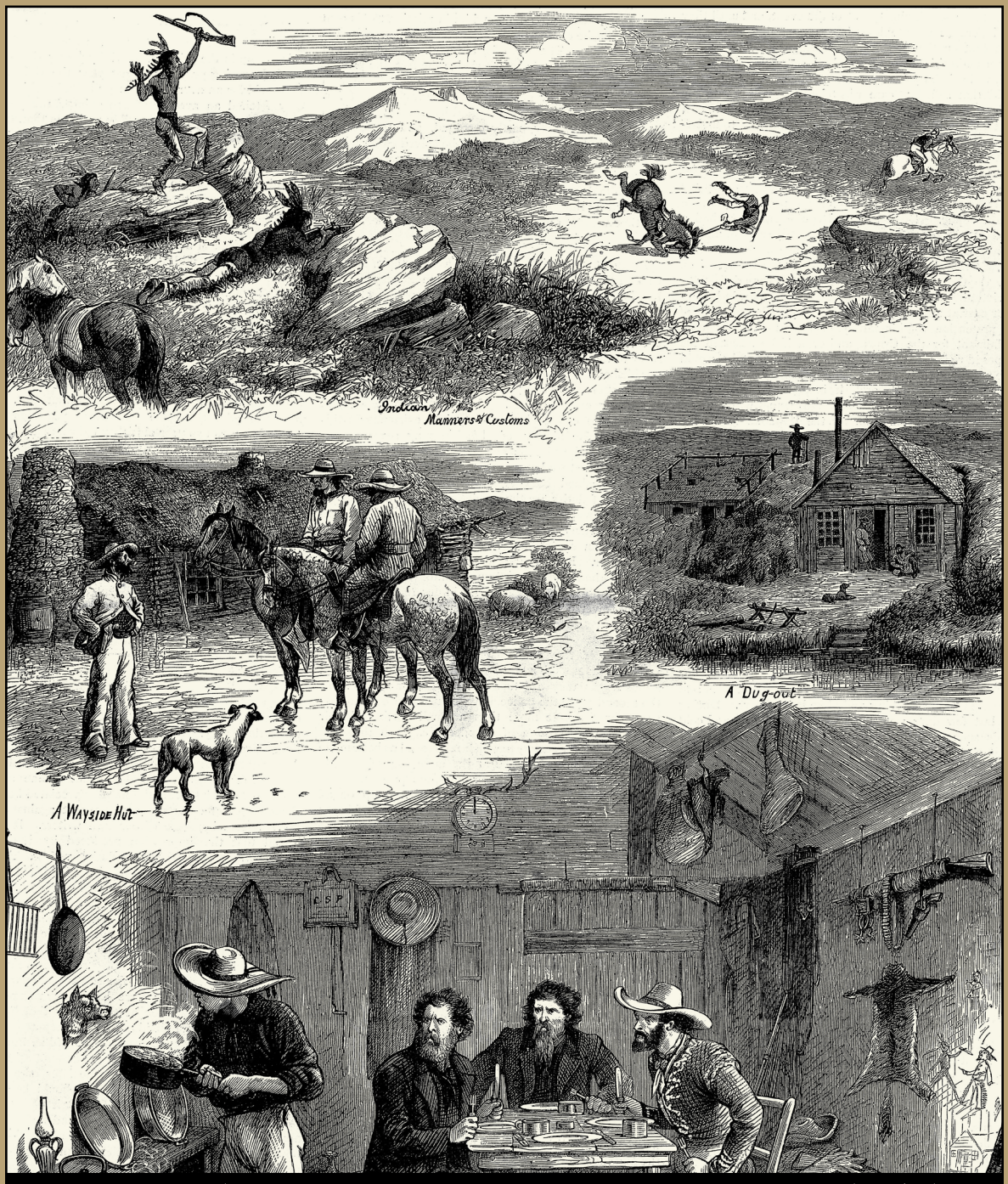
CALIFORNIA SUPREME COURT
HISTORICAL SOCIETY

Review

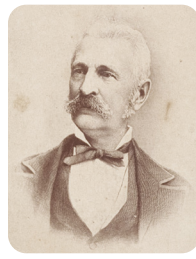
FALL/WINTER 2023



Serranus Clinton Hastings: A Counterpoint on Culpability

Serranus Clinton Hastings: A Counterpoint on Culpability

BY KRISTIAN WHITTEN



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

EDITOR'S NOTE: *The Spring/Summer issue of the* Review *included an article by San Francisco lawyer and historian John Briscoe, generally supporting the recent renaming of Hastings College of the Law to UC College of the Law, San Francisco. Our original intention was to feature a second article in that same issue questioning the name change and further interrogating Serranus Hastings' role in the Indian massacres of the mid- and late-1850s. None of the scholars we contacted last spring agreed to take up the opposing position. But after that issue was published, Kristian Whitten, a retired deputy attorney general and Hastings alumnus, came forward and has written this rejoinder to John Briscoe's article.*

JOHN BRISCOE'S "Reflections on the Great Denaming Debate" in the *Review*'s Spring/Summer 2023 issue quotes Thucydides as remarking: "Most people . . . will not take the trouble in finding out the truth, but are much more inclined to accept the first story they hear."[1] He also posits, "History should make you uncomfortable," quoting Sydney Sheehan.[2] Both of those concepts are at play in the renaming of Hastings College of the Law.

The law school's renaming was driven by a scholarly characterization of its founder as "profit[ing] from the theft of California Indian land,"[3] and being the "wealthy mastermind" of Indian hunting expeditions.[4]

According to this narrative, when the settlers' "pastoral activities began to threaten the Yuki hunter/gatherer economy, . . . [the Yuki] retreated into mountain areas where they faced the twin challenges of fewer food sources and violent encounters with hostile tribes. Without access to productive land and fearful of the dangers associated with hunting and gathering on neighboring tribal lands, Yuki began killing settlers' stock to survive."[5]

However, at the time of the events at issue, the death penalty was imposed for many crimes, including "horse stealing and cattle rustling."[6]

At the same time, the California Legislature passed the 1850 "militia acts," which created "ranger militias" that were commissioned and supervised by the governor to serve as local police forces. It is reported that more than 3,000 militiamen enrolled in 24 of these ranger militias, which are said to have indirectly encouraged Indian killings by "a far greater number of vigilantes, with devastating effect."[7]

These were the volatile times in which Serranus Clinton Hastings purchased 1,200 acres in the Eden Valley of Mendocino County to provide for his livestock.

In his 1978 history of Hastings College of the Law, the late UC Berkeley historian Thomas Garden Barnes describes California's first chief justice as having become "very rich, and very newly-rich," by the time he and the state founded the college.[8]

In 1851, two years after arriving in California, Hastings moved his family into a modest home in the state's third capital, Benicia. The bulk of his later-acquired real property holdings were in San Francisco, Sacramento, Solano, Napa, Lake and Mendocino counties.[9]

Much, if not all, of that land was considered by the state's indigenous people to be theirs, but before Congress conveyed it to the State of California, it had been ceded to the United States under the terms of the Treaty of Guadalupe Hidalgo after the Mexican War. Mexico had acquired it after its successful war of independence from Spain.[10]

1. John Briscoe, "Reflections on the Great Denaming Debate" (Spring/Summer 2023) *CSCHS Review* 8.

2. *Id.* 9.

3. Benjamin Madley, *An American Genocide*: *The United States and the California Indian Catastrophe, 1846–1873*, New Haven: Yale Univ. Press, 2016, 348.

4. Benjamin Madley, "California's Yuki Indians: Defining Genocide in Native American History" (2008) 39 *Western Hist. Qtrly.,* 303, 319.

5. Benjamin Madley, "Patterns of frontier genocide 1803–1910: the Aboriginal Tasmanians, the Yuki of California, and the Herero of Namibia" (2004) 6 *J. of Genocide Res.* 167, 177.

6. William Gangi, "A Scholar's Journey in the Dark Side" (2007) 11 *Chap. L. Rev.,* 1, 18, fn. 79, citing Raoul Berger, *Death Penalties: The Supreme Court's Obstacle Course,* Harvard Univ. Press, 1982, 148. As Prof. Berger points out: "The common law, it will be recalled, knew no doctrine of disproportionate or excessive punishment," and that "such was the disproportion that prevailed at the adoption of the Constitution." *Ibid.* See *People v. Love* (1961) 56 Cal.2d 720, 734 (McComb, J. dissenting) ("In the early history of the United States of America, including California, the death penalty was imposed by early settlers to stop the rustling of cattle").

7. Madley, *An American Genocide* 173–75.

8. Thomas Garden Barnes, *Hastings College of the Law: The First Century*, Univ. of Calif. Hastings College of the Law Press: 1978, 25.

9. *Id.* 28.

10. The United States acquired ownership to the 100 million acres of land known as California in 1848, when the U.S. Senate ratified the Treaty of Guadalupe Hidalgo. In 1853, Congress conveyed 500,000 acres of that land to the new State of California. The state then made that land available for purchase by private parties, and in 1858 Serranus Hastings purchased from the state 1,200 acres of that land. Eventually, he acquired many tens of thousands of acres by, among other

Regarding the claims of Hastings' alleged "theft" of his land from those indigenous people, in the twenty-first century the "uncomfortable" truth is that at that time, the law in the United States of America and of the new State of California was, and is still today, that:

> It is well settled that . . . the tribes who inhabited the lands of the States held claim to such lands after the coming of the white man, under what is sometimes termed original Indian title or permission of the whites to occupy. That description means mere possession not specifically recognized as ownership by Congress. After conquest they were permitted to occupy portions of territory over which they had previously exercised "sovereignty," as we use that term. This is not a property right but amounts to a right of occupancy which the sovereign grants and protects against intrusion by third parties but which right of occupancy may be terminated and such lands fully disposed of by the sovereign itself without any legally enforceable obligation to compensate the Indians.[11]

In his 2016 book, *An American Genocide,* UCLA history professor Benjamin Madley writes that Hastings built his fortune on California real estate, and thus "profited from the theft of Indian land."[12]

Following Madley's lead, Briscoe creates his own narrative that the Mendocino Indian Wars constituted "genocide," and that Serranus Hastings "had directed the mass murders of Indians in Round Valley and elsewhere, and taken their lands."[13]

However, Madley and Briscoe are wrong in their foundational assumption that Hastings' title to the Eden Valley was inferior to Indian tribes' aboriginal rights.[14]

And there is nothing in their narrative that, by extension, would prevent their theory about Hastings' title from applying to that of all current non-native holders of title to land in California.

means, purchasing "school-land warrants." An image of one of his such warrants is reproduced in this *Review* issue above.

11. *Tee-Hit-Ton Indians v. United States* (1955) 348 U.S. 272, 279. In Briscoe's 2003 law review article, cited at page 9 of his *Reflections* (John Briscoe, "The Aboriginal Land Rights of the Native People of Guam" (2003) 26 *Hawaii L. Rev.* 1, 3–4), he confirms that Congress has the right to extinguish "aboriginal title" "without any legally enforceable obligation to compensate the Indians." Thus, Congress' cession of the formerly Mexican land to California extinguished any "aboriginal title," and Hastings took good title to some of that land from the State of California.

12. Madley, *An American Genocide* 350.

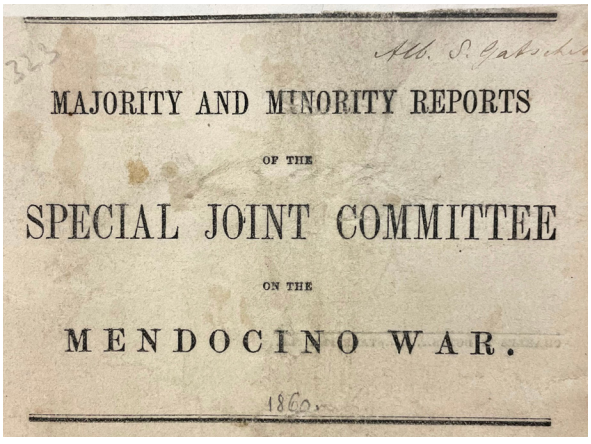
13. Briscoe, "Reflections," (Spring/Summer 2023) *CSCHS Review* 2.

14. See also Brendan C. Lindsay, *Murder State: California's Native American Genocide, 1846–1873,* Lincoln: Univ. of Nebraska Press, 2012, 2 ("It is the openly arrived at and executed genocide of Native peoples in order to secure property with which I am concerned in this study").

School land warrant granting 160 acres of land to S. Clinton Hastings in 1852, one of many he held. *Photo*: *Public domain.*

Regarding the claim, by proponents of denaming, that Hastings "masterminded" Indian hunting expeditions, there is no assertion and no evidence that he killed, or knew in advance of any plan to kill, Indians. In fact, he testified under oath in the legislature's 1860 investigation into the Mendocino Indian Wars[15] that he had no knowledge of any Indian killings before they occurred.

15. The legislature's investigation is published in Select Committee on Indian Affairs, "Majority and Minority Reports of the Special Joint Committee on the Mendocino War" (1860) *Appendix to the Journal of the Senate of California*, 11th Session (1860 report). The majority report, signed by Senators Farrell and Dickinson and Assembly members Maxon and Phelps, found that "grievous wrong has been committed upon a defenseless race" and strongly criticized the settlers' "slaughter of [Indian] beings, who at least possess the human form." *Id*. 6. The majority report concluded that no "war" had actually occurred in Mendocino County, because the abject "slaughter" of native Indians, who themselves made "no attacks," did not rise to the "dignity" of being called "war, and that the amount appropriated by the federal government for the thousands of Indians in California" was "a pittance scarcely sufficient to pay the salaries of the officers employed for its disbursement" *Ibid*. The minority report, signed by Assemblyman Lamar, found the settlers' conduct to have been necessary, and blamed the federal and state governments for failing to control the Indian population. He noted that many Indians worked for settlers, receiving "liberal compensation for their labor," and asserted that a government policy should be adopted to facilitate such "domestication." *Id*. 9–11. Printed versions of the depositions of Serranus Hastings and selected others, appended to the legislature's report, also are set out, transcribed from the original handwritten documents, in the "White Paper" prepared by Professor Brendan Lindsay for the Hastings Legacy Review Committee, "Serranus Clinton Hastings in Eden and Round Valleys" (Dec. 14, 2021) 58, uclawsf.edu/wp-content/uploads/2022/01/Hastings-Legacy-Review_FINAL-1.pdf [as of Aug. 30, 2023]; Record F3753:484 Deposition of S. C. Hastings 1860 at Sacramento, CA. Except as noted, *infra*, citations to the depositions in this article are to this latter and more readily available source. In addition to the depositions chosen for inclusion in Professor Lindsay's White Paper are


MAJORITY AND MINORITY REPORTS
OF THE
SPECIAL JOINT COMMITTEE
ON THE
MENDOCINO WAR.
1860.

Cover, Majority and Minority Reports of the Special Joint Committee on the Mendocino War, Calif. Leg., 1860 (see n. 15). *San Francisco Pub. Lib. Photo: Jake Dear.*

Rather, the claim is that by petitioning the governor to commission a local militia that came to be known as the Eel River Rangers, Hastings was effectively in *control* of the Rangers and hence is as guilty as the members of that militia for their despicable acts.

The conclusion that Hastings controlled, or had means to control, the Eel River Rangers is a product of hindsight bias, and ignoring the culture and primitive modes of communication existing at the time, is an unwarranted stain on his legacy. At the time livestock rustling was a capital offense, and the fact that the 1860 legislative investigation did not recommend prosecuting any of those who participated in Indian killings is evidence that such atrocities were considered inevitable, albeit unfortunate.[16]

In seeking the establishment of a local militia, Hastings was employing existing law to establish a local police force, charged with protecting his and the settlers' lives and property, and keeping the peace.

Thus, the claims that Hastings held animus toward California's indigenous people greater than his contemporaries' and was an accessory to genocide are contradicted by his actions, and his sworn testimony in 1860.

And it was the sudden reversal of the law school's decision not to change its name that was the "sea change" in the name change process. Whatever one may think of Hastings' morality, it was fundamentally unfair to abruptly reverse the long-studied and considered decision not to change the name, thus preventing the many stakeholders who had assumed that the name would not be changed from contributing in any meaningful way to that decision.[17]

The Indian Tribes

Additional twenty-first century discomfort is caused by the fact that some indigenous people were warriors. As recounted by historian Stephen Ambrose:

> The terms "peace" and "war" as understood by the Americans had no meaning to the Indians. Hostilities could break out at any time, for no apparent cause other than the restlessness of the young warriors, spurred by the desire for honor and glory, which could only be won on raids, which always brought on revenge raids, in a regular cycle.[18]

continued on page 6

others that are included with the printed Joint Committee's majority and minority reports. They include that of George J. Clarke, who testified that he observed the Eel River Ranger's leader, Walter Jarboe, facilitating the feeding of numerous Indian prisoners, and that Jarboe's conduct toward them was "uniformly kind." 1860 report, 46. James Tobin testified in his deposition to his multiyear relationship with Mendocino County Indian tribes, and to the fact that the federal government had reduced its appropriations for California's tribes to a point at which "it has been impossible to feed the Indians in that section of the Country." He said: "[I]t is impossible for the Indians and whites to live together peaceably unless the Indians are fed." 1860 report, 54–55. Images and key text from the legislature's reports, and from some of the depositions, are reproduced in this *Review* issue above and at pages 11 and 12.

