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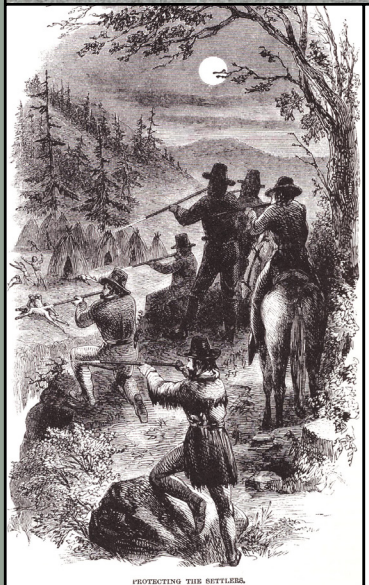


PROTECTING THE SETTLERS.

AN ACT *for the Government and Protection of Indians.*

Passed April 22, 1850.

The People of the State of California, represented in Senate and Assembly, do enact as follows:

§ 1. Justices of the Peace shall have jurisdiction in all cases of complaints by, for, or against Indians, in their respective Townships in this State.

§ 2. Persons and proprietors of lands on which Indians are residing, shall permit such Indians peaceably to reside on such lands, unmolested in the pursuit of their usual avocations for the maintenance of themselves and families: *Provided*, the white person or proprietor in possession of such lands may apply to a Justice of the Peace in the Township where the Indians reside, to set off to such Indians a certain amount of land, and, on such application, the Justice shall set off a sufficient amount of land for the necessary wants of such Indians, including the site of their village or residence, if they so prefer it; and in no case shall such selection be made to the prejudice of such Indians, nor shall they be forced to abandon their homes or villages where they have resided for a number of years; and either party feeling themselves aggrieved, can appeal to the County Court from the decision of the Justice: and then divided, a record shall be made of the lands so set off in the Court so dividing them, and the Indians shall be permitted to remain thereon until otherwise provided for.

§ 3. Any person having or hereafter obtaining a minor Indian, male or female, from the parents or relations of such Indian minor, and wishing to keep it, such person shall go before a Justice of the Peace in his Township, with the parents or friends of the child, and if the Justice of the Peace becomes satisfied that no compulsory means have been used to obtain the child from its parents or friends, shall enter on record, in a book kept for that purpose, the sex and probable age of the child, and shall give to such person a certificate, authorizing him or her to have the care, custody, control, and earnings of such minor, until he or she obtain the age of majority. Every male Indian shall be deemed to have attained his majority at eighteen, and the female at fifteen years.

Reflections on the Great Denaming Debate

Of Colleges and Halls and Judges Bearing Gifts

Reflections on the Great Denaming Debate

BY JOHN BRISCOE

UC College of the Law, San Francisco Chancellor and Dean David Faigman. *Photo: UC College of the Law, San Francisco.*

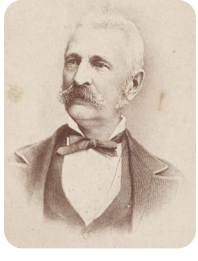
Four justices of the court of appeal and nine other representatives of the California judiciary eagerly awaited their first meeting with seven chief judges of Indian tribal courts. This meeting would be the first of the California Tribal Court / State Coalition, just created by California Chief Justice Ronald George.[1] Moreover, the thirteen California representatives had a gift of great value for their Indian counterparts.

It was the morning of May 20, 2010. The representatives gathered not on what little remained of Indian land in California but in the grand chambers of the California Judicial Council in the new Hiram Johnson State Office Building at 455 Golden Gate Avenue in San Francisco. After introductions, the meeting began.

Justice Richard Huffman waited for an appropriate moment to tell the Indian judges of the gift the state members had for them. The moment came, Justice Huffman announced the gift — access to the state judges' exclusive, high-powered search engine — and, with pride in his delegation's gracious gesture, added, "It's called 'Serranus.'"

Those in the room that day have slightly different recollections of aspects of that moment — who sat where, who said precisely what. But all remember one thing the same: At the sound of *Serranus*, a stony silence fell.

After a time, Huffman explained that the name referred to Serranus Hastings, the first chief justice of California. After another, long while, Chief Judge Lester Marston of the Blue Lake Rancheria Tribal Court explained, for the thirteen state members, that Serranus Hastings, that celebrated first chief justice, the founder of California's first law school, had directed the mass murders of Indians in Round Valley and elsewhere, and taken their lands. All the chief judges of the Indian tribes knew what Hastings had done. Only one of the thirteen state judges, all having sterling educational backgrounds, knew even the least whispers of the misdeeds of Hastings.[2]



Chief Justice Serranus Hastings. *Photo: Public domain.*

Hastings indeed committed grievous misdeeds. In relatively short order, in the most modest of gestures, new Chief Justice Tani Cantil-Sakauye stripped the name *Serranus* from the search engine intended to honor the Indian tribal courts. More than a decade later, after first proclaiming emphatically that the crimes of Hastings should *not* cause his name to be stripped from the law school he had founded, the chancellor and dean of the college reversed course and emphatically recommended the name come down. The legislature and governor concurred and the name was changed, effective this year, to UC College of the Law, San Francisco.

The denaming[3] of Hastings College of the Law is part of a pattern, a movement, to dename and sometimes rename institutions, buildings, streets. What are we to make of it? The decision (in the end) to dename Hastings College of the Law is a useful case study to consider at the outset. For one, the matter of California's first chief justice seems particularly appropriate for this periodical. Second is the recentness of events. The "misdeeds" of Hastings came to light only of late, and the decision to dename was made just last year, effective this year. Third, the course of the Hastings controversy follows a pattern often seen in other controversies: The revelations of a dark past, outrage from some quarters, the formation of a committee, a decision not to rename usually based on a set of principles developed for the particular case, and finally, in some instances, a reversal and a decision to dename. To understand the Hastings controversy one first must understand certain critical facts of California's early history — facts not found in the mainstream histories of the state, or only obliquely alluded to, until very recently.

California's Grim Beginnings

Before Congress admitted California to the union on September 9, 1850, it vigorously debated whether

1. California Judicial Council, Press Release No. 22, May 20, 2010.

2. The account of this meeting is drawn from the author's personal communications with two participants, Chief Judge Abby Abinanti of the Yurok Tribe, and now-retired Court of Appeal Justice James Lambden.

3. "Dename" is a verb, and "denaming" a noun, or at least a gerund. UC Berkeley used the term in its 2020 decision to take the name "Boalt" from its law school. "UC Berkeley removes racist John Boalt's name from law school," *https://news.berkeley.edu/2020/01/30/boalt-hall-denamed/#:~:text=Boalt%20Hall%20will%20now%20be,North%20Addition%20and%20South%20Addition* [as of Apr. 4, 2023]. "Denaming" seems preferable, if only for syllable count, to "diseponymization."

California should be admitted as a free or a slave state. Sen. John C. Calhoun of South Carolina in particular, summoning his greatest rhetorical powers, opposed California's admission unless it were a slave state; Sen. Daniel Webster of Massachusetts equally fiercely argued for its admission as a free state. In the end, California was admitted as a free state,[4] as we have all been told.

But California was not a free state. It had already legislated itself to be a slave state (or at least a slave *land,* since it was not yet a state), with a flourishing slave trade. And it remained a slave state for scores of years. Its institutionalized slavery of Indians (and too of Black people), soon to be accompanied by Gov. Peter Hardeman Burnett's proclaimed "war of extermination" against Indians, was efficiently enforced by three branches of government, which, as it happened, had all been created unconstitutionally. A précis of California's colonization, and its ultimate and present status as a prize of war, is useful.

Spain, having "discovered" it, claimed California in 1542. But it did not begin to colonize it until 1769, when Franciscan priests, acting on authority of the king of Spain, established the first California mission at San Diego. In all, the Spanish, through the Catholic Church, founded 21 missions, from San Diego to Sonoma. In 1821 Mexico attained independence from Spain, and in 1834 seized virtually all of the mission lands from the church and began granting them to favored men. More than 600 of those vast land grants would later be proved valid in American courts.[5] In 1846, the United States began war with Mexico, seized Alta California (what we call "California"), invaded Mexico, and marched to the outskirts of Mexico City. Mexico sued for peace.[6]

A treaty of peace was signed by negotiators for the two countries on February 2, 1848, in the town of Guadalupe Hidalgo, within cannon shot of Mexico's capital city. (Today it is part of Mexico City.) The treaty promised Mexico there would be no more American terror rained on it. In return, Mexico ceded to the United States the lands we know as New Mexico, nearly all of Arizona, large portions of Colorado and Wyoming, and all of Utah, Nevada, and California.[7]

Nine days before the treaty was signed, on January 24, 1848, gold was discovered in Northern California. The Mexican negotiators obviously were oblivious to that discovery, which great writers ever after would try to capture in words.

A "mini gold rush" occurred in early 1848, but it soon petered out, in the mining expression, and life in San Francisco returned to its somnolent, potholed normal.

Incidentally, the population of the little Pueblo of San Francisco, which only the year before had changed its name from Yerba Buena, was 469, according to a census ordered by the U.S. military governor and taken in 1847 by Lt. Edward Gilbert of the U.S. Army.[8]

Other than that gold rush, little changed in California until late that year of 1848. On December 5, President James Polk, in his State of the Union Address, announced to the world that the reports of gold in California were true, and that all were free to come and take it. Hundreds of thousands did come and did take. Jim Holliday aptly titled his monumental book on this time *The World Rushed In*.[9]

What we think we know of the California Gold Rush — whether we know it or not — we know from the writings of Bret Harte, who wasn't actually here during the Gold Rush.[10] We imagine the forty-niners as heroic, intrepid, latter-day Argonauts. But what sort of men were they really (and they were virtually all men), who made the long treacherous sea voyage around the Horn, or chose a shorter route that took them by foot through the jungles of Central America, to come to San Francisco for the Gold Rush? They were, in the main, men who had left wives, children, mothers, jobs, the law, creditors, and other enemies to travel 4,000 miles or much more to seek gold, or a fortune in other than gold, and a new life.

Mining on the American River near Sacramento, circa 1852. *Photo: Public domain.*

4. Kevin Starr, *California*, New York: The Modern Library, 2005, 96–97. 9 Stat. 452, Public Law 31-50.

5. W. W. Robinson, *Land in California*, Berkeley: Univ. of Calif. Press, 1948, 106.

6. Starr, *California* 60–70; John Walton Caughey, *California*, New York: Prentice-Hall, Inc., 1940, 268–84.

7. Caughey, *California*, *supra*, 73–74; Hubert Howe Bancroft, *History of California*, San Francisco: The History Co., Pub., 1886, v. V, 590–92; Richard Griswold del Castillo, *The Treaty of Guadalupe Hidalgo*, Norman: Univ. of Oklahoma Press, 1990, 30–42.

8. Oscar Lewis, *San Francisco: Mission to Metropolis*, Berkeley: Howell-North Books, 1966, 46.

9. Holliday, *The World Rushed In*, New York: Simon & Schuster, 1981.

10. Bret Harte plagiarized much of stories such as "The Luck of Roaring Camp" from the letter sheets (think large postcards) of pioneer Louise Clappe, writing as "Dame Shirley." Regarding Harte's plagiarism, see Lawrence Ferlinghetti and Nancy J. Peters, *Literary San Francisco,* San Francisco: City Lights Books and Harper & Row, Pub., 1980, 18.

We cannot comprehend the enormity of the California Gold Rush, nor of the transformations it brought about. In early 1850, eight months before California would be admitted as a state of the United States, two obscure German writers wrote an essay in an equally obscure German journal. In it they declared, "Now we come to California. The most important thing which has happened here . . . is the discovery of the California gold mines. Even now, after scarcely 18 months, it can be predicted that the discovery will have much greater consequences than the discovery of America itself."[11] Those two little-known, then, German writers were Karl Marx and Friedrich Engels. More than a century later, in 1981, the scholar Jim Holliday wrote, with the advantage of hindsight, "Everything about California would change. In one astonishing year the place would be transformed from obscurity to world prominence. . . . The impact of that new California would be profound on the nation it had so recently joined."[12] The following year Wallace Stegner wrote, "The California Gold Rush was a universal mass trespass that shortly created laws to legitimize itself."[13]

The population of just the newly named Pueblo of San Francisco grew from 469 in June of 1847, to 2,000 by the beginning of 1849, to 25,000 by the end of that year, and to something on the order of 50,000 by the end of 1850.[14] California was aswarm with settlers, who paid little heed to the property rights of the private landowners, and none to the property rights of the Indians.

In the state as a whole, the population of the *native* Californians — between first European "contact" in 1542 and the end of the brief mission era in 1834, a period of nearly 300 years — dropped from 350,000 to 150,000, demographers say. The causes were many: European diseases to which the Indians had no immunity; abuse at the hands of certain of the Spanish padres and soldiers; and suicides wrung from despair. From 1834 until 1880, however, the native population plummeted far more precipitously, from 150,000 to 18,000. In all, the native Californians suffered a 95 percent loss of population between 1542 and 1880.[15]

For that latter period of 1834–1880, by far the principal cause of the Indian population collapse was the murder, mostly mass murder, by the mostly white gold-seekers and settlers. Indian hunting was sport. But it had the added benefit of ridding the land of those who had superior land rights, rights the United States was obliged to honor under international law. More about that in a few paragraphs.

The State of California was at the heart, if that's a right metaphor, of that mass murder. The legislature authorized private militias to slaughter Indians, and between 1850 and 1861 some 3,456 men signed up with 24 state-sponsored militia groups, who massacred Indians by the hundreds. The most scholarly account to date states that a minimum of 370 massacres were committed, and hundreds more smaller "vigilante" killings. In just the period April 1850–December 1854, Indian massacres occurred from extreme Northern California (peoples of the Tolowa, Modoc, Yurok and Shasta tribes, to name just a few) to the southernmost part of the state, where the Cahilla and Cupeño were slaughtered.[16]

In the 1850s, Serranus Hastings organized and financed Indian-killing expeditions.[17] During this period he was also the first chief justice of California (1849–1851), as well as the state's third attorney general (1852–1854).

During the Civil War, Leland Stanford solicited volunteers for quasi-military campaigns against California Indians. As governor of California (1861–1863), he signed into law appropriation bills to fund those killing expeditions.[18] UCLA Prof. Benjamin Madley wrote in his deeply researched, and deeply troubling 2016 book, *An American Genocide*, that Hastings and Stanford "thus profited from the theft of California Indian land . . . [and] helped to facilitate genocide . . . ."[19]

Stanford and Hastings were only two of thousands of white men directing or facilitating those mass murders. Near Eureka in Humboldt County, white men massacred hundreds of Wiyot Indians in the late 1850s. A horrified young Bret Harte wrote of these mass killings for his newspaper the *Northern Californian*. Following the inevitable death threats from the killers, Harte prudently slunk away to San Francisco, where he found himself at the heart of a nascent literary scene.[20]

Though state and local school authorities have chosen, until recently, to largely conceal or ignore this history, it was not unknown to California's early chroniclers. In Volume VII of Hubert Howe Bancroft's magisterial (seven-volume) *History of California* (1890), embedded deep on page 477, are these words, acrid with sarcasm:

11. Karl Marx and Friedrich Engels, "Review: January-February 1850," *Neue Rheinische Zeitung Revue*, Jan.–Feb. 1950, reprinted in David Fernbach, ed., *The Penguin Marx Library*, v. 1, Political Writings, Harmondsworth, England: Penguin Books, 1973, 265, 275.

12. Holliday, *The World Rushed In, supra*, 26.

13. Stegner, "The Gift of Wilderness," in *One Way to Spell Man,* New York: Doubleday & Co., 1982, 164.

14. Frank Soulé, John H. Gihon, and James Nisbet, *The Annals of San Francisco*, New York: D. Appleton & Co., 1855, 176, 226, 244, 300.

15. Benjamin Madley, *An American Genocide: The United States and the California Indian Catastrophe,* New Haven: Yale Univ. Press, 2016, 346–47, and authorities cited.

16. *Id*. 175, 351.

17. *Id*. 347–50.

18. *Id*. 348–50.

19. *Ibid*.

20. Harte in 1868 became the first editor of the *Overland Monthly*, which brought out writers such as himself (including his famous story of the Gold Rush, "The Luck of Roaring Camp"), one Samuel Clemens (Mark Twain), Ina Coolbrith, Noah Brooks, and so many others.

Thus it is that the California Valley cannot grace her annals with any single Indian war bordering on respectability. It can boast, however, a hundred or two of as brutal butcherings, on the part of our honest miners and brave pioneers, of any area of equal extent in our republic. The poor natives of California had neither the strength nor the intelligence to unite in any formidable numbers; hence, when now and then one of them plucked up courage to defend his wife and little ones, or to retaliate on one of the many outrages that were constantly being perpetrated upon them by white persons, sufficient excuse was offered for the miners and settlers to band and shoot down any Indians they met, old or young, innocent or guilty, friendly or hostile, until their appetite for blood was appeased.[21]

"Protecting the Settlers," illustration for *Harper's New Monthly Magazine*, 1861. *Image: Calif. State Library.*

Following its acquisition, as a prize of war, of more than half of Mexico,[22] the United States never got around to providing laws for the land we call California. Under the United States Constitution, only Congress could, of course.[23] But white men in California grew impatient. They wanted "their land" to become a state of the United States. And so, in 1849 and 1850, with no authority whatever from Congress, they convened in Monterey to write their own constitution, and laws, for a place — not a territory, not a state — they called California.

