

GEORGE NICHOLSON

# Introduction

*From the Editor-in-Chief*

John W. Cooley, in his *Appellate Advocacy Manual, A Design and Decision-Making Approach*, opens with a lengthy chapter on “Multifaceted Functions of Appellate Practitioner.” He suggests imagination is indispensable for lawyers and for judges.<sup>1</sup> He seems to use Justice Felix Frankfurter’s letter to a little boy as a guide in his early section headings, which suggest we, in our profession, are artists, poets, novelists, musical composers, essayists, even dreamers, and the like, at different times and in different circumstances.<sup>2</sup>

Professor Cooley’s seeming inspiration is a letter sent seventy years ago by Justice Frankfurter to a twelve-year-old Virginia boy, Paul Claussen, Jr., who sought advice about “some ways to start preparing myself while still in junior high school” for a career in law. Justice Frankfurter replied:

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<sup>1</sup> “Albert Einstein, the genius physicist whose name is synonymous with intelligence, once said, ‘I am enough of an artist to draw freely upon my imagination. Imagination is more important than knowledge. Knowledge is limited. Imagination encircles the world.’ In these words, Einstein encapsulated a profound insight into the interplay between imagination and knowledge, a concept that continues to resonate in today’s world. In this article, we will delve into the historical context, the essence of this quote, its relevance in contemporary society, key takeaways, and more, providing a comprehensive understanding of Einstein’s wisdom.” “Imagination and Knowledge, The Profound Wisdom of Albert Einstein,” *Phrontistery* (October 10, 2023), <https://medium.com/@qphrontistery/imagination-and-knowledge-d02fdcb696ca>. Einstein’s perception of imagination surely applies to the likes of Elon Musk, but his perception also applies to all of us, as law professors, law students, lawyers, and judges. Use of our imagination requires quiet reflection, perhaps repeated, on serious matters, even some not so serious matters. My late colleague, Justice Cole Blease, told me decades ago that he would set aside a complex draft opinion, sometimes several times, and revisit it later. He said he sometimes found he erred in expressing a key point and found better, perhaps more accurate ways of expressing it. Putting off important matters to the last minute does not allow for reflection, use of your imagination, or reconsideration. Cases can be lost in such circumstances.

<sup>2</sup> John Cooley, *Appellate Advocacy Manual, A Design and Decision-making Approach*, vol. 1, part 1, “Appellate Skills,” A. “The Art and Science of Appellate Practice,” chap. 1 (1989).

My Dear Paul:

No one can be a truly competent lawyer unless he is a cultivated man. If I were you, I would forget about any technical preparation for the law. The best way to prepare for the law is to be a well-read person. Thus, alone can one acquire the capacity to use the English language on paper and in speech and with the habits of clear thinking which only a truly liberal education can give. No less important for a lawyer is the cultivation of the imaginative faculties by reading poetry, seeing great paintings, in the original or in easily available reproductions, and listening to great music. Stock your mind with the deposit of much good reading, and widen and deepen your feelings by experiencing vicariously as much as possible the wonderful mysteries of the universe, and forget about your future career.<sup>3</sup>

Benjamin Cardozo seems to agree philosophically, “Method is much, technique is much, but inspiration is even more.”<sup>4</sup>

Mark Twain provides a small illustration of inspiration. He says, “The difference between the almost right word and the right word is really a large matter—’tis the

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<sup>3</sup> John Sutro, “The Good Lawyer,” *Santa Clara Lawyer* 7, no. 1 (1966): 2; “Because the Renaissance figure is not perfect in every discipline he masters, we damn him for too much breadth and not enough depth—a dabbler rather than an expert—failing to realize that his successes in most genres he masters and redefines is precisely because he brings a vast corpus of unique insights and experience to his work that narrower specialists lack. The Greek poet Archilochus first delineated the contrast between the fox who ‘knows many things’ and the hedgehog who ‘knows one—one big thing.’ We have become a nation of elite hedgehogs, whose narrow expertise is not enriched by awareness of or interest in the wider human experience.” Victor Davis Hanson’s commentary, “We Are in Need of Renaissance People,” *American Greatness* (October 7, 2024), <https://victordhanson.com/we-are-in-need-of-renaissance-people>. Hanson is a professor emeritus of classics at California State University, Fresno, the Martin and Illie Anderson Senior Fellow in classics and military history at the Hoover Institution, Stanford University, and visiting professor at Hillsdale College. He has written hundreds of articles, book reviews, and newspaper editorials on Greek, agrarian, and military history and essays on contemporary culture. He has authored or edited twenty-four books. His mother, Pauline Davis Hanson, was an associate justice, Court of Appeal, Fifth Appellate District (Fresno). She is honored annually by Fresno County Women Lawyers with the Justice Pauline Davis Hanson Scholarship, “to encourage and support outstanding academic achievement and commitment to serve by women law students,” [https://www.law.berkeley.edu/files/Hanson\\_Application.pdf](https://www.law.berkeley.edu/files/Hanson_Application.pdf). “Certain athletes, decathletes, are akin to renaissance people, [t]hey are the most versatile, toughest and most elaborate of all athletes. All self-respecting decathletes can be called as one big family, because only these boys know what the decathlon is all about. These guys are the first at the stadium and also the last ones who leave the stadium. While other athletes are already warm and cozy sipping coffee at home, decathletes are piloting all their other disciplines, because only one discipline is not enough for them.” Adam Sebastian Helcelet, “History of the Decathlon,” *Decathlonpedia* (December 1, 2018), <http://decathlonpedia.com/article/history-of-the-decathlon>. Helcelet is a Czech professional track and field decathlete.