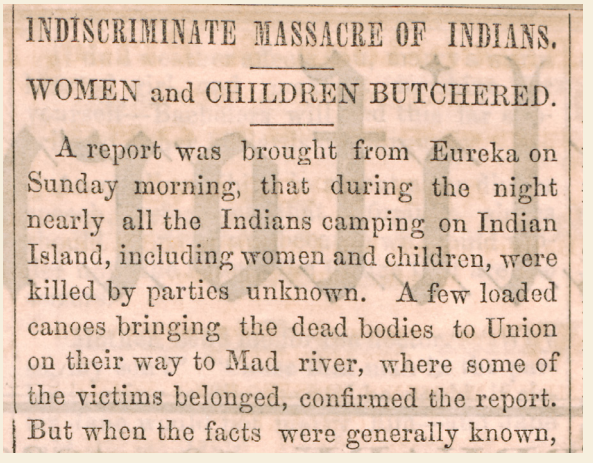
16. Contrast the statements of Gov. Peter Burnett, in his State of the State Address on January 6, 1851, with the later (1860) statements of Serranus Hastings. Burnett characterized the Indian population as "foe," "savage," and "exceedingly adverse to manual labor." He asserted that "the two races cannot live in the same vicinity in peace," and concluded: "That a war of extermination will continue to be waged between the races until the Indian race becomes extinct must be expected. While we cannot anticipate this result but with painful regret, the inevitable destiny of the race is beyond the power of wisdom of man to avert." *https://governors.library.ca.gov/addresses/s_01-Burnett2.html* [as of Sept. 3, 2023]. By comparison, Hastings testified under oath in the 1860 investigation, *supra* fn. 15: "[Although] . . . Yuka [sic] Indians . . . had been and were then hostile to the white people and had been committing depredations upon the stock in the vicinity of Round Valley. . . . I believe[d] that I could by feeding one or two tribes subdue them and make them useful and have no difficulty with them . . ." Lindsay "White Paper," *supra* fn. 15, 58. Nevertheless, contemporaneous observers in 1860 appear to have viewed Gov. Burnett's "war of extermination" as state policy. (See accompanying editors' sidebar on p. 5.)

17. See "Policies subject area, Facilities and Resources, Naming University Properties, Academic and Non-Academic Programs and Facilities," https://policy.ucop.edu/doc/6000434/NamingProperties#:~:text=The%20University%20of%20California%20has,service%20mission%20of%20the%20University [as of Aug. 16, 2023]. The University of California's systemwide name-change polices have been in place since 2002, and "must be consistent with the University's role as a public trust." They are to assure "that Chancellors seek the widest possible counsel when considering proposals for naming or renaming in order to take advantage of the intuition's collective memory," and they require, inter alia, a thorough consultative process. UC Hastings is an affiliated college of the University of California. Cal. Ed. Code § 92201; *Foltz v. Hoge* (1879) 54 Cal. 28.

18. Stephen E. Ambrose, *Undaunted Courage: Meriweather Lewis, Thomas Jefferson, and the Opening of the American West,* New York: Simon & Schuster, 1996, 188.

WAS THERE A STATE POLICY OF "EXTERMINATION"?

As observed in footnote 16 on page 4, California's first chief executive, Gov. Peter Burnett, foresaw "a war of extermination" that would be waged against "the Indian race" until it "becomes extinct." In the course of researching images to accompany this article we found a number of original sources, including newspaper articles, related to this theme as part of news accounts describing the killing of Indians in Northern California circa 1860. Three publications stood out, and are described here.



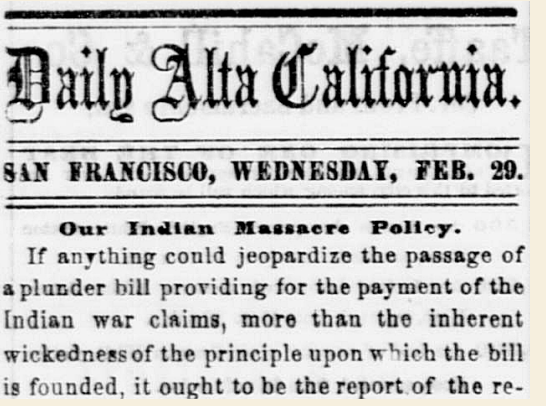
INDISCRIMINATE MASSACRE OF INDIANS.

WOMEN and CHILDREN BUTCHERED.

A report was brought from Eureka on Sunday morning, that during the night nearly all the Indians camping on Indian Island, including women and children, were killed by parties unknown. A few loaded canoes bringing the dead bodies to Union on their way to Mad river, where some of the victims belonged, confirmed the report. But when the facts were generally known,

The first, attributed (in Lindsay, "White Paper," *supra* fn. 15, 326) to the noted writer Bret Harte, appeared in the February 29, 1860, edition of the *Northern Californian Union* under the headline "Indiscriminate Massacre of Indians, Women and Children Butchered." It reported that groups of settlers had attacked and slaughtered approximately 70 Indians in Humboldt, the vast majority — 50 or 60 — "women and children." The "[o]ld women, wrinkled and decrepit lay weltering in blood, their brains dashed out and dabbled with their long gray hair." And there were numerous "[i]nfants scarce a span long, with their faces cloven with hatchets and their bodies ghastly with wounds." The same article further related: "It is also said that the same has been done at several ranches on the Eel river," undertaken by "men who have suffered from depredations so long on Eel river and vicinity."

A corresponding news report published in San Francisco's *Daily Alta California* described the same Humboldt events under the headline "Horrible Massacre of Indians at Humboldt Bay" (Feb. 29, 1860). Finally, that edition of the newspaper editorialized about the Humboldt episode as well as other related events under the headline, "Our Indian Massacre Policy" (Feb. 29, 1860), labeling the killers "exterminators" and repeatedly characterizing the state as promoting extermination. The editorial apparently viewed Gov. Burnett's anticipated "war of extermination" as reflecting state policy. It asserted:

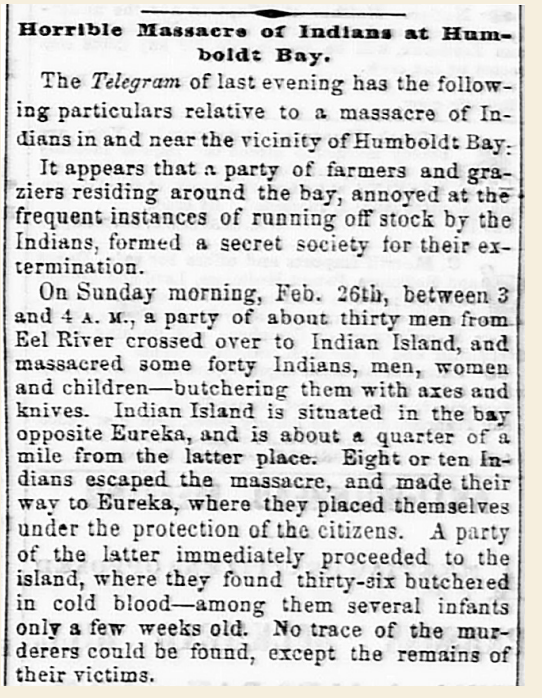


Daily Alta California.

SAN FRANCISCO, WEDNESDAY, FEB. 29.

Our Indian Massacre Policy.

If anything could jeopardize the passage of a plunder bill providing for the payment of the Indian war claims, more than the inherent wickedness of the principle upon which the bill is founded, it ought to be the report of the re-



Horrible Massacre of Indians at Humboldt Bay.

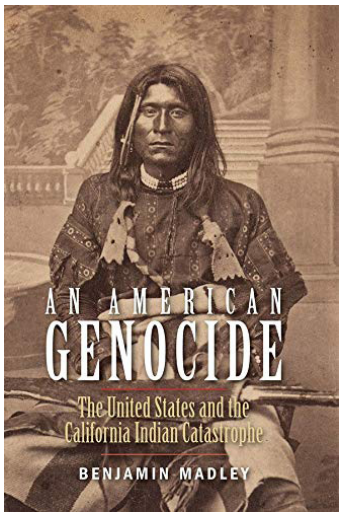
The *Telegram* of last evening has the following particulars relative to a massacre of Indians in and near the vicinity of Humboldt Bay.

It appears that a party of farmers and graziers residing around the bay, annoyed at the frequent instances of running off stock by the Indians, formed a secret society for their extermination.

On Sunday morning, Feb. 26th, between 3 and 4 A. M., a party of about thirty men from Eel River crossed over to Indian Island, and massacred some forty Indians, men, women and children—butchering them with axes and knives. Indian Island is situated in the bay opposite Eureka, and is about a quarter of a mile from the latter place. Eight or ten Indians escaped the massacre, and made their way to Eureka, where they placed themselves under the protection of the citizens. A party of the latter immediately proceeded to the island, where they found thirty-six butchered in cold blood—among them several infants only a few weeks old. No trace of the murderers could be found, except the remains of their victims.

"This policy of exterminating the Indians is, in a great degree, the work of a few . . . land grabbers who first cover as many of the valleys among the mountains and on the river margins as possible, with school-land warrants and other titles, and then employ the Killers to go on and massacre the Indians in the whole region, for the purpose of leaving the country free for their herds. Some of these men have been commissioned after the nefarious object of their organization was known, and have slaughtered their hundreds of Indians, not because the latter were guilty, but because these white-faces, with black hearts and red hands, were paid for their work of death and extermination."

— THE EDITORS



Benjamin Madley, *An American Genocide: The United States and the California Indian Catastrophe, 1846–1873.*

An 1852 government report said that many Californians believed "destiny has awarded California to the Americans to develop," and that if the Indians "interfered with progress they should be pushed aside."[19] But after more than a century of the "civilization" imposed by the State of California and the United States, some tribes have learned to profit handsomely from their unique status.[20]

On its present-day website, the Round Valley Indian Tribes in Covelo, Mendocino County, California, recount that the Yuki were warriors who were "aggressive and attacked other nearby native peoples on numerous occasions trying to protect their homeland and resources."[21] In addition, as Madley noted, at the time we're studying there were ongoing violent encounters between the Yuki and other tribes.[22]

Serranus Hastings' Actions in the Late 1850s Did Not Constitute Genocide

Madley's 2008 Yale Ph.D. thesis focused on redefining the term "genocide" to include the Yuki's "cataclysmic population decline" between 1854 and 1864.[23]

His ultimate conclusion that the Yuki case is one of genocide rests on his determination that the "intent to destroy, in whole or in part, a national, ethnical, racial, or religious group as such" (as required by the 1948 UN convention's definition) can be inferred by actions of diverse groups of individuals who are not working in direct concert.[24]

In that thesis, Madley began by recounting a grim and dramatic event on May 15, 1854, about "six Missourian explorers" swooping down on 3,000 Yuki Indians in the Round Valley " 'who just lay over the horses' necks and shot . . . . They just rode them down . . . . It was not difficult to get an Indian with every shot . . . .' The massacre was a prelude to an American genocide."[25] This account had nothing to do with Serranus Hastings or existing settlers, but it set a sensational tone for Madley to single out Serranus Hastings as the "wealthy mastermind" of the Eel River Rangers militia's actions.[26]

In his book, Madley admits that, by referring to the Yuki's experience as genocide, he is applying a twentieth century international treaty, which by its own terms does not allow for retroactive application, to nineteenth century events,[27] but he asserts that the UN genocide convention "remains the only authoritative international legal definition."[28]

Nevertheless, he then divides "killings" into four categories: battles, massacres, homicides, and even legal executions following a court trial. In each case, Madley believes that the killings can be genocidal when they "consciously contribute to a larger killing pattern" aimed at a "national, ethnic, racial, or religious group."[29]

However, the UN's Office on Genocide Prevention and the Responsibility Project states:

> Intent is the most difficult element to determine. To constitute genocide, there must be a proven intent on the part of perpetrators to physically destroy a national, ethnical, racial or religious group. Cultural destruction does not suffice, nor does an intention to simply disperse a group. . . . Importantly, the victims of genocide are deliberately targeted — not randomly — because of their real or perceived membership of one of the four groups protected under the Convention (which excludes political groups, for example). This means that the target of destruction must

19. *https://www.loc.gov/classroom-materials/immigration/native-american/removing-native-americans-from-their-land/* [as of Aug. 16, 2023].

20. See Donald Craig Mitchell, *Wampum: How Indian Tribes, the Mafia and an Inattentive Congress Invented Indian Gaming and Created a $28 Billion Gambling Empire*, New York: The Overlook Press, 2016. In 2020, tribes that operate casinos in California received gaming revenue that totaled $8 billion, and in 2008, at least one tribe that operates a casino was paying its members $100,000 a month. Donald Craig Mitchell, "Tuition-waiver policy for Native Americans isn't the right way to atone for historical wrongs." *Cal Matters*, June 29, 2022, https://calmatters.org/commentary/2022/06/tuition-waiver-policy-for-native-americans-isnt-the-right-way-to-atone-for-historical-wrongs/# [as of July 28, 2023].

21. "About Us," *Round Valley Indian Tribes*, *https://www.rvit.org/about/about-us* [as of Aug. 16, 2023].

22. See text accompanying fn. 5.

23. Madley, "California's Yuki Indians," 39 *Western Hist. Qtrly.*, 303, 304.

24. *Id.* 329–30 ("There are, however, complicating factors relating to proof of intent, the federal government's role, and the non-state actors as agents of genocide").

25. *Id.* 303–04.

26. *Id.* 319.

27. Madley, *An American Genocide*, 5.

28. *Ibid.* See Edna Friedberg, *Why Holocaust Analogies Are Dangerous,* United States Holocaust Memorial Museum, Dec. 12, 2018, *https://www.ushmm.org/information/press/press-releases/why-holocaust-analogies-are-dangerous#* [as of Aug. 16, 2023] ("It is all too easy to forget that there are many people still alive for whom the Holocaust is not 'history,' but their life story and that of their families").

29. Madley, *An American Genocide*, 11—13.

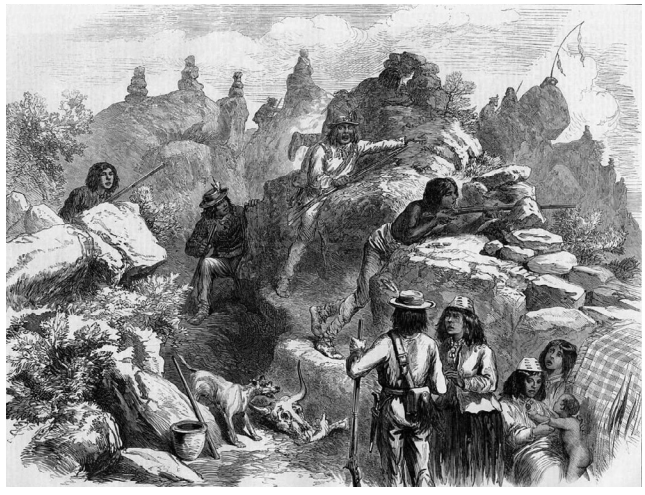
be the group, as such, and not its members as individuals.[30]

Madley's thesis thus admits that generalizing about California Indians is difficult,[31] and his book acknowledges an "ongoing American genocide debate."[32]

Although the wanton killings committed by the Eel River Rangers were deplorable, the group also took prisoners and returned Indians to the Mendocino Reservation. And the separate killing by Hastings' employee, H.L. Hall, of 14 Indians because they stole and butchered livestock, a capital offense at the time (which was not specifically noted by Madley — but is addressed in Hastings' testimony), occurred in the absence of state law enforcement and the result of the "vigilante justice" of the time. Hall also took prisoners and returned them to the reservation.[33]

Serranus Clinton Hastings

Hastings was a man trained in the law who, after he left state service, in 1878 established the first law school west of the Mississippi. One of his most vocal detractors at the time claimed he was doing so to atone for his past sins.[34]



"The Modoc Indians in the Lava Beds." *Illustration, 1873. Public domain.*

From the outset, he was at odds with his hand-picked board of directors. As the college's first dean, and contrary to the directors' rule barring women students, he supported Clara Shortridge Foltz's admission,[35] and he later sparred with the directors in court over the University of California's role in the administration of the law school,[36] leading UC Berkeley's professor Barnes to describe the law school's relationship with the university as a "common law marriage."[37]

In 1834, Hastings left New York, where he was born in 1814, and in 1837 "moved to the far frontier, the Black Hawk Purchase, now Iowa, then part of the Wisconsin Territory."[38] There he was appointed a justice of the peace, served in the territorial legislature, and as a member of the new state's first contingent of United States congressmen, where he served with colleagues like John Quincy Adams and Abraham Lincoln. In 1848, he became Iowa's chief justice, and in 1849, came to California with the Gold Rush[39] in the company of 3,000 Iowans. During that crossing they reportedly were attacked by Indians, who were dispersed with military help secured by Hastings.[40] In late 1849 he was appointed California's first chief justice

30. Madley, "California's Yuki Indians," 39 *Western Hist. Qtrly.,* 303, 331, *quoting* William D. Rubenstein, *Genocide: A History,* London: Routledge, 2004, 53 ("American policy toward the Indians . . . never actually encompassed genocide"), *ibid. quoting* Guenter Lewy, "Were American Indians the Victims of Genocide?" *History News Network*, Sept. 2004, https://hnn.us/articles/7302.html ("Genocide was never American policy. . . . [T]he sad fate of America's Indians represents not a crime but a tragedy") [as of Aug.16, 2023].

31. Madley, "California's Yuki Indians," 39 *Western Hist. Qtrly.,* 303, 332.

32. Madley, *An American Genocide*, 14. Indeed, as shown in the editors' sidebar on page 5, that debate traces back to at least 1860, when some contemporaneous observers characterized the state as having and enforcing a "policy of extermination."

33. Lindsay "White Paper," *supra* fn. 15, 59—62: Record F3753:449, Deposition of H.L. Hall, 1860 at Round Valley, Mendocino County, CA [capitalization in original] [as of Aug. 16, 2023]. See Dan McLaughlin, "California's First Experiment Without Police," *National Review*, Aug. 20, 2020, *https://www.nationalreview.com/2020/08/san-francisco-1850s-california-first-experiment-without-police/* ("Californians learned the hard way that vigilante justice and the demands of the mob are no substitute for police and courts of law") [as of Aug. 23, 2023]. California Governor Gavin Newsom also publicly referred to the state's treatment of its native population as genocide (Fuller, "He Unleashed a California Massacre," A-12), but apparently decided not to use the word "genocide," in his published executive order establishing his Truth and Healing Council. See *https://www.gov.ca.gov/wp-content/uploads/2019/06/6.18.19-Executive-Order.pdf* (June 18, 2019) [as of Sept. 7, 2023]. Similarly, President Joe Biden's accusations of genocide in Ukraine were denied by his National Security Advisor, Jake Sullivan, to which Biden responded: "We'll let the lawyers decide, internationally, whether or not it qualifies [as genocide], but it sure seems that way to me." "Biden says Russia is committing 'genocide' in Ukraine," *ABC News*, Apr. 12, 2022, *https://www.nbcnews.com/politics/white-house/biden-calls-putin-actions-ukraine-genocide-rcna24131* [as of Aug. 16, 2023].