In October 1849 they drew up a constitution for the place California, and delivered it to the voters, meaning white men, who approved it (12,872 for and 811 against), on November 13. The 1849 Constitution seemed to absolutely prohibit slavery in its Section 18: "[N]either slavery, nor involuntary servitude, unless for punishment of a crime, shall ever be tolerated in this *state*."[24]

At the same time, they created (again without authority of Congress) a supreme court, a governor, and a legislature.

A lawyer, judge, and adventurer named Serranus Hastings was proclaimed first chief justice of California. Under Chief Justice Hastings, California's third branch of government, acting without the required authority of Congress, which is to say illegally, got right down to business.

The Judiciary Strikes First

In March 1850, one month before the legislature enacted the vilest piece of legislation in its history, six months before the place called California would become a state of the United States, and then under false pretenses, the Supreme Court of California decided its first case, *People v. Smith*.[25] Eight white men had been arrested in Napa (or Nappa) for the massacre of Indians and the burning of their village and the people's food stores. They were a Captain Smith, Benjamin Kelsey, Samuel Kelsey, James Lewis, Julian Graham, James Prigmore, John Kelly and W. Anderson. In the words of white Napa Valley pioneer George Yount, the men "passed the day in murder & butchery." The local judge denied them release from jail pending trial, and the white killers appealed that order to the Hastings Supreme Court, seeking to be released. The Supreme Court ordered the men released, on bond. Predictably — as the court no doubt knew would happen — the men jumped bail. None was ever tried, and many went on to live prominently prosperous lives in Napa.[26]

21. Hubert Howe Bancroft, *History of California*, v. VII, 477, San Francisco: The History Co., 1890, 477. Although Bancroft listed himself as the author of each of the 39 volumes of history of the American West that bears his name, he wrote little of it. The seven volumes on the history of California until 1890 were written by a man named Henry Lebbeus Oak, who labored in Bancroft's "history factory" for decades. Kevin Starr, *Clio on the Coast: The Writing of California History, 1845–1945,* San Francisco: The Book Club of California, 2010, 27.

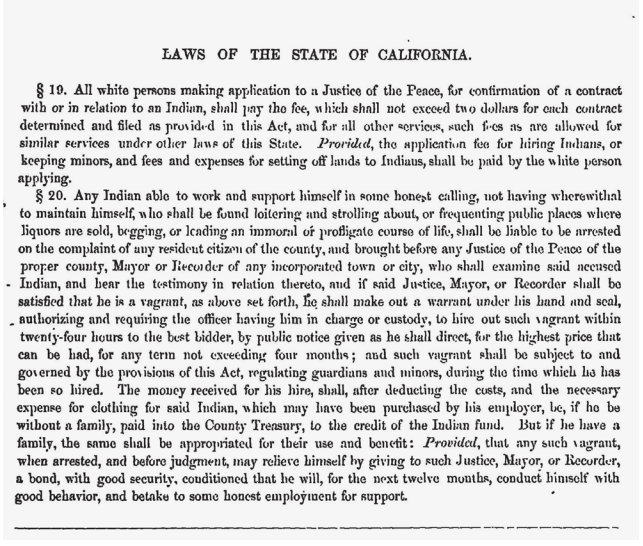
22. The land area of today's Mexico is approximately 761,000 square miles. The combined land area of California, Nevada, Utah, New Mexico, Arizona, Colorado, and Wyoming is about 800,000 square miles.

23. Art. IV, § 3, clause 2.

24. *See https://archives.cdn.sos.ca.gov/pdf/1849-california-constitution-for-website-9-16-20.pdf., italics added.* Note that the Preamble reads, "We the People of California [not State of] . . . do establish this Constitution" [as of Apr. 7, 2023].

25. (1850) 1 Cal. 9.

26. Madley, *An American Genocide*, 122, 124, 159–60. Recently deceased former Napa County Superior Court Judge Philip Champlin had been researching the case, eager to learn why no trial was ever held. Professor Madley now is focusing on that very question. *See also* discussion of *People v. Smith* in Marie Silva, "Expanding Justice for All: The Supreme Court of California in Times of Change" (Fall/Winter 2022) CSCHS *Review* 21–22.



LAWS OF THE STATE OF CALIFORNIA.

§ 19. All white persons making application to a Justice of the Peace, for confirmation of a contract with or in relation to an Indian, shall pay the fee, which shall not exceed two dollars for each contract determined and filed as provided in this Act, and for all other services, such fees as are allowed for similar services under other laws of this State. *Provided*, the application fee for hiring Indians, or keeping minors, and fees and expenses for setting off lands to Indians, shall be paid by the white person applying.

§ 20. Any Indian able to work and support himself in some honest calling, not having wherewithal to maintain himself, who shall be found loitering and strolling about, or frequenting public places where liquors are sold, begging, or leading an immoral or profligate course of life, shall be liable to be arrested on the complaint of any resident citizen of the county, and brought before any Justice of the Peace of the proper county, Mayor or Recorder of any incorporated town or city, who shall examine said accused Indian, and hear the testimony in relation thereto, and if said Justice, Mayor, or Recorder shall be satisfied that he is a vagrant, as above set forth, he shall make out a warrant under his hand and seal, authorizing and requiring the officer having him in charge or custody, to hire out such vagrant within twenty-four hours to the best bidder, by public notice given as he shall direct, for the highest price that can be had, for any term not exceeding four months; and such vagrant shall be subject to and governed by the provisions of this Act, regulating guardians and minors, during the time which he has been so hired. The money received for his hire, shall, after deducting the costs, and the necessary expense for clothing for said Indian, which may have been purchased by his employer, be, if he be without a family, paid into the County Treasury, to the credit of the Indian fund. But if he have a family, the same shall be appropriated for their use and benefit: *Provided*, that any such vagrant, when arrested, and before judgment, may relieve himself by giving to such Justice, Mayor, or Recorder, a bond, with good security, conditioned that he will, for the next twelve months, conduct himself with good behavior, and betake to some honest employment for support.

"Act for the Government and Protection of Indians," 1850, Sections 19 & 20. *Image: California Judicial Center Library.*

With that first decision began the jurisprudence of the Supreme Court of California.

Not to be Outshone by a Mere Court, the Legislature Weighs In

The first California Legislature took it upon itself to write laws notwithstanding that it, like the California Supreme Court and like the governor, had no authority from Congress to do anything. Early on its docket was a "Bill for the Protection, Punishment and Government of Indians." That bill became the 133rd law passed by the California Legislature. As enacted, the bill was given the anodyne name, "Act for the Government and Protection of Indians."[27]

But everyone knew it as the "Indian Slavery Act."

The act provided that, upon the petition of a white man to a justice of the peace, one or more Indians could be made that petitioner's slave:

> Any Indian . . . found loitering and strolling about, or frequenting public places where liquors are sold, begging, or leading an immoral or profligate course of life, shall be liable to be arrested on the complaint of any reasonable citizen of the county, . . . authorizing and requiring the officer having him in charge or custody, to hire out such vagrant within twenty-four hours to the highest bidder, . . . for any term not exceeding four months . . . . The money received for his hire, shall, after deducting the costs, and the necessary expenses, be paid into the County Treasury, to the credit of the Indian Fund. But if he have a family, the same shall be appropriated for their use and benefit. . . .[28]

The act was hardly rushed through the legislature in a flurry of hasty *hachage de saucisson*. The Senate alone considered the bill on eight different days in March and April of 1850.[29] The bill passed and became law on April 22, 1850.

The Indian Slavery Act would seem (a lawyer's most cravenly hedging two words) to have violated Article I, section 18 of the state's new Constitution. Would it not?

Less than five months later, on September 9, 1850, Congress admitted California to statehood, on condition it be a free state. But California was a slave state and would remain so for decades. So, from its first moment of statehood, California was in violation of its act of admission to the Union.[30]

When in Los Angeles, visit the site of the imposing federal courthouse downtown. The block on which that courthouse sits was for years the site of perhaps the largest of many Indian slave markets in California.[31]

The Indian Slavery Act remained on the books for nearly a hundred years. It was not repealed until 1937. In that year, in as obfuscating a legislative sausage as has ever been hashed, referring to it in the same breath with scores of other laws only by chapter, and date, and year, with utterly no mention of its subject, the legislature repealed the Indian Slavery Act.[32]

Just as no one knows exactly how many Indians were killed in the course of state-sponsored massacres, likewise no one knows how many Indians were indentured to white masters during this long period of Indian slavery in California. A tedious, case-by-case search of all court filings throughout the state, beginning April 22, 1850, would be required to begin to find out.[33]

27. Cal. Stats. 1850, ch. 133, 408.

28. *Id.,* § 20.

29. *Journal of the Legislature of the State of California*, 1850, 217, 224, 228, 257, 258, 337, 338, 343, 366, 384, 386, 387 (Mar. 14, 16, 38, 30, April 16, 17, 19 and 22 — when it passed).

30. *https://californiahistoricalsociety.org/blog/california-a-free-state-sanctioned-slavery/* [as of Apr. 4, 2023]. Black slavery was practiced here as well. California's constitution proclaimed that "neither slavery nor involuntary servitude, unless for punishment of a crime, shall ever be tolerated." *Ibid*. Yet archives statewide contain evidence that slavery was practiced out in the open. One newspaper ad in the *Sacramento Transcript* offered "A valuable Negro girl, aged eighteen . . . of amiable disposition, a good washer, ironer and cook" for sale. Susan D. Anderson "California, a 'Free State Sanctioned Slavery,'" *https://www.aclunc.org/blog/california-free-state-sanctioned-slavery* [as of Apr. 15, 2023].

31. "Los Angeles' 1850s Slave Market Is Now the Site of a Federal Courthouse," *https://www.kqed.org/news/11790005/los-angeles-1850s-slave-market-is-now-the-site-of-a-federal-courthouse* [as of Apr. 4, 2023].

32. Cal. Stats. 1937, ch. 369, Div. XX, 1180.

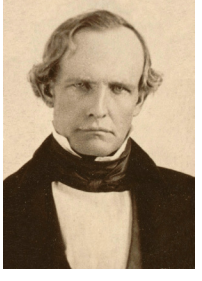
33. Kimberly Johnston-Dobbs, "Early California Laws and Policies Related to California Indians," a study done for Senate President Pro Tempore John Burton, *https://web.archive.org/web/20141012063249/https://www.library.ca.gov/crb/02/14/02-014.pdf* [as of Apr. 4, 2023]; *see* "Slavery by Another Name," *https://www.aclunc.org/sites/goldchains/explore/native-american-slave-market.html* [as of Apr. 4, 2023]; "History of Slavery in California," *https://en.wikipedia.org/wiki/History_of_slavery_in_California* [as of Apr. 4, 2023]; Kimberly Johnston-Dodds and Sara Supahan, "Involuntary Servitude, Apprenticeship, and Slavery of Native Americans in California," *The California*

These court files will stand out for, if nothing else, their paucity of paper. Each most likely consists of at most two moldy sheets: The "petition" of the white man who sought a slave or slaves, and the judge's order granting the petition. (It is difficult to imagine a white judge denying a petition, but if there were denials, what portraits in courage they must be.) The to-be-enslaved Indians were given no notice of their impending bondage. Nor were they allowed to challenge it.

Perhaps an appropriate state official, such as the current attorney general, could suggest to the legislature and governor that the state research, and publish, all the enslavement decrees. Descendants of those enslaved might begin to trace their roots. Too, it might be purgative to know the names of the enslav*ers*, and the names of the state judges who authorized the individual enslavements, in violation of their own state constitution.

The Executive Rises to Be Most Heard

Less than four months after California was admitted to the Union, ostensibly as a free state, its first governor, in his first State of the State Address, fulminated against "the Indian foe." Calling Indians "savages" in his climactic moment, he thundered, "[A] war of extermination will continue to be waged between the races until the Indian race becomes extinct . . . !"[34] On the eastern slope of Twin Peaks in San Francisco, a street is named for that governor, Peter Hardeman Burnett. Burnett's speech was delivered on January 6, 1851 — 170 years to the day before the insurrection at the nation's Capitol. As to the "Indian question," all three branches of government were in rare and inglorious unison.



Governor Peter Hardeman Burnett, ca. 1860. *Photo: Public domain.*

The Denaming Question at Hastings College of the Law and Elsewhere

Once, the land stretched away without names. It is covered now with the names we have imposed on it, and the names contain our history as the seed contains the tree.

— *Wallace Stegner*[35]

This history was well known to the seven Indian judges who had traveled to the headquarters of the state's court system, San Francisco, on May 20, 2010, for that first meeting of the Tribal / State Council. Virtually none of the history, though, was known to the thirteen non-Indian representatives of the state court system. None, or very little, of this history of the founding of the state is taught in our grammar and high schools. As for schools of higher education, students of the state's great historians Herbert Eugene Bolton at Berkeley and John Caughey at UCLA were not taught it. The late Kevin Starr,[36] the greatest historian of California ever in the opinion of many, didn't teach it. Yet some say this brief account is the most important "history" of California.

Whether buried, forgotten, or ignored, such history, when brought to light, underlies so many of the denaming questions today.[37]

Latter-day scholars like UCLA's Benjamin Madley have at last brought some of this history to light. And the truth has belatedly found its way to the popular press. The *San Francisco Chronicle* on July 20, 2017, published an op-ed piece that addressed the then-recent denamings of John C. Calhoun College at Yale and Phelan Hall at the University of San Francisco. The piece noted that Calhoun's "crimes" in the Yale case were slave owning and support for the institution of slavery. In the USF case, Phelan's offense was anti-Chinese racism, virulent to be sure. The op-ed essay then asked, if slave owning and racism were causes for the deletion of a name, what about genocide? Where does genocide fall on the spectrum that seems to have been adopted for these decisions? The essay pointed to the fact that a number of prominent "early Californians,"[38] including John C. Fremont, Leland Stanford and Serranus Hastings, were also prominent enablers who effected a near-annihilation of the California Indian. As noted earlier, between European "contact" and 1880, that population fell by 95 percent.

The *New York Times* more than four years later, on October 27, 2021, ran a long front-page, above-the-fold story about the Hastings-directed murders.[39] A year after that, the State of California stripped the name "Hastings"

Indian History Website, 2022, *https://calindianhistory.org/involuntary-servitude-apprenticeship-slavery-native-americans-california/* [as of Apr. 4, 2022]; Benjamin Schneider, "It Happened Here: A History of Slavery in California," *S.F. Weekly,* Feb. 4, 2021, *https://www.sfweekly.com/news/it-happened-here-a-history-of-slavery-in-california/* [as of Apr. 4, 2023].

34. Peter Burnett, "State of the State Address," January 6, 1851, *https://governors.library.ca.gov/addresses/s_01-Burnett2.html* [as of Apr. 4, 2023].

35. Stegner, "The Gift of Wilderness," *supra*, 164.

36. Kevin Starr, in disclosure, was a close friend.

37. This bit of history of California, incidentally, is a history of about 200 years. What about the history of the peoples here for the 200 or 800 or 15,000 years before? San Francisco was called "Yelamu" for at least three times as long as it has been called "San Francisco." What were its names for the thousands of years before?

38. The present occupiers of what we call California have been here, generally speaking, since 1769, and did not arrive in numbers until 1849. But other people were living and thriving here for thousands of years before, perhaps as many as 15,000 years. That is another way of saying since the end of the last Ice Age. They did not call this place "California." That much is fairly certain.

39. Thomas Fuller, "He Unleashed a California Massacre. Should This School Be Named for Him?" *N.Y. Times*, Oct. 27, 2021, *https://www.nytimes.com/2021/10/27/us/hastings-college-law-native-massacre.html* [as of Mar. 20, 2023].

from Hastings College of the Law, and gave it another name — UC College of the Law, San Francisco — effective Jan. 1, 2023.

Although I am often blamed (upon occasion credited) for the denaming of Hastings College of the Law, I never urged its denaming. True, I authored that 2017 op-ed piece in the *Chronicle*. And that piece did appear under the headline, "The Moral Case for Renaming Hastings College of the Law."[40] But my essay never made that "moral case" for renaming, as the headline implied. I didn't write that headline, nor would I, given the opportunity, have written much less approved of it. My essay sought only to suggest the application of a dollop of old-time, respectful intellectual rigor to the discussion since Hastings, Yale, and USF are, still, institutions of "higher learning." As a rational community, don't we deserve a thoughtful, deeply considered analysis that tells why slaveholding and racism call for denaming, but genocide does not? What is the name for that sort of discussion?

Too, I wanted to call out the hypocrisy that infests so many of these decisions. The Yale decision to strip the name Calhoun was pressed by students who expressed high emotional distraughtness at having to see the name chiseled in stone on their university campus. Was it not odd, though, that those same students had no issue with the name "Yale"? Elihu Yale, the founder of Yale University, was an English slave trader who profited handsomely from the institution of slavery.[41]

So What to Make of the Denaming Business?