<sup>4</sup> Benjamin N. Cardozo, “The Game of the Law,” in *Law and Literature and Other Essays and Addresses* (1931), 163. No jurist has ever been more eloquent. Why? Was it a natural gift? Did he cultivate it? Think about it. James Hankins may help, with his, “Teaching Eloquence,” *Law & Liberty* (October 17, 2024) <https://lawliberty.org/teaching-eloquence>. A thorough depiction of Justice Frankfurter’s list to young Claussen appears in the first chapter, “The Early Years,” in *Gerald Gunther, Learned Hand: The Man and the Judge* (1994). Contrast Hand’s education with your own. You will better understand why Cardozo, Holmes, Hand, and others, in the early days of American jurisprudence, as well as America’s Founders, were so erudite and eloquent. Shouldn’t we all spend some time and thought as we go on how to become more erudite and eloquent, regardless of how long we serve the law. I am sure those referenced in this footnote and cited in the two references did that, all their lives.

difference between the lightning-bug and the lightning.”<sup>5</sup> Choosing the just right word for lawyers and judges is of crucial importance, whether oral or written. But we must always remember when speaking, “The right word may be effective, but no word was ever as effective as a rightly timed pause.”<sup>6</sup>

Cooley, Frankfurter, and Cardozo never suggest technical and legal skills and knowledge are not indispensable to the successful practice of law and judging. They only suggest, while we work diligently toward perfection in technical and legal skills and knowledge, we may fall behind if we do not engage in broad learning and utilize our imaginations to tantalize and inspire ourselves with, “did I consider,” “perhaps,” “maybe,” “what if,” and “why not,” throughout our legal lives. Twain’s humor helps us to engage our imaginations, creativity, and timing.

Asking ourselves those questions implicates open and inquisitive minds and the full and free exercise of the rights we all enjoy as citizens, especially the rights to think and speak freely that are indispensable to the practice of law. The earlier we learn these things, the earlier we practice these things, the better. Certainly, we must learn them or reinforce them in law school. Law professors owe it to their students and to the law to jettison their personal ideologies, biases, and predilections at the classroom door, and inspire, encourage, and aid their students to think for themselves.

Law professors—indeed, all lawyers and judges—owe a duty to defend the Bill of Rights and especially the First Amendment. Free speech is under fire at present from a variety of sources, public and private, foreign and domestic.

“It’s the First Amendment for a reason: free speech is a fundamental prerequisite for liberal democracy. But *The Guardian*, with logic that Stalin would have appreciated, insists the concern over free speech has been ‘concocted’ by the Right. This is one example of many that shows the assault on free speech today primarily comes from the very people—the legacy media, academia, and progressives—who once championed unencumbered dialogue.”<sup>7</sup>

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<sup>5</sup> Mark Twain, *The Wit and Wisdom of Mark Twain: A Book of Quotations* (Dover Thrift Editions, 1999), 36.

<sup>6</sup> *Mark Twain’s Speeches, Paine’s Edition*, “Introduction by Albert Bigelow Paine” (1923), <http://www.twainquotes.com/UniformEds/UniformEdsCh29-v.html>.

<sup>7</sup> Joel Kotkin, Presidential Fellow in Urban Futures, R. Hobbs Professorship in Urban Studies, Chapman University, “The Coming Strangulation of Free Speech,” *The American Mind*, a publication of Claremont Institute (September 20, 2024), <https://americanmind.org/salvo/the-coming-strangulation-of-free-speech/>; Jonathan Turley, the J. B. and Maurice C. Shapiro Professor of Public Interest Law; Director of the Environmental Law Advocacy Center; Executive Director, Project for Older Prisoners, Georgetown Law, has written an indispensable book for our current era, *The Indispensable Right: Free Speech in an Age of Rage* (2024). Everyone on the Right and the Left should read it and reflect deeply upon what America would look like without the First Amendment.