34. Barnes, *Hastings College of the Law,* 22.

35. *Foltz v. Hoge* (1879) 54 Cal. 28. See John Caragozian, "Clara Foltz: pioneer lawyer for women, criminal defendants and all Californians," *S.F. Daily Journal,* Nov. 8, 2022, 5.

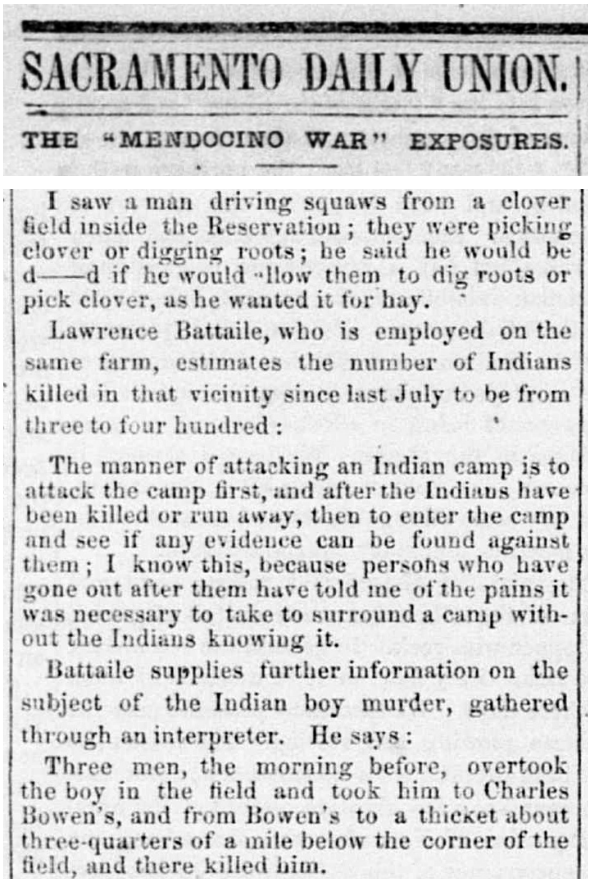
36. *People ex. rel. Hastings v. Kewen* (1886) 69 Cal. 215.

37. Barnes, *Hastings College of the Law*, 85.

38. *Id*. at pp. 25–26.

39. *Ibid*.

40. See Beverly Ann Doran, "S. Clinton Hastings," thesis submitted in satisfaction of the requirements for the degree of Master of Arts, Univ. of Calif., Berkeley, deposited in the University Library Mar. 26, 1952, 17.



SACRAMENTO DAILY UNION.

THE "MENDOCINO WAR" EXPOSURES.

I saw a man driving squaws from a clover field inside the Reservation; they were picking clover or digging roots; he said he would be d——d if he would allow them to dig roots or pick clover, as he wanted it for hay.

Lawrence Battaile, who is employed on the same farm, estimates the number of Indians killed in that vicinity since last July to be from three to four hundred:

The manner of attacking an Indian camp is to attack the camp first, and after the Indians have been killed or run away, then to enter the camp and see if any evidence can be found against them; I know this, because persons who have gone out after them have told me of the pains it was necessary to take to surround a camp without the Indians knowing it.

Battaile supplies further information on the subject of the Indian boy murder, gathered through an interpreter. He says:

Three men, the morning before, overtook the boy in the field and took him to Charles Bowen's, and from Bowen's to a thicket about three-quarters of a mile below the corner of the field, and there killed him.

The "Mendocino War" Exposures, *Sacramento Daily Union*, April 16, 1860. *Public domain*.

and in 1851, after his Supreme Court term ended, he ran for and was elected its third attorney general.[41]

An example of Hastings' judicial approach to the rights of native people is found in *Sunol v. Hepburn*,[42] where land had been granted to a native person named Roberto by the Mexican government, and conveyed by him to Sunol in payment of a debt. The majority opinion determined that Sunol had not received good title from Roberto because Mexican laws prevented native people from selling land. In doing so it described the purpose of Mexican laws that prevented native people from transferring their lands:

> All of them manifest the great anxiety which the rulers of Mexico have felt, to collect the natives together in communities and subject them to municipal regulations, to secure to them the ability to pay tribute imposed upon them for the supply of the national treasury, to induce them to forget their ancient religious rites and embrace the Catholic faith, to reform their idle and roving propensities and make them industrious and useful subjects.[43]

Chief Justice Hastings dissented, interpreting Mexican law narrowly in favor of Roberto, so that it would not prevent his title from passing to Sunol, by pointing out that the laws preventing native people from transferring their lands were based on the fact that title to land was actually held by the government. Thus, because they were "the mere occupants of the lands from which they had never been ejected," he reasoned that a transfer of such title was only "voidable" by the native people and their heirs, and the government. Because the government did not challenge Roberto's title, Hastings would have granted a new trial to determine other issues that had not been reached.[44]

Juxtapose that with a case that Briscoe cites as manifesting Hastings' anti-Indian attitude,[45] where white settlers were arrested for allegedly massacring Indians, and sought to be released on bail pending trial. The local magistrate denied that request, but in the first case to come before it, the California Supreme Court ordered them released on bond. Briscoe says that they "jumped bail" and were never tried, which he assumes "the court no doubt knew would happen."[46]

What Briscoe fails to report is that Madley's book, upon which he relies heavily, reveals that the defendants were represented by a "legal defense team," and that the court's opinion provided two reasons for releasing them on bond: (1) the lower state courts were still not fully organized, and (2) there was no jail or prison where the accused could be securely held.[47]

Madley's book also says that they "jumped bail," but that "several remained prominent citizens"; and that California superintendent of Indian Affairs Thomas J. Henley later explained, "[t]he excitement ran high during the confinement of the parties, and the responsibility of

41. See Doran, "S. Clinton Hastings," 83–84.

42. (1850) 1 Cal. 254.

43. *Id.* 278.

44. See also Doran, "S. Clinton Hastings," 40–41. See generally, Barnes, *Hastings College of the Law*, 34–37. But see *United States v. Candelaria* (1926) 271 U.S. 432, 442, *citing Sunol v. Hepburn*; *Agua Caliente Band of Cahuilla Indians v. Superior Court* (2006) 40 Cal.4th 239, 247 ("The [United States Supreme Court] explained that since the arrival of the colonists on American soil, the [Native American] tribes were treated as dependent sovereign nations, with distinct political communities under the protection and dominion of the United States," citing *Worcester v. Georgia* (1832) 31 U.S. 515, 549–61 (Marshall, C.J.)).

45. *People v. Smith* (1850) 1 Cal. 9.

46. Briscoe, "Reflections" (Spring/Summer 2023) *CSCHS Review* 5.

47. Madley, *American Genocide* 124–25. See *People v. Smith*, *supra* 1 Cal. at 14–15 ("If the District Courts were fully organized, and their terms prescribed and known, we should, perhaps, not deem it within the proper exercise of a sound discretion to bail them; but considering the want of definite and well understood laws regulating proceedings in the existing Courts of First Instance, and the uncertainty as to the time when the District Courts will be ready to proceed with business, superadded to the fact that there is no jail or prison in which prisoners can be kept with security, we feel disposed to order their release on bail").

conducting the prosecution was very great, and even dangerous to personal safety," but "we do know that the arrests halted the killing campaign . . . ."[48]

Thus, rather than being an indication of anti-Indian bias, these early legal proceedings show that the rule of law was beginning to develop and have a positive effect in those chaotic early days of statehood, and that by December of 1850, when *Sunol v. Hepburn* was decided, the California courts were starting to operate as such.[49]

The Renaming of UC Hastings

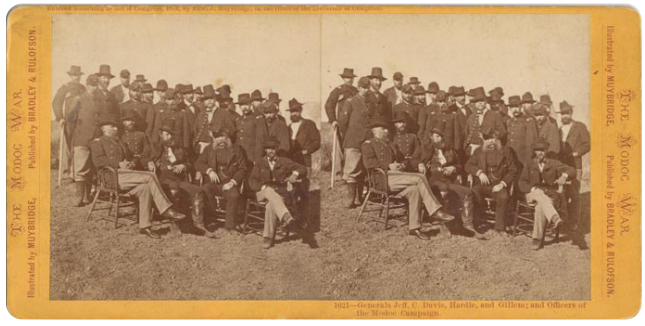
On September 23, 2022, California Governor Gavin Newsom signed AB 1936, which changed the name of Hastings College of the Law to College of the Law, San Francisco, effective January 1, 2023.[50]

Among the findings made in AB 1936 are that:

> S.C. Hastings perpetrated genocidal acts against Native California Indigenous People, most especially the Yuki Tribe . . . .
>
> S.C. Hastings enriched himself through the seizure of large parts of [the Eden and Round Valleys] and financed the college of law bearing his namesake with a $100,000 donation . . . ; and
>
> S.C. Hastings' name must be removed from the College to end this injustice and begin the healing process for the crimes of the past.[51]

Briscoe compares this legislative action to the renaming of Calhoun College at Yale University because John C. Calhoun owned slaves and supported the institution of slavery, and of Phelan Hall at the University of San Francisco because John Phelan "was a rank racist."[52] He notes that "as far as we know" neither man killed a slave or a Chinese person, and asks, "If slaveholding and racism are grounds for renaming, what of genocide?"

And in his July 20, 2017, op-ed in the *San Francisco Chronicle*, Briscoe concluded that Serranus Hastings made a fortune in real estate, which was facilitated by his acquiring title to land "by the massacre of the rightful claimants, a near-extinction [he] promoted and funded. As UCLA professor Benjamin Madley wrote in his sobering *An American Genocide*, published in 2016 by



"The Modoc War." Generals Jeff. C. Davis, Hardie, and Gillem; and officers of the Modoc Campaign. *Stereograph by Eadweard Muybridge, 1872. Photo courtesy of the California History Room, California State Library, Sacramento, California.*

none other than Yale University Press, . . . Hastings had 'helped to facilitate genocide.' "[53]

In discussing UC Hastings' process, Briscoe notes that its chancellor and dean, David Faigman, stated in a September 14, 2020, memo, "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."[54]

And after reaching that conclusion, Dean Faigman and James Russ, president of the Round Valley Indian Tribes, co-authored a July 3, 2021, op-ed piece in the *Sacramento Bee* concluding: "Changing the name of the school would be of little benefit to the living descendants of Serranus Hastings' crimes. These atrocities should not be erased — instead it should be a societal goal to never forget this sordid chapter of American history and the challenges that Native Americans continue to face."[55] While disagreeing that Hastings committed what were

48. *Ibid.*

49. See Doran, "S. Clinton Hastings," 34 ("The beginnings of the court were set in a period of transition. In the transfer of governmental control from Mexicans to Americans there was bound to be some degree of confusion until the new government was firmly established and efficiently working."); *id.* 36 ("Despite the fact that the state government had been organized and was in operation, there still prevailed a great deal of political and legal confusion").

50. Cal. Ed. Code § 92200.

51. Cal. Stats. 2022, ch. 487 (reg. sess.).

52. Briscoe, "Reflections" (Spring/Summer 2023) *CSCHS Review* 9.

53. 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 Aug. 16, 2023].

54. Briscoe, "Reflections" (Spring/Summer 2023) *CSCHS Review* 12. See also *id.* 8 (Yale University remains named after "an English slave trader who profited handsomely from the institution of slavery"); Myron Moskovitz, "Cancel 'Berkeley'?," *S.F. Daily J.,* June 5, 2023, 6 (the name of "an individual whose views warrant no honor or commemoration" can take on a secondary meaning that, over time, "come[s] to embody and represent very different values and perspectives").

55. David L. Faigman and James Russ, "UC Hastings Namesake Killed, Displaced California Tribes. But Changing Name Isn't Enough," *Sacramento Bee,* July 3, 2021, *https://www.sacbee.com/opinion/op-ed/article251138474.html* [Sept. 2, 2023]. Several years later, in the *New York Times* front-page article that caused the sudden decision to change the name, James Russ, president of the Round Valley Indian Tribes is quoted as "emphasiz[ing] that the leadership is happy to accept the college's offer of legal assistance for the tribe's activities. 'We have a window of opportunity and we don't want to screw it up,' Mr. Russ said." Thomas Fuller, "He Unleashed a California Massacre. Should This School be Named for Him?" *N.Y. Times,* Oct. 27, 2021, 1.

crimes at the time, I believe that the societal goal is nevertheless a good one.

However, in October of that year, Thucydides' prediction about people not wanting to take the time to find out about the truth was about to become manifest.

As Briscoe notes, Dean Faigman suddenly changed his mind and supported changing the law school's name, when all that had happened of significance in the interim between September 2020 and October 2021 was the publication of a front-page article in the *New York Times* repeating the claims made by Madley in his book.[56] Within a week of that article, the name-change legislation was already in process.

But Briscoe's account omits an important detail; almost immediately after the *New York Times* article was published, several powerful and wealthy law school alumni, including former California Assembly Speaker and San Francisco Mayor Willie Brown and Joseph Cotchett, announced their insistence that the name be changed. Cotchett, who had given roughly $10 million to the law school to establish the Cotchett Law Center, said, "I will do everything in my power as a 55-year alumnus of Hastings to change the name."[57]

Briscoe also notes that under Yale's renaming criteria: "[t]here is a strong presumption against renaming a building on the basis of the values associated with its namesake."[58] When addressing the renaming of the building at Berkeley Law named after John Boalt, he fails to note that the Berkeley campus' Building Name Review Committee determined that John Boalt had no connection to the university,[59] or the law school dean's conclusion that even where "notable individuals" owned slaves or supported racist polices, "in those instances there are good reasons to honor these individuals notwithstanding their racist statements and actions." One of those "notable individuals" who supported racist policies was Earl Warren, former California governor and chief justice of the United States.[60]

Thus, it would appear that UC Hastings' leadership's decision to seek the required legislative cooperation in changing the law school's name had more to do with money and political clout than weighing against his alleged shortcomings objective factors that compared a notable individual's contributions to society and the school.[61]

The Evidence

In reviewing Serranus Hastings' alleged shortcomings, it appears that the school's leadership and California's legislature and governor simply accepted as gospel what the *New York Times* said about him on October 21, 2021,[62] notwithstanding all the evidence and process that had preceded the Hastings Legacy Review Committee's conclusion to retain the Hastings name.

However, there is no mention in the *Times* article of the fact that in the 1860 legislative investigation into the Mendocino Indian Wars, Serranus Hastings testified under oath that he had no contemporaneous knowledge of the Indian killings with which he is now being charged.[63] At the conclusion of that investigation, the

56. Briscoe, "Reflections" (Spring/Summer 2023) *CSCHS Review* 12.

57. Nanette Asimov, "UC Hastings Leaders Move to Change Name Linked to Native American Massacres," *S.F. Chronicle*, Nov. 2, 2021, *https://www.sfchronicle.com/bayarea/article/UC-Hastings-leaders-move-to-change-name-linked-to-16586688.php* [as of Aug. 16, 2023].

58. Briscoe, "Reflections" (Spring/Summer 2023) *CSCHS Review* 12.

59. "Memorandum from the Building Name Review Committee to Chancellor Carol Christ, Re: Berkeley Law's Proposal to Remove the Name from Boalt Hall," 5 (undated) https://chancellor.berkeley.edu/sites/default/files/building_name_review_committee_recommendation_-_boalt_hall.pdf [as of Aug. 16, 2023].

60. Memo from Dean Erwin Chemerinsky to UC Berkeley Building Name Review Committee, Nov. 30, 2018, 3, https://chancellor.berkeley.edu/sites/default/files/boalt_hall_building_name_review_committee_proposal.pdf [as of Aug, 16, 2023]. See Sumi Cho, "Symposium: Redeeming Whiteness in the Shadow of Internment: Earl Warren, Brown and a Theory of Racial Redemption" (1989) 19 *B.C. Third World L .J.* 73.

61. See Doran, "S. Clinton Hastings," 143 ("Hastings, pioneer, jurist, and businessman, added to the color of early California history. Questions may be raised as to the methods employed by the judge, but that he made contributions of merit to California cannot be denied.").

62. Fuller, "He Unleashed a California Massacre." At the April 26, 2022, hearing before the California Assembly's Higher Education Committee, the chair of the committee said that he was convinced that what the *New York Times* wrote about Serranus Hastings was true, because the *Times* prints only "news that's fit to print." "I do not doubt the facts," he said. See *https://www.assembly.ca.gov* committees, Media Archive, 04/26/2022 Assembly Higher Education Committee [as of Aug. 16, 2023]. Before the state Senate Education Committee, commenting on opposition to eliminating the Hastings name, Sen. Mike McGuire . . . asked, "if this is fake news or not?" He then said: "I am embarrassed to hear folks come in and defend the name of this institution." *https://www.senate.ca.gov*, Committees, Media Archive, 04/06/22, Senate Education Committee [as of Aug 16, 2023]. See Malcolm Maclachlan, "Bill advances to change name of Hastings Law School," *S.F. Daily Journal,* April 7, 2022 (" 'That's true, an investigation was done in 1860,' [state Sen. Thomas] Umberg said. 'It is a further embarrassment to us that the Legislature should absolve him where the historic record is I think complete and replete with Hastings' part in these atrocities.' ").