Is it part of our impulse — whatever its source — to teach and perpetuate history, which comes from the word for story? And aren't we, like coyotes, storytellers at heart?[42]

Sima Qian, China's Grand Historian (146–86 BCE), wrote a variation on what George Santayana would write 2,000 years later: "Those who don't forget the past will be masters of the future."[43] Sima Qian's is one of the most extraordinary works of history ever written. It comprises 130 scrolls and gives an account of more than 2,000 years of Chinese history. Nevertheless, his work until recently had been viewed skeptically by scholars. Here's an example of why: Writing about the First Emperor, who had reigned a century before, Sima Qian tells us,

> When the First Emperor ascended to the throne, he ordered the digging at Mount Li begun. When later he unified his empire, he ordered 700,000 men to work on his death-vault. The workers dug to underground springs, and poured copper to form the enclosure of the outer casing of the coffin. Palaces and towers housing a hundred officials were built and filled with treasures. Workmen made crossbows primed to shoot at intruders. *Mercury* created a hundred rivers and the ocean, and was set to flow mechanically. Above, the heavens were replicated, and below, the mountains and the rivers of the land. Candles of the fat of mermaids would burn for a thousand years.[44]

Three hundred years before Sima Qian, Thucydides had remarked, "Most people . . . will not take the trouble in finding out the truth, but are much more inclined to accept the first story they hear."[45] That was hardly the case with Sima Qian's story. A project of such preposterous dimensions as Sima Qian described must be a fabrication, thought scholars for centuries. But the Grand Historian went further. He described a vast army of sculpted life-size warriors arrayed to protect the mausoleum. In the winter of 1974, Yang Zhifa, a farmer, clanged his hoe against an object. It was a sculpted head of a life-sized clay warrior. That warrior, as we now know, was but one of an army of more than 8,000 such terracotta warriors unearthed so far that had been sculpted, fired and buried there more than 2,000 years before.[46]

40. John Briscoe, "The Moral Case for Renaming Hastings College of the Law," *S.F. Chronicle*, July 20, 2017, *https://www.sfchronicle.com/opinion/openforum/article/The-moral-case-for-renaming-Hastings-College-of-11275565.php* [as of Mar. 22, 2023].

41. Mark Alden Branch, "A Renaming Question Very Close to Home," *Yale Alumni Magazine,* Sept.–Oct. 2020, *https://yalealumnimagazine.org/articles/5216-a-renaming-question-very-close-to-home* [as of Apr. 4, 2023]; Nora McGreevy, "Who Is the Enslaved Child in This Portrait of Yale University's Namesake," *Smithsonian Magazine,* Oct. 15, 2021, *https://www.smithsonianmag.com/smart-news/yale-researchers-hope-to-identity-enslaved-child-in-namesake-portrait-180978879/* [as of Apr. 4, 2023].

42. Malcolm Margolin, *The Ohlone Way: Indian Life in the San Francisco-Monterey Bay Area*, Berkeley: Heyday, 1978, 134–37, 38 (Coyote teaching humans how to catch salmon).

43. 前事之不忘後事之師也．司馬遷 — 史記. From *Records of the Grand Historian*, Introduction. I deeply appreciate John Stucky, recently retired library director of San Francisco's Asian Art Museum, for this translation.

44. Sima Qian, *Shiji*, v. 6. Burton Watson, tr., *Records of the Grand Historian,* Hong Kong: Columbia Univ. Press, 1993, 63, italics in original; another translation is found in Yang Hsien-yi and Gladys Yang, trs., *Selections from Records of the Historian,* Peking: Foreign Languages Press, 1979, 186; and see Raymond Dawson, tr., *Sima Quian: The First Emperor,* Oxford: Oxford Univ. Press, 2007, xi, xxiii.

45. Thucydides, *History of the Peloponnesian War*, Bk. 1, ch. 20.

46. See, e.g., Kinoshita, Hiromi (2007), Jane Portal, ed. *The First Emperor: China's Terracotta Army*. London: British Museum. *ISBN 978-0-7141-2447-6*; "Terracotta Warriors Discover Transfer Finder's Lives" [*sic*], October 13, 2019, *http://www.chinadaily.com.cn/china/2009-10/13/content_8786478.htm* [as of Apr. 4, 2023]; Simon Parry, "Curse of the Terracotta Army: How those who discovered relic suffered ruined lives," *Daily Mail,* September 8, 2007, *http://www.dailymail.co.uk/news/article-480757/Curse-Terracotta-Army-How-discovered-relic-suffered-ruined-lives.html#ixzz1v6D15iSM* [as of Apr. 4, 2023].

Today, near the site of the terracotta warriors excavation, scientists have detected extremely high levels of mercury. The fabulous mausoleum awaits discovery.

And so some history, newly learned, can delight.

Or not. An expression gaining currency is "History should make you uncomfortable."[47] The discomforting knowledge of Hastings' crimes led to the stripping of his name from the law school he founded. The Hastings change happened about the same time that Yale University took the name John C. Calhoun off the college of that name. And it occurred about the time that the University of San Francisco removed the name James D. Phelan from a campus building named for Phelan. Calhoun College was denamed because Calhoun owned slaves and was a fiery advocate for the institution of slavery. Phelan Hall was denamed because Phelan was a rank racist. Neither man killed a slave (an economically foolish thing to do, if you think about it), or a Chinese person, so far as we know. To put the question again, if slaveholding and racism are grounds for denaming, what of genocide?[48] Are there guiding principles?

To linger a little longer with the discomfort, the disease that history can cause, let us consider another matter. When an overwhelmed and almost overrun Mexico ceded the vast American West to the United States, all assumed, or pretended to assume, that the private land grantees of the Mexican and Spanish governments owned the coastal and central valley lands of California. They likewise assumed that the United States owned the lands in the Sierra, where the Spanish and Mexicans, generally speaking, had not made land grants, and where the gold was found. The Treaty of Guadalupe Hidalgo, which ended the war and effected the cession of California and the rest of the American West to the United States, recognized the established principle of international law that the United States had to honor private property rights created by the Mexican government (and the handful that had been created by the Spanish government before it). And the treaty implicitly recognized the principle of international law that a conqueror becomes the owner of all property that had been owned by the prior sovereign.

But all the pretended assumptions about land ownership ignored the equally established international-law principle of "aboriginal rights." That principle holds that indigenous peoples — notwithstanding their conquest by armed invaders, notwithstanding their near-extermination by those killers, notwithstanding their enslavement — maintain their rights in lands their ancestors historically used and occupied. Those rights, under international law, are superior to the rights of the conqueror.

And international law is part of our law.[49] Even as early as 1849, the year of the Gold Rush in California, the U.S. Supreme Court had several times recognized the principle of aboriginal title, beginning with the case of *Johnson v. M'Intosh* in 1823.[50] It decided additional cases in 1831, 1832, and 1835, another in 1853, and would continue to reaffirm the principle throughout the remainder of the nineteenth and all of the twentieth centuries.[51]

Judges like Serranus Hastings, California's first chief justice, and Ogden Hoffman, the first judge of the first federal court in the West, the Northern District of California in San Francisco, who heard most of the "Land Cases," surely knew the principle of aboriginal rights. For they, as they would be quick to tell you, were learned in the law.

They were learned and they were arrogant. Once during the Civil War Judge Hoffman, angry that months earlier President Abraham Lincoln had appointed Stephen Field to the U.S. Supreme Court and not him, engaged in a written dispute with Lincoln over the meaning of an order that Lincoln himself had written, and signed.[52] As for Hastings, his orders to his men to massacre Indians emanated from the highest arrogance. Hastings and federal Superintendent of Indian Affairs Thomas Henley designed plans for the removal of natives from Round Valley in Mendocino County. As part of their plan, they launched raiding parties and held town-hall style public gatherings where settlers aired their grievances, leading to increased racial prejudice and hatred toward the Indians. Hastings' ranch manager, H.L. Hall, had been involved in many brutal assaults on the native population. In 1859, Hastings created the "Eel River Rangers," with Walter Jarboe as captain. "Jarboe

Tolowa woman, date unknown. *Photo: Del Norte County Historical Society.*

47. Sydney Sheehan, "History Should Make You Uncomfortable," *The Coalition of Master's Scholars on Material Culture*, Nov. 20, 2020, *https://cmsmc.org/publications/history-should-make-you-uncomfortable* [as of Apr. 4, 2023].

48. Not to mention about the name "Yale" itself. As noted earlier, Elihu Yale, the namesake of Yale University, was very profitably engaged in the slave trade.

49. *La Paquete Habana* (1900) 175 U.S. 677.

50. 21 U.S. 543.

51. *E.g.*, *Cherokee Nation v. Georgia* (1831) 30 U.S. 1, 18; *Worcester v. Georgia* (1832) 31 U.S. 515, etc. *See* cases collected in Briscoe, "The Aboriginal Land Rights of the Native People of Guam" (2003) 26 *Hawaii L. Rev.* 1, fn. 4, and 3–9.

52. Judge Hoffman's telegram to Lincoln of Dec. 17, 1863, can be seen here: *https://picryl.com/media/ogden-hoffman-to-abraham-lincoln-thursday-december-17-1863-telegram-concerning* [as of Apr. 4, 2023]; *http://library.brown.edu/cds/catalog/catalog.php?verb=render&id=1211489369156250&colid=39; https://library.brown.edu/cds/catalog/catalog.php?verb=render&colid=39&id=1211489369156250&view=showmods* [as of Apr. 8, 2023]. Lincoln's telegram to Hoffman of two days prior, Dec. 15, 1863, is set out in Roy P. Basler, ed., *The Collected Works of Abraham Lincoln*, New Brunswick: Rutgers Univ. Press, 1953, 67–68.

engaged [settlers] to hunt Indians, promising them payment from the state, or if Sacramento failed to pay, from the operation's extremely wealthy mastermind, Judge Hastings, who owned an Eden Valley ranch . . . ."[53]

On top of this, or consistent with it, Hastings was a member of the Know Nothing Party, and an advocate for slavery. And he was an arrogantly not-nice man in his business and personal life.[54]

But in the thousand or more land-title cases these learned judges presided over — Ogden Hoffman decided most of them — the land rights of the Indians appear never to have been discussed, much less adjudicated with any semblance of fair process. I will spare you the hundreds of legal citations that, taken together, would prove the negative.[55]

"Blind Polly," Modoc woman, date unknown. *Photo: Del Norte County Historical Society.*

That might shock, but it should not surprise. The Indians — the Indians who survived the massacres, the Indians who were not enslaved — were effectively barred from appearing in court to testify on their own behalf.[56] As Benjamin Madley has written,

> State legislators . . . [o]n April 16 [1850] barred Indians with "one half of Indian blood" or more from giving evidence in favor of, or against, any white person" in criminal cases. Four days later, they denied Indians the right to serve as jurors. [O]n February 19, 1851, they specified that only "white male" citizens could become attorneys. On April 29, 1851, lawmakers banned Indians "with one-fourth or more of Indian blood" . . . from serving as witnesses in civil cases involving whites. In combination, these race-based laws largely shut Indians out of participation in and protection by the state legal system.[57]

Flush with the successes of the Indian killings, Leland Stanford and many others acquired vast tracts of land and made fortunes in real estate. Virtually all of the Sacramento Valley, and all the coastal land in California from just south of Fort Ross in the north to the Mexican border, had been purportedly granted into private ownership by the Mexican government. Those vast grants were the subject of decades of litigation between men claiming to have been granted land by Mexico (and in but a handful of cases, Spain) on the one hand, and the United States on the other, which would be the owner of the land if the private claim failed. None of the more than 800 cases, it seems, even bothered to mention the prior, superior land rights of the Indian.

Amid even the barbarism of the California Gold Rush, Indians had rights guaranteed by law — American domestic law and international law. Those rights included the right not to be murdered, not to be enslaved, and not to be stripped at gunpoint of their lands by their new governmental masters. The State of California systematically denied them those rights. May that history give us, as Middle English put it, dis-ease.

Denaming Controversies Elsewhere

The current freshet of controversies over school and building names may have begun, in this country at least, at the University of Texas in 2010, when it was learned that a residence hall was named for a Ku Klux Klan member, one William Stewart Simkins. The name of the hall was changed. Since then, buildings associated with other Klansmen and white supremacists have been denamed at Duke University (2014), the University of North Carolina at Chapel Hill (2020), and the University of Oregon (2016). In 2015, Georgetown University changed the names of two buildings that had been named for university leaders who sold 272 slaves in 1838

53. Madley, *An American Genocide*, 277–79, and esp. the primary evidence cited in endnotes 114 and 115 on p. 608; *see also* Frank H., Baumgardner III, *Killing for Land in Early California: Indian blood at Round Valley: Founding the Nome Cult Indian Farm*, New York: Algora Publ., 2006, 71, 90–92, 93–94; Brendan C. Lindsay, *Murder State: California's Native American Genocide, 1846–1873*, Lincoln: Univ. of Nebraska Press, 2012, 194–208.

54. *See* Beverly Ann Doran, "S. Clinton Hastings," thesis submitted in satisfaction of the requirements for the degree of Master of Arts in History, Univ. of Calif., Berkeley, deposited in the University Library March 26, 1952, 118–21, 124–43. In his lifetime Hastings was accused of infidelity to his wife, from whom he never divorced, and also to one Mary Keller, who, long "acquainted" with Hastings, claimed she married the judge shortly after the death of the first Mrs. Hastings. When the aged Hastings married Lillian Knust, a girl of 19, Ms. Keller sued Hastings for breach of promise and assorted other torts of the time. The case reached Hastings' old court, *Hastings v. Keller* (1886) 69 Cal. 606; and see *S.F. Chronicle,* Feb. 19, 1893, 24, col. 4. In business, the primary concern of his life, Hastings was a ruthless and serial litigant. Doran, "S. Clinton Hastings," 66–79. Hastings was a member of the political party known as the Know Nothings, which opposed "foreigners" and immigrants, separately it ought to be noted, and supported the institution of slavery. *Id.* 80–81.

55. *But see* W.W. Robinson, *Land in California,* Berkeley: Univ. of Calif. Press, 1948, 90–101.

56. California Research Bureau, *Early California Laws and Policies Related to California Indians*, prepared for Sen. John Burton, President pro Tempore of the California Senate, Sept. 2002, *https://www.nijc.org/pdfs/Subject%20Matter%20Articles/Historical/Early%20CA%20Laws%20and%20Policies.pdf* [as of Apr. 4, 2023]. This subject merits much more treatment than can be afforded here.

57. Madley, *An American Genocide*, 159—60.

and used the proceeds to finance the modern Georgetown University.[58]

Princeton students objected to the name of the university's Woodrow Wilson School because of Wilson's views on race and his support for racial segregation, both as president of Princeton and as president of the United States. Princeton first elected to retain the name but then removed it. Stanford University began a similar study relating to its use on campus of the name "Serra," for Junipero Serra, a Franciscan friar, who founded the California mission system, which is thought by many historians to have badly mistreated its Indian "wards." In 2019, the university renamed two dormitories and a major campus street. Serra, as it happens, was canonized by the Catholic Church in September 2015.[59]

Similar controversies have arisen in recent years on campuses around the world.[60]

How do we assess such matters as they arise, such as the proposal of the San Francisco Board of Education (withdrawn, for the moment) to dename 44 public schools including George Washington High School, Abraham Lincoln High School, and Dianne Feinstein Middle School?[61] (As an aside, normally the opponent of an argument deploys the rhetorical device *reductio ad absurdum.* Here was the historically rare case of the *proponent* of the argument deploying it, apparently unwittingly, to great though unintended effect. The proposing school board members were summarily recalled by the voters from office.)

Members of the Round Valley Indian Tribe retrace the 1863 route of the Nome Cult walk, a forced relocation of Indians from Chico, California, to Covelo, California. *Photo: U.S. Forest Service*.

How are we to make these decisions? By "we" I mean an engaged citizenry. Are there rules?

To start, established historical organizations have formulated expressions of the value and role of history. (I'm confining the brief survey below to American organizations.) These expressions can be seen as thoughtful developments of the terse wisdom of Santayana and Sima Qian, or merely as windy periphrasis. Regardless, they can be useful handholds as we grope for purchase when considering a denaming question.

The Organization of American Historians, the major professional society for academic historians, "promotes open access to historical resources and scholarship, the exhibition and preservation of artifacts, the discussion of historical questions, and the dissemination of knowledge."[62]

The association also publishes "Criteria for Standards in History/Social Studies/Social Sciences (updated 2019)."[63] And it provides a "Statement on Standards of Professional Conduct (updated 2011)," which includes this passage:

> **Because interpreting the past is so vital to democratic debate and civic life** in the public realm, historians regularly have the opportunity to discuss the implications of their knowledge for concerns and controversies in the present — including present controversies about past events. It is one of the privileges of our profession to share historical insights and interpretations with a wider public, wherever the locus of our employment.[64]

58. Regarding this denaming history, see Yale University, "Letter of the Committee to Establish Principles on Renaming to President Salovey," Nov. 21, 2016, *https://president.yale.edu/sites/default/files/files/CEPR_FINAL_12-2-16.pdf,* 8–10 [as of Apr. 4, 2023].

59. "President Eisgruber's message to community on removal of Woodrow Wilson name from public policy school and Wilson College," June 27, 2020, *https://www.princeton.edu/news/2020/06/27/president-eisgrubers-message-community-removal-woodrow-wilson-name-public-policy* [as of Apr. 30, 2023]; Claire Wang, "Serra Mall to be renamed Jane Stanford Way on Oct. 7, following two years of controversy," *Stanford Daily*, Sept. 18, 2019, *https://stanforddaily.com/2019/09/18/serra-mall-to-be-renamed-jane-stanford-way-on-oct-7-following-two-years-of-controversy/#:~:text=Serra%20Mall%20will%20be%20officially,his%20mistreatment%20of%20Native%20Americans* [as of Apr. 30, 2023].