Armando Simón expands the worry of growing censorship, “From Sweden and Germany, to Australia and New Zealand, to France and Finland, to America and Canada, to Armenia and Italy, to Britain and Ireland, a network of censorship has been developing and steadily solidifying. Censorship has even been imposed on scientists. Ironically, this blanket of darkness has occurred in those countries with the longest tradition of freedom, specifically of freedom of speech, assembly and of writing. Soon, the peoples of those countries will have to resort to samizdat [clandestine copying and distribution of literature banned by the state].”<sup>8</sup>

This latter set of international circumstances is very odd since more than seventy-five years ago, the Universal Declaration of Human Rights was adopted, with no dissenting votes, by the General Assembly of the United Nations, essentially mimicking the First Amendment to the United States Constitution as to free speech.<sup>9</sup> Article 19 of the Declaration reads: “Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.”

## Ladies Justice

Justice **Shama Mesiwala** is younger than most of our other authors. She began law school at twenty and has already done as much as many lawyers with twice the years as a member of the bench and bar. She was a determined and able CCAP lawyer, a trusted chambers’ lawyer with Justice Ronald Robie for eleven years, a superior court commissioner, and a superior court judge. For eleven years, she has been an in-demand professor of appellate advocacy at UC Law-Davis. During that time, she was president of the Schwartz/Levi

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<sup>8</sup> Armando Simón, a trilingual native of Cuba, is a retired forensic psychologist and college professor, “A Blanket Of Darkness Is Falling Over The West,” *Issues & Insights* (September 19, 2024), <https://issuesinsights.com/2024/09/19/a-blanket-of-darkness-is-falling-over-the-west/>; for an astounding example of European legal chutzpah, see Georgetown Law Professor Turley, who has written another important and related piece, “Europe’s Plot to Regulate Political Speech in America,” *The Hill* (August 17, 2024), <https://thehill.com/opinion/congress-blog/4831049-eu-threat-free-speech-america>.

<sup>9</sup> “The Universal Declaration of Human Rights is a milestone document in the history of human rights. Drafted by representatives with different legal and cultural backgrounds from all regions of the world, the Declaration was proclaimed by the United Nations General Assembly in Paris on 10 December 1948 (General Assembly resolution 217 A) as a common standard of achievements for all peoples and all nations.” On the day before it was adopted, Eleanor Roosevelt, who helped draft the Declaration, declared it “may well become the international Magna Carta of all men everywhere.” She further declared, “We hope its proclamation by the General Assembly will be an event comparable to the proclamation of the Declaration of the Rights of Man by the French people in 1789, the adoption of the Bill of Rights by the people of the United States, and the adoption of comparable declarations at different times in other countries.” FDR’s widow, Eleanor Roosevelt, “On the Adoption of the Universal Declaration of Human Rights,” *American Rhetoric* (December 9, 1948), <https://www.americanrhetoric.com/speeches/eleanorrooseveltdclarationhumanrights.htm>.

American Inn of Court. She was cofounder of the South Asian Bar Association of Sacramento. She tells us in this issue of the challenging, inspiring, and full story of a handful of courageous women on the California bench, from the beginning, in her exhaustive commentary, “Ladies Justice: Celebrating Seven Trailblazing Female Firsts on the California Court of Appeal.”<sup>10</sup>

### **Chinese Workers in the Early Supreme Court and a Forgotten Supreme Court Decision**

Chinese workers in the early Supreme Court and a forgotten Supreme Court decision: Professor **Charles McClain** has been teaching for a half century. He offers us “Chinese Immigrants in the California Supreme Court: The Earliest Civil Cases.” It all began with a criminal case, *People v. Hall* (1854) 4 Cal. 399, while the first civil case was decided eight years later, in *Lin Sing v. Washburn* (1862) 20 Cal. 534.

**John Wierzbicki** has been a legal writer, historian, and intellectual property lawyer for more than thirty years. He is also a member of the Board of Directors, California Supreme Court Historical Society (CSCHS). He recently published a series of articles in the CSCHS *Review* on the early life and career of Bernie Witkin. He is working on a Witkin biography. He presents “*South Dakota v. Brown*: The Forgotten Decision on the Extradition of American Indian Movement Leader Dennis Banks,” a story about a state high court case dealing with the rights of Native Americans, the uniqueness in American law in state-to-state relations, and its role as a harbinger for the Court’s later crisis. It is truly a forgotten, but complex and intriguing case.