63. See Briscoe, "Reflections" (Spring/Summer 2023) *CSCHS Review* 9–10; Lindsay "White Paper," *supra* fn. 15, 58: Record F3753:484 Deposition of S.C. Hastings, 1860 at Sacramento, CA: "I arrived at Eden Valley with a herd of about 300 cows and calves & put them also in charge of Mr. Hall on my arrival then I learned that the Indians had dispersed from the Ranch in the Valley and had killed seven breeding mares this I learned from Mr. Hall and two or three other persons I found when I arrived there. I had no doubt then nor have I at this time that the reports were true — on my way home about a day's ride from Eden Valley my son a young man of 16 years of age informed me that Mr. Hall had been out the

California Legislature did not implicate Hastings in any killings or other wrongdoing.

The failure to fully consider the 1860 files is a miscarriage of justice; doing so would have resulted in a more complete examination of the times, and the then current, sorry state of affairs between the Indian tribes and the state and federal governments. Those who rushed through the name change prefer to avoid exposing these "uncomfortable" truths by scapegoating Hastings, who is no longer able to speak for himself.

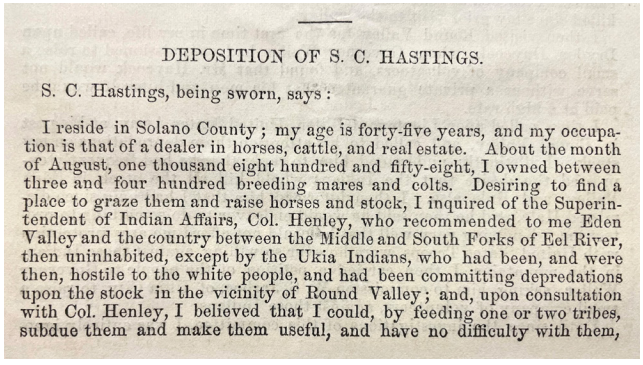
What Hastings actually did in order to protect his and other settlers' lives and property was first ask the federal authorities to contain the Indian tribes so that they would stop rustling and slaughtering livestock; and when that request was refused, he followed state law in drafting and circulating a petition asking the governor to authorize local law enforcement (then called militias) to protect their property and lives.

As he and his predecessors had done in many other instances, the governor complied with the settlers' request and commissioned the militia, which he ultimately disbanded in early 1860, conveying his "sincere thanks for the manner in which [the force's work] was conducted."[64]

Regarding killings attributed to his employee, H.L. Hall, Hastings testified that he eventually terminated Hall's employment because he believed him inadequate to care for his cattle, not because of the killings. Thus it appears that, between the lack of today's speedy communication,[65] and the perception by lawmakers and settlers in the 1850s and early 1860s that ongoing conflict between Indians and settlers was inevitable in the absence of state-sponsored law enforcement, vigilante killings were not viewed as unusual.[66]

The UC Hastings Board of Directors Committee Report

The characterization of those killings as "genocide" was more recently rejected by a committee of the law school's Board of Directors, after a group of the school's alumni provided that board with evidence from the 1860 investigation indicating that Madley's and Sacramento State



DEPOSITION OF S. C. HASTINGS.

S. C. Hastings, being sworn, says:

I reside in Solano County; my age is forty-five years, and my occupation is that of a dealer in horses, cattle, and real estate. About the month of August, one thousand eight hundred and fifty-eight, I owned between three and four hundred breeding mares and colts. Desiring to find a place to graze them and raise horses and stock, I inquired of the Superintendent of Indian Affairs, Col. Henley, who recommended to me Eden Valley and the country between the Middle and South Forks of Eel River, then uninhabited, except by the Ukia Indians, who had been, and were then, hostile to the white people, and had been committing depredations upon the stock in the vicinity of Round Valley; and, upon consultation with Col. Henley, I believed that I could, by feeding one or two tribes, subdue them and make them useful, and have no difficulty with them,

Deposition of Serranus C. Hastings, Special Joint Committee on the Mendocino War, Calif. Leg., 1860, p. 29 (see n. 15). *San Francisco Pub. Lib. Photo: Jake Dear.*

University history professor Brendan Lindsay's conclusions about Hastings do not reflect the facts about him or the culture of the times.[67]

The committee focused on the facts that the Board of Directors had included in its resolution to pursue renaming the law school: "Serranus Hastings promoted and funded genocide," and after reviewing the material submitted by alumni, the directors had determined "that the Board does not have adequate information to say that Judge Hastings engaged in genocide."[68]

These facts and evidence also led the Board of Directors' committee to admit "that there is no incontrovertible proof that Judge Hastings knew more than he acknowledged."[69]

But the committee's report rejected the broader request by some alumni to reconsider the name-change resolution, and the Board of Directors' decision shows that it was clouded by what is referred to as "hindsight bias" — that is, "the tendency for people with knowledge of an outcome to exaggerate the extent to which they perceive that outcome could have been predicted. . . . More colloquially it is known as 'Monday morning quarterbacking.'"[70]

What is now widely referred to as hindsight bias can be traced back to the work of psychologist Baruch Fischhoff, who found that:

morning previous to my arrival there and killed 14 male Indians, in whose camp we found the remains of horses, this fact was concealed from me by Mr. Hall." *Id.* 59: "Until since the investigation of this committee I was entirely ignorant of any outrages commit[ted] except the one related by my son led by Mr. Hall and the Indians. I dismissed him not because I then knew that he had committed any outrages but because that I was satisfied that my stock would be much better taken care of in other persons hands." (*Ibid.*)

64. Lindsay "White Paper," *supra* fn. 15, 106–07, Record F3753:409 Gov. Weller to Jarboe, Jan. 3, 1860.

65. See *post* fn. 78.

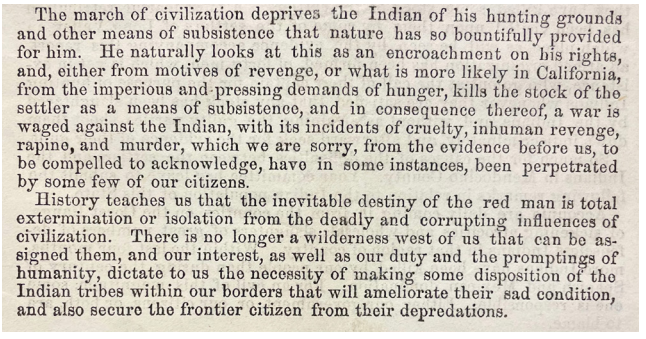
66. See *supra* fn. 16. And yet, as shown in the editors' sidebar on page 5, some vociferously objected to what they characterized as the state's "policy of extermination."

67. In spite of that finding by the committee, the entire UC Hastings Board rejected that finding. It also accepted Madley's analysis of what constitutes genocide as true.

68. Chip Robertson & Albert Zecher, "Re-Examination of Board of Directors Decision to Pursue Renaming of College" (May 28, 2022), Hastings Legacy Review Committee, Board of Directors Report, 9 uclawsf.edu/wp-content/uploads/2023/04/Report-of-Committee-to-Re-Examine-Bd-Decision-5-28-22-1.pdf [as of Aug. 30, 2023].

69. *Id.* 2. It did not recommend abandoning the name change, stating that the UC Hastings Board's decision was a "moral" and not a "legal" one. *Id.* fn. 3.

70. See generally, Hal R. Arkes and Cindy A. Schipani, "Medical Malpractice v. Business Judgment Rule: Differences in Hindsight Bias" (1994) *73 Or. L. Rev.* 587, 588.



The march of civilization deprives the Indian of his hunting grounds and other means of subsistence that nature has so bountifully provided for him. He naturally looks at this as an encroachment on his rights, and, either from motives of revenge, or what is more likely in California, from the imperious and pressing demands of hunger, kills the stock of the settler as a means of subsistence, and in consequence thereof, a war is waged against the Indian, with its incidents of cruelty, inhuman revenge, rapine, and murder, which we are sorry, from the evidence before us, to be compelled to acknowledge, have in some instances, been perpetrated by some few of our citizens.

History teaches us that the inevitable destiny of the red man is total extermination or isolation from the deadly and corrupting influences of civilization. There is no longer a wilderness west of us that can be assigned them, and our interest, as well as our duty and the promptings of humanity, dictate to us the necessity of making some disposition of the Indian tribes within our borders that will ameliorate their sad condition, and also secure the frontier citizen from their depredations.

Excerpt from the Majority Report, Special Joint Committee on the Mendocino War, Calif. Leg., 1860, p. 1. *San Francisco Pub. Lib. Photo: Jake Dear.*

> In hindsight, people consistently exaggerate what could have been anticipated in foresight. They not only tend to view what has happened as having been inevitable but also to view it as having appeared "relatively inevitable" before it happened. People believe that others should have been able to anticipate events much better than was actually the case.[71]

Hindsight bias is found in a variety of applied settings including law, politics, historical judgment, psychotherapy case histories, medical diagnoses, and employee evaluations, and the United States Supreme Court has warned factfinders to avoid the distortion it can cause.[72]

> One of the most empirical explanations of hindsight bias posits that "learning an outcome alters what people believe about the world in ways that make the known outcome seem inevitable." A related account explains this inevitability might be an adaptive feature related to self-esteem such that it enables people to "appear intelligent, knowledgeable, or perspicacious." . . . Perhaps the point of greatest agreement among researchers is that the hindsight bias is automatic and non-conscious. That is, it operates even without the awareness of the person influenced by it.[73]

The committee's report claims that Hastings' failure to report Indian killings by an employee to law enforcement, and his assistance in the formation of a local militia that went on to wantonly kill many Indians, shows his complicity in those killings.[74]

Thus, the committee assumed that prior to Hastings' role in the creation of the Eel River Rangers, and his acts of facilitating that group, there was state "law enforcement" extant in the Eden Valley of Mendocino County. However, that state militia, which Hastings and the other settlers sought and obtained from the governor after their request for help from the U.S. Army was rejected, *became* the state's law enforcement.[75]

What the committee really found troubling is what state and federal law provided for at that time, which led to the subjugation of Indians and the 1860 investigation's findings. But in doing so the committee incorrectly characterized and exaggerated Hastings' role, concluding: "Either Hastings did not concern himself with what the militia was actually doing, even merely to confirm that it was not engaging in mass violence — which his ongoing support for the militia clearly obligated him to do — or he knew and did not object. In either case he is implicated in the militia's wrongdoing."[76]

That statement underscores that the committee's knowledge of the militia's ultimate "mass violence" caused it to presume that Hastings should assume that the militia would engage in "mass violence," thus imposing a duty on him to continually check on the militia. It also assumes that once the militia was operational, Hastings had the power to stop it. In fact, the governor ordered the militia leader to restrain its behavior, but his order was not implemented. At that time, such orders were not quickly or easily delivered.[77]

Further, the report takes no account of the times, and the fact that communication even remotely like what we have today was not available. Nor was travel quick or easy. It took Hastings five to seven days to travel between Eden Valley and his home in Benicia. Print media was

71. Jeffrey J. Rachlinski, "A Positive Psychological Theory of Judging in Hindsight" (1998) 65 *U. Chi. L.J.* 571, 572, quoting Baruch Fishhoff, "For Those Condemned to Study the Past: Heuristics and Biases in Hindsight," in Daniel Kahneman, Paul Slovic, and Amos Tversky, eds, *Judgment under uncertainty: Heuristics and biases*, Cambridge: Cambridge Univ. Press, 1982, 335, 341.

72. Adam Powell, "KSR Fallout: Questions of Law Based on Findings of Fact and the Continuing Problem of Hindsight Bias" (2009) 1 *Hastings Sci. & Tech. L.J.* 241, 260. See *KSR Int'l Co. v. Teleflex Inc.* (2007) 550 U.S. 398, 421 ("A factfinder should be aware, or course, of the distortion caused by hindsight bias and must be cautious of arguments reliant on ex post reasoning"). See also Deborah L. Rhode, "Leadership in Law" (2017) 69 *Stan. L. Rev.* 1603, 1639 (with hindsight bias "[w]e revise the history of our beliefs in light of what actually happened; in hindsight, we exaggerate what could have been anticipated in foresight").

73. Justin D. Levinson, "Superbias: The Collision of Behavioral Economics and Implicit Social Cognition" (2011–2012) 45 *Akron L. Rev.* 591, 600–601.

74. UC Hastings College of the Law, Report to the Board of Directors, *supra* fn. 68, 3–4.

75. See Madley, *An American Genocide* 173–78 (California's 1850 militia acts created 24 "ranger" militias, which "set an example that a far greater number of vigilantes followed, with devastating effect."

76. *Id.* 6.

77. Lindsay "White Paper," *supra* fn. 15, 100, Record F3753:382 Gov. Weller to Jarboe Sept. 8, 1859; *id.* 103, Record F3753:399 Gov. Weller to Jarboe, Oct. 23, 1859. See also text accompanying footnotes 78 and 79.

local, and Mendocino County was not reached by telegraph until 1870.[78]

In a letter to the governor, Hastings described the fastest way for someone to get from Sacramento to the Eden Valley without the roads and bridges of today: "night boat to San Francisco I will meet him on board at Benicia to come down with him. He will have then to go to Petaluma & can take the Stage to Cloverdale Where he can procure a horse."[79]

Given his many business interests in other parts of the state, Hastings was not able to supervise day-to-day operations in the Eden Valley, and judging him by current standards is illegitimate.[80]

Madley's Genocide Narrative

In order to bolster his genocide narrative, Madley conflates the despicable action of some settlers acting under state authority with Hastings' use of state law to help settlers petition the governor to form a local police force for their protection. The resulting suggestion that Hastings "masterminded" Indian killings is more than an exaggeration; it is not supported by direct evidence that takes account of the record of the 1860 investigation and the times. [81]

The literary method used in Madley's book was described by Stanford University history professor Richard White as "call[ing] nineteenth century elected officials 'the primary architects of annihilation' against Native Americans in the state. Reading it is like watching bodies being piled on a pyre."[82] That hyperbolic presentation distracts the reader's attention from the reality that essential facts necessary to connect Serranus Hastings to the narrative are missing.[83]

But Madley cannot dispute that Hastings bought his considerable lands from the state, and the weakness of his argument that Hastings had effective control over the Eel River Rangers and hence was an accomplice to the atrocities they committed is suggested by the college's Board of Directors committee's report rejecting the genocide label for Hastings, and its own hindsight bias. Although the name-change legislation finds that Hastings committed "genocidal acts,"[84] judging Hastings's conduct and his connection to the atrocities committed by the Eel River Rangers by today's standards is not the historically appropriate way to evaluate whether he was good or bad; moral or immoral.[85]

To Sum Up

Today's times are very different from those in California's early statehood. Addressing the ruthlessness of the conquest of Native California is and should remain a top priority for those of us who daily benefit from the state's current prosperity. But singling out and scapegoating Serranus Hastings is antithetical to creating the successful and lasting partnership that Dean Faigman and James Russ agreed in their July 2021 *Sacramento Bee* op-ed was the best way to achieve "a societal goal to never forget this sordid chapter of American history and the challenges that Native Americans continue to face."[86]

Also, this is a law school we're discussing, and the process by which the school's name was summarily changed is unworthy of its 145-year legacy of teaching the value of due process of law, transparency, and inclusion in such decision-making.

Although the title and much of the text of the *Sacramento Bee* op-ed adopt Madley's and Briscoe's narrative and do not reflect the truth about Serranus Hastings' actions or intentions, the partnership agreed upon by Dean Faigman and James Russ and the restorative justice that it speaks to are something that he would likely support. In the long run, remembering, not erasing, would best facilitate meaningful and ongoing amends. ✯

Kristian Whitten is a member of the UC Hastings Class of 1973 and is a former president of the Hastings Alumni Association and the former Hastings 1066 Foundation. He is also a retired California deputy attorney general.

78. Alice L. Bates, "History of the Telegraph in California" (1914) 9 *Annual Pub. of the Hist. Soc. of So. Calif.* 185.

79. Lindsay, "White Paper," *supra* fn. 15, 96 Record F3753:365, S.C. Hastings to Gov. Weller, April 30, 1859.

80. See Sumi Cho, "Symposium: Redeeming Whiteness," 19 *B.C. Third World L.J.* 79–80 ("In the field of history, a guiding canon is to judge one's subject in the context of his time, by 'recreating the world as it looked to those who lived it,' and evaluating historical figures within their era's social, moral and political norms. To do otherwise is presentist — illegitimately assessing historical figures based upon contemporary values and goals.").

81. Regarding H.L. Hall, Madley's thesis refers to him as a "vigilante leader" but does not reference his killing Indians who were alleged to have rustled Hastings' livestock. Madley, "California's Yuki Indians" 39 *Western Hist. Qtrly.,* 317.

82. Richard White, "Naming America's Own Genocide," *The Nation,* Aug. 17, 2016, *https://www.thenation.com/article/archive/naming-americas-own-genocide/* [as of Aug. 16, 2023].

83. In the *New York Times* article (*supra* fn. 55), Madley is quoted as follows: "It's not an exaggeration to say that California state legislators established a state-sponsored killing machine," and then goes on to conflate Serranus Hastings with the state.

84. See text accompanying fn. 51.

85. See *supra* fn. 80.

86. See *supra* fn. 55. The editors' sidebar on page ** recites newspaper accounts and an editorial of the time about atrocities committed against Indians in Humboldt County and other locations, including on or near the Eel River. None is alleged to have been undertaken with Hastings' knowledge or participation.

Academy founders, from left, Edward Lasher, Cyril Viadro, Gideon Kanner, Ellis Horvitz and Jerry Braun. *Photo, 1970s. Courtesy of California Academy of Appellate Lawyers.*

The California Academy of Appellate Lawyers: A Half Century of Accomplishments

BY BENJAMIN G. SHATZ

The California Academy of Appellate Lawyers celebrated the 50th anniversary of its founding in 2022. That year also saw the death of the legendary Ellis Horvitz, one of the academy's early members and a figure of renown to appellate practitioners and the California Supreme Court.