60. Yale University, "Letter of the Committee to Establish Principles on Renaming to President Salovey."

61. "San Francisco school board drops plan to rename 'injustice-linked' schools," *The Guardian*, Apr. 7, 2021, *https://www.theguardian.com/us-news/2021/apr/07/san-francisco-school-board-schools-rename* [as of Apr. 8, 2023]; Isaac Chotiner, "How San Francisco Renamed Its Schools," *The New Yorker*, Feb. 6, 2021, *https://www.newyorker.com/news/q-and-a/how-san-francisco-renamed-its-schools* [as of Apr. 8, 2023].

62. Organization of American Historians, "Advocacy," *https://www.oah.org/resources/advocacy/* [as of Apr. 4, 2023].

63. Organization of American Historians, "Criteria for Standards in History/Social Studies/Social Sciences (updated 2019)," *https://www.historians.org/jobs-and-professional-development/statements-standards-and-guidelines-of-the-discipline/criteria-for-standards-in-history/social-studies/social-sciences* [as of Apr. 8, 2023].

64. "Statement on Standards of Professional Conduct (updated 2023)," *http://historians.org/jobs-and-professional-development/*

In denaming cases specifically, what principles or factors have been invoked?

At Hastings

At the former UC Hastings College of the Law, when my July 2017 op-ed piece about the misdeeds of Hastings appeared, a low clamor arose that the name be changed. Chancellor and Dean David Faigman appointed a committee, and on September 14, 2020, wrote the students, faculty, adjunct faculty, staff, and alumni of his decision. After laying out the background of the matter, Dean Faigman listed the factors that would guide him, and then delivered his conclusion. Here are his words, with heavy elision for the sake of space:

> Factors to consider in removing a name:
>
> 1. In thinking about how an institution responds to disrepute subsequently discovered, or recognized, about a namesake, an institution must consider not only the namesake's historical wrongs but also the namesake's degree of notoriety in today's society. . . .
>
> 2. When a school is named for an individual who has fallen into relative obscurity, however, very different considerations come into play. . . .
>
> 3. A school whose name is associated with an otherwise generally unknown donor gains name recognition . . . from factors, independent of the personality or deeds of the person for whom it is named . . . .
>
> 4. Removing a name also has the effect of erasing that individual from history. . . .
>
> 5. A final and basic consideration . . . involves how fundamental the name is to the entire institution . . . .
>
> 6. In deliberating on all of the factors that might be considered . . . I reached the conclusion that, when taken together, the factors relevant to considering this question *overwhelmingly point toward retaining the name,* UC Hastings College of the law.[65]

Two years later Dean Faigman, presumably employing the same six (by my count) factors, equally emphatically urged that the name of Hastings be brought down. All that had happened, since the dean's earlier pronouncement that the name should remain, was the publication of that front-page article in the *New York Times* about the crimes of Hastings. Such a publication is perhaps a seventh factor to Dean Faigman's list.

At Yale

At Yale University, President Peter Salovey first decided not to dename Calhoun College. Two months later, in June 2016, he decided *to* dename it. He *then* formed a committee to make recommendations for principles to guide such decisions in the future. Here are the principles recommended by that committee in its letter to Salovey of November 21, 2016, heavily elided again for space:

> 1. Presumptions: Renaming on account of values should be an exceptional event.
>
> There is a strong presumption against renaming a building on the basis of the values associated with its namesake. . . .
>
> The presumption against renaming is at its strongest when a building has been named for someone who made major contributions to the University.
>
> 2. Principles to be considered: Sometimes renaming on the basis of values is warranted.
>
> 3. Decisions to retain a name or to rename come with obligations of nonerasure, contextualization, and process. When a name is altered, there are obligations on the University to ensure that the removal does not have the effect of erasing history.[66]

At Boalt Hall

UC Berkeley stripped its law school of the name "Boalt" in January 2020, with relatively little fuss.[67] A committee formed to consider a change in name identified two guiding principles:

> [T]he University of California renews its commitment to the full realization of its historic promise to recognize and nurture merit, talent, and achievement by supporting diversity and equal opportunity in its education, services, and administration,

statements-and-standards-of-the-profession/statement-on-standards-of-professional-conduct [as of Apr. 4, 2023], bolding in original. Much other useful material may be found in Hans Kohn, "A Historian's Creed for Our Time," (1953) 39 *Bulletin of the Amer. Assn. of Univ. Professors*, 608–15, *https://www.jstor.org/stable/40221203* [as of Apr. 8, 2023]; Henry Osborn Taylor, *A Historian's Creed,* Cambridge: Harvard Univ. Press, 1939.

65. Faigman Memorandum, Sept. 14, 2020, 7–8, italics added (in possession of the author). When a friend asked my thoughts on the memorandum, I told him I hadn't gotten it. My friend said I should have gotten it, since I was an adjunct member of the faculty. And so my friend sent me a copy. On page 3 I read, "On July 8, 2017 . . . John Briscoe, formerly an adjunct professor of law at UC Hastings, published an editorial in the *San Francisco Chronicle* . . . ." That's when I learned of my new status at Hastings.

66. Letter of the Committee to Establish Principles on Renaming; the president's decision not to dename, and then to dename, is found on pp. 4–5 of the PDF. On the decision to rename Calhoun Hall, see: "Yale changes Calhoun College's name to honor Grace Murray Hopper," *Yale News*, Feb. 11, 2017, *https://news.yale.edu/2017/02/11/yale-change-calhoun-college-s-name-honor-grace-murray-hopper-0* [as of Apr. 4, 2023]. See also Office of the President, "Decision on the Name of Calhoun College," Feb. 11, 2017, *https://president.yale.edu/decision-name-calhoun-college* [as of Apr. 4, 2023].

67. Gretchen Kell, "UC Berkeley removes racist John Boalt's name from law school," *Berkeley News,* Jan. 30, 2020, *https://news.berkeley.edu/2020/01/30/boalt-hall-denamed/#:~:text=Boalt%20Hall%20will%20now%20be,North%20Addition%20and%20South%20Addition* [as of Apr. 4, 2023].

as well as research and creative activity. The University particularly acknowledges the acute need to remove barriers to the recruitment, retention, and advancement of talented students, faculty, and staff from historically excluded populations who are currently underrepresented. . . .

Whether or not a building's name is removed, we believe it is historically and socially valuable to retain a public record, perhaps in the form of a plaque in the building, that notes the building's history of naming and the reasons for removing the name.[68]

Little fuss was also the case at the University of San Francisco when the name James D. Phelan came down from the hall that had borne his name.[69] Boalt's sin, in short, was anti-Chinese racism. As noted earlier, the sin of Phelan, who was a San Francisco mayor and United States senator, was the same.

Dean Faigman ascribed no authorship to the "factors" he employed in his decision *not* to dename Hastings College of the Law (and presumably also in his decision *to* dename it). He is not to be faulted in this regard. For one thing, his factors are thoughtful ones, it is plain enough.

Dean Faigman came up with six (again, by my count); Yale three (not counting sub-parts); and the committee at Berkeley, two. Stanford's committee came up with seven, for what it is worth.[70]

Conclusion

Decisions whether to strip a name, topple a statue, or otherwise clast an icon are often made in the heat of the moment and, just as usually, in isolation. At the law school formerly known as Hastings, a decision not to dename was forcefully made, on plainly thoughtful principles, before a decision *to* dename was made, on the same principles, apparently. That too was the case at Yale, which only *after* those first two contradictory decisions decided to search for principles, for guidelines. Might it be well not only for universities but cities and states, museums and historical societies, and the like, to develop a set of generally accepted principles to guide these decisions? Too, might we better cultivate a sense of — well, something ineffable perhaps, which is to say not describable, at least in our language. *Giazilo* may be the word. It's from the Esan language of southern Nigeria and means something like, "Let's think," "Let's reflect." It denotes those things, but also connotes dialogue, and respectful deliberation, all with the purpose of common good.[71]

That gift that the California judges gave their Indian counterparts in 2010 — access to the state judges' exclusive, high-powered search engine — has had its name changed from "Serranus."[72] The new name of the search engine, statewide, is JRN, shortened from "Judicial Resources Network" and its Serranus-sounding sibilance. ✯

Students on the SkyDeck at UC College of the Law, San Francisco. *Photo: UC College of the Law, San Francisco.*

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68. See data on support for the name change from alumni, faculty, and students in "Berkeley Law's Proposal to Remove the Name from Boalt Hall," *https://chancellor.berkeley.edu/sites/default/files/building_name_review_committee_recommendation_-_boalt_hall.pdf* [as of Mar. 20, 2023].

69. "USF Dedicates Burl A. Toler Hall," May 9, 2017, *https://usfdons.com/news/2017/5/9/dons-honor-club-usf-dedicates-burl-a-toler-hall-Toler-USF.aspx* [as of Apr. 8, 2023].

70. The Stanford criteria, less most of the explanatory material, are these:

1. *The centrality of the person's offensive behavior to his or her life as a whole.* . . .
2. *Relation to the University history*. The case for renaming is weaker when the honoree has had an important role in the University's history. . . .
3. *Harmful impact of the honoree's behavior.* . . .
4. *Community identification with the feature.* . . .
5. *Strength and clarity of the historical evidence.* . . .
6. *The University's prior consideration of the issues.* . . .
7. *Possibilities for mitigation* [that is,] whether the harm can be mitigated and historical knowledge preserved. . . .

Stanford University, "Principles and Procedures for Renaming Buildings and Other Features at Stanford University" [no date], *https://campusnames.stanford.edu/renaming-principles/* [as of May 17, 2023].

71. No, I am not an Esan speaker. I found the word serendipitously, if the expression is allowed, while searching for a Hippocratic Oath for historians. I found such an oath at *https://giazilo.com/a-hippocratic-oath-for-historians/*, and thereby found the meaning of the word *giazilo* at *https://giazilo.com/about/* [as of May 17, 2023].

72. See, e.g., *https://www.courts.ca.gov/partners/documents/2013_Serranus_Survey_Results.pdf* [as of May 17, 2023].

Yetta Stromberg. February, 21, 1921. The 20-year old, on $10,000 bail pending appeal of her conviction and 10-year sentence, appeared as a witness for defendant Bon Boloff, charged with criminal syndicalism. *Photo: Getty Images*.

A Red Flag about a Red Flag in 1920s California

BY JOHN S. CARAGOZIAN

After a teenage camp counselor raised a red hammer-and-sickle flag and had the children pledge allegiance to it, she and other camp personnel were convicted of felonies. The case's background and eventual resolution by the U.S. Supreme Court offer insights into 1920s California.

In the early twentieth century, California was "at the quirky vanguard of social change . . . ."[1] For example, California's Progressives enacted direct democracy — popular initiative, referendum, and recall — to dilute business control of the state legislature. The City of Los Angeles took the step of replacing a private utility with a municipal one to provide residents with water and electricity.

By the 1920s, however, the pendulum had swung the other way. The fatal 1910 bombing of the *Los Angeles Times* building by labor union radicals, the 1917 Russian revolution, and the rise of militant labor unions such as Industrial Workers of the World all contributed to an era of repression. This so-called First Red Scare was characterized by federal armed raids and imprisonment and deportations, all directed against anarchists, Communists, socialists and labor leaders across the nation. During the same years, California and other states enacted "syndicalism" statutes criminalizing advocacy of violence to accomplish political or economic change, and courts consistently upheld those statutes.[2]

The era's right-wing organizations included the influential Better America Foundation, founded in L.A. in 1920 to crusade against "un-American activity" in California. Well-funded by private utilities (such as Southern California Edison) and other businesses, the BAF prioritized defeating organized labor. The BAF also opposed the eight-hour workday, the abolition of child labor, the Constitution's Seventeenth Amendment (providing for direct election of U.S. senators), and public schools stocking books by such "Bolshevik" authors as Arthur Schlesinger Sr.[3]

The BAF kept many of its operations secret, but its tactics included paying "professional informers," supplying witnesses in prosecutions against unions and other perceived radicals, and underwriting political campaigns.[4] (Readers familiar with the Watergate scandal might be interested to know that BAF's co-founder and president was Los Angeles businessman Harry Haldeman, grandfather of H.R. Haldeman. The younger Haldeman, U.S. President Richard Nixon's chief of staff from 1969 through 1973, was convicted of and imprisoned for perjury and obstruction of justice in the Watergate cover-up.)

At the other end of the spectrum was the Pioneer Summer Camp Conference founded in Los Angeles by various Communist and other leftist organizations. Beginning in 1927, the Conference operated a summer camp on rented land near Yucaipa in San Bernardino County for working-class children. Because the landowner charged only nominal rent and adults volunteered their services, camp fees were low, only $6 per week per child. Children received leftist political education and also engaged in traditional activities such as hiking and baseball.

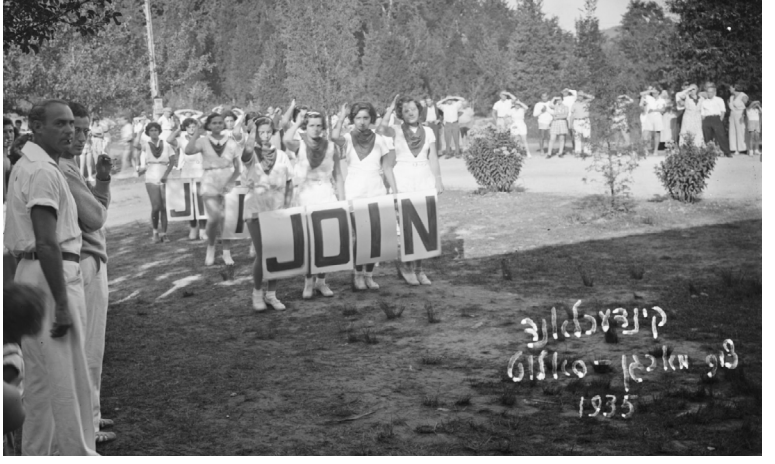
In the summer of 1929, Pioneer Camp had 40 children between 10 and 15 years old and half a dozen staff, including 19-year-old Yetta Stromberg. Stromberg had graduated from L.A.'s Roosevelt High School, completed one year at UCLA, and was a member of the Young Communists League. Her daily camp duties included raising a homemade triangular red flag with a hammer and sickle and reciting with the children, "I

1. Daniel Hildebrand, "Pure Speech and Constitutional Transformation," (1993) 10 *Constitutional Commentary* 133, 140. *See also* Carey McWilliams, *Southern California Country: An Island on the Land*, New York: Duell, Sloan & Pearce, 1946, 283 (referring to the "political pathology of Los Angeles" after 1911), 273–74 ("[T]he impression is widespread that, about 1934, Southern California became politically insane.").

2. *See, e.g.*, *Whitney v. California* (1927) 274 U.S. 357, and cases cited therein.

3. *See* Edwin Layton, "The Better America Foundation: A Case Study of Superpatriotism" (May 1961) 30 *Pacific Historical Review* 137–47.

4. *E.g.*, Carey McWilliams, *Southern California Country*, 291.



Morning salute, Camp Kinderland, New York, 1935. Like the Pioneer Camp in Southern California, Camp Kinderland was one of a number of summer camps founded by Jewish union activists and social progressives during the 1920s. Some of these camps drew young adults instead of children. Like Yetta Stromberg, leaders and counselors at other camps were pursued by law enforcement officials and, during the 1940s and '50s, by state and federal lawmakers investigating Communism. *Photo: NYU Library.*

pledge allegiance to the workers' red flag, and to the cause for which it stands, one aim throughout our lives, freedom for the working class." Along the same lines, the children "chanted Communistic songs," most of which Stromberg had written.[5] She also taught history to the children.[6]

The BAF learned of the Pioneer Camp and pressured San Bernardino County law enforcement to act. Law enforcement visited the camp and ordered its "disbandment," but camp staff ignored the order.[7] Then, in August 1929, carloads of sheriff's deputies, district attorney personnel, and private citizens (mostly American Legion members) raided the camp. The raiders also "act[ed] in cooperation" with the Los Angeles Police Department's notorious "Red Squad."[8] So aggressive was the raid that "three small children" were held as material witnesses.[9]

Stromberg and the other camp staff were arrested and charged with violating California Penal Code section 403a: "Any person who displays a red flag . . . or any flag . . . of any color or form whatever in any public place or in any meeting place . . . [1] as a sign, symbol or emblem of opposition to organized government or [2] as an invitation or stimulus to anarchistic action or [3] as an aid to propaganda that is of a seditious character is guilty of a felony."

At trial in San Bernardino County Superior Court, the prosecution introduced evidence of the flag and pledge.[10] The prosecution also offered into evidence Communist literature seized at the camp. That literature contained statements such as "[Communists] openly declare that their goal can be achieved only by the violent overthrow of the whole of the present social system." The defense objected on the grounds that the literature was Stromberg's personal property and had never been shared with the children. The trial judge overruled the objection.[11]

The jury convicted Stromberg of violating section 403a for the flag raising and convicted Stromberg and the rest of the camp staff of conspiracy. The court sentenced Stromberg to up to ten years' imprisonment.[12] All of the defendants were released on bail pending appeal of their convictions.[13]

The International Labor Defense (a Communist International arm) and the American Civil Liberties Union jointly funded the appeal.


YETTA STROMBERG
Chief Defendant of Yucaipa Children's Camp Case
WILL SPEAK AT A
MASS MEETING
Pacific Hall—543 Third Street
Tuesday, November 26th—8 P. M.
AUSPICES INTERNATIONAL LABOR DEFENSE
PUBLIC INVITED ADMISSION FREE

San Bernardino Daily Sun, November 24, 1929. *Image: UCR California Digital Newspaper Archives*.