### **Criminal Justice Trilogy II**

In my Introduction to the 2023 issue of *California Legal History*, I discussed three revolutions in the administration of criminal justice—the constitutional revolution wrought by the Warren Court in the 1950s and 1960s, the crime victims’ revolution initiated by citizens and prosecutors in the 1980s and 1990s, and the final revolution, or counterrevolution: a revolt against traditional processes and practices launched by progressives in the new century. This counterrevolution, as I noted last year, “is a more dramatic and far more novel departure, procedurally and substantively, than those wrought by Chief Justice

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<sup>10</sup> Years ago, Justice Mesiwala wrote a precursor to her “Ladies Justice” piece. For that precursor, see Shama Mesiwala, “All-Female Panel Convened at the Third Appellate District,” *Sacramento Lawyer* (July/August 2012): 14; and for another of her eloquent commentaries, see Shama Mesiwala, “Servants to Justice,” *Journal of Appellate Practice and Process* (2021), <https://journals.librarypublishing.arizona.edu/appellate/article/id/2946>.

Earl Warren and his colleagues, or by those who initiated the crime victims' legal rights movement.” This counterrevolution is ongoing actively. It has been dynamically achieved by the criminal defense bar and its supporters, in and out of government. In its more recent stages, it has acquired new allies, progressive prosecutors driven by nontraditional agendas. I wrote:

It had been my intent to include articles on both the second and third revolutions in the 2023 issue of *California Legal History*, written by distinguished and highly experienced prosecutors and criminal defenders. But while I had little trouble finding members of the prosecutorial bar to write on either revolution, I had considerable difficulty finding members of the criminal defense bar with the inclination and time to write. When I finally began to succeed in locating criminal defenders who were willing and had the time to write, it was too late in the 2023 publication cycle.<sup>11</sup> Thus, their story must be presented in the 2024 issue of *California Legal History*.

Ultimately, despite serious and sustained efforts, I failed to recruit experienced criminal defenders to write. So, I followed a different approach. I spoke with Professor **J. Clark Kelso**, McGeorge School of Law. I have known him for decades. He is an important and ubiquitous legal intellectual with practical political experience and unmatched civic achievement. I asked him to write for this issue about his long and ongoing service as the federal receiver for California's prison medical care system. He agreed and chose the

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<sup>11</sup> Criminal Justice Trilogy I appeared last year in volume 18, the 2023 issue of *California Legal History*. That initial Trilogy included three related stories: Todd Spitzer and Greg Totten, “Did Brown v. Plata Unleash a More Dangerous Genie?,” at p. 47; Nancy E. O'Malley and Harold Boscovich, “Victims' Rights in California: A Historical Perspective to Modern Day,” at p. 91; and George Nicholson, “The Roots of America's Crime Victims' Legal Rights Movement, 1975–2023, A Personal Retrospective and Memoir,” at p. 115; all may be found here, <https://www.cschs.org/publications/california-legal-history>.

title, “Bringing Humanism to California’s Prisons.”<sup>12</sup> Although I knew most of it, I learned many of the following facts from him:

Professor Kelso was appointed in 2008 by federal District Judge Thelton E. Henderson as the federal receiver for California’s prison medical care system. Judge Henderson charged him with making changes in that system to bring it into conformity with constitutional minimums. Professor Kelso has since served as the federal receiver for almost seventeen years.