A half century after its somewhat serendipitous founding, now is a good time to tell the tale of the academy's origin and contributions. For more than 50 years, the group has provided important support to appellate practitioners across the state and backed needed improvements to practice rules. Moreover, individual members — some of the state's leading practitioners — have been major players in landmark cases that changed substantive appellate law in California, including in the state's high court.

Advocating for a "Nerd Club"

Academy lore has it that appellate lawyers Ed Lascher and Gideon Kanner were vigorously kvetching about some grand appellate annoyance at Gideon's office one day in 1969. Gideon's law partner, Jerry Fadem, rushed past them in his typical disheveled fashion, crying out something to the effect, "You dorks should have a nerd club so you can jabber on about geeky appellate stuff."[1]

To California lawyers practicing in the appellate courts of the 1960s through the 1980s, these names would all be familiar: Ed was well known for his long-running "Lascher at Large" column in the *State Bar Journal* (and later in the *Daily Journal*). He appeared as counsel in numerous California Supreme Court opinions beginning in 1964 — including one in which he himself was the plaintiff / appellant seeking increased compensation for criminal-defense appellate work.[2]

Similarly, Gideon was equally famous (or infamous) for his extensive writing, teaching (at Loyola Law School), and acerbic personality.[3] Gideon's name appears as counsel in numerous Supreme Court cases between 1968 and 2007.[4] At the time of the above anecdote, Gideon worked at Fadem & Kanner with Jerry Fadem,

1. As recounted to the author by Gideon Kanner.
2. *Lascher v. California* (1966) 64 Cal.2d 687.
3. *See* "Tribute to Gideon Kanner" (1991) 24 *Loyola L.A. L. Rev.* 515 et seq.
4. *See e.g., Garrett v. Superior Court* (1968) 11 Cal.3d 245; *Metropolitan Water Dist. of So. Cal. v. Campus Crusade for Christ, Inc.* (2007) 41 Cal.4th 954.

a maniacal and self-described "certifiable workaholic," who also appeared as counsel in Supreme Court cases from 1958 to 1996 — even though he died in 1994.[5]

Fadem's scornful comment resonated so deeply with Ed that in July 1970 he began gathering information about appellate bar organizations. An Illinois native, Ed was aware of the Illinois Appellate Lawyers Association, formed in 1968,[6] and, as a result of his inquiry, he learned that group directed its efforts to "perfect[ing] a closer relationship" with appellate courts and law schools, and sponsoring legislation on appellate procedure.[7]

In August, Ed worked up a draft three-page form letter, which Gideon helped edit.[8] In October 1970 he wrote judges and lawyers, gauging interest in forming a similar group in California. He noted "increased problems in the functioning of the appellate courts" and sought suggestions for addressing them.[9] The academy still has those pre-internet letters, and carbon copies of responses, forming a holy appellate archive of foundational documents. Reading them is like eavesdropping on emails between friendly colleagues and adversaries, filled with penetrating insight, mirth, and an abiding devotion to the appellate courts and appellate practice.

A "Massing of Problems"

Most important, Ed wrote to lawyers, including Ellis Horvitz, urging creation of an organization of appellate specialists because the State Bar "patently lacks both the interest and machinery" to address the "massing of problems for both appellate courts and appellate practitioners."[10] Those problems included an "inexorable trend" toward burgeoning caseloads affecting the justices, particularly at the Court of Appeal level, and "disagreement" on "proposed alterations in the appellate system."[11] In late 1970, upon learning that Seth Hufstedler would be chairing the newly formed State Bar Committee on Appellate Courts, Ed asserted it was "welcome news" that the "State Bar has bestirred itself (however belatedly) to take at least the beginning of some interest in matters appellate."[12]

As noted, Ed's primary concern was the "overloading of justices," which he saw "continuing unabated without the slightest prospect of amelioration."[13] His understanding of the crush of work (and lack of court staff) was that Court of Appeal justices essentially had to resolve at least one case a day to keep up, which meant that litigants were not getting the "three-judge, deliberative opinion to which they were entitled."[14] Retired Justice Roy Gustafson, one of the justices Ed had written detailing "deficiencies in the present [appellate] system," echoed that concern, enumerating other especially vexing problems, including the lack of sufficient judges to handle "the tremendous case load . . . with an acceptable level of quality."[15] His other concerns included the effect of denials of hearing by the Supreme Court; "the lack of geographical integrity of appellate authority"; the potential for intra-district conflicts; the unnecessary and "potentially harmful existence of permanent divisions within districts"; too few judges; and "the detrimental preparation of mere 'memorandum opinions.' "[16] Appellate lawyers were also concerned about the standards for publication of opinions,[17] procedures and timing for record preparation,[18] and delay (i.e.,

Ed's primary concern was the "overloading of justices," which he saw "continuing unabated without the slightest prospect of amelioration."

5. *See, e.g.*, *Trust v. Arden Farms Co.* (1958) 50 Cal.2d 217; *City of Manhattan Beach v. Superior Court* (1996) 13 Cal.4th 232. *See also*, "Jerrold Fadem: Going to Bat for Property Owners" (Summer 1980) 49 *Loyola Lawyer* 11.

6. *See* AppLawyers.org [as of Nov 3, 2023].

7. Letter to Ed Lascher from Francis D. Morrissey (the second president of the Illinois Appellate Lawyers Assn.), July 30, 1970. (CAAL Academy Archive of Gideon Kanner (hereinafter AA) pdf 245.) See letter from Lascher to Univ. of Illinois Law Prof. Prentice Marshall, May 24, 1971 ("In the course of recent efforts here in California to form a society or association of appellate lawyers (somewhat inspired by the one existing in Illinois), we found that the one complaint which was uniform, in the handful of specialists in that field[,] was the total lack of communication between the appellate bench and the appellate bar") (AA-201).

8. Letter to Lascher from Kanner, Aug. 5, 1970.

9. Letter to Roy A. Gustafson from Ed Lascher, Oct. 12, 1970 (AA-252).

10. Form letter from Ed Lascher sent to numerous judges and lawyers, Oct. 12, 1970 (AA-232); letter from Ed Lascher to Justice Gustafson, Oct. 12, 1970 (noting the mailing of his letter to Jean Wunderlich, Henry Kappler, Henry Walker, Ellis Horvitz, William Boone, William Gregory, Burton Marks, Paul Selvin, Hillel Chodos, William James, James McCormick, and Thomas Rubbert, along with responses) (AA-252, AA-231, AA-227, AA-226, AA-225, AA-224, AA-229).

11. *Id.* at AA-232-233.

12. Letter to Seth M. Hufstedler from Ed Lascher, Nov. 20, 1970 (AA-238).

13. Form letter from Ed Lascher sent to numerous judges and lawyers, Oct. 12, 1970 (AA-232-233). Judicial overload was the result of the so-called "deluge of litigation," i.e., "From 1961 to 1971, total filings in the California Supreme Court increased from 1,313 to more than 3,400. The total caseload of the state courts of appeal increased from 4,109 to 14,500 in the same period." Harry N. Scheiber, "Innovation, Resistance, and Change: A History of Judicial Reform and the California Courts, 1960–1990" (1993) 66 *S. Cal. L. R.* 2049, 2088.

14. *Id.*, Lascher form letter, Oct. 12, 1970 (AA-233).

15. Retired Justice Roy A. Gustafson, "Some Observations About California Courts of Appeal" (1971) 19 *UCLA L. Rev.* 167, 167, 183—84.

16. *Ibid.*

17. Letter from Henry E. Kappler to Ed Lascher, Oct. 16, 1970 (AA-227); letter from Burton Marks to Supreme Court Justice Raymond L. Sullivan, Oct. 19, 1970 (AA-230).

18. Letter from Robert A. Seligson to Ed Lascher, June 13, 1972 (AA-11).

L–R: Jerry Braun and Edward Horowitz. *Photo: CAAL, 1970s.*

it sometimes took a year for fully briefed appeals to be argued). Ed suggested that counsel be advised in advance, or at argument, as to tentative rulings,[19] similar to how many trial courts operated at the time, and still do.

Justice Otto Kaus, then on the Second District Court of Appeal, felt that such an organization was "long overdue and urgently needed," given the "almost total lack of dialogue" between the appellate bench and bar.[20] Kaus lamented the "lack of inventiveness within the appellate courts" toward solving procedural and caseload problems.[21] Concerned about the typical lawyer's "gross lack of familiarity" with appellate practice, frustrating and amplifying the courts' work,[22] he envisioned appellate experts working, perhaps with Continuing Education of the Bar, to create resources to improve appellate practice, including those who practice criminal as well as civil law.[23] Kaus believed that justices would support such a group, given the obvious benefits to all: "Friendly dialogue between bench and bar would inure to our mutual benefit."[24]

Social engagement was a key component; the group did not want to take itself too seriously.

The Academy Comes Together

Although a few lawyers were dubious, most contacted endorsed the idea of a statewide association, whether cautiously or wholeheartedly. By the end of 1970, the idea was firmly entrenched, and Gideon volunteered to take the laboring oar of attempting some form of administration.[25]

Those first efforts, in 1971, involved two dinners — at the renowned La Scala and Trader Vic's restaurants in Beverly Hills.[26] Because the group had not yet selected a name, members jocularly referred to these as meetings of the Appellate Lawyers Informal Eating and Drinking Association (ALI-EDA, a takeoff on the American Law Institute / American Bar Association's ALI-ABA).[27] Social engagement was a key component; the group did not want to take itself too seriously.

By mid-1971, the gang had pulled together a "completely status-less, unofficial, odd and unnamed amorphous group" of about 20 California appellate specialists.[28] Judicial outreach was another priority, including to judges on the U. S. Court of Appeals for the Ninth Circuit, who at that time were thought to be so disconnected from the bar that one rascal called them "the court that knows nobody and that nobody knows."[29]

At the 1971 State Bar Convention in San Diego, the group hosted a dinner party that drew half a dozen sitting justices who strongly supported the nascent organization.[30] These justices, Ed later wrote, believed that "the problems facing the appellate courts [were] so acute and so big that help should be recruited from every possible source."[31]

Leadership and a formal structure were now needed, but even dedicated members were hesitant to commit the time. As core member Hillel Chodos quipped: "Someone will have to be president. If nominated, I will not run; if elected, I will not serve."[32]

19. Lascher form letter, Oct. 12, 1970 (AA-233).

20. Letter from Thomas E. Rubbert to Ed Lascher, Nov. 17, 1970 (AA-235).

21. *Ibid.*

22. *Ibid.*

23. *Id* (AA-236). Kanner had earlier emphasized that the group had to include the "criminal guys" because "After all, it is their stuff that is clogging the courts and diverting judicial talent into [criminal law issues]." Kanner to Lascher letter, Aug. 5, 1970.

24. *Ibid.*

25. Letter from Gideon Kanner to "all counsel who in one way or another have responded favorably to Ed Lascher's suggestion that we band together and form some kind of group of appellate practitioners" (i.e., Ed Lascher, Ellis Horvitz, Burton Marks, Henry Kappler, Paul Selvin, William Gregory, William B. Boone, Thomas Rubbert, Hillel Chodos, and Harvey Grossman) Dec. 14, 1970 (AA-222).

26. Letter from Gideon Kanner to Hillel Chodos, Burton Marks, Ed Lascher, Harvey Grossman, William Boone, Henry Kappler, Paul Selvin, Ellis Horvitz, William Gregory, Jan. 18, 1971 (noting Jan. 27, 1971, dinner meeting at La Scala); letter from Ellis Horvitz to Gideon Kanner, Dec. 13, 1971 (referencing La Scala and Trader Vic's) (AA-195). Dec. 21, 1971, memo re reservations for approximately 18 people at Trader Vic's on Jan. 7, 1972 (AA-194).

27. Invitation from Ellis Horvitz, June 1, 1971, to meet at Trader Vic's ("We have no agenda, only amiable conversation concerning the appeals and tribulations of appellate practice").

28. Letter from Lascher to Prof. Marshall, June 7, 1971.

29. Letter from Lascher to Chodos, Aug. 2, 1971.

30. Letter from Ed Lascher to Seth M. Hufstedler, Dec. 20, 1971 (AA-192); letter from Gideon Kanner to 22 lawyers, Nov. 24, 1971 (noting that "after about a year of informal talks, and a lot of individual mulling," a meeting with six justices took place at which the justices unanimously encouraged the creation of an appellate practitioner organization) (AA-176).

31. Letter from Lascher to Hufstedler (AA-192).

32. Letter from Chodos to Lascher, Sept. 14, 1971 (noting meeting at the State Bar Convention with Justices Molinari,

That would not do, of course, so in January 1972, in Trader Vic's Garden Room a committee formed, consisting of Gideon, Ellis, and 16 others, to recommend a name, create bylaws, and establish membership criteria, stressing experience in quality appellate work.[33]

The founding fathers (they were all men at this time) wanted to build "a statewide group of lawyers who participate regularly and principally in appellate matters."[34] Lawyers from the plaintiff and defense bars, in private and government practice, along with judges would be welcome. The goal was to encourage frequent and easy communication and take a "constructive interest in matters pertaining to appellate courts and appellate lawyers."[35] That interest would not be limited to lobbying but should exchange information, and include lawyers from the plaintiff and defense bars, and from private and government practice. Ultimately, both civil and criminal practitioners were included because problems with the appellate courts were "interrelated."[36]

By summer 1972, after numerous drafts, the group had ratified a constitution and the California Academy of Appellate Lawyers was officially born.[37] Gideon served as the first president, and Ellis was the secretary.[38] Dues were $150 and membership, which has always been by election only, numbered about 20. By 1979, membership had more than doubled to about 55,[39] and hovers around 120 today.[40]

Over the years the group consistently included notables in the appellate world, including Bernie Witkin[41] and appellate justices such as Supreme Court Justices Rose Bird, Joseph Grodin, Marcus Kaufman, Otto Kaus, and Cruz Reynoso and Court of Appeal Justices Kenneth Andreen, Kathy Banke, Nick DiBiaso, Dan Bromberg, Martin Buchanan, Charles Froehlich, Margaret Grignon, Brian Hoffstadt, Bob Kane, Elwood Lui, Dick Neal, Jim Richman, Miriam Vogel, Howard Weiner, and Ninth Circuit Judge Paul Watford.

L–R: Kent Richland and Bernie Witkin. *Photo: CAAL, 1970s.*

A Half Century of Accomplishments

The academy coalesced at a tumultuous time, when many in the bench and bar felt that the appellate court system was overburdened and needed reform.[42] In 1969, the Judicial Council began a rulemaking project to radically overhaul appellate operating procedures. This was prompted by statistics showing serious problems and the need for reform. For example, an increased volume of appeals had made 18- to 25-month delays between the notice of appeal and a decision common. The Administrative Office of the Courts ran a workshop to discuss ideas to address the caseload crisis, such as adding more research attorneys, creating central staff, and using memorandum decisions.[43] The Supreme Court instituted its practice of depublishing Court of Appeal opinions in 1971, and the State Bar Committee on Appellate Courts had proposed that an additional court be created and inserted between the courts of appeal and the Supreme Court.[44]

Academy members, writing individually, vigorously debated these issues among themselves, in the legal press, and in law review articles.[45] As an organization,

Thompson, Kaus, Ault, and Friedman, who unanimously and unambiguously urged the creation of an appellate organization).

33. Appellate Lawyers' Organization Minutes of Jan. 7, 1972 (AA-172).

34. Lascher form letter, Oct. 12, 1970 (AA-234).

35. *Ibid.*

36. Lascher form letter, Oct. 12, 1970 (AA-234).

37. Memo to "All Members of the Appellate Lawyers Group," June 22, 1972 (enclosing a draft constitution and proposing the name California Academy of Appellate Lawyers) (AA 1-7).

38. In the first decade or so, he was followed by Ed Lascher, Cyril Viadro, Ellis Horvitz, Robert Seligson, Paul Selvin, Reed Hunter, Mike Berger, Jerry Braun, and Ed Horowitz. See CAAL letterhead in 1979 listed past presidents and officers. (AA-262.) See also letter from Paul Selvin to Herbert Lasky, Dec. 18, 1972 (noting president and secretary) (AA-423).

39. CAAL Roster, May 15, 1979 (AA-255).

40. *See* https://members.calappellate.org/member-directory [as of Mar. 31, 2023].

41. Letter from Gideon Kanner to Bernie Witkin, Sept. 10, 1973 (welcoming Witkin "as an Honorary Member, with the observation that the honor is ours").

42. E.g., Gustafson, "Some Observations About California Courts of Appeal" 167, 194 fn. 94 (using 1971 census data to assert; "The least populous [California appellate] district would be more populous than any of the following states: New Mexico, Utah, Maine, Rhode Island, Hawaii, New Hampshire, Idaho, Montana, South Dakota, North Dakota, Delaware, Nevada, Vermont, Wyoming, Alaska").

43. See Jeffrey A. Parness & Sandra B. Freeman, "The Process of Factfinding in Judicial Rulemaking: 'Some Kind of Hearing' on the Factual Premises Underlying the Judicial Rules" (1984) 5 *Pace L. R.* 1, 26—30.

44. *See, e.g.,* Shirley Hufstedler, "New Blocks for Old Pyramids: Reshaping the Judicial System" (1971) 44 *Cal. L. R.* 901; "The Court of Review: A New Court for California" (1972) 47 *Cal. St. B. J.* 28; Seth Hufstedler, "California Appellate Court Reform: A Second Look" (1973) 4 *Pac. L. J.* 725.