The District Court of Appeal reversed all the conspiracy convictions because, as the prosecution admitted, no "overt act" had been charged. The court, however, upheld Stromberg's section 403a conviction. The court ruled that the evidence — including the Communist literature — showed that "the camp was conducted as a school of armed revolutionary propaganda and that the flag was exhibited as a symbol of that teaching. . . ." The court held section 403a constitutional, because California is able to

5. *See* "Raid on Reds' Camp Nets Six," *L.A. Times*, Aug. 4, 1929, A2.

6. *People v. Mintz* (1930) 106 Cal. App. 725, 729.

7. "Raid on Reds' Camp Nets Six," *L A. Times*, Aug. 4, 1929, A2.

8. *Id.* During the 1920s and '30s, the L.A.P.D.'s Red Squad — formally termed the Intelligence Squad — "broke up union and other leftist meetings," was paid under the table by "grateful employers," and became involved in strike-breaking outside of Los Angeles. *See* Bill Boyarsky, "Big Brother in Blue: Protectors of Privilege: Red Squads and Police Repression in America," *L.A. Times*, Jan. 20, 1991, Book Review, 4.

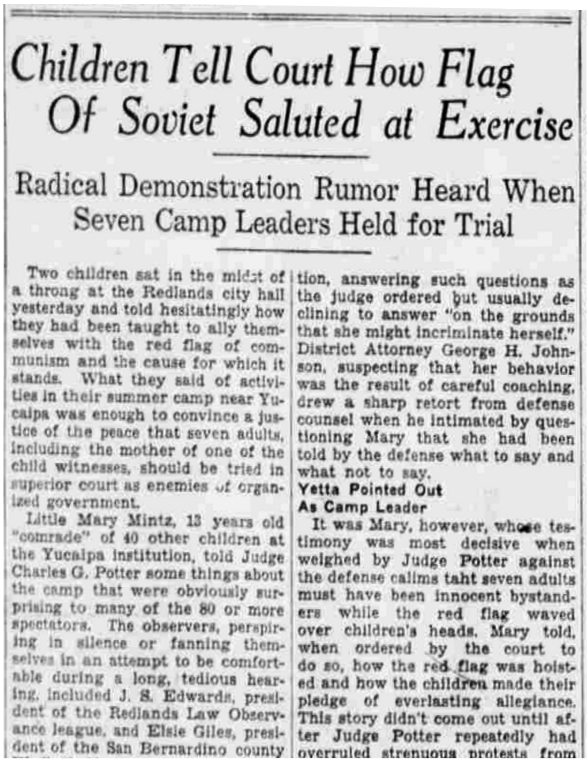
9. *See* "Raid on Reds' Camp Nets Six," *L A. Times*, Aug. 4, 1929, A2.

10. Contemporaneous newspaper coverage of the trial included descriptions of Stromberg as a "pretty Los Angeles college girl." *See, e.g.,* "Red Flag Flying Punished," *L.A. Times*, Oct. 10, 1929, 10. *See also* "Yetta Fights Against Terms in San Quentin," *San Bernardino Sun*, Apr. 16, 1931, 1 ("pretty . . . co-ed.").

11. *See* 106 Cal.App. at 729.

12. *See, e.g.,* "Sentence Given to Women Reds," *L.A Times*, Oct. 24, 1929, 6.

13. *Ibid.*



Children Tell Court How Flag Of Soviet Saluted at Exercise

Radical Demonstration Rumor Heard When Seven Camp Leaders Held for Trial

Two children sat in the midst of a throng at the Redlands city hall yesterday and told hesitatingly how they had been taught to ally themselves with the red flag of communism and the cause for which it stands. What they said of activities in their summer camp near Yucaipa was enough to convince a justice of the peace that seven adults, including the mother of one of the child witnesses, should be tried in superior court as enemies of organized government.

Little Mary Mintz, 13 years old "comrade" of 40 other children at the Yucaipa institution, told Judge Charles G. Potter some things about the camp that were obviously surprising to many of the 80 or more spectators. The observers, perspiring in silence or fanning themselves in an attempt to be comfortable during a long, tedious hearing, included J. S. Edwards, president of the Redlands Law Observance league, and Elsie Giles, president of the San Bernardino county

tion, answering such questions as the judge ordered but usually declining to answer "on the grounds that she might incriminate herself." District Attorney George H. Johnson, suspecting that her behavior was the result of careful coaching, drew a sharp retort from defense counsel when he intimated by questioning Mary that she had been told by the defense what to say and what not to say.

Yetta Pointed Out As Camp Leader

It was Mary, however, whose testimony was most decisive when weighed by Judge Potter against the defense calims taht seven adults must have been innocent bystanders while the red flag waved over children's heads. Mary told, when ordered by the court to do so, how the red flag was hoisted and how the children made their pledge of everlasting allegiance. This story didn't come out until after Judge Potter repeatedly had overruled strenuous protests from

San Bernardino Daily Sun, August 17, 1929. *Image: UCR California Digital Newspaper Archives*.

bar "willful and deliberate training of traitors," especially "among those who by reason of youth and inexperience have no chance to form an independent judgment."[14]

The California Supreme Court denied a hearing,[15] but the U.S. Supreme Court granted review. In her brief, Stromberg argued that section 403a unconstitutionally criminalized raising a flag of a legal political party (namely, Communists) and of a nation with which the U.S. was not at war (namely, the Soviet Union). The prosecution's brief countered by implying that Stromberg was somehow suspect because of her "Russian parentage" and arguing that, even if part of section 403a were unconstitutional, that part could be severed and Stromberg's conviction upheld.[16]

In a 7–2 decision, the Supreme Court reversed Stromberg's conviction.[17] The court's majority opined that states could outlaw speech posing a clear and present danger of violence. However, the San Bernardino jury's verdict was general, so it was possible that Stromberg's conviction was solely for violating clause 1 of Section 403a (quoted above), that is, raising a flag "in opposition to organized government." Because a clause 1 violation did not necessarily pose a clear and present danger, the court deemed the clause "[r]epugnant to the guaranty of liberty in the Fourteenth Amendment."[18]

The case was a landmark. For the first time, the U.S. Supreme Court reversed a state court conviction on free speech grounds. Moreover, the court explicitly held that the First Amendment's free speech protections were enforceable against states and that "visual symbols like the red flag" qualified as speech.[19] The Supreme Court further signaled that it would "closely scrutinize local actions that might compromise the integrity of the political process by restricting speech."[20]

California law enforcement continued to attack Stromberg for her camp activities. After the section 403a trial, she and other camp staff members were charged with a separate crime: operating a children's home (namely, the camp) without a license.[21] Moreover, the American Legion urged the San Bernardino County District Attorney to retry Stromberg (no such retrial occurred) and then complained when the camp was reopened.[22]

The 1929 raid and trial apparently failed to deter Stromberg's political advocacy. The following year, for example, she and four others were arrested for misdemeanor disturbing the peace after "preaching riots and insurrection" at Stromberg's alma mater, Roosevelt High School. They were convicted and sentenced to 90 days in jail.[23]

Stromberg herself continued to be dogged with Communist accusations despite the reversal of her felony convictions. The FBI tracked her, and she was blacklisted from teaching at California public schools.

Stromberg died in 2008, at the age of 97. She never spoke publicly about the Supreme Court case and its aftermath. However, her great niece Judy Branfman, a filmmaker and UCLA research affiliate, interviewed Stromberg at length and is completing a film that includes video of those interviews.[24] ✯

John Caragozian is a Los Angeles lawyer and on the Board of the California Supreme Court Historical Society. He thanks Professor Nat Stern and Janie Schulman for their contributions to this column. He welcomes ideas for future monthly columns on California's legal history at *jcaragozian@sunkistgrowers.com*.

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14. 106 Cal.App. 725, 729–32.
15. *Stromberg v. California* (1931) 283 U.S. 359, 361.
16. *See Stromberg v. California*, Brief of Appellee, 10–11, 26.
17. 283 U.S. 359.
18. *Id.*, 363–70.
19. *E.g.*, David Currie, "The Constitution in the Supreme Court: Civil Rights and Liberties 1930–1941" 1987 *Duke L. J.* 800, 809, 813–14.
20. Daniel Hildebrand, "Pure Speech and Constitutional Transformation," *supra*, *Constitutional Commentary* 149.
21. "Yucaipa Reds in More Grief," *L.A. Times*, Nov. 5, 1929, A8.
22. *See* "Legion Swats Communism," *L.A. Times*, May 22, 1931, A12; "Camp Declared Being Reopened by Communists," *L.A. Times*, Sep. 27, 1932, A6.
23. *See* "Reds Get Jail Sentences," *L.A. Times*, May 14, 1930, A1.
24. Information is available at *https://www.orangegrovesandjailsfilm.com/* [as of Jan. 29, 2023].

Justice Kelli Evans:

Compassion and Grace Under Pressure

BY TIELA CHALMERS AND DAVID A. LASH

In recent years, California governors have made a concerted effort to increase the number of women and people of color on the bench at all levels. Governor Gavin Newsom, in particular, has made this effort a focus of his administration, and thanks to him, the bench today bears a much closer resemblance to California's population. A majority of our Supreme Court justices are now people of color, and women, as well as being brilliant and thoughtful jurists. Nowhere is this shift more evident than in the governor's most recent appointment to the California Supreme Court: Justice Kelli Evans. The governor has shown great foresight in naming Kelli to the court, choosing a jurist whose background, experience, and sensibilities will bring invaluable compassion, intellect, and patience to the state's highest court. In becoming the newest justice, Kelli brings a lifetime of experience, superior achievement, and dedication to fairness and access to justice. She brings these vital judicial attributes to a platform where those values could not be more important. We applaud both the governor and the new justice.

As California lawyers long involved in public interest pursuits, we have known and admired the high court's newest member for many years. We first met Kelli when she was a staff attorney at the American Civil Liberties Union of Northern California in San Francisco during the late 1990s. Traveling in the same legal circles, working on similar issues, all focused on using the law to help those most in need, we quickly came to admire her heart and mind. After she moved on, our professional paths next met when, years later, she returned to the ACLU as its associate director, guiding its work on racial, reproductive, and criminal justice.

But it was during her years at the State Bar, as its senior director of the administration of justice, where we worked closely together and proudly became fast friends, collaborating on a variety of issues relating to the "justice gap."[1] Kelli assumed a leadership role in connecting the legal aid and pro bono communities with those whose hands control the purse strings, helping to bridge a challenging divide. In that position, facing issues so critical to low-income communities across the state, it seemed to us that Kelli's personal history infused her with a reality and passion that would touch the lives of vulnerable

Kelli Evans at her confirmation hearing, Nov. 10, 2022. *Photos: California courts.*

individuals and families in ways that would have a profound impact. Focusing her career on protecting and advancing justice and opportunity for those who need it most seems to be a part of her soul. But so is a strong work ethic and a calm demeanor that eases tense conversations and makes dialogue possible.

Kelli grew up in Colorado. She and her sister saw their mother struggle with addiction and mental illness, a trauma for any family member to experience, much less children. When Kelli was about 5, her mother took both her and her sister to live with their maternal grandmother, knowing this move would allow them to have better lives. Typical of Kelli's outlook on life, she seems to have only gratitude for her mother and the difficult, life-altering decision made to give up responsibility for the girls' upbringing in favor of her own mother. It meant that Kelli grew up with an attentive and devoted adult who guided her with an unwavering moral compass, support and encouragement, and a strong foundation.

Kelli speaks gratefully about the impact of legal aid on her early life. She remembers dressing for her first day of school and going with her grandmother to register at the local elementary school — excited at the prospect of reading and learning — only to be told that her grandmother did not have the legal authority to register her for school. Luckily for Kelli — and for us — Kelli's grandmother found her way to Legal Aid, where a staff attorney drafted a power of attorney, giving Kelli's grandmother the legal authority she would need to enroll the children in school, make medical decisions on their behalf, and generally serve as a life-stabilizing parental presence for these then-young girls.

To those of us who know her, it is no surprise that Kelli enjoyed school quite a lot and, of course, did very well. Although they became a strong unit, the family had few resources, living for years in public housing. Just as Kelli was entering high school, they were lucky

1. The term "justice gap" refers to the chasm between those who need legal help and those who are able to obtain legal help. In some areas of law, 80 percent of people are unable to locate or afford legal assistance and are forced to try to navigate complex legal issues and procedures without any professional help.

Above & page 19: Kelli Evans' confirmation hearing, Nov. 10, 2022. *Photos: California courts.*

enough to finally obtain a subsidized housing voucher that allowed them to live in market-rate housing at an affordable cost. As a result, they were able to move into a neighborhood that was in the catchment area of one of the best high schools in the state. There, Kelli was able to take AP classes and participate in great extracurricular activities. She graduated among the top students in her class from a top school, all the while working 20 hours a week to help support the family. She saw what hard work and intellectual effort could do, and she also saw that without some of the advantages she had, things could have come out very differently.

She has that uncanny ability to listen carefully to whoever she is talking with, making them feel they have her full attention to the exclusion of all others, clearly working hard to understand both what they are saying and perhaps also what they are not saying.

Kelli went on to Stanford as a National Merit Scholar, earning a bachelor's degree in public policy, and then to UC Davis School of Law, where she was the recipient of the Martin Luther King Jr. Award for Public Service. Her experience in the immigration and prison law clinics there clearly informed her later work.

After law school, Kelli followed what was becoming a well-defined career path that paralleled her personal story and her personal passions. She accepted a year-long fellowship opportunity at Equal Rights Advocates, a nonprofit entity advocating for gender justice in employment and education, working on employment rights cases, representing largely low-wage workers, protecting their rights and their livelihoods. Next, she moved on to the ACLU of Northern California, where she handled litigation and drafted amicus briefs in several high-profile civil rights cases. Her devotion to civil rights causes eventually, and seemingly inevitably, drew her to Washington, D.C., first as a senior trial attorney at the Civil Rights Division of the U.S. Department of Justice, and then at a private law firm focused on police misconduct and other civil rights issues.

Her work on police misconduct matters brought her back to California to serve (for seven years) as a federal court monitor, overseeing compliance by the Oakland Police Department with the consent decree entered into in the case frequently referred to as "the Riders."[2] We are hard pressed to think of a position that calls for more grace under pressure than serving as a police department consent decree monitor. It requires an amalgam of skills rarely seen, including evaluating the constitutionality of police actions, an ability to listen to all sides, bringing calm and patience to a difficult situation, all while maintaining an unwavering commitment to justice. Kelli served in this role in multiple cities over the course of her career, a testament to the way so many disparate parties with differing values and convergent interests respected her fairness and dedication. In fact, she founded a company that provided that service to police departments and other consent decree parties over the course of several years.

Kelli returned to the ACLU in 2010 as its associate director, and then moved to the State Bar of California, where we both worked closely with her, spending a good deal of time together on a variety of issues relating to the justice gap. It was there that we saw her deal with delicate situations on a continual basis. The one constant in her performance was her motivation to do what was right, what was just, and what would best serve the interests of those who otherwise would be marginalized. We witnessed her belief-in-action that the law, lawyers, and government be guided by fairness and equality, no matter one's station in life. Her dedication to those principles is what drove her, inspired us, and resulted in policy and programs aimed at accomplishing those goals.

2. *Allen v. City of Oakland* was a federal civil rights lawsuit originally brought in 2000 in which plaintiffs alleged that a group of four longtime officers of the Oakland Police Department (known as "the Riders") kidnapped, planted evidence on, and beat citizens. The suit also alleged that the department turned a blind eye to this misconduct. The case was settled in 2003 with a payment to the plaintiffs and the appointment of independent monitors. (N.D.Cal. 3:02-cv-04935, available on PACER, *https://pacer.login.uscourts.gov/csologin/login.jsf?pscCourtId=CANDC&appurl=https://ecf.cand.uscourts.gov/cgi-bin/iquery.pl*.)

The way Kelli talks makes it easy to trust her. She has that uncanny ability to listen carefully to whoever she is talking with, making them feel they have her full attention to the exclusion of all others, clearly working hard to understand both what they are saying and perhaps also what they are not saying. Using that remarkable skill, she helped to bring more resources to the table for those serving the underserved, while satisfying those concerned with efficiency that this issue, too, was being addressed.

Kelli left the State Bar for the California Department of Justice, where she served as a special assistant to Attorney General Xavier Becerra. Her portfolio of responsibilities unsurprisingly focused on her areas of expertise and passion, including policy issues ranging from police accountability to discrimination. From there she became the chief deputy legal affairs secretary to Gov. Newsom, working on a wide variety of legal issues in state and federal courts. Those responsibilities included oversight of the Board of Parole Hearings. Here is another example of Kelli's ability to see both sides and navigate difficult spaces. Her work on police misconduct issues showed her the challenges faced by those being stopped, arrested, or charged with a crime. At the same time, in her role with the parole board, she worked with victims of crime, hearing and balancing their concerns and issues with those of the people convicted. She worked hard to be fair to all, her signature calling. We saw her compassion for families who were hurting and her fairness to those seeking parole. A balancing act supreme, always driven by a sense of justice.

Kelli also played a lead role in crafting and implementing the governor's 2019 moratorium on the death penalty. In addition to halting executions in California, it repealed the state's lethal injection regulations and dismantled California's death chambers. When the governor faced a lawsuit over his actions, Kelli secured pro bono representation to defend the policy and oversaw the course of the litigation that successfully defeated all challenges. Kelli also represented the governor's office on a variety of other notable criminal justice issues, including modernizing California's laws related to the use of deadly force by law enforcement officers. Kelli's ability to work with both law enforcement and community advocacy groups on this issue is a perfect example of her leadership and vision, as well as her ability to listen, collaborate, and achieve a sometimes hard-to-imagine consensus. In commenting on Kelli's work in this area, a career law enforcement officer observed, "In all my years working with law enforcement leadership and various advocates and organizations, never have I ever seen such a skillful handling of such a sensitive and controversial subject."