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<sup>12</sup> Capital punishment has a long and tortured history and a huge impact on the administration of criminal justice. Its legacy will soon impact Professor Kelso’s work with California’s prison health care system. I begin briefly with some history and *People v. Anderson* (1972) 6 Cal. 3d 628, in which the California Supreme Court declared capital punishment to be cruel and unusual and unnecessary to any legitimate goal of the state. By doing so, the court thus spared the lives of more than one hundred death row inmates. While the court decided *Anderson* on February 18, 1972, voters reinstated capital punishment by approving a November 1972 initiative, Proposition 17. In 1973, the legislature enacted a new statute making the death penalty mandatory for a number of crimes including first-degree murder in specific instances. It was not long before the California Supreme Court struck down that law in *Rockwell v. Superior Court* (1976) 18 Cal. 3d 420, thus freeing some seventy death row inmates. This time, the court acted as it did because the law did not provide accuseds with the opportunity to present mitigating evidence in the penalty phase. In 1977, the legislature responded to *Rockwell* by revising the law to comply with the court’s decision. Voters soon changed the law again by enacting Proposition 7, in November 1978. This gave an automatic appeal to the California Supreme Court, which would directly affirm or reverse the sentence and conviction without going through an intermediate appeal to the California Court of Appeal. In 1986, three members of the state Supreme Court, Chief Justice Rose Bird and Justices Joseph Grodin and Cruz Reynoso, lost their retention elections due in large part to their almost universal rejection of capital punishment in their decisions. Thereafter, over a period of years, executions in small numbers haltingly returned after long delays. Even so, executions ended altogether in 2006. In 2012, voters rejected Proposition 34 which would have, most notably, replaced capital punishment with life imprisonment without the possibility of parole and require people sentenced to life in prison without the possibility of parole to work in order to pay restitution to victims’ families. Four years later, Proposition 62, a second try at abolishing the death penalty, was rejected by voters. Proposition 66, the “Death Penalty Reform and Savings Act,” was approved by voters to streamline capital appeals, and require death-row inmates to work in jail and pay restitution to victims’ families, something from which they were previously exempted. In *Briggs v. Brown* (2016) 3 Cal. 5th 808, the Supreme Court unanimously upheld the initiative. However, it did seek to avoid separation of powers problems by deeming provisions of the initiative that appear to impose strict deadlines on the resolution of judicial proceedings to be directive rather than mandatory. Governor Gavin Newsom issued Executive Order N-09-19 on March 13, 2019. It is a complex order, but most notably it directed closure of the gas chamber at San Quentin Prison. Apparently, the gas chamber has now been dismantled and in 2024, a “Condemned Inmate Transfer Program,” was in place. It aspired to relocate 623 former death row inmates who remain under death sentences to 24 different California Department of Corrections and Rehabilitation (CDCR) facilities by the summer of 2024. The medical and general impacts imposed on the health and well-being of former death row inmates by mainlining them, as well as those impacts on the health and well-being of the general prison inmate population, remain to be seen. Also see, David Carrillo and Brandon C. Stracener, “Commute Them All,” *Los Angeles Daily Journal* (March 22, 2024), <https://www.dailyjournal.com/articles/377774-commute-them-all-revisited>. A proposed state constitutional amendment, Proposition 6, on the November 2024 ballot provides that CDCR shall not discipline any prisoner for refusing a work assignment. If adopted, how will that new constitutional provision impact *California Penal Code* § 2700.1, which reads, in part, “Every person found guilty of murder, sentenced to death, and held by the Department of Corrections and Rehabilitation pursuant to Sections 3600 to 3602 shall be required to work as many hours of faithful labor each day he or she is so held as shall be prescribed by the rules and regulations of the department.” The section also reads, “In any case where the condemned inmate owes a restitution fine or restitution order, the Secretary of the Department of Corrections and Rehabilitation shall deduct 70 percent or the balance owing, whichever is less, from the condemned inmate’s wages and trust account deposits, regardless of the source of the income, and shall transfer those funds to the California Victim Compensation and Government Claims Board according to the rules and regulations of the Department of Corrections and Rehabilitation, pursuant to Sections 2085.5 and 2717.8.”

It isn't surprising that Judge Henderson named him as the federal receiver because he is generally recognized as the "Mr. Fix-It" for California State Government, having held with distinction a number of high-level positions in California's executive branch, including service as California's Insurance Commissioner, a constitutional officer; Director, Department of Information Technology; Director, California Performance Review; Director, Department of General Services; Chair, California Earthquake Authority; and for six years, as the State's Chief Information Officer.

He is one of the leading authorities on judicial administration in California. He has worked closely with the leadership in the California Judicial Branch and with Senate, Assembly and Executive Branch leaders on constitutional amendments, legislation, and rules of court to improve and reform the California Judiciary and the administration of justice. He was appointed as the Gordon D. Schaber Chair in Health Law and Policy in 2023.

In recognition of his many accomplishments, Professor Kelso received the "2014 Elizabeth G. Hill Public Official of the Year" award from the American Society for Public Administration—Sacramento Chapter. In 2017, he received the "Transformational Leader Award" at the Government Transformation & Innovation Conference in Sacramento, California.

Also, in specific recognition of his service to the administration of justice, the California Judicial Council selected him to receive the 1998 Bernard E. Witkin Amicus Curiae award, which is given to an individual other than a member of the Judiciary for outstanding contributions to California's courts.