45. See memo from Hillel Chodos to the Appellate Lawyers Group, March 17, 1972 (lengthy analysis of State Bar

the academy has publicly and repeatedly weighed in on all manner of important appellate issues. The academy opposed depublication, undue delay in appellate processing,[46] the use of research attorneys (in the early days), limitations on the lengths of briefs,[47] permanent divisions within appellate districts,[48] increases to the costs of reporter's transcripts,[49] inadequate judicial pay,[50] and any splitting or reorganizing of the Ninth Circuit Court of Appeals.[51] The academy also expressed "strong opposition to proposed cuts in the budget of the California Supreme Court."[52] The academy supported: the citability of Court of Appeal opinions immediately upon publication (rather than awaiting the Supreme Court's grant-of-review period);[53] allowing administrative presiding justices to transfer cases between divisions;[54] the recording of and public accessibility to oral arguments;[55] and the idea of en banc arguments within districts.[56] The academy also urged: the use of tentative opinions or focus letters;[57] the use of summary dispositions without oral argument by the Supreme Court;[58] and that death penalty appeals be heard in the California Courts of Appeal.[59]

L–R: Peter Davis and Ellis Horvitz. *Photo: CAAL, 1970s.*

That level of active involvement has remained consistent over the decades, including filing amicus briefs with the Supreme Court. For example, when the Supreme Court reviewed the propriety of an oral argument notice form used by a particular court of appeal in *People v. Pena*,[60] the academy filed an amicus brief emphasizing the importance of oral argument to the appellate process and urging that any oral argument waiver form should not unnecessarily discourage or infringe on the exercise of the right to oral argument.

Similarly, when the Supreme Court addressed the question of what specific document's notice should trigger the time to appeal (i.e., a statement of decision or file-stamped ruling), in *Alan v. American Honda*,[61] the academy filed an amicus brief highlighting the need for clear rules assuring that the courts and litigants have an unambiguous understanding of when a notice of appeal must be filed, and offering proposals.

Active academy members also have authored the leading appellate treatises, including The Rutter Group's *California Practice Guide on Civil Appeals and Writs* (Jon Eisenberg, Ellis Horvitz, Howard Weiner, and most recently Laurie Hepler), various chapters in the CEB appellate and writ practice guides, Matthew Bender's practice guide: *California Civil Appeals and Writs* (edited by Kira Klatchko & Ben Shatz), West's *California Litigation Forms: Civil Appeals & Writs* (co-authored by Kent Richland), *Appellate Practice in Federal and State Courts* (edited by David Axelrad with Rick Derevan and Robin Meadow), and *Advanced Topics in Appellate Practice: The Path of Mastery* (Charlie Bird).

Almost by definition, academy members have been some of the most active lawyers handling cases in the state's appellate courts. Although a listing of cases involving academy members would be too extensive, consider only Supreme Court cases in which an academy president was counsel — on both sides of the case. The high court heard at least 18 such cases between 1970 and

Committee on Appellate Courts to establish a Court of Review) (AA-133-141).

46. CAAL letter (Pres. Ray Cardozo) to Judicial Council, Mar. 29, 2022; CAAL letter (Pres. Cardozo) to Cal. Supreme Court, Aug. 18, 2020.

47. E.g., CAAL letter (Pres. Jerome Braun) to Judicial Council AOC, Nov. 6, 1981 (opposing 50-page limit on briefs; opposing reduction of stipulated extensions to only 30 days); CAAL letter to Cal. Supreme Court, Apr. 5, 1988 (expressing "enthusiastic support for efforts to expedite appeals" but still allowing reasonable time for briefing, and urging alternatives to clerk's transcripts); CAAL letter (Pres. Victoria De Goff) to Ninth Cir. Clerk Cathy Catterson, July 23, 1992 (expressing "grave reservations about . . . the proposed rule drastically reducing the allowable length of briefs in civil cases").

48. Letter from Lascher to Leonard Friedman, Mar. 20, 1982.

49. CAAL letter (Pres. John Taylor) to Assemblymember Miguel Santiago, June 20, 2019.

50. CAAL letter (Pres. Charles Bird) to U.S. Senate and House Chairs, Sept. 7, 2007.

51. CAAL letter (Pres. Jay-Allen Eisen) to U.S. Representatives, Feb. 22, 1999 ("vigorously" opposing SB 253, which would have split California into divisions of the Ninth Circuit).

52. CAAL letter (Pres. De Goff) to Pres. Pro-Tem of the Senate David Roberti, June 3, 1992.

53. CAAL letter (Pres. Douglas Young) to Cal. Supreme Court, June 7, 1996.

54. CAAL letter (Pres. Gerald Uelmen) to AOC, Feb. 15, 1991.

55. CAAL letter (Pres. Charles Bird) to Chief Justice Ronald George, June 8, 2008; CAAL letter (Pres. Charles Bird) to the six Court of Appeal presiding justices, Feb. 27, 2008.

56. CAAL letter (Pres. Jerome Falk) to Judicial Council's Appellate Standing Advisory Committee, June 17, 1994.

57. *Ibid.*

58. *Ibid.*

59. *Ibid.*

60. *People v. Pena* (2004) 32 Cal.4th 389.

61. *Alan v. American Honda* (2007) 40 Cal.4th 894.

2020. Obviously, the list of cases would balloon if it contained only a president on one side of the case and would reach tremendous length if it included just cases with even a single academy member involved at all. The point is merely that academy members are an integral part of the work of the Supreme Court and appellate practice in California generally.

The Academy Today

Today the academy has over 100 members engaged in a variety of appellate activities interacting both in person and online. Members regularly post questions on an active listserv and receive advice and support, drawing on the experiences of the entire academy. Questions can range from the geographically specific to tricky issues arising in complicated procedural situations.

The academy also hosts in-person meetings several times a year. These gatherings embody the academy's initial purpose as envisioned by the founders: to allow experienced appellate lawyers, judges, academics, and court staff to candidly discuss all aspects of appellate practice and appellate justice, while enjoying great food and wine.

Discussion of pending cases with justices is naturally off-limits as a matter of ethics, but short of that, academy members and their guests are free to raise and debate all manner of substantive and procedural issues. Again, such discussions serve the purpose of keeping members of the practicing bar and the bench informed on a host of issues, such as publication of opinions, judicial elections, court budgets, appellate ethics, sanctions, memorandum opinions, reliance on staff attorneys, and the value of oral argument. A fundamental ground rule is confidentiality, making discussions frank and sometimes surprising.

When the State Bar created general MCLE requirements, and later specialized appellate MCLE requirements, the academy became certified to provide MCLE and appellate specialization credits, and focused even more rigorously on providing high quality programs covering advanced topics, involving judicial and academic speakers.

Along with a member directory and application instructions, the academy's website includes letters and briefs filed by the academy's amicus committee. That committee entertains suggestions from the full membership and the public about cases that might benefit from academy amicus participation and what positions to take. The academy maintains "side neutrality," meaning that it does not seek to favor any specific partisan interests (e.g., plaintiff's side, defense side, criminal prosecution or defense) or to take sides in divisive issues, but rather seeks outcomes that best serve the goals of appellate justice. This includes promoting and encouraging sound appellate procedures designed to ensure fair and effective disposition of appeals and writs. The academy's

L–R: Robert Hinerfeld, Reed Hunter and Sanford Svetcov. *Photo: CAAL, 1970s.*

numerous amicus briefs and letters over the years have addressed a variety of appellate issues such as judicial notice, appealability, appellate timing, and writ practice.

The group's rules committee evaluates and proposes changes to the rules governing appellate practice. For example, following the academy's long-standing interest in publication of appellate opinions, it submitted letters in 2006 supporting amending the publication rule so that courts should publish opinions that meet criteria for publication.[62] Similarly, in 2008 the academy urged that the Supreme Court and Court of Appeal produce live and archived video of oral arguments available to the public — something that has come to fruition with respect to the Supreme Court and is in progress with the Courts of Appeal.[63]

Academy members are now — and historically have been — active participants and leaders of every regional appellate bar organization

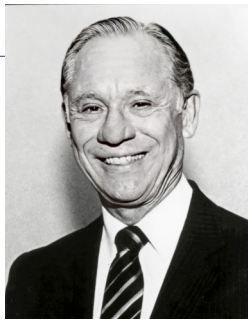
Academy members are now — and historically have been — active participants and leaders of every regional appellate bar organization as well as the various State Bar (now California Lawyers Association) appellate committees, the Judicial Council's Appellate Advisory Committee, and every other similar group. And, even after 50-plus years, the academy is going strong and its members have made a lasting contribution to California practice and law. ✯

Benjamin G. Shatz, a CAAL member, considers himself blessed to have worked with Gideon Kanner and Reed Hunter early in his career. He currently co-leads the Appellate Practice at Manatt, Phelps & Phillips, LLP in Los Angeles with Mike Berger.

62. CAAL Letters (Pres. Robin Meadow) to Admin. Office of the Courts, Jan. 4 and Mar. 7, 2006.
63. *Supra*, n. 62.

Justice John A. Arguelles

1927–2022



Born in Los Angeles in 1927, John Arthur Arguelles entered the United States Navy near the end of World War II. Following his discharge, he earned both his undergraduate degree in economics and his J.D. from UCLA. He served on the Los Angeles Municipal and Superior courts, the California Court of Appeal, Second Appellate District, Division 4, and finally on the California Supreme Court, where he was an associate justice, and the second Latino to sit on the court, from 1987 to 1989.

He and his wife Martha, who predeceased him, had three children. Justice Arguelles died on April 10, 2022, at the age of 94.

On December 7, 2022, the California Supreme Court convened a special memorial session, presided over by then-Chief Justice Tani Cantil-Sakauye, honoring Justice Arguelles. Three former colleagues spoke. The full transcript will eventually be published in the Court's *Official Reports*. The version presented below has been edited for length and clarity.

* * *

CHIEF JUSTICE CANTIL-SAKAUYE: Good morning, welcome to oral argument. This is a special day because oral argument will be preceded by a memorial for our colleague, Supreme Court Justice John A. Arguelles. We have three speakers with us, and we are welcoming them today. We'll begin with Robert Loewen, former partner at Gibson, Dunn & Crutcher.

ROBERT LOEWEN: Justice Arguelles joined Gibson, Dunn & Crutcher as counsel in 1989 when he retired from this bench, and that was an unusual designation in those days, but he was a pretty unusual guy. We quickly became friends. Lawyers young and old started coming to John for his wisdom and advice. I especially liked to discuss complex questions of legal ethics, a subject on which he was both knowledgeable and wise.

I also sought his advice on appellate practice. One time I was writing an appellate brief, and I was concerned there was a precedent that may not get enough consideration of important differences and probably to the benefit of my opponent. John said, "You need to bend the twig." I must have looked puzzled because he explained the metaphor: "A bush that grows near the sea often leans away from the prevailing wind," he said. John shared his own experience as a judge where he had been persuaded to view a certain case differently than it might first appear. "The lawyers in those cases began by presenting the facts in a way that made me lean in the direction of their argument," he said. They bent the twig. Once he saw the facts from their perspective, it was easy for them to point out the distinction that they wanted to make.

CHIEF JUSTICE CANTIL-SAKAUYE: Thank you, Mr. Loewen, for those memories and the wisdom of Justice Arguelles. We next invite Presiding Justice Manuel Ramirez of the Court of Appeal, Fourth Appellate District, Division Two. Good morning.

PRESIDING JUSTICE MANUEL RAMIREZ: Madam Chief, good morning. Members, honorable members of this court, good morning. Thank you very much, Chief, for inviting me to join you in this celebration of life of our former colleague and dear friend.

To properly recognize Justice Arguelles, I would like to share two views of him, the professional view, with which many here are familiar, and a personal view. My view of my relationship with someone I consider to be a great, wonderful gentleman. Someone who, in all aspects of his life, was elegant, dignified, and the model of civility. As I reflected on Justice Arguelles' legal career, which spanned many, many decades, I am reminded of the words spoken by Oliver Wendell Holmes, "Continuity with the past is a necessity, it is not a duty." And so, appraisal and a highlight of Justice Arguelles' past tells us many things. Justice Arguelles served in the United States Navy in 1945, 1946, and he was honorably discharged. He graduated from the University of California, Los Angeles in 1950, received his Juris Doctorate from UCLA School of Law in 1954, and was admitted to the State of California Bar in 1955. During eight years of private practice, he was a registered legislative advocate in Sacramento.

Presiding Justice Manuel Ramirez. *Photo: California Courts*.

Later, he was president of the East Los Angeles Montebello Bar Association, a founding member of the Mexican American Bar Association, and a Montebello city councilman, elected to that position in April 1962 by the then-largest vote in the history of the city of Montebello. In December 1963, just before he was to begin serving as mayor, he was appointed to the Municipal Court, East Los Angeles District, by Governor Edmund G. "Pat"

From left: Justices Armand Arabian, John Arguelles, and Edward Panelli, and Chief Justice Ronald George. *Photo: Greg Verville.*

Brown. Governor Ronald Reagan then appointed him to the Los Angeles County Superior Court in September of 1969. While a Superior Court judge, Justice Arguelles was an executive board member and a vice president of the California Judges Association. And from 1977 to 1979, he was a member of the California Judicial Council. In May 1984, after almost 21 years on the trial bench, Governor George Deukmejian appointed him as an Associate Justice on the Second District Court of Appeal. Three years later, in March of 1987, Governor Deukmejian appointed him to the California Supreme Court, where he served as an associate justice until March of 1989.

Justice Arguelles chaired and co-chaired two, in my opinion, landmark Judicial Council committees that studied the language needs of non-English-speaking persons. He was appointed to that position by Chief Justice Donald Wright to chair the committee that started its studies in 1975 and concluded in 1977. That committee continues to this day and now oversees the following language access metrics: Spanish, Vietnamese, Mandarin, Cantonese, Korean, Punjabi, Russian, Arabic, Farsi, Tagalog, and many, many others, as well as the Certified Court Sign Language Interpreters Program. Imagine that. That was the committee he started. It is the most extensive interpreter program, Chief, as you know, in the entire world.

Justice Arguelles' judicial career was noteworthy, as having served at four court levels, the municipal court, the superior court, the Court of Appeal, and the Supreme Court. Even more telling, however, in my opinion, is the fact that he was appointed four times by three very different governors of both major political parties. I celebrate his judicial career by recognizing his generosity of spirit, his compassion, and his faith in his fellow Americans, which he exemplified in his own very unique manner in mentoring me and inspiring others.

I made my way through college on a really difficult and different road. And throughout that entire time, I was guided by Justice Arguelles. Now, you may all be thinking, why am I, as the presiding justice of the Court of Appeal in Riverside, talking about someone who worked, lived, and grew up in Los Angeles and later in Orange County? So as trial lawyers have said to all of us, bear with me, Your Honor, I'll connect the dots in just a moment, very briefly.

I grew up in a family of 10, where we were long on love but very, very short on money. As the oldest male in a Mexican American family, I worked throughout my high school years to help out my family. But between work and school activities, my grades suffered. And I wasn't admitted to a traditional four-year school. Consequently, I enrolled in the evening program at East Los Angeles Junior College. That decision allowed me to work full time from 6 o'clock in the morning to 3 o'clock in the afternoon, which, in turn, gave me the opportunity to attend classes at East Los Angeles Junior College from 4 to 10 p.m., unless I had a chemistry or biology lab, in which case it would be 4 to 11 pm. I carried a full load the entire time of 20 units.

Because it was so unlikely that a night student working full time could graduate in three semesters and maintain a 3.5 grade point average, the dean of discipline called me into his office. He was concerned that something unusual had happened. After reviewing extensively my transcripts and offering me one of the warmest congratulations I have ever received, Dean Butcher did something that literally set the course of my life. He contacted Justice Arguelles and told him that he had someone in his office that he wanted him to meet. I spoke with Justice Arguelles in Dean Butcher's office on the phone, and Justice Arguelles told me to contact him two years later when I graduated from college. I did, and he invited me to the courthouse in Pomona to meet with him for lunch. There, he introduced me to many of his colleagues, including Judge Carlos Teran and Judge Charles Vogel. Inspired by that meeting, I decided to go to law school, and from that meeting, I walked away with almost 15 or 16 letters of recommendation from all of the judges who were in the lunchroom at the time that meeting took place.

Justice Arguelles continued to mentor me after I graduated from Loyola and began my career as a deputy district attorney. He took an interest in my career, and he advised me on all my assignments. When I was appointed to the municipal court by Governor Deukmejian in 1983, Justice Arguelles was there to administer the oath of office, and the same for superior court in Orange County. Seven years later, I stood before the Judicial Nominees Evaluation Commission for a confirmation to the Court of Appeal, and Justice Arguelles, now retired from the California Supreme Court, was there to speak on my behalf. Throughout my entire career as an attorney and on the bench, Justice Arguelles was there. He continued to guide me and provide me with his counsel.

I am so fortunate and so blessed to be able to call him my friend, my mentor.

I would, in closing, submit to each of you that Justice Arguelles was a man of his generation, rightly called the greatest generation. Born in 1927, living as a child and teenager through the Great Depression, joining the Navy while still a teenager, rising to community service and leadership as an adult, Justice Arguelles was a leader in that generation which brought this country to the fulfillment of its destiny. As was said of John Adams, a leader of another generation, so too with Justice Arguelles. "From fancy's dreams to active virtue turn, let freedom, friendship, faith, thy soul engage and serve like them, thy country, and thy age." Justice Arguelles possessed each of those three wonderful virtues. His soul engaged in freedom in his many published appellate and Supreme Court opinions and his vital and important contributions as a Judicial Council member. His entire professional career was tirelessly dedicated and relentlessly committed to the improvement of our system of administration of justice. God bless him and may he rest in peace. Again, I thank you all for the privilege to stand before you and pay tribute to a very dear and special former member of our profession, a member of this court, and my dear friend, Justice Arguelles. Thank you, Chief.

CHIEF JUSTICE CANTIL-SAKAUYE: Thank you, Presiding Justice Ramirez. Next, we invite the Honorable Marvin R. Baxter, Associate Justice, Supreme Court of California, retired. Welcome. We miss you. How odd it is to see you on the other side.

JUSTICE MARVIN R. BAXTER, RET.: Well, good morning, Chief and Associate Justices. May it please the court.

