice arena. The much-hyped

promise of *Gideon*'s imprimatur on the right to counsel led us all to expect Herculean societal changes. Yet despite the best courtroom efforts of even well-funded, skilled public defenders, many of their clients still can't breathe. That recognition by all of us would go a long way toward balancing the scales of justice.



MARIA E. STRATTON has been an associate justice of the California Court of Appeal, Second Appellate District, Division 8 since 2018. In 2006 she was appointed a judge of the Los Angeles County Superior Court, where she served until 2018. From 1993 to 2006 she was the Federal Public Defender for the Central District of California.



2022 WRITING COMPETITION VIRTUAL ROUNDTABLE

Virtual Roundtable Participants — Top row, left to right: Chief Justice Tani Cantil-Sakauye, recently retired Justice Kathryn Mickel Werdegar, Competition Chair Selma Moidel Smith, and Society President Daniel Kolkey. Bottom row, left to right: Winning authors Leah Haberman, Ryan Carter, and Simon Ruhland. (Published in the San Francisco and Los Angeles editions of the Daily Journal on September 6, 2022.)

THE CALIFORNIA SUPREME COURT HISTORICAL SOCIETY is pleased to announce the winners of its 2022 CSCHS Selma Moidel Smith Student Writing Competition in California Legal History.

First place was won by Leah Haberman of Columbia Law School (JD Candidate, class of 2024) for “More Than Moratoriums: The Obstacles to Abolishing California’s Death Penalty.” She concludes that only a change of public opinion, rather than legal or judicial action, is likely to end the death penalty in California. She receives a prize of \$2,500.

Second place was awarded to Ryan Carter, UCLA School of Law (MLS, Master of Legal Studies, with specialization in Public Interest Law & Policy, 2022), for “San Fernando Valley Secession: How a Quest to Change the Law Almost Broke L.A. Apart (and Whether It Still Could).” His paper traces the social and political forces that attempted to change state laws on city formation to favor or oppose secession. He receives a prize of \$500.

The third-place winner was Simon Ruhland, UCLA School of Law (LLM, Master of Laws, with specialization in International and Comparative Law, 2022), for “Wind

of (Constitutional) Change: Amendment Clauses in the Federal and State Constitutions.” He argues that the difficulty of amending the U.S. Constitution has caused it to become less reflective of major societal changes than the constitutions of states such as California. He receives a prize of \$250.

The distinguished judges were Professors Lawrence Friedman of Stanford Law School and Rebecca Latham Brown of USC Gould School of Law.

The high quality of the winning papers has resulted in the editorial decision to publish all three in the 2022 volume of *California Legal History*. Professor Brown commented that Haberman’s paper was “the most historical, with a focus on an important legal issue in California”; that she “liked the original historical research (interviews and archives)” in Carter’s paper; and that Ruhland’s paper might well have placed higher if it had been “centrally about California,” as “it seemed to be at a level of scholarship that I would not expect from a student.”

The competition is open to all law and graduate students, and papers may address any aspect of legal history dealing significantly with California. ★

CALIFORNIA LEGAL HISTORY

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FROM THE PRESIDENT

EDMOND BURKE DESCRIBED society as “a partnership . . . between those who are living, those who are dead, and those who are to be born.”¹

Law — if it is to be both stable and legitimate — must likewise be founded on the wisdom of our ancestors, as modified and improved by the living, for the benefit of those who are to be born. Although we may reject some of our ancestors’ laws and principles as outdated or even immoral, Benjamin Cardozo’s analysis of the judicial process still holds: “logic, and history, and custom, and utility, and the accepted standards of right conduct, are the forces which singly or in combination shape the progress of the law.”² Failing to appreciate the wisdom of the past likely generates mistakes for the future.

In that spirit, the California Supreme Court Historical Society preserves and communicates the history of the lives and decisions of the justices of the California Supreme Court, as well as California legal history in general. We record, memorialize, and maintain the oral history of departing California Supreme Court justices, and publish edited versions of these histories in our annual journal, *California Legal History*, and in our books, like *Chief*³ — the oral history of retired Chief Justice Ronald M. George. These works give insights into the thinking of those who interpret our laws and Constitution — insights that any attorney can profit from.

We also publish, twice yearly, this scholarly *Review*, which you are reading at this very moment and which addresses a wide variety of historical topics, including judicial decisions and biographies.

As the Society’s newly elected president, I have asked the Society to take our efforts a few steps further. With the board’s approval, we will begin to:

- offer legal history programs with CLE credit, such as our program, scheduled this November, on the California Supreme Court’s groundbreaking decision in *Perez v. Sharp*,⁴ which struck down California’s interracial marriage ban in 1948 — nearly two decades before the U.S. Supreme Court did so in *Loving v. Virginia*;⁵

- offer programs that have direct relevance to all California attorneys, such as a roundup of recent California Supreme Court opinions;

- address current legal topics, such as the CLE program

that we plan to offer this winter on the California Supreme Court’s jurisprudence concerning abortion; and

- include debates on historical topics in this *Review*.

In the near future, the Society also expects to complete its oral history regarding Bernard Witkin — the “Justinian” of California law, as retired Justice Norman Epstein characterized him at a special proceeding of the California Supreme Court in 1996 — which we have undertaken in association with the Witkin Charitable Foundation.

And over the coming years, the Society plans to commence working on the oral histories of former Associate Justice Mariano-Florentino Cuéllar and Chief Justice Tani Cantil-Sakauye.

The Society will also be increasing the prizes awarded in its “Selma Moidel Smith” student writing competition. This competition gives law students and graduate students an opportunity to publish works of original research on any aspect of California legal history. This year’s winners, who were published in our journal’s most recent edition, included a summary of the legal challenges over the past 50 years to California’s death penalty, offered an original piece of scholarship concerning the law governing municipal reorganizations with a look at the San Fernando Valley’s failed efforts to secede from Los Angeles, and evaluated the differing approaches for amending state constitutions.

Needless to say, these projects, programs, the journal, and indeed this *Review* all depend on your financial support. For as little as a \$25 dues checkoff at the time you pay your State Bar dues, you can be a member and help preserve California’s legal legacies for those yet born. ★

With warm wishes for a Happy New Year,
Daniel M. Kolkey



1. Henry Kissinger, *Leadership: Six Studies in World Strategy*, London: Penguin Press, 2022.

2. Benjamin Cardozo, *The Nature of the Judicial Process*, New Haven: Yale Univ. Press, 1921, 112.

3. Ronald M. George, Chief: *The Quest for Justice in California*, Berkeley: Institute of Governmental Studies Press, 2013.

4. (1948) 32 Cal.2d 711.

5. (1967) 388 U.S. 1.

DANIEL M. KOLKEY is president of the California Supreme Court Historical Society, a former associate justice on the California Court of Appeal, an advisor to four different state governors, and a retired partner of Gibson Dunn & Crutcher LLP.

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On the Cover: Detail of the cover of *ONE Magazine's* Oct., 1954 issue. Story on page 2. All *ONE Magazine* images: *Courtesy ONE Archives at the USC Libraries.*