To complement Professor Kelso's exclusive article, "Bringing Humanism to California's Prisons," and to provide information on two private organizations dedicated to inspiring and aiding prisoners, parolees, and their families in reordering their lives in more positive ways, for them, for their families, and for society, I recruited Judge **Larry Stirling**, Ret., Superior Court, County of Los Angeles, and former California Assembly Minority Leader, **Pat Nolan**, to tell us how Prison Fellowship, a Christian ministry, has worked successfully inside and outside America's prisons for nearly half a century to inspire and aid prisoners and parolees to transform their lives, and to provide aid to their families. Prison Fellowship has also worked with governors, legislators, prison officials, and judges to improve prison conditions, establish non-prison alternatives for nonviolent offenders, aid the victims of crime and their families,

and better equip the administration of criminal justice to mitigate the harm caused by crime—and thus better serve offenders and their families, victims and their families, and our nation’s people.

I recruited **Mary Weaver**, executive director of Friends Outside, Los Angeles, to write about her organization. She directed me, instead, to Judge **Marguerite D. Downing**, Superior Court, County of Los Angeles, and **Natalie LaCourt**, her assistant, who wrote the article. Weaver says, “The mission of Friends Outside is to assist children and families, prisoners, and former prisoners with the immediate and long-term effects of incarceration, and to act as a bridge between those we serve, the community at large, and the criminal justice system, thereby enhancing the character of justice.”

At one time, there were many chapters of Friends Outside, including one in Sacramento. Justices of the Third Appellate District were introduced to the Sacramento chapter by the appellate district’s former Presiding Justice Robert K. Puglia. Justice Puglia purchased a table for himself and his colleagues for years. Originally, I intended to recruit someone from Friends Outside, Sacramento, to write for this issue of *California Legal History*. I was surprised to learn it was defunct as were so many other chapters.

This criminal justice trilogy is meant to document legal history, of course, but also to inform readers of the vast potential for expanding resources for and enhancing the impact of organizations such as Prison Fellowship and Friends Outside, Los Angeles, with proven track records inspiring and aiding prisoners and parolees. Criminal recidivism is not a mystical subject. If criminals learn they can get away with crime, they will do it. In that sense, working with prison inmates and parolees is akin to working with alcoholics and narcotics addicts: Successful intervening organizations recognize only individuals can overcome their own negative propensities or addictions. Successful intervening organizations recognize they can only help those who are willing, indeed, determined to help themselves.

Although, obviously, the administration of criminal justice is premised on the rule of law and the adversary system for seeking truth, with both sides represented by ethical and able advocates, it is not productive to segregate into warring factions outside of court. It is essential for federal and state judges, prosecutors, defenders, crime victims’ advocates, peace officers, and probation, parole, and corrections officials, as well as prisoner and parolee advocates—whatever their political, philosophical, jurisprudential, or penological perspectives—to communicate and collaborate rationally when providing their views to presidents, governors, federal and state legislators, civic leaders, the news

media, and the public. Everyone is involved in our complicated federal and state criminal justice systems, even though burdened with competing, but related legal interests and duties. Ultimately, public safety is the primary goal for everyone, in and out of government at all levels, while other matters entail subsidiary goals.

Positive and successful elements in the quest for public safety include proactive crime prevention programs that are well funded and well operated. Wise and pervasive crime prevention programs reduce the heavy weight of crime, especially violent crime, on victims and their families, while reducing the burdens on law enforcement agencies, prosecution and defense bars, and corrections agencies. Historically, the state attorney general's office within the California Department of Justice proactively conducted a multifaceted, statewide crime prevention program that reached into every city and county in the state. That statewide initiative might be renewed with substantial and sustained vision, funding, and staffing, in close and collegial collaboration with local prosecutors and peace officers.

In 1981, President Ronald Reagan proclaimed the first National Victims' Rights Week during the third week of April and that week has been observed as such annually ever since. It has again become a pivotal time for everyone in California and the nation to reflect on and respond proactively to the harm done to crime victims and their families everywhere and to ponder how to diminish the volume and seriousness of crime and its harsh, adverse impact on the victims of crime and their families.

It would be timely and prudent next year, if not sooner, to focus substantial prosecution and law enforcement resources, local and statewide, on reducing the huge, negative impact of crime, especially violent crime, on black men and black families. We know this to be happening because the U.S. Commission on Civil Rights issued a formal report, "Federal Efforts in Examining Racial and Ethnic Disparities among Victims of Violent Crime," on September 18, 2024.<sup>13</sup> "Black Americans are 12 times as likely as White Americans to die by firearm homicide. Crime concentration in certain areas became associated with