My relationship with John Arguelles was formed through his appointments to the Second District Court of Appeal in 1984 and the California Supreme Court in 1987. My job at the time was the appointment secretary, and my responsibility was to investigate and evaluate applicants for executive and judicial appointments and to recommend those most worthy to the governor. After doing so for these judicial positions, I concluded that on a scale of 1 to 10, John Arguelles was a 10. His reputation as a highly regarded and experienced trial judge was clear, having served six years on the Los Angeles Municipal Court appointed by Governor "Pat" Brown and 15 years on the Los Angeles Superior Court through appointment by Governor Ronald Reagan. It was also apparent that his background contributed greatly to his outstanding personal attributes and his proven ability to relate extremely well with others. Simply stated, he was a man of the people. Born in 1927 and raised in East Los Angeles during the Great Depression, when things were really tough, he held odd jobs to help support his family, and he served in the U.S. Navy after graduating from high school.

Justice Marvin Baxter. *Photo: California Courts*.

Once honorably discharged and with the help of the GI Bill, he fulfilled his dream of earning undergraduate and law degrees from his beloved UCLA. After being admitted to the California Bar in 1955, John entered private law practice in East Los Angeles and, in his own words, specialized in anything that walked through the door. The opportunities in the law for women and minorities were severely limited, especially at that time, but John persevered and overcame the obstacles and earned an excellent reputation as a lawyer and as a community leader. He represented people with everyday legal problems, some trade associations at legislative hearings in Sacramento, was one of the founding members of the Mexican American Bar Association of Los Angeles and served as a member of the Montebello City Council, among other accomplishments.

That success, that exposure, and the respect that he earned from across the political aisle led to an outstanding 26-year judicial career with service at every level of California's judicial system. I must admit that Governor Deukmejian was very well acquainted with John and was fully aware of his impressive background and reputation. So I must acknowledge that my research and my recommendations were simply icing on the cake when the governor elevated Judge Arguelles to California's appellate and Supreme Courts. My only regret is that my tenure on the Supreme Court did not overlap with that of Justice Arguelles. He was a seasoned jurist with a wonderful down-to-earth personality, always willing to consider the views of others with an open mind.

We stayed in touch with one another over the years. As recently as a week or so before he passed, we had a conversation. He would often mention his love and affection and appreciation of Martha and their children and considered them his greatest source of happiness and inspiration. His parting words during our final conversation were that he was grateful for having lived such a long, good and fulfilled life. We're all grateful for his significant contributions to the administration of justice in California, and for those fortunate enough to have known John personally, the memories of his friendship and his grace and his courtesy will live on. Thank you very much.

CHIEF JUSTICE CANTIL-SAKAUYE: Thank you, Justice Baxter. The Supreme Court thanks all of the speakers today for such a profile of a great man. ✯

Justice Norman L. Epstein

1933-2023

BY JOHN R. WIERZBICKI

Norman Epstein. *Photo: California Courts*.

Norman L. Epstein was born April 9, 1933, in Los Angeles, the year of two great local events, the Long Beach earthquake and the Griffith Park fire — harbingers that something extraordinary had occurred. His father owned Efferg Drugs, on the corner of Third and Hill streets, at the base of Angels Flight. His mother was an amateur pianist and painter.

Norm, an only child, was wracked with asthma, and his parents moved often, hoping to find a home that would be healthier for him. Eventually, his health improved and the family landed on Croft Avenue in West Hollywood, at the time a predominantly Jewish neighborhood. Across the street lived the great pianist André Previn, who had fled Hitler's Germany. Norm's mother hired Previn to give piano lessons to both her and to Norm. Norm would later say that, in his case, the lessons were unavailing.

Norm persevered in his studies and became valedictorian at Fairfax High School. Notable alumni from that era include actor David Janssen, musician Herb Alpert, and football quarterback-turned-politician Jack Kemp. Norm went on to UCLA, where he benefited from a tuition-free education, an experience for which he remained grateful. He met Ann Snyder during his junior year, and they married after his first year of law school. Ann was a teacher but left that profession once they had two children: Mark (who is now a Superior Court judge) and Carol. She later started a children's book fair company. Ann predeceased Norm, passing away in 2008.

Norm was torn between entering a doctoral program in history or political science and going to law school. He later said that he attended UCLA Law School because he could afford to go there, but in the process became a lifelong Bruin. During the summer, he worked for Carnation Dairy, delivering milk in a nonrefrigerated truck that he had to fill every day with burlap bags of ice. Norm later had the good fortune to be hired as a summer clerk by Legislative Counsel Ralph Kleps, a job that Norm said taught him more about the process of law and legislative drafting than anything else he could have done.

On graduating from law school in 1958, Norm sought a position with the Office of the California Attorney General, then headed by Edmund G. "Pat" Brown. He recalled that during the bulk of his interview, he sat quietly while the head of the L.A. office was on the phone with Brown about the upcoming gubernatorial election, in which Brown was running. Norm later joked that they were forced to hire him because he heard too much.

In the early 1960s, Norm was assigned to write an Attorney General Opinion addressing whether a school district would violate the free school provision of the state Constitution by charging students a dime to bowl at a bowling center as part of an elective gym class. Norm wrote that it did.[1] Soon after, he was ushered into Stanley Mosk's office. Mosk had succeeded Brown as attorney general. As Norm entered, Mosk was sitting behind his desk chatting with someone. Norm sat to the side. Finally, Mosk asked the visitor what he wanted. The visitor, who was with the bowling industry, expressed deep concern about the possible effect of an unfavorable opinion. Mosk turned to Norm and asked: "What's your view?" Norm, consistent with the published opinion, said he thought the school's charge was unconstitutional. "Well, I guess that's it," Mosk responded, and dismissed the visitor. Norm never forgot that episode.

Norm didn't stay long with the attorney general's office, however. The California State College (now California State University) system had been formed, and the attorney general assigned Norm to do legal work for the system while it searched for its first general counsel. He must have impressed them, because he was asked to take the role, despite his having been in practice only three years. He would go on to create and lead the counsel's office of 11 attorneys to serve the 19-campus system and the California Maritime Academy.

Norman Epstein. *Photo: California Courts*.

During the 1960s, tumult enveloped the state college system, of which the violent student protests at San Francisco State during 1968–1969 were the most notable. As the campus turmoil came to a head, the AFL-CIO-affiliated teachers' union threatened a general strike across the state college system. Norm successfully reached a settlement with the union and averted the strike. But not everyone was happy, and at the following Board of Trustees meeting, a trustee who thought Norm had acted beyond his authority moved a vote of no confidence. No one seconded.

Governor Ronald Reagan, who attended the Board of Trustees meetings due to his position and so personally got to see Norm at work, later rewarded him for his efforts on behalf of the state college system. Despite the fact that Norm was a Democrat, the Republican Reagan

1. Opinion No. 61-137 (1962) 39 Cal. Atty. Gen. 136.

Left to right: Judge Ronald Tochterman, Sacramento County Superior Court; Justice George Nicholson, Court of Appeal, Third Appellate District; Bernard Witkin; and Presiding Justice Norman L. Epstein, Court of Appeal, Second Appellate District, Division Four. *Photo by Brenda Nicholson, circa 1991.*

appointed Norm to the Los Angeles Municipal Court in one of the last acts of his administration.

In 1979, just four years after joining the court, Norm's municipal court colleagues elected him assistant presiding judge, which typically meant that Norm would be presiding judge the following year. But he did not serve the municipal court in that position because Governor Jerry Brown, a Democrat, elevated him to the Los Angeles Superior Court in March 1980. Norm tried again in 1990, running for election as assistant presiding judge in the superior court, as a stepping stone to becoming presiding judge. But a third governor had other plans. This time, Republican George Deukmejian intervened by nominating Norm to the Second District Court of Appeal. It took a quarter of a decade, and four governors, for Norm to finally reach his goal. In 2004, Governor Arnold Schwarzenegger, a Republican, appointed Norm as presiding justice of the Second District's Fourth Division.

Norm once said he never found being on the Court of Appeal boring, and proclaimed that one of the job's great benefits was the variety of material to write about. He would go on to write more than 2,000 opinions, over a hundred dissents, and a smattering of concurring opinions as an appellate justice. But when asked to identify a particular stand-out case, he demurred, and instead pointed to his whole body of work.[2]

When he started as a judge in 1975, Norm recognized that he knew little about criminal law. To educate himself, he read, analyzed, and wrote summaries of every new California criminal case. The California Continuing Education of the Bar published these as the *Digest of California Criminal Cases,* which grew to five volumes before it ceased publication in 1980. Norm also wrote a monthly commentary on criminal cases for the California Judges Association.

If self-education was Norm's priority, educating others was his passion. Just a few years after taking classes at the California Judicial College as a new municipal court judge, he was teaching incoming judges. He would go on to become dean of the college in 1981 and a two-time recipient of the Bernard Jefferson Award for Judicial Education.

Norm's involvement with the college led to some of the most important relationships in his life. Two notable ones he would call the "Bernie of the South" and the "Bernie of the North." The southern Bernie was Bernard Jefferson of Los Angeles, who was the second African American appellate judge in California and a renowned expert on evidence issues. For seven years, Norm and Jefferson taught an evidence course together at the Judicial College, along with a third lecturer. She was Ann Rutherford, a superior court judge from Butte County.

After spending a few years as a widower, Norm married Rutherford. Los Angeles Superior Court Judge David Yaffe, a close friend of Norm's from his days at UCLA and his biking buddy, officiated at the wedding. On weekends, Norm and Yaffe used to bicycle from Norm's house in Mar Vista up over the hill, have breakfast in the San Fernando Valley, then bicycle back. In later years, they had to cut it back to biking to Marina del Rey and back.

The northern Bernie was Bernie Witkin, who hailed from Berkeley and helped found the college. In 1980, Witkin was seeking a potential co-author on criminal law. In just five years after becoming a municipal court judge, Norm had developed himself into a recognized expert in the field, and colleagues at the college recommended him to Witkin. Witkin called Norm to invite him to collaborate on *Crimes* and *Criminal Procedure*, which in 1988 were combined into one and renamed Witkin and Epstein, *California Criminal Law*. Their co-authorship would continue until Witkin's death in 1995.

During his long judicial career, Norm accumulated many awards, including the State Bar's Bernard Witkin Medal (2001) and the Judicial Council's Jurist of the Year (2007). On his retirement in 2018, the *Metropolitan News-Enterprise* said that Norm was "generally regarded as one of California's outstanding appellate jurists" and was "known both for his affability and scholarship."[3] But as with most things dealing with California law, perhaps Bernie Witkin summed it up best. In January 1995, the *Met News* hosted a dinner honoring Norm as its "Person of the Year," at which Witkin was invited to speak. Witkin, who would die before the year was out, said this about Norm: "I will soon reach my cabin in the sky. Not so long afterwards, you will arrive on your bicycle — 10 speed? More likely 50 speed." But before that day comes, Witkin exhorted Norm to continue the good fight in their joint endeavor to "preserve the rule of law and the free enterprise system of this great Western

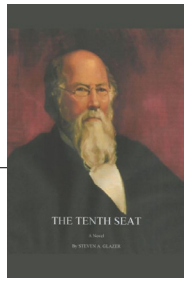
Continued on page 26

2. Transcript of Interview by Larry Rubin of Norman Epstein (July 20, 2016), California Appellate Court Legacy Project, 43. https://www.courts.ca.gov/documents/Norman_Epstein_7124.pdf [as of Oct. 31, 2023].

3. "Presiding Justice Norman L. Epstein Slates Aug. 22 Retirement From Court of Appeal," *Metropolitan News-Enterprise*, June 13, 2018, http://www.metnews.com/articles/2018/epstein061318.htm [as of Aug. 9, 2023].

Stephen Field, Reconsidered

BY BOB SNIDER



Steven Glazer
The Tenth Seat: A Novel
Steven Glazer, 2022

"To me the attraction of the historical novel," Gore Vidal once wrote, "is that one can be as meticulous (or as careless!) as the historian and yet reserve the right not only to rearrange events, but most important, to attribute motive."[1] The first book by Steven Glazer, a retired federal administrative law judge, is a fictionalized history of Stephen Field, and it succeeds as both fiction and history.

Field was the first California Supreme Court justice to become an associate justice of the United States Supreme Court. His 35 years on the high court's bench have been surpassed by only Justice William O. Douglas, at least so far. The son of a comfortable Massachusetts family, Field graduated at age 20 from Williams College in 1837 and then followed his older brother David into a prestigious Manhattan law firm, where he practiced for 10 years.

Already well traveled in Europe, Field sailed to California in 1849 as one of several thousand Argonauts, as the gold-seeking miners and capitalists were called. Field realized that the fledging miners, real estate speculators, and small businessmen would need attorneys, to say nothing of a new legal code necessary for California's future statehood. Thus, to serve his fellow East Coast emigrants, he set up shop as a sole practitioner in newly christened San Francisco.

Field helped organize a land rush in what is now Marysville, Yuba City's neighbor. He soon became a wealthy real estate lawyer as well as an elected First Alcalde, the traditional Mexican magistrate who served simultaneously as a judicial officer and mayor. But after the legislature created a local judgeship, the appointee despised Field for his New York roots and his perceived pro-abolitionist views. Ultimately, the dissolute judge's enmity led to Field's brief incarceration, temporary disbarment, and exclusion from local practice, causing him much economic distress.

When Field also failed at financial and real estate speculating, he ran for the Assembly and won the seat. He returned to law practice in Marysville after losing a state Senate race. Elected to the California Supreme Court in 1857, Field ascended to the chief justice's seat by 1859, only 10 years after arriving in the state. That year he married Sue Virginia Sweringen Field, his wife for the next 40 years.

1. Gore Vidal, *Burr: A Novel*, New York: Vintage, 1973, 429.

The novel takes us through the Field Court's early decisions on topics ranging from formal business incorporation to incestuous marriage. Then, during the Civil War in 1863, President Lincoln and the Senate appointed Field to the unprecedented tenth Supreme Court seat, which was created to administer the new federal circuits in the West.

Associate justices at that time were required to "ride circuit," yet despite the coming Transcontinental Railroad, no justice was disposed to travel to nascent California, Oregon, and the western territories. Lincoln therefore nominated Field, at the urging of several prominent influencers: California Governor Leland Stanford, Secretary of War Edwin Stanton, and Field's own brother, by then a close presidential advisor. The new tenth seat had the added bonus of packing the Supreme Court with justices loyal to the Union.

Although the extra seat was soon eliminated in 1866 by Congress's Radical Republicans in order to prevent President Andrew Johnson from filling it, Field took over a deceased justice's seat and remained on the court through 1897. His next three decades were highlighted by the *Slaughter-House Cases*,[2] where Field dissented from the landmark ruling limiting the new Fourteenth Amendment's reach, and *Plessy v. Ferguson*,[3] where he joined the Court's majority in spawning the doctrine of racially separate but equal treatment.

Thanks to the device of historical fiction, though, this novel is far from a dry exegesis of Field's state and federal opinions. Instead, Glazer unearths historical truths and animates them through imaginary dialogue that draws the reader in. The result is a clever interplay of fact and fantasy. Authentic trial accounts punctuate the novel, such as the lengthy divorce / alimony proceeding between a United States senator from Nevada and, depending on whom one believes, his wife or mistress. That trial, which gained national and international attention, is brought to life in the author's hands.

Other courtroom happenings colorfully describe the antics of Field's contemporaries, even though the subject himself appears uninvolved at first. As it turns out, a plaintiff whom he ruled against — who happens to be, like Field, a former California chief justice — encounters Field a year later in a jaw-dropping encounter. To disclose more would spoil the story, but suffice it to say that the true-life episode is worthy of a Netflix plot twist.

Given California's Code of Judicial Ethics and current Rules of Professional Conduct, it's surprising how Field discusses pending cases with friends and family members, sits for an oral argument delivered by his brother, and assists a defendant who eventually appears before his

2. (1873) 83 U.S. 36.
3. (1896) 163 U.S. 537.

own court. Although those episodes actually took place, one can't always tell whether the author's account of oral arguments in either supreme court are verbatim or invented. Yet there lies the charm of the novel, which is peppered with real but fictionalized characters like Stanford and Lincoln when they discuss Field's nomination, or Chief Justice Roger Taney when he jousts with Field about slavery and suffrage.

The author posits plausible conversations among these historical luminaries. At the same time, he imagines Field's marital counseling for Chief Justice Salmon Chase's daughter and her husband; Field's intermittent affair with a Donner Party survivor; and his philosophical debate with John Marshall Harlan about race while *Plessy v. Ferguson* was pending. The book also contains an informative digression on the *Dred Scott*[4] case, which vindicated slavery and led to the North-South divide and Civil War.

Predating *Dred Scott*, California's 1850 admission to statehood upset the balance between free states and slave states. It also cleaved the state Supreme Court into pro-slavery and "Free-Soiler" anti-slavery camps, culminating in a lawyers' duel. While the nation may seem gun-obsessed now, a look back at nineteenth-century California shows that personally carrying handguns was widespread, even among attorneys and judges. Fistfights, brandished pistols, and a fatal second duel all enliven the Field saga. In a nice counterpoint to the novel, those events are completely factual.

Field's role in upholding segregation in *Plessy v. Ferguson* appears at odds with his earlier opposition to anti-Asian racism, which had been memorialized in state laws such as the one prohibiting Chinese witnesses from testifying against Caucasians. As a judge in *In re Ah Fong*,[5] Field held in 1874 that the federal government, not California, had exclusive jurisdiction over immigration. That decision halted the state's practice of rejecting Chinese entrants who, by mere conjecture, might become criminals, public charges, or "lewd and debauched women."

A few years later, Field's presidential aspirations were torpedoed by his support of Chinese immigrant rights, as well as by his close relationship with four California railroad barons with familiar surnames — Stanford, Mark Hopkins, Collis Huntington, and Charles Crocker. The public and press viewed those magnates as oppressing farmers and stockmen, exploiting small business owners, and gouging small communities that wanted branch lines.