In 2021, Newsom appointed Kelli to the Alameda County Superior Court. As is the case for many new judges, Kelli spent her first year on that bench in a variety of assignments, including the Civil Harassment calendar, a court where poverty is an issue in most proceedings and where the daily calendar can be one of the most challenging in any trial court. Many of the litigants represent themselves, and there is no shortage of mental health challenges. Whether the parties are being physically threatened by a neighbor, or believe their roommate is spying for an extraterrestrial entity, this is the calendar of last resort. For the many representing themselves, this is their big chance to be heard — and they are often unwilling to adhere to guidelines and follow social cues. But Kelli's compassion and patience were legendary.

We had the occasion to sit through this calendar when Kelli was on the bench, and it was striking. She brought a unique combination of patience — apparently an endless reserve of it — with the ability to stop a long diatribe and be decisive. Those appearing had a strong sense that she cared about what they said and was listening carefully — but also that she was clear when she had heard enough. Her heart somehow never clashed with her ability to be judicially efficient. All were treated fairly; all knew that they had not been denied access to justice. This may be why the local trial lawyers association selected Kelli as Alameda County Judge of the Year after only her first year on the bench.

It is this same sense of respect that Kelli brings to the Supreme Court. The identity of the parties will matter not at all. Her character will ensure that fairness will prevail. As the first Black lesbian justice on the court, having grown up in poverty, experiencing the power of legal aid, understanding firsthand the life-saving impacts of access to justice, Kelli Evans brings a perspective to the court that surely will prove vital. ✭

Tiela Chalmers serves as chief executive officer and general counsel of the Alameda County Bar Association and Legal Access Alameda. David A. Lash serves as the managing counsel for pro bono and public interest services at O'Melveny & Myers LLP. The opinions expressed in this article are theirs alone.

Portraits of Jake

Jake Dear, chief supervising attorney of the California Supreme Court *(above, in his court office)* retired in early January 2023 after an extraordinary 40-year career with the California Supreme Court. I have known Jake only a few short years, as associate editor of this *Review*, and he has already become a good friend and colleague, and a man I greatly admire. To celebrate Jake's retirement, the *Review* has gathered stories from present and past justices and staff colleagues. We celebrate Jake and send best wishes for success and safe travels in his next adventures. — *Molly Selvin, Review editor*

Although I was able to experience only a brief part of the time, it quickly became evident to me that Jake's 40 years of exemplary service to the court blurs the line between institution and individual. Jake is not only a repository of the Supreme Court's history and tradition, he is also an embodiment of those aspects of the court. Jake handled the court's cases, administrative challenges, and human concerns with an open mind and an even hand, resolving all disputes with careful study and precision — the same qualities that a court should possess to establish and maintain its status as an essential institution.

— *Patricia Guerrero, chief justice of California*

For 12 years Jake Dear served as chief supervising attorney to the California Supreme Court. Consequently, most members of the court family — justices, staff attorneys, administrative personnel — at one time or another found their way to his office. I did, many times.

Up to the fifth floor, down the long corridor, and there, on the left, it is: door open, Jake at his desk — maybe on the phone, maybe at his computer, perhaps absorbed in a legal volume. If he's on the phone, he waves you in and gestures to the chair in front of his desk. This allows you to survey his office. What might capture your attention first is the bookshelf to your left where appear the framed and inscribed photographs of every justice with whom Jake has served during his 40-year career with the court, first as extern, then annual law clerk, staff attorney, and lastly, as chief supervising attorney. Five justices in all.[1]

Adorning his desk are the expected items: open volumes, perhaps drafts of whatever opinion he is working on, memos to the chief, notes reminding him of calls to return, photos of his wife, Mo, and their son, Adam. Then, front and to the left — a pair of wooden shoes. The shoes, now a repository for business cards, are a memento of Jake's time as a young boy living near Arnhem, the Netherlands, during his father's employment there. Yes, he assures visitors, he did wear the shoes.

Directly in front of you, fanned out on the front of the desk, is an array of issues of the California Supreme Court Historical Society *Newsletter* (now the *Review*) dating back approximately 15 years. In addition to his court duties, Jake is a longtime editor of the *Newsletter / Review*, where he now serves as associate editor. His knowledge of the court's history runs deep. He has written, to name only a few, articles about the court's historical sites,[2] its leadership among state courts,[3] and the role of the court's commissioners in the late nineteenth and early twentieth centuries.[4]

Once off the telephone, Jake turns his attention to you. Whatever issue or problem has brought you to his office, he will assist in resolving. Then, duties permitting, he'll spend time with you just "catching up," discussing

1. Associate Justices Stanley Mosk and Joseph Grodin, and Chief Justices Malcolm Lucas, Ronald M. George, and Tani G. Cantil-Sakauye.

2. Jake Dear and Levin, "Historic Sites of the California Supreme Court" (1998–99) 4 *Cal. Sup. Ct. Hist. Soc'y Yearbook* 63.

3. Jake Dear and Edward Jessen, "Followed Rates and Leading State Cases, 1940–2005" (2007) 41 *UC Davis L. Rev.* 683.

4. Jake Dear, "California's First Judicial Staff Attorneys: The Surprising Role That Commissioners Played, 1885–1905, in "Creating the Courts of Appeal" (2020) 15 *Cal. Legal Hist.* 125.

ABOVE LEFT, L–R: Associate Justice Kathryn Werdegar, David Werdegar, & Jake. ABOVE RIGHT, FOREGROUND, L–R: Jake, Associate Justice Martin Jenkins, & Chief Justice Patricia Guerrero. *All photos in this article courtesy Sherry Glassman and court staff.*

mutual interests in matters legal, general, and personal. If something amuses him, his hearty laugh echoes in the corridor outside his office. Visit concluded, you leave his office with a lighter step.

Jake brings to every aspect of his life — work and leisure alike — a dedication to detail, accuracy, and quality. Paramount, of course, is his contribution to the court's decisions and opinions. Often assigned the most complex cases, his skill in researching, analyzing, and writing, his willingness to discuss with colleagues and think difficult issues through — all are notable in assisting the court to reach the best decision. He brings these talents to the cases he's assigned and he shares them with staff attorneys who consult him on their assigned cases.

Never a 9-to-5 sort of person, Jake takes work home with him. His battered brown leather messenger bag accompanies him to the office every working day. Yet he finds time for his leisure passions — wine, fine dining, travel. Together with Mo, a talented cook, he is a gracious host. Fortunate are guests who reap the benefits of his extensive knowledge and appreciation of fine wine and gourmet dining.

Fortunate, too, like my husband, David, and I, are those who have traveled with Jake and Mo. Jake brings to his trip planning the same enthusiasm, deep research, and attention to detail that he brings to his work. It's rumored he has a following on Trip Advisor. Not shy about his French, he engages with the people he encounters along the way — the innkeeper, the sommelier, the master fromager, his fellow traveler.

Most who know Jake call him friend. The court will miss his legal acumen, his work ethic, his historical knowledge, all his incalculable contributions to its endeavors. But because Jake is Jake, the friendships will surely continue.

— Kathryn Mickle Werdegar, associate justice, California Supreme Court, 1994–2017

WHEN I JOINED the California Supreme Court as an annual attorney in 2004, Jake Dear had already been around for two decades. I soon noticed that he took a genuine interest in everyone at the court, including those, like me, who thought they'd only be there for a short spell. And he was interested in everyone's ideas, too. I don't know if he meant it as a compliment, but I still recall with some pride how he came to my office one time and told me that a recent memo I had helped my justice prepare had scored some solid "debating points" against the position he favored. We stayed in touch after I left the court — Jake's interest in people means he is good about staying in touch — and he was instrumental in my return many years later.

By that time, Jake had taken over as chief supervising attorney. It was a great fit, with the position taking full advantage of his contrasts. Jake could be described as easygoing; over many years, I still have never once seen him lose his temper, and his office door is always open for casual conversation and, most likely, an offer of tea. Yet he is also quick to take action when a situation requires it. He is intellectually curious and to some degree flexible, both mandatory requirements if someone is going to serve 40 years at the court. Yet he is also committed to a core set of principles, with his most unyielding beliefs concerned with how courts should go about their work (transparently, carefully, and evenhandedly).

One of Jake's favorite activities each year has been taking new attorneys for a tour of the court building, teasing out lore from every office, stairwell, and hallway. I am grateful that with these tributes, his own historical significance will be noted and celebrated.

— Kyle Graham, chief supervising attorney of the California Supreme Court

JAKE DEAR — his name, identity, and influence — is synonymous with the excellence and integrity of the California Supreme Court. For decades, as the top lawyer of the court, having been chosen as the chief of staff to three chief justices (myself included!), Jake has successfully advised us on untying the most complex of Gordian knots. In the halls of my former court, and in the appellate courts, he is universally known, admired, and pursued for his legal knowledge, advice, and acumen.

For my 12 years as Chief Justice of California, Jake was a constant, trusted confidante and advisor on all matters legal, court, and judiciary related. He also led the court and staff. And this was not because he was the revered

ABOVE LEFT: Jake & Chief Justice Tani Cantil-Sakauye in staff conference. ABOVE RIGHT: Jake & his wife Mo.

editor in chief of the law review at our alma mater, UC Davis School of Law, or had started his career at the court working with a veritable pantheon of California Supreme Court justices. No, Jake was a leader because he is a person of action; as I like to say, he has innate industry with balanced and compassionate judgment.

As he drafted complex memoranda for me, the court, staff, and others, Jake immersed himself in the tasks at hand. I say tasks plural because as the top lawyer, he not only led my chambers, lawyers, and professional staff, he was the go-to person for all the lawyers and professional staff at the court.

Walking by his office, his teacup steaming amidst his fire code paper pyramid violation of a desk, long-stemmed flowers from the farmers market leaning against whatever they could find, I would regularly observe Jake. There he sat, transfixed by what was on his computer monitor, the outside world effectively shut out.

Sometimes, when we'd meet in my chambers or his office to discuss legal issues, internal court procedures, HR matters, or just to catch up, Jake would consume an apple. I was fascinated by his deft use of the small paring knife he always produced and his efficient effortless strokes as he surgically addressed the object in his hand. Or, later in the day, Jake would hold court in his office, tea included of course, with a court family member, listening, providing counsel or exchanging stories of wine, Emma the cat, or France. For Jake and Mo, his accomplished and distinguished wife, also a UC Davis law alum, France is home away from home.

All of this is to say that Jake Dear is a marvel. A marvel within the California legal universe, not the cinematic kind. His laser-like zeal on byzantine laws, ancient legislative history, superseded relevant regulations, and the fine print on page 800, footnote 32, of an internet provider's consumer contract — coupled with his written and verbal analytic presentation of those matters — places Jake Dear in the California legal and judicial firmament. His analytic and scholarly contributions to California jurisprudence are immeasurable and everlasting.

— *Tani G. Cantil-Sakauye, chief justice of California 2011–2022*

Few people have proved their devotion to the court more than Jake Dear. After one year on Justice Stanley Mosk's staff, Jake left for the bright lights of private practice and set what may well be a world record for realizing it was not for him. Within a short time he was back at the court. We worked together on the staffs of three chief justices, Malcolm Lucas, Ronald George, and Tani Cantil-Sakauye, and it's difficult to encapsulate that experience because it was so rich and varied.

Others have written about Jake's prodigious research abilities, management skills, and ability to focus. When he was drafting a memorandum or opinion, Jake's office would become strewn with an ever-increasing pile of open books and notes. When I caught sight of the surface of his desk, I knew that his project was coming to a close. His research skills have proved invaluable in pursuing other interests.

For example, Jake knows the records of the 1849 and 1879 constitutional conventions at which California's basic legal document was created probably better than almost anyone. We visited the site of the 1849 Monterey Convention and were struck by the lack of pomp and ornamentation. We share a fondness for the debates on the proper location for the Supreme Court, which include comments on where the whiskey was better and concerns that the air of what is now a certain state capital was so foul that vultures were known to drop dead in midflight — not to mention the floods.

One of Jake's greatest pleasures has been researching and creating wonderful vacations for him and his wife, Mo. Over the years, the two have sampled cuisine across France, visited beautiful locations off the beaten path, and hiked in glorious landscapes, making French and Francophile friends wherever they go. I'm always amazed, and a little bit jealous, of the photos he sends of the food they have just been served or of another spectacular view.

Jake was the driver behind creating one of the permanent historical displays on view in the courthouse. His mission was to find photographs of the multiple sites of the Supreme Court since 1849. He was indefatigable and ingenious in finding suitable images. For most of the court's history, photographs required more than

ABOVE LEFT: Chief Justice Ronald George & Jake. ABOVE RIGHT: Beth Jay & Jake.

a smartphone or compact camera. It was so much fun when he'd produce a new hard-won discovery depicting another of the court's many homes.

I could describe many more bits and pieces of our years working together. Jake and I would spend a long time arguing over the placement of the word "only" in a sentence. He lunched almost daily and always happily on leftovers from the delicious dinner Mo had made the night before. In his office, he kept wooden shoes he wore as a child living in the Netherlands, a small model airplane, and photos showing his own history at the court. We generously edited each other's drafts and I strongly believe my work improved because of it.

The bottom line is that I learned a lot from Jake, and out of our years together came a friendship that I feel very lucky to have. I wish him and Mo nothing but the best.

— Beth Jay, an attorney at the California Supreme Court for more than 35 years, the last 27 as principal attorney to three successive chief justices

As I reflect upon the nearly 15 years of my service as chief justice of California, one of the highlights was my collaboration with Jake Dear as head of the chambers staff and chief supervising attorney of the high court. It is difficult for me to enumerate the numerous ways in which he provided invaluable assistance to me, and to describe his many exceptional skills and contributions, but I shall mention a few.

Jake's legal research skills never ceased to impress me. One example is a case in which he and I prepared an opinion that garnered the concurrence of all of my colleagues on the court, after resolving difficult and novel questions of law. Jake's research uncovered some dispositive legislative history and case law dating back to the 1860s and the 1880s that had eluded the parties' very experienced and highly respected counsel, and that caused the court to solicit supplemental briefing from the parties.

Jake's writing skills always reflected a receptive approach to the arguments and issues that came before the court, and a very readable style.

Working with Jake was a most pleasurable experience for me and a truly collaborative effort, with each of us able to convince the other of the merit of something not previously considered.

In addition to Jake's responsibilities as a staff attorney and head of chambers staff, he managed to perform with remarkable skill the duties of chief supervising attorney for the entire legal staff of the California Supreme Court. Few individuals possess the open-mindedness and diplomatic skills demanded by that task.

The court and the public at large are most fortunate that Jake intends to volunteer his services to the court in retirement, while still allowing sufficient time for him to pursue foreign travel and his many other interests.

My wife, Barbara, joins me in extending our greatest appreciation to Jake for his exemplary service, and our warmest wishes for the future to him and his wife, Mo.

— Ronald M. George, chief justice of California, 1996–2011

Put simply, Jake Dear is a marvel. From the perspective of a fellow judicial attorney who spent more than half a century at the California Supreme Court, I believe Jake has made as great a contribution to the Supreme Court as an institution as any other person.

To begin with, Jake is, by far, the best administrator I have ever known. He is the consummate problem solver. He is organized, knows how to search out and compile the relevant data necessary to meet every contingency, and has the initiative and diligence to create and maintain the resources that have enabled the court, as an institution, to perform in a consistent and reliable manner. His contribution to the court's institutional memory is incalculable.

In addition, Jake is a prodigious and creative legal thinker and researcher. I know of no one who researches a legal problem or issue as thoroughly or as deeply as Jake has done in case after case. The scores of opinions he has worked on have demonstrated his ability to keep his eye on the big picture while delving into the details of the history and evolution of the relevant legal doctrines at issue.

Importantly, Jake has achieved his numerous legal and administrative accomplishments with the utmost integrity and evenhandedness. He is a most devoted steward of California law, always guided by a dedication to go where the relevant legal precedents lead.

ABOVE LEFT, L–R: Hal Cohen, Beth Jay, Chief Justice Ronald George, & Jake. ABOVE RIGHT, L–R: Jake & Sherry Glassman.

Finally, on a personal note, Jake has been a wonderful and true friend. On our daily morning "constitutionals" around the Civic Center Plaza, we not only debated at length the legal issues and problems on which each of us was working but also shared more personal matters that were on our minds and that reinforced our friendship. He was always there to lend support when I needed it.

The court and the public have been so lucky to have the benefit of Jake's talent and service for so many years. We all are in his debt.

— Hal Cohen, former chief supervising attorney, worked for over 50 years with the California Supreme Court

Visitors to the interior hallways of the California Supreme Court view, along the walls, imposing photos of the justices who have served from the court's beginning to present days. But missing from this display are the faces of the many hundreds of staff attorneys who, working anonymously behind the scenes, provide the sort of backup that is essential to the functioning of a busy and high-quality tribunal. Of course, there is not enough room to include all of their portraits, and attempting to select those whose work has been particularly worthy of recognition would be a daunting task, but if that task were undertaken, I have no doubt that Jake Dear's portrait would be there, and in a prominent location.