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<sup>13</sup> "U.S. Commission on Civil Rights Releases Report: Federal Efforts in Examining Racial and Ethnic Disparities among Victims of Violent Crime," <https://www.usccr.gov/news/2024/us-commission-civil-rights-releases-report-federal-efforts-examining-racial-and-ethnic>; the report itself, "Rights of Victims," is here, <https://www.usccr.gov/files/2024-09/federal-efforts-in-examining-racial-and-ethnic-disparities-among-victims-of-violent-crime.pdf>; "Key Take Aways from U. S. Commission on Civil Rights Report," [https://www.usccr.gov/files/2024-09/crime\\_victims\\_report\\_factsheet.pdf](https://www.usccr.gov/files/2024-09/crime_victims_report_factsheet.pdf). Watch U.S. Commission on Civil Rights Hearings, convened on November 17, 2023, at Commission Headquarters, 1331 Pennsylvania Avenue, Northwest, Suite 1150, Washington, D.C., at 9:00 a.m., "Racial Disparities in Violent Crime Victimization in the United States," Panel 1, [https://www.youtube.com/watch?v=KY\\_InDqjXbo](https://www.youtube.com/watch?v=KY_InDqjXbo); Panel 2, <https://www.youtube.com/watch?v=U5YSiMqVefc>; Panel 3, <https://www.youtube.com/watch?v=BKMan-7SBXY>; and Panel 4, <https://www.youtube.com/watch?v=wSN0uVqa35Q>. To obtain a transcript of all the fore going proceedings, go to <https://www.usccr.gov/files/2024-02/11-17-23-briefing-transcript-usccr.pdf>.

race because contemporary disadvantaged neighborhoods are predominately Black or Latino. People living in households that earn the lowest incomes are more likely to be victimized than their higher-income counterparts, and young people are more likely to be victims of crime as well.”

“In 2017,” according to Pat Nolan, “Prison Fellowship founded Second Chance Month to raise awareness and improve perceptions of people with a criminal record, encourage second-chance opportunities, and drive momentum for policy change throughout the country. Prison Fellowship asked Senators Amy Klobuchar, D-Minn., and Robert Portman, R-Ohio, to take the lead with the United States Senate resolution to declare April 2017 as Second Chance Month. Sens. James Lankford, R-Okla., and Richard Durbin, D-Ill., also co-sponsored the resolution.”

The very next year, President Donald J. Trump proclaimed April 2018 as Second Chance Month.<sup>14</sup> In his proclamation, President Trump declared in his first paragraph, “During Second Chance Month, our Nation emphasizes the need to prevent crime on our streets, to respect the rule of law by prosecuting individuals who break the law, and to provide opportunities for people with criminal records to earn an honest second chance. Affording those who have been held accountable for their crimes an opportunity to become contributing members of society is a critical element of criminal justice that can reduce our crime rates and prison populations, decrease burdens to the American taxpayer, and make America safer.”

President Joseph R. Biden Jr. continued the tradition through 2024.<sup>15</sup> In his proclamation, President Biden declared in the first paragraph, “America was founded on the promise of new beginnings. During Second Chance Month, we recommit to building a criminal justice system that lives up to those ideals so that people returning to their communities from jail or prison have a fair shot at the American Dream.”

Second Chance Month could be a good thing if more-timely proclaimed and conducted comprehensively, with well planned, funded, and executed public education programs throughout California and the nation. It should be a time to encourage prisoners and parolees to reflect seriously on the harm they do to their crime victims and their families, on the harm they do to their own families—especially their children—and to reflect seriously on how to avoid

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<sup>14</sup> “President Donald J. Trump Proclaims April 2018 as Second Chance Month, Issued on: March 30, 2018,” <https://trumpwhitehouse.archives.gov/presidential-actions/president-donald-j-trump-proclaims-april-2018-second-chance-month>.

<sup>15</sup> “A Proclamation on Second Chance Month, 2024, March 29, 2024,” <https://www.whitehouse.gov/briefing-room/presidential-actions/2024/03/29/a-proclamation-on-second-chance-month-2024>.

recidivism, reestablish credibility, and build and lead law-abiding lives. The huge, compounding impact criminals have on trade and commerce, especially in California, should also be included in public education as well as prisoner, parolee, and probationer education.

National Victims' Rights Week and Second Chance Month are not opportune moments for politicians to seek votes or to promote their standing with interest groups. After all, our nation's politicians at all levels exist to serve the people, all the people. All politicians should remember the final paragraph in each of Lincoln's addresses at Gettysburg and in his two Inaugurals and, hopefully then energetically labor collaboratively to seek rational remedies to our nation's crime problems, especially its violent crime problems, and foster related crime prevention and public education programs for the good of all our nation's citizens.<sup>16</sup>