Glazer adroitly excavates the mind of Field, a strict constructionist whose judicial philosophy about the legislature's primacy was unshaken throughout his career. The author's anachronistic use of modern language like "Kinda" and "Yeah, sure" in conversations involving Field, who died in 1899, is a little disconcerting at first. But overall, the author creditably voices his subject's innermost thoughts and motivations as he ponders how to decide an issue. Glazer devises fictitious dialogue between Field and his wife to insert necessary historical details. He also turns some elegant courtroom phrases, such as "The well fronting the bench transformed from lawyers surrounding a woman to a buzzing hive of quarreling drones and a weeping queen bee."

At 42 chapters, *The Tenth Seat is* not a frothy beach read, yet legal history buffs, especially California ones, will love this book. So will mainliners of political gossip, as they savor the machinations behind Field's state judicial election and federal judicial appointment. While the novel is an entertaining tale, it's also meticulously researched, with over 600 end notes that run almost a hundred pages. And the several dozen illustrations and museum-quality photographs interspersed in the text transport the reader nimbly to the late nineteenth-century era. Today, when court-packing, states' rights, and racial tension are all top of mind in this country, *The Tenth Seat* reminds us of what French critic Jean-Baptiste Alphonse Karr wrote in 1849: "Plus ça change, plus c'est la même chose." ✯

4. *Dred Scott v. Sandford* (1857) 60 U.S. 393.
5. (C.C D. Cal. 1874) 1 Fed. 213.

Robert M. Snider (bobsnider58@gmail.com), a Palm Desert resident, serves as an administrative hearing officer for several public agencies and cities in Southern California. He is a retired California deputy attorney general. This review was first published in the February 2023 issue of *Los Angeles Lawyer* and is reprinted here with permission.

JUSTICE NORMAN L. EPSTEIN *cont'd from pg. 24*

democracy." He concluded: "I'm glad that I lived long enough to know you."[4]

I echo Witkin's statement. Norm was one of the first people I met after my appointment as editor of the Witkin treatises, and we worked together on *Criminal Law*. I then got to know him better when I interviewed him for the CSCHS's oral history project on Bernie Witkin. He was unfailingly gracious and erudite. His death is a great loss.

Norman Epstein died on March 24, 2023, at age 89. ✯

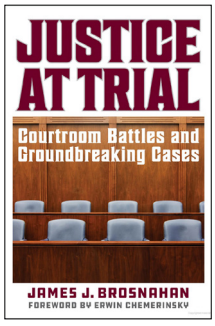
4. Witkin, handwritten notes attached to letter dated Dec. 19, 1994 from Jo-Ann Grace, president, *Metropolitan News* Company, Witkin Archive, California Judicial Center Library, 2.

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.

Doing Well While Doing Good

BY HON. JOSEPH R. GRODIN

James J. Brosnahan
Justice at Trial: Courtroom Battles and Groundbreaking Cases
Lanham, MD: Rowman & Littlefield Publishers, 2023



The Greek poet Archilochus wrote, "The fox knows many things, but the hedgehog knows one big thing." In modern times the philosopher Isaiah Berlin, in an essay on Tolstoy, drew upon this ancient metaphor to divide writers and thinkers into those who view the world through the lens of a single overarching idea (the hedgehogs) and those (the foxes) who decline such sweeping philosophical concepts in favor of describing the world through a variety of experiences. The distinction is useful but subject to qualification; a keen observer is likely to come equipped with bifocal vision, capable of seeing and displaying both foxian and hedgehogian perspectives — both the detail and the landscape, and areas in between.

Indeed, such multilevel vision is essential for a great trial lawyer, and is on vivid display in James Brosnahan's fine book, *Justice at Trial: Courtroom Battles and Groundbreaking Cases*. As the title suggests, the book consists mainly of stories of cases in which Brosnahan has been involved throughout his extensive career, from his first trial as a federal prosecutor in Phoenix to his argument before the California Supreme Court in support of the recommendations of the then-recently created California Redistricting Commission. Along the way we learn about his role in important and challenging cases. We see him in the prosecution of Don Silverthorne, president of the San Francisco National Bank, for widespread fraud.

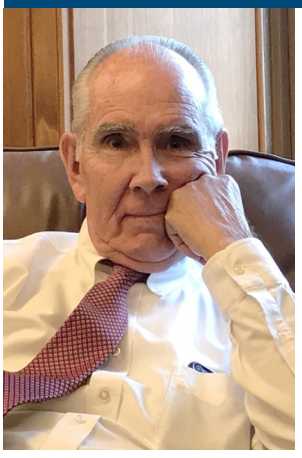
We see him defending, on First Amendment grounds, the producers of a television movie, "Born Innocent," against a claim that the movie, which depicted a brutal sexual assault against a young girl, could be held responsible for inspiring similar conduct in real life. We learn how he defended an individual charged with making bombs in his San Francisco house to be used to overthrow the Philippine dictator, Ferdinand Marcos, by showing that the FBI had intentionally mishandled the evidence. And in a case with current resonance, we learn about his extensive preparations for the trial of Caspar Weinberger, President Ronald Reagan's secretary of defense, charged with unlawfully collaborating to cover up Reagan's order sending missiles to Iran in violation of an embargo imposed by Congress. The trial never took place because Weinberger was pardoned by Reagan's successor, George H. W. Bush.[1]

These case-focused narratives reflect a good trial lawyer's obsession with detail, and often contain lessons Brosnahan learned along the way. "I began to tell juries in final argument that the lawyers mattered less than the parties, the facts, and the law. I found that preparation for trial requires a complete immersion in other people's lives, while at the same time trying to preserve an objective view of the case";[2] "At my utopian law school, the third year would be entirely devoted to teaching psychology to prepare lawyers for understanding the mentality of clients and others in their practice";[3] "Juries apply collective intelligence. They recall facts in their deliberations and put them together with the judge's instructions on the law";[4] "In a data-based society statistics make it easier to tolerate harm that others must endure";[5] "Nothing disrupts a cross-examiner's control more than losing eye contact with the witness";[6] "One of the hardest parts of being a trial lawyer is finding the patience to wait for certain things to happen";[7] "There is a great truth in lawyers: bullies must be confronted";[8] and (referring to his practice of visiting the physical surroundings of the focus of the trial, "Always go to the scene."[9] Collectively such observations provide a useful manual for any aspiring trial lawyer.

But the book is more than a description of individual cases and lessons learned; it is also a memoir, providing insights into the career and motivations of one of the country's most influential lawyers. Brosnahan describes, through both case descriptions and supplemental material, how he was born into a working-class family in Brookline, Massachusetts, his father earning five dollars a week as a bookkeeper at Symphony Hall in Boston; how at age 3 a prolonged headache led to a diagnosis of rheumatic fever with heart involvement, and in turn to a sentence by his overly zealous family doctor to a bed stay that turned out to last two and a half years; and how his early educational experience, which included having

1. See Jim Brosnahan, "The Indictment and Presidential Pardon of Caspar Weinberger" (Fall/Winter 2019 *CSCHS Review* 18–20, https://www.cschs.org/wp-content/uploads/2019/12/2019-CSCHS-Review-Fall-Presidential-Pardon.pdf [as of Aug. 16, 2023].
2. Brosnahan, *Justice at Trial*, 9.
3. *Id*. 13.
4. *Id*. 43.
5. *Id*. 49.
6. *Id*. 57.
7. *Id*. 106.
8. *Id*. 126.
9. *Id*. 127.

CALIFORNIA LEGAL HISTORY'S NEW EDITOR



Justice George Nicholson

Seeing "an opportunity to . . . teach law, ethics, civility, and collegiality through legal history, with balance," former Justice George ("Nick") Nicholson has agreed to edit *California Legal History* following the retirement of Selma Moidel Smith. Nicholson, who served for 28 years on the Court of Appeal, Third Appellate District, and earlier, as an Alameda County prosecutor and a judge on the Sacramento Municipal and Superior Courts, began his writing career as the sports editor of his high school and college newspapers. Nick began playing baseball in 1950. His baseball heroes were and have remained Branch Rickey and Jackie Robinson. For more than 70 years, he has played, coached, managed, and taught baseball "I have been seriously editing and writing for almost 70 years," he noted, including appellate opinions, articles for legal publications, and frequent commentaries in major newspapers. He is eager to share his love of history with *Journal* readers and welcomes article ideas and submissions. ✯

DOING WELL WHILE DOING GOOD *continued from pg. 27*

to repeat the fourth grade and ending high school with a D-minus average, was dramatically unpromising until he decided to study, and how excelling at sports led to increased self-confidence and, through sports scholarships, to Boston College and thereafter Harvard Law School. After graduation he served 16 years as a federal prosecutor, first in Phoenix, then in San Francisco, moved to a private law firm, Cooper White & Cooper, which provided him with a diversity of trial experience, and finally took a partnership in Morrison & Foerster, where, among other things, he coordinated a pro bono program of advocacy and litigation that has achieved national recognition.

Here we come to Brosnahan's hedgehog, the author's passion for justice, which dominates the book as it does his career. In his view, being a lawyer and his concern for doing justice are inseparable, not only in his selection and handling of cases but also in his choice of professional activities outside the courtroom. It is not an abstract philosophical concept of justice, more of an instinctive reaction stemming from his childhood experiences. "As I wrote *Justice at Trial*," he says in the Preface, "my memory kept returning to my youngest days when decisions by people with power over me formed who I became. I have been an outsider willing — no, anxious — to call out the powerful when I think they deserve it. . . . I wrote this book to give hope to readers trying to overcome medical problems, academic difficulties, and any other impediments to leading a fulfilling and impactful life. I hope the reader will see how challenges can become your strengths, and perhaps lead you to a life of fighting for justice, change, and reform."[10] At a time when a few lawyers seem to have flagrantly abandoned their obligations to the public, the author provides a sterling example of what it takes to do well by doing good. ✯

Joseph R. Grodin is a former Associate Justice, California Supreme Court, and Distinguished Emeritus Professor, UC College of the Law, San Francisco.

10. *Id*. xxi–xxii.

Subscription Information:

Membership in the Society is open to individuals at the rate of $50 or more per year, which includes the journal as a member benefit. For individual membership, please visit www.cschs.org, or contact the Society at (800) 353-7357 or 4747 North First Street, Suite 140, Fresno, CA 93726.

Libraries may subscribe at the same rate through William S. Hein & Co. Please visit http://www.wshein.com or telephone (800) 828-7571.

Back issues are available to individuals and libraries through William S. Hein & Co. at http://www.wshein.com or (800) 828-7571.

Please note that issues prior to 2006 were published as California Supreme Court Historical Society Yearbook. (4 vols., 1994 to 1998–1999.)

LEGAL HISTORY WINNERS RECOGNIZED AT VIRTUAL ROUNDTABLE

Virtual Roundtable Participants — *Top row, left to right:* Society President Daniel Kolkey, Chief Justice Patricia Guerrero, and Student Writing Competition Judges Laura Kalman, and Sarah Barringer Gordon. *Bottom row, left to right:* Winning authors Kyle DeLand, Michael Banerjee, and Miranda Tafoya.

During a virtual Zoom meeting on August 21, the California Supreme Court Historical Society congratulated the winners of its 2023 Selma Moidel Smith Student Writing Competition.

The top three writers represented Berkeley Law and UC Irvine School of Law. They presented summaries of their papers to historical society members, including California Supreme Court Chief Justice Patricia Guerrero and Society President Daniel Kolkey.

Before the three winners summarized their reports, Chief Justice Guerrero said, "It's a great pleasure and privilege to congratulate these bright young minds of the future who have been judged by our distinguished professors for these awards."

The annual competition is open to all students and recent graduates in history and/or law, and papers may address any aspect of legal history dealing significantly with California.

First place was awarded to Berkeley Law student Kyle DeLand for his paper "The End of Free Land: The Commodification of Suscol Ranch and the Liberalization of American Colonial Policy." DeLand's study investigates nineteenth century California's "free" versus "cheap" land policies. The state has long been the epicenter for fights that led to a shift from promoting squatters' ownership of the land they occupied to a policy that favored speculators. DeLand's paper provocatively examines the work of Paul Wallace Gates and others who have studied California land law. DeLand will receive $5,000.

The second-place winner was Michael Banerjee, also of Berkeley Law. His article, "California's Constitutional University: Private Property, Public Power, and the Constitutional Corporation, 1868–1900," offers a detailed exploration of how one of the world's premier public universities emerged as the private property of the UC Regents, non-public constitutional officers, and lawmakers who control an independent branch of government. Banerjee considers the constitutional university a new and uniquely American innovation in higher education that has been widely copied, an entity "chartered directly by the sovereign people." Banerjee will receive $2,500.

UC Irvine student Miranda Tafoya won third place. Her paper, "A Shameful Legacy: Tracing the Japanese American Experience of Police Violence and Racism from the Late 19th Century Through the Aftermath of World War II," integrates her family's experiences with discrimination against Japanese Americans. At a time of renewed concern about policing techniques, she highlights the role of police violence in maintaining California's internment camps. Tafoya will receive $1,000.

The papers were judged by University of Pennsylvania Professor of Constitutional Law Sarah Barringer Gordon and Laura Kalman, UC Santa Barbara history professor and member of the Society's Board of Directors. The winning papers will appear in the forthcoming issue of *California Legal History* and will be available on the California Supreme Court Historical Society's website.

The competition is named in honor of long-time board member Selma Moidel Smith, who initiated and directed it from 2007 to 2022. ✯

A version of this story was published in the Los Angeles and San Francisco editions of the Daily Journal *on Aug. 22, 2023. Reprinted with permission.*

NOW AVAILABLE

California Legal History

VOLUME 18, 2023

JOURNAL OF THE CALIFORNIA SUPREME COURT HISTORICAL SOCIETY

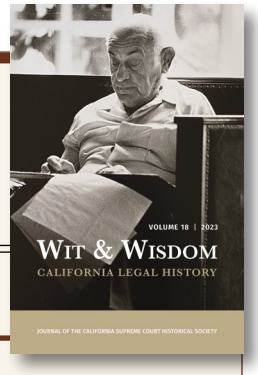


TABLE OF CONTENTS

If you like what you read here, please join us

The *Review* focuses on substantive articles exploring the origins and evolution of California law as well as the lawyers, judges and ordinary Californians who have written that story. We welcome your article ideas, suggestions of books we might review as well as volunteer reviewers. We have also launched a new opinion feature in which writers reflect on contemporary legal and political controversies in light of California's past.

At the same time, we want to include news about our members in these pages. Please tell us about your accomplishments, a new job, or a recent award. Send me your ideas at *molly.selvin@gmail.com.* ✯

MEMBERSHIP DONORS 2022–2023

Gold
$5000

Gibson, Dunn, & Crutcher LLP
Greines Martin Stein & Richland LLP
Shjeflo, Riley & Cruz LLP

Silver
$3500

Littler Mendelson, P.C.

Benefactor
$2500

Cotchett Pitre & McCarthy LLP

Bronze
$2000

ADR Services, Inc.
Horvitz & Levy LLP

Founder
$1000

Elizabeth Cabraser
Joseph L. Chairez
Daniel M. Kolkey

Steward
$750 to $999

Hon. Kathryn Mickle Werdegar

Sponsor
$500 to $749

Jay-Allen Eisen
George Howard
David McFadden
Richard Rahm
Kirk Sturm

Grantor
$250 to $499

George Abele
James Andion
Hon. Tami Bogert
Hon. Kathleen Butz
Hon. Richard Charvat
Joyce Cook
Richard Daggenhurst
Bert Deixler
Jeffrey Dennis-Strathmeyer
David Ettinger
Dennis Fischer
Jennifer King
Ruth Lavine
Douglas Littlefield
Lawrence Rohlfing
James Shekoyan
Charles Vogel
Matthew Werdegar
Kristian Whitten

Sustaining
$100 to $249

Phillip Allred
John Baker
Michael Bayard
Kathleen Berglund
Scot Bernstein
John Burns
Hon. Robert Byers
Alan Crivaro
Johnny Crowell
Jake Dear
Christine Durham
Simone Easum
Hon. Mark Eaton
Max Factor III
Hon. Donald Franson
Fred Goldman
Hon. Ronald Grey
Catrina Griffin
Darrell Griffin
Hon. Lloyd Hicks
Lisa Hightower
William Hoffman
Eric Isaacson
Hon. Harold Kahn
Bernard Kamine
Mitchell Keiter
Donald Kelley
Paul Killion
Levin
Hon. Elwood Lui
Jason Marks
Frank McGuire
Grover Merritt
Hon. Carlos Moreno
Robert Mukai
Michael Nolan
Frederick (Fritz) Ohlrich
Sylvia Papadakos-Morafka
Robert Pfister
Hon. Ron Robie
Tyler Runge
Walter Shjeflo, Jr.
Linda Shubeck
Selma Moidel Smith
Katherine Sullivan
John Taylor
Dorothy Thompson
William Thomson
Hon. John Tiernan
Jessica Vapnek
Bob Wolfe
Rosalyn Zakheim

Advocate
$60 to $99

Michael Coppess
Elizabeth D'Orazio
Hon. Susan Gill
Hon. Joshua Groban
Benjamin Hanna
Savannah Luschei
Sandra Mosk
Colleen Regan
Celia Rowland
Molly Selvin
Michael Traynor
Hon. Terry Truong
Dag Wilkinson

Judicial
$50 to $99

Hon. Marvin Baxter
Thomas Brom
Thomas Clark
Hon. Carlos Dominguez
Lynn Evans
Hon. Richard Harris
Jessica Howell
Jack Hug
Shaun Khojayan
Janet Kulig
Hon. Daniel Maguire
Jerome Montgomery
San Francisco Law Library
Hon. Michael Stern
Peter Talia

Become a member, renew your membership, or make a contribution at

★ ★ ★ WWW.CSCHS.ORG ★ ★ ★

CALIFORNIA SUPREME COURT
HISTORICAL SOCIETY
Review

California Supreme Court Historical Society
4747 N. First Street, Suite 140
Fresno, CA 93726
Phone (800) 353-7537
director@cschs.org
www.cschs.org

FALL/WINTER 2023
TABLE OF CONTENTS

On the Cover:
"Sketches in the Territories of the United States." Cover, *The Graphic*, June 28, 1879. *Public domain.*