Jake, after a brief experiment with large-firm legal practice, decided he would prefer to return to the court, where he had clerked after graduation from law school, and it was my good fortune to be able to offer him a position on my staff. That was 40 years ago. Since then he has worked on the staffs of succeeding chief justices, becoming chief supervising attorney and outspanning the longevity of everyone, judge or lawyer, who was there when he began.

Jake has been more than a good staff attorney; he has displayed a commitment to the court as an institution, taking pleasure in researching and making available to the public obscure byways of the court's history, becoming a key figure in the California Supreme Court Historical Society, and above all, concerning himself with the efficient workings of the court and its public reputation, all with his characteristic modesty and balanced judgment. He has become a part of the institution he has come to love.

I have no worries about Jake's retirement. He has many interests that he shares with his wife Maureen, including their common enthusiasm for the French countryside and all it has to offer; he has many friends with whom he shares mutual love and respect; and no doubt he will continue to be involved in assisting the court when he has opportunity to do so. I also have no doubt that he will be missed.

— Joseph R. Grodin, associate justice, California Supreme Court, 1982–87, and professor, UC College of the Law, San Francisco

My abiding memory of Jake will always be the "NOHRM!" (or however it's spelled) that would greet me whenever I called him on the phone or popped into his office. I cannot swear to it, but I'd bet dollars to doughnuts that he greeted me with that sort of enthusiasm on my first day at the court in 1987, because it would be just his style. Back in those days (before the 1989 Loma Prieta earthquake), all the justices and the senior attorneys on their staff were on the fourth floor of the courthouse. Junior attorneys and externs were on the fifth, and the sixth was the AG's domain. Jake was on the staff of Chief Justice Malcolm Lucas and had an office at the corner of McAllister and Larkin, part of what is now Justice Goodwin Liu's chambers. My office was further along McAllister, and, as best I can figure out, is now somewhere in the middle of Justice Leondra Kruger's chambers. I'd swear that Jake must have come down the hall just to say hello in his booming voice and congratulate me on landing an office with a big window overlooking Civic Center Plaza and a historic wardrobe that had a functional sink.

I didn't have that many dealings with Jake my first couple of years at the court when I worked for Justice John Arguelles or at the start of my stint on the criminal central staff. But our relationship underwent a sea change when I took over as the staff director in 1993 and even more so with the advent of the George Court in 1996. As the years passed, it was a rare week (or day) without a visit, phone call, email, or text from Jake seeking input

ABOVE, L–R: Alice Collins, Chief Justice Tani Cantil-Sakauye, Jake & Larry Lee.

about possible changes to the court's practices, answers to questions about unusual procedural issues, and the like. What typified all of these contacts, and Jake's interactions with court staff in general, was his enthusiasm and his genuine interest in what you had to say. It was never just lip service or some pro forma contact. Jake cared, and that was obvious.

And it was not just on the professional side. Jake and I had kids of about the same age, and he never seemed to get bored hearing what mine was up to. And vice versa, although Jake was always more interested in hearing about others than talking about himself. When I had to deal with some serious medical issues in our family, Jake was a rock of emotional support. I think his ability — his instinct, actually — to care about others was a big part of his success as chief supervising attorney for former Chief Justices George and Tani Cantil-Sakauye. It certainly made it easier for us to disagree with each other when need be.

Working closely with Jake for over 30 years was a pleasure. That's the bottom line. And those almost-daily emails and texts I mentioned? They're among the few things I've missed in retirement.

— Norman Vance directed the Supreme Court's criminal central staff, 1993–2021

When I retired from the California Supreme Court five years ago, there were few staff attorneys left from the court who had served under Chief Justice Rose Bird. Hal Cohen, of course, Alice Collins, Jake Dear, and me. Hal, my head of chambers for Justice John Arguelles from 1987 to 1989, famously came to the court to work for Justice Mathew Tobriner in (could it be?) 1969. Alice preceded me on the criminal central staff by a few months in 1983 and would go on to work for Justice Stanley Mosk and Chief Justice George, to name just a few of the judges lucky enough to benefit from her talents. Jake and I joined the court in the fall of 1983 as annual law clerks. For a time, then, we four attorneys were the remaining staff eyewitnesses to the 1986 retention election that led to the unprecedented removal of Chief Justice Bird, as well as Justices Joseph Grodin and Cruz Reynoso. Oh, the stories we could tell!

But time marched on, and justices came and went. I worked with Jake and Alice for Chief Justice Malcolm Lucas in the early 1990s, and then, for 21 years, for Justice Kathryn Mickle Werdegar. Hal, who worked for a succession of chiefs, eventually went part-time, and then retired. Alice, who worked for Chief Justice George and Chief Justice Tani Cantil-Sakauye, retired about five years ago, as did I. But Jake, the lone survivor, persevered. I have missed Jake in my retirement, especially our periodic chats about cases, about court personalities, about legal strategies and court policies. We talked not just of calendar memos and opinions, but more "behind-the-curtain" stuff: the merits of conference memos written by staff for petitions for review, potential justices' votes on A list cases, B list cases, and habeas corpus petitions, efficiency ideas regarding the processing of capital cases, State Bar matters, things happening in the Clerk's Office and the Administrative Office of the Courts. All this constitutes "the work of the court." And Jake was always in there, first with Chief Justice Lucas, then Chief Justice George and then Chief Justice Cantil-Sakauye, helping things run smoothly and with fairness, so the California Supreme Court could approach what was the unspoken goal: to be an efficient arm of the state government dispensing fairness and justice to the people of the State of California.

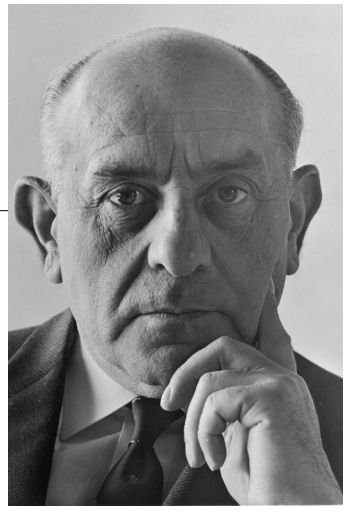
As I said, I have missed my time with Jake, and I'm confident the court misses him too. I can only hope the torch has been passed to staff members who can approach Jake's dedication and integrity on behalf of the institution we served for so long. Congratulations on your retirement, old friend. You deserve it!

— Larry Lee, staff attorney for the California Supreme Court for almost 35 years

FOLLOWING THE TRADITION *established by former California Supreme Court chief supervising attorney Hal Cohen, Jake continues, pro bono, to undertake various work and projects for the court.* ✯

Chief Justice Phil Gibson's Scheme to Appoint Bernie Witkin as Reporter of Decisions and Transform the Judicial Council

BY JOHN WIERZBICKI



Bernie Witkin. *Photo: John Wierzbicki collection.*

In the past few issues of the *Review*,[1] we have looked at the early career of Bernie Witkin, whom the California Legislature declared had done more to help shape California's legal system "than any other single individual in the twentieth century."[2] Witkin was renowned as an author, speaker, advisor, and raconteur. He was also briefly California's twenty-first reporter of decisions. But not much has been written about Witkin's appointment, or how Chief Justice Phil Gibson employed Witkin in that role to recast the Judicial Council into the chief policymaking body of the California courts. This is that story.

Chief Justice Phil Gibson. *Photo: California courts.*

The office of Reporter of Decisions in California stems from the earliest days of statehood. From the time of the first state Constitution in 1849, the California Supreme Court has been responsible for issuing written opinions and the legislature for providing for their "speedy publication."[3] To fulfill this obligation, the court has, since 1850, appointed a reporter of decisions, along with any assistants that the reporter requires, and can also remove the reporter as it chooses.[4]

Randolph V. Whiting was the reporter of decisions throughout the 1930s. Whiting, a one-time grand master of all Freemasons in California,[5] had been in the position since 1917. Much of the work of the reporter's staff at that time involved writing a syllabus, or summary, for each decision and drafting headnotes that identified the important issues of law therein. Once so enhanced, the decisions would be edited and prepared for publication, and then handed off to the court's longtime printer, Bancroft-Whitney Co. of San Francisco.[6]

As reporter, Whiting served at the pleasure of a court led by Chief Justice William H. Waste. The Waste Court during that time was notable for its stability. There was little turnover of justices during this period, and by the early 1930s, the major "good-government" progressive reforms had all been implemented.[7] But the court's seeming tranquility did not extend to the reporter's office, which faced a dramatic increase in its workload. Whiting's predecessor, C.P. Pomeroy, had produced 6.5 volumes of opinions per year during his tenure. For Whiting, it was up to about 9 volumes per year.[8] The reporter's staff simply could not keep pace when filings were heavy, causing delays in publication. When filings were fewer, staff were often left idle.[9]

Bancroft-Whitney's publishing rival, West Publishing of St. Paul, Minnesota, saw an opportunity. West made the court an offer: give us the right to publish the opinions of the California Supreme Court and the state's Courts of Appeal and in return, we will write the headnotes and syllabi for those opinions, and provide them to the court at no cost.[10] Having an outside publisher take on those laborious responsibilities (and for free!) was of obvious benefit to the court as Whiting's staff struggled

1. See John Wierzbicki, "A Lawyer by Accident, Bernie Witkin's Early Life and Career. Part I: A Suitable Replacement" (Fall/Winter 2020) CSCHS *Review* 27–32; John Wierzbicki, "A Lawyer by Accident, Bernie Witkin's Early Life and Career. Part II: Preparing for a Public Life" (Spring/Summer 2021) CSCHS *Review* 15–19.

2. Cal. Ed. Code, § 19328, subd. (a).

3. Cal. Const., Art. 6, § 14 (1849), Cal. Const., Art. VI, § 14; *see also* Edward W. Jessen, "Headnotes About the Reporters, 1850–1990" (Spring/Summer 2007) CSCHS *Newsletter* 1.

4. *See* Cal. Gov. Code, § 68902.

5. 1934 Proceedings of the Grand Lodge of Free and Accepted Masons of the State of California, 6.

6. Jessen, "Headnotes About the Reporters, 1850–1990," *supra* (Spring/Summer 2007) CSCHS *Newsletter* 7.

7. Salyer, Lucy E., "The California Supreme Court in an Age of Reform, 1910–1940," in Harry N. Scheiber, ed., *Constitutional Governance and Judicial Power: The History of the California Supreme Court*, Berkeley: Institute of Government Studies, Public Policy Press, Univ. of California, 2014, 193.

8. Jessen, "Headnotes About the Reporters, 1850–1990," *supra* (Spring/Summer 2007) CSCHS *Newsletter* 6.

9. *Id*. 7. Witkin recalled that Whiting "had a staff of about six and they all practiced law very successfully"— with the implication being that they so did while employed at the reporter's office, perhaps during their idle time. Witkin, unpublished interview with Bernard E. Witkin, Sept. 9, 1986, Witkin Archive, California Judicial Center Library, 24.

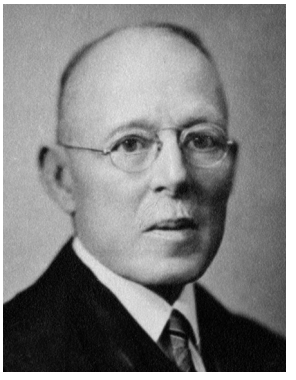
10. Minutes of Supreme Court of California: "In Re Publication of California Reports" (Mar. 27, 1940). *See also* Witkin, unpublished interview, *supra*, Sept. 9, 1986, 24.

to do the job.[11] Another consideration was that Whiting would be leaving at the end of November 1940 after 23 years as reporter, having reached the compulsory retirement age.[12] This posed an opportunity to have a private publisher take over and eliminate the reporter's office altogether.

In March 1940, the California Supreme Court made public its acceptance of West Publishing's offer. It announced that once Whiting retired, West Publishing would become the official publisher and the court would then "reorganize the office of . . . [the] reporter and make such changes in the personnel of said office and the disposition of the work of such reporter and his assistants as may seem advisable to this court at that time."[13] But as fate would have it, the reporter's office would not be Waste's to reorganize. In late May, Waste fell ill, reportedly suffering from "extreme fatigue."[14] By early June 1940, he was dead.

Waste's death gave Cuthbert Olson, the first Democratic governor in 40 years, a chance to reshape the court. He choose Phil Gibson, his former campaign treasurer, as chief justice. Olson had appointed Gibson as an associate justice just several months before, after Justice William Langdon died.[15] With him to this new role, Gibson brought his "law secretary," Bernie Witkin.

Randolf V. Whiting. *Photo: Grand Lodge of F. & A.M. of California.*



Chief Justice William Waste. *Photo: California courts.*

Witkin had been Langdon's law secretary since 1930, but he was best known for his popular bar review course and his treatise, the *Summary of California Law*. When Gibson joined the court, he asked Witkin to stay on with him, to which Witkin agreed.[16] Like Langdon, Gibson apparently acquiesced to Witkin continuing his activities outside the court.[17] Although they worked together for less than a year, Witkin must have impressed Gibson greatly. As one court observer from that time would soon remark, "Bernie Witkin seems to have become to Chief Justice Phil Gibson what Justice Samuel Rosenman is to President Roosevelt — a sagacious counsellor in that fascinating but delicately-timing occupation known as 'public relations.' "[18]

Olson's choice of Gibson as chief justice proved inspired. He was a gifted administrator. In addition to other reforms, he would change how and what the California Supreme Court would decide, while ensuring that the Courts of Appeal had sufficient resources to manage the redistribution. In that way, he dramatically reduced the court's backlogged docket, which by Waste's death

11. Jessen, "Headnotes About the Reporters, 1850—1990," *supra* (Spring/Summer 2007) CSCHS *Newsletter* 7. Jessen, like others, credited Witkin with originating this proposal, but with a caveat, noting, "It may not be coincidental that Phil Gibson was chief justice at the time Witkin implemented his system, but Gibson's role, if any, is unknown and the anecdotal credit has always been given entirely to Witkin." As we shall shortly see, Jessen's instinct concerning Gibson was sound.

12. Minutes of Supreme Court of California: "In Re Publication of California Reports" (Mar. 27, 1940).

13. *Ibid*. Under the current practice, "The official reports shall be published under a contract to be entered into on behalf of the state by the Chief Justice of California, the Secretary of State, the Attorney General, the President of the State Bar, and the Reporter of Decisions, who shall serve as secretary." Cal. Gov. Code, § 68903.

14. "Judge Waste Recovering," *S.F. Chronicle*, May 24, 1940, 15.

15. Earl C. Behrens, "Olson to Name Gibson for Waste Post," *S.F. Chronicle*, June 8, 1940, 1. For the now vacant associate justice position, Olson chose Berkeley law professor Max Radin. But after the California Judicial Qualifications Commission rejected Radin's nomination (because of his support for individuals who refused to testify before a legislative committee on subversive activities), Olson would name tax professor Roger W. Traynor as a more innocuous appointee. Arthur Caylor, "Radin's Rejection Stirs California," *N.Y. Times*, July 28, 1940. *See* Margaret Levy and Gordon Morris Bakken, "Conversations with Justice Stanley Mosk" (1996—97) 3 *California Supreme Court Historical Society Yearbook* 175, 202, recounting Governor Olson's response to Warren's announced reason for rejecting Radin — because he was a professor with no judicial experience: "The real reason was, Warren thought [Radin] was too radical. . . . I was with Olson in his office when he got the news, and I never saw him as angry as he was. He said 'That Warren is a hypocrite! He's really opposed to him because he didn't like his political views. . . .' Then Olson said, 'Get me Gibson on the phone.' He got Phil Gibson on the phone and said, 'Get me another college professor. I want to show what a hypocrite Warren is.' And Gibson scouted around and came up with the name of Roger Traynor. And sure enough, Traynor got confirmed even though he was 'only a college professor' [with no judicial experience]."

16. Wierzbicki, "Part II: Preparing for a Public Life," *supra* (Spring/Summer 2021) CSCHS *Review* 15–19, 18.

17. This arrangement is not as unusual as it may appear. Raymond Peters (later himself a California Supreme Court justice) ran a competing bar review course while he was a "law-secretary at large" to the court, until Witkin's course drove him out of business. Malcolm Tuft, "The California Supreme Court and I: A Reminiscence" (Summer/Fall 1991) *Western Leg. Hist.* 275—82, 276.

18. Untitled item, *The Jewish News of Northern California,* Oct. 11, 1940. Rosenman, a New York state judge, was the first person to hold the position of White House counsel and is credited with first using the phrase "New Deal" to describe Roosevelt's policies. "Samuel I. Rosenman, 77, Dies; Coined New Deal for Roosevelt," *N.Y. Times*, June 15, 1973.

Bernie Witkin *(left)*, at a mid-1970s meeting of California Academy of Appellate Lawyers. *Photo: CAAL.*

had grown to at least three years.[19] But his first priority was the Judicial Council.[20]

Unlike the Reporter of Decisions office, the Judicial Council was a new addition to the California courts. Voters approved the council's creation in 1926, to be composed of the chief justice and other state court judges, who would study court administration and seek to "speed up" justice.[21] Many of those voters, however, must have been disappointed in how the council operated under Waste. In its inaugural report, Waste said that the council would act only "after due consideration of every matter presented."[22] Witkin later used more colorful language to describe how Waste ran the council.

> At the time I came to work for the court in 1930 the California Judicial Council had been going for some time and other judicial councils throughout the country were doing terrific jobs. The California Judicial Council under Chief Justice Waste . . . well, if they ever met nobody knew it. They had two elderly secretaries who received the mail and they rendered a report to the legislature on statistics. How many filings there were in the court and how many dispositions. They never did one damn thing.[23]

To invigorate the council, Gibson needed the help of someone savvy and trustworthy, who knew the court members, and who would persevere. He decided that his law secretary was just that person.

Meanwhile, now with a new chief justice in place, Bancroft-Whitney sought to keep the *Official Reports* contract by matching West Publishing's offer of free headnotes.[24] It also had the advantage of a long history with the court and could be trusted to know the process of publishing decisions better than West.[25] This suited Gibson just fine. It wouldn't do to have Witkin act with the Judicial Council in the role of Gibson's law secretary. He needed him to have a position with more gravitas — such as reporter of decisions. And with Bancroft-Whitney performing most of the work of the reporter's office, Witkin would be free to operate on Gibson's behalf. Gibson would have Witkin start by leading the effort to revise the Rules of Appellate Procedure, which were badly outdated. Witkin later described their conversation.

> Phil said to me, 'Here's what we are going to do. We are going to get rid of Whiting. He's going to retire. No need for a reporter anymore. All there is, is headnotes.' That's all he knew about it. 'You are going to be reporter of decisions.'
>
> It was a big increase in salary from $3,000 to $6,000 a year, you know. That was big money.
>
> Then he said, 'Since you won't have anything to do you are going to run the Judicial Council program to revise the rules on appeal.' He had a way of talking that way.
>
> I was no dummy. Instead of complaining I said, 'Okay, it's a deal. But I'll need a little help.'
>
> He said, 'What do you mean?'
>
> 'Well, there is a little more to reporting than headnotes. I'll need one assistant.'
>
> 'Okay, who do you want?'
>
> 'I want Nankervis,[26] the only guy who knows it.'
>
> 'Okay.'
>
> 'And we'll need a stenographer.'
>
> 'All right, that's okay.'
>
> 'On the rules on appeal I'll need about an assistant and a half.'

19. McClain, Charles J. "The Gibson Era, 1940–1964," in Scheiber, ed., *Constitutional Governance and Judicial Power*, *supra*, 251.

20. Witkin: "Shortly after Phil Gibson became chief justice he said to me . . . 'I'm going to revive the Judicial Council' or some such words as that. . . ." Witkin, unpublished interview, *supra,* Sept. 9, 1986, 24.

21. Salyer, "The California Supreme Court in an Age of Reform, 1910–1940," in Scheiber, ed., *Constitutional Governance and Judicial Power*, *supra*, 191.

22. *Ibid*. In a play on the adage "haste makes waste" Witkin described the court during this time as "Waste without haste." Witkin, unpublished interview, *supra,* Sept. 9, 1986, 8.

23. Witkin, unpublished interview, *supra*, Sept. 9, 1986, 24.

24. Minutes of Board of Bancroft-Whitney (June 12, 1940) from Bernie Witkin's personal papers (in author's possession). "It was unanimously agreed that we would offer to prepare headnotes of the decisions handed down by the California Supreme and Appellate Courts, and, if necessary, give the State license to use same free of charge."

25. Witkin later claimed that Bancroft-Whitney had an "in" at the court who helped it to defeat West Publishing. Witkin, unpublished interview, *supra*, Sept. 9, 1986, 24.

26. William Nankervis Jr., who later became the twenty-second reporter of decisions (1949—1969).

'Okay.'

So I became reporter of decisions.[27]

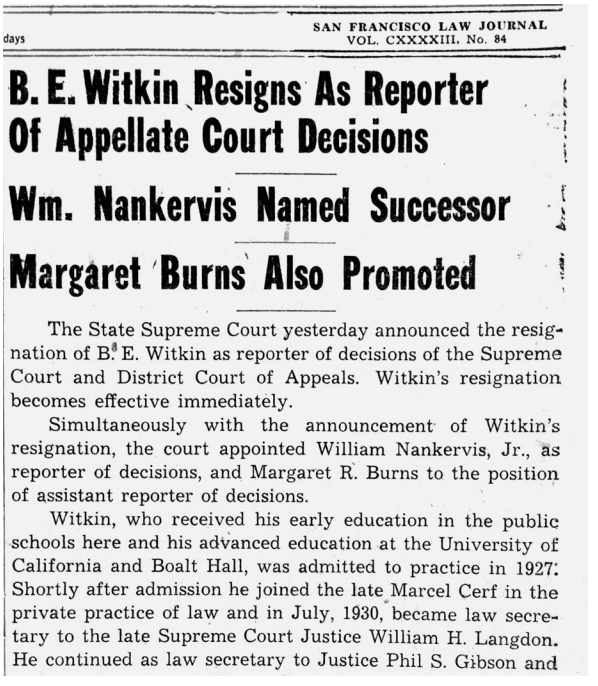
The appointment became official on November 20, 1940, and Witkin started in his new role on December 1. But Judicial Council reform had to wait. First, Witkin had to train Bancroft-Whitney on the art of crafting headnotes.[28] Those efforts lead to the creation of a style manual, which was then published in 1942 for use by appellate courts and lawyers.[29] A version of it remains in use.[30]

Meanwhile, Chief Justice Gibson had to do some political maneuvering. Gibson lobbied the legislature, and in 1941 got it to approve using the Judicial Council to rewrite the rules on appeal and to appropriate funds for experts and support staff for that effort.[31] Witkin would lead the appellate rules committee as its draftsperson. Witkin later described what happened.

> Phil appointed a committee [of judicial] council members as my committee to work with, and in his usual somewhat inconsistent way, he appointed the dean of the court [the senior justice], Justice John W. Shenk, as the chairman of the committee.[32] He did this knowing full well that Shenk was an enemy of all reforms.[33] The whole thing could have been a total failure. However, I outwitted him because I thought my career was too important to end right then.[34]

Witkin asked for, and got, a State Bar committee to assist him, composed of 100 members, which included every major law office that participated in appeals. "It was an outstanding committee and it was that group that took my drafts and gave them their support. [This was the] means by which we got it through the council."[35] In early 1943, the legislature was presented with the rules, which went into effect that July. The legislature was so pleased with the result that it passed a permanent appropriation for research staff for the Judicial Council.[36]

It is from this time that the Judicial Council began its active role in the administration of the California courts. The composition of the Supreme Court also dramatically changed during this period, most notably with the addition of Roger Traynor, and the substance and caliber of its decisions made it "perhaps the most highly regarded state appellate court in the nation."[37]



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B. E. Witkin Resigns As Reporter Of Appellate Court Decisions

Wm. Nankervis Named Successor

Margaret Burns Also Promoted

The State Supreme Court yesterday announced the resignation of B. E. Witkin as reporter of decisions of the Supreme Court and District Court of Appeals. Witkin's resignation becomes effective immediately.

Simultaneously with the announcement of Witkin's resignation, the court appointed William Nankervis, Jr., as reporter of decisions, and Margaret R. Burns to the position of assistant reporter of decisions.

Witkin, who received his early education in the public schools here and his advanced education at the University of California and Boalt Hall, was admitted to practice in 1927. Shortly after admission he joined the late Marcel Cerf in the private practice of law and in July, 1930, became law secretary to the late Supreme Court Justice William H. Langdon. He continued as law secretary to Justice Phil S. Gibson and

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As for Witkin? He did not stay long as reporter of decisions, resigning in November 1949 "to devote my full time to writing, teaching and law practice."[38] ✯

John R. Wierzbicki is a legal author, historian, and intellectual property attorney. He serves on the California Supreme Court Historical Society's Board of Directors and has been conducting, on behalf of the Society, a series of oral histories on Bernie Witkin's life and work.

27. Witkin, unpublished interview, *supra*, Sept. 9, 1986, 24–25.

28. *Ibid*. *See*, *e.g.*, B.E. Witkin, "Suggestions on the Preparation of Headnotes," Mar. 3, 1941, and subsequent correspondence from Bernie Witkin's personal papers (in author's possession).

29. Jessen, "Headnotes About the Reporters, 1850–1990," *supra* (Spring/Summer 2007) CSCHS *Newsletter* 7.

30. California Style Manual (4th ed. 2000). The reporter's office is currently drafting a fifth edition.

31. McClain, "The Gibson Era, 1940–1964," in Scheiber, ed., *Constitutional Governance and Judicial Power*, *supra*, 250.

32. Shenk was the senior justice on the court, having been appointed in 1924. He would remain on the bench until 1959.

33. Witkin was not wrong about Shenk's attitude concerning reform. For example, a few years later, Shenk would write the dissent in *Perez v. Sharp* (1948) 32 Cal.2d 711, asserting that California's laws prohibiting inter-racial marriage between whites and non-whites should be upheld because "they have a valid legislative purpose." *Id*. 742. However, it is more likely that Gibson appointed Shenk as chair in order to co-opt him into the reform process rather than allow him to complain about it from the outside.

34. Witkin, unpublished interview, *supra*, Sept. 9, 1986, 25.

35. *Id*. 26.

36. McClain, "The Gibson Era, 1940–1964," in Scheiber, ed., *Constitutional Governance and Judicial Power*, 250.

37. *Id*. 246. *See also* Jake Dear & Edward Jessen, "Followed Rates and Leading State Cases, 1940–2005" (2007) 41 *UC Davis L. Rev.* 683.

38. "B.E. Witkin Resigns As Reporter of Appellate Court Opinions," *S.F. L J.*, Nov. 1, 1949, 1. Witkin's tenure was, by far, the shortest of any reporter in the twentieth century.

Hal Cohen Inducted into the Appellate Lawyers Hall of Fame

REMARKS BY HAL COHEN

EDITOR'S NOTE: *The California Lawyers Association's Committee on Appellate Courts bestows its annual Appellate Lawyer Hall of Fame Award upon an attorney who has excelled as an appellate lawyer and whose career exemplifies the highest of values and professional attainment. Prior honorees have been Ellis Horvitz, Jon Eisenberg, Dennis Riordan, and Wendy Lascher. The most recent award was conferred on former chief supervising attorney of the California Supreme Court, Hal Cohen. Below are his remarks made at that ceremony, held in Monterey, California, in person and via video, on November 5, 2022.*

At the outset, I want to thank the Committee on Appellate Courts and the California Lawyers Association for selecting me for this honor; Chief Justice George, Chief Justice Cantil-Sakauye, and Justice Dato for submitting very generous letters of support to the committee on my behalf; and my colleague Greg Wolff for proposing my nomination. I am very humbled but also very proud to accept this honor, not only given the extremely accomplished appellate lawyers who previously have been chosen for this award, but also because I realize that I am accepting this distinction on behalf of all the appellate judicial attorneys in California who have followed a similar career path. These judicial attorneys, working in both the California Courts of Appeal and the California Supreme Court, are most often not known to other appellate lawyers or to the public, but they perform an incredibly important role in California's judicial system and generally do not receive the recognition they deserve.

Because my career as an appellate judicial attorney differed from those of the prior recipients of this honor who worked largely in the private sector, I thought I would share a few personal thoughts regarding some of the challenges and the rewards of the work of an appellate judicial attorney in California and particularly of those who are lucky enough to work at the California Supreme Court.

There are a number of challenges that are largely unique to judicial appellate attorneys:

First, at the California Supreme Court, chambers attorneys must endure the rigorous gauntlet of the Supreme Court's preliminary review (PR) process. In most legal positions, one's work is typically reviewed by at most one or two colleagues, but at the Supreme Court calendar memos — draft preliminary opinions circulated prior to oral argument on which a chambers attorney has labored often for weeks or even months — are subjected to the vigorous review of six other judicial staffs, each of which prepares a PR that is circulated throughout the court, containing detailed comments, suggested changes, and penetrating critiques frequently running ten or more pages. In my view, the PR process, without question, plays a big part in ensuring that the court's ultimate opinions will be of the highest quality, but it is always stressful, and humbling, to have the drafts you have worked so long to perfect put before the critical eye of generally kind but always demanding colleagues.

Second, as in effect a collaborative ghostwriter, I needed to attempt to adjust to the distinct writing style of each of the justices with whom I worked. Given the length of my tenure at the court, I had to learn and attempt to accommodate the very different writing styles and idiosyncrasies of eight justices. The first justice I worked with, Mat Tobriner, was quite comfortable with lengthy opinions with long sentences and extended paragraphs. Indeed, one Court of Appeal justice was said to have remarked, somewhat playfully, that "it takes Mat Tobriner 14 pages simply to clear his throat!" I must admit that I suffer from the same affliction, and many of the justices I have worked with since my time with Justice Tobriner have continually been burdened with editing my long sentences and lengthy paragraphs, frequently pressing me to break up my initially drafted sentences into three or four more easily digestible segments.

Third, because of the confidential nature of a judicial attorney's work, continuing even after an opinion one has worked on has been published, one cannot (or at least should not) discuss one's work publicly with those outside the court. The consequence is that, at most social occasions, I found myself in a constrained and not very interesting or satisfying position, even with close friends. Although it was possible to share publicly available information about cases pending before the court, I could not disclose what cases I was personally working on (or had worked on) or reveal the back-and-forth that is so much a part of the appellate deliberative process and that those outside the court were naturally most interested to learn.

Fourth, and this is particularly challenging for one who has spent his or her whole career as a judicial attorney, I cannot reveal to others a compendium of my life's work. The names of all the hundreds of cases I have contributed to, including the ones of which I am most proud, must remain confidential.

In retrospect, however, there is no question that the challenges posed by the job are greatly outweighed by the rewards of working as a judicial attorney at the California Supreme Court. Once again, I will point out four aspects of particular significance.

First, of course, is the importance of the work itself. At the Supreme Court, one is always aware that you are making a very direct contribution to the formulation and evolution of California law. There is immense satisfaction in knowing your work is making a difference and in playing an important part in advancing the cause of justice.

Second, the work is invariably intellectually stimulating. Particularly at the Supreme Court level, the cases that the court chooses to hear almost always present difficult legal issues, often questions on which lower appellate courts have reached differing conclusions. For me, it was incredibly satisfying to have the luxury, and freedom from billable hours, to be able to take the time to deeply research the history and background of an esoteric or problematic legal rule, and to compare California's treatment of the subject with the treatment in other states, in the federal system or, at times, in other countries or under international law. And, at the Supreme Court, a chambers attorney's work is not limited to a particular subject matter or even to civil or criminal cases in general. Rather, I had the opportunity throughout my many years at the court to continually confront entirely new areas of the law and to compare the evolution of rules in very different settings, for example from constitutional cases dealing with freedom of speech or racial discrimination to novel tort, contract, or inverse condemnation disputes. The variety assured that I was always delving into new fields and learning new legal history and concepts.

Third, the monastic-like, academic environment of appellate work in the judicial setting suited me. One scene in a movie I recently saw for the second time reminded me of an important part of what I loved about my work. The movie was an Israeli film, "The Footnote," about a father and son, both Talmudic scholars, who each were considered for the same prestigious award. The scene in question showed the son, descending into the bowels of a large library, to find his father at his father's workplace in the library basement, and discovering his father celebrating his perceived success with colleagues. I, too, spent hours in the court's library — which, truth to tell, in recent years I had mostly to myself as younger colleagues did all their research online — and I remember well the joy of finally finding, after hours of research through piles of bound volumes, the one passage that perfectly captured the thought, analysis, or explanation that had been rattling around in my head but had previously eluded my tangible expression.

Finally, perhaps the most significant reward of my work at the Supreme Court was the wonderful and warm relationships I developed with each of the justices with whom I worked, with the other justices on the court, and, most especially, with the colleagues on our own staff and on the staffs of other justices. In this respect, the culture of the California Supreme Court is much different from that of other appellate courts with which I am familiar, where appellate judges or justices do not encourage, or sometimes do not even permit, their chambers attorneys to confer and share ideas with the staffs of other judges on a panel. The California Supreme Court's culture very much encourages the sharing of ideas and legal dilemmas with all the court's attorneys. Some of my best and most productive times were spent discussing and debating — often, I must admit, at a volume that at times alarmed neighboring office mates — the difficult issues in the case that I, or the other attorney, was working on. It was the loss of the opportunity for such face-to-face discussions during the COVID pandemic that ultimately led me to decide that, after more than 50 years at the court, it was time to fully retire.

after the petition conference, circa 2005. *Photo: California Supreme Court staff.*

As I look back, my many years at the Supreme Court resulted in a terrific, most fulfilling career for which I will always be tremendously grateful. I thank all the justices with whom I worked and all the judicial attorneys with whom I have had the privilege to serve. And, again, I thank the committee for the great honor of this recognition of my work at the court. ✯

Hal Cohen, after graduation from Harvard Law School in June 1969, and a cross-country drive with his bride, Inez, began a one-year clerkship with Associate Justice Mathew Tobriner. That one-year clerkship turned into a lifelong, more than 50-year career at the court. After Justice Tobriner, Hal worked with Justices Otto Kaus, Joseph Grodin, Joyce Kennard, Allen Broussard, John Arguelles, and Chief Justices Ronald George and Tani Cantil-Sakauye. And, thankfully, his marriage to Inez — with two children and four grandchildren — continues to this day! ✯

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SPRING/SUMMER 2023
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Top: Members of the Round Valley Indian Tribe retrace the 1863 route of the Nome Cult walk, a forced relocation of Indians from Chico, California, to Covelo, California. *Photo: U.S. Forest Service.*
Lower left: "Protecting the Settlers," illustration for *Harper's New Monthly Magazine*, 1861. *California State Library.*
Lower right: "Act for the Government and Protection of Indians," 1850, Sections 1–3. *Image: California Judicial Center Library.*