### On Related Matters

Progressive prosecutors are now substantial actors in the third revolution in the administration of criminal justice that began roughly midway so far in the new century. That third revolution continues as a counterrevolution grounded, in many ways, more in ideology than in law and rational, factual analysis. This latest trend has largely been pursued without rational discourse and debate, or education and inclusion of citizens. Even now, however, elements of this latest trend are increasingly in play and may soon be mitigated, if not reversed by vote of the people, including recall of progressive prosecutors. San Francisco's former progressive prosecutor, Chesa Boudin, was removed by a recall vote of the people in 2022. There have been several recalls of progressive prosecutors in other states, east and west. District Attorney Pamela Price, Alameda County, has been in office less than two years. Even so, she faces a recall election in

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<sup>16</sup> Judges can try to help, too, especially in the early stages of young criminals' lives. In the late 1980s and early 1990s, while sitting in a high-volume felony disposition court and based on experience acquired there with lawyer Jerry Chong and his illiterate client, I worked with Chong and countless other individuals and organizations to conceive and draft a law for a judicial pilot project, JurisLIT, to provide literacy programs for criminal probationers, ages 18–30. I asked the most liberal state legislator at the time, Assemblyman John Vasconcellos, and the most conservative, Senator John Doolittle, to carry the bill and steward it to passage. They did and Governor George Deukmejian signed it. State Superintendent of Schools Bill Honig helped too. I wrote several unique requirements into the bill: (1) no recidivism to remain in program; (2) measured, validated, and sustained success on a learning ladder to remain in the program; (3) a university reporting and evaluation mechanism; and (4) a sunset clause to enable the legislature and the governor to assess whether to continue the project. Unlike too many "remedial," criminal "rehabilitation" programs, my intent was to build an experimental program that would: (a) have measurable standards that were enforced, (b) be assessed externally, and (c) end at a specific point. If not demonstrably successful, it would not be extended legislatively. At the specific request of the Elk Grove Unified School District, Adult Education Division, I worked on a second related project to create, administratively, a spin-off literacy project for inmates of the Rio Cosumnes Correctional Center. (For more, see, *JurisLIT Final Report*, Sacramento County Probation Department (1994), <https://eric.ed.gov/?q=jurislit&id=ED378363>; George Nicholson, "Reading, 'Riting or Doing Time: Illiterate Offenders on Probation Getting Straight," *American Bar Association Journal* 76, no. 6 (June 1990).)

November 2024. Where is all this headed? No one can begin to know without serious, sound study, and time.

To help us better understand the advent of progressive prosecutors and the confusing impact they impose on the public generally and public safety specifically, I recruited a highly experienced and able traditional prosecutor to write a review, but failed to recruit a highly experienced and able progressive prosecutor, or liberal law professor, to write a competing review of Zack Smith and Charles D. Stimson, *Rogue Prosecutors: How Radical Soros Lawyers Are Destroying America's Communities*, published in 2023.<sup>17</sup> Thus, this year I present the traditional prosecutor's perspective. I will continue to seek balance by trying to recruit someone on the Left to review the book next year.<sup>18</sup>

In the meantime, **Tom Hogan** will review Smith and Stimson in this issue. Hogan is a former prosecutor who was twice elected as the Chester County District Attorney in Pennsylvania, a county with over 500,000 citizens. Previously, he served as a federal prosecutor for the U.S. Department of Justice. After he left law enforcement entirely, he practiced law at a major international

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<sup>17</sup> Also see, Cully Stimson, "Rogue Prosecutors and the Rise of Crime," *Imprimis* 53, no. 3, Hillsdale College (March 2024), <https://imprimis.hillsdale.edu/rogue-prosecutors-and-the-rise-of-crime>. Of related interest, see *Worrell v. DeSantis* (2024) \_\_ Southern Reporter 3d \_\_; slip op., [https://supremecourt.flcourts.gov/content/download/2435518/opinion/Opinion\\_SC2023-1246.pdf](https://supremecourt.flcourts.gov/content/download/2435518/opinion/Opinion_SC2023-1246.pdf), Florida Supreme Court (June 6, 2024), upholding the authority of a Florida governor to remove a progressive prosecutor because the governor concluded she [so] mishandled "the administration of criminal justice in the Ninth Circuit [that she] has been so clearly and fundamentally derelict as to constitute both neglect of duty and incompetence;" cf., then U.S. Attorney General Robert H. Jackson when he spoke of, "The Federal Prosecutor," during his presentation before the Second Annual Conference of United States Attorneys, Great Hall, Department of Justice Building, Washington, D.C., April 1, 1940, <https://www.justice.gov/sites/default/files/ag/legacy/2011/09/16/04-01-1940.pdf>. Jackson earlier served as U.S. Solicitor General and later served as a U.S. Supreme Court justice and the Chief U.S. Prosecutor at the Nuremberg trials of Nazi war criminals following World War II.

<sup>18</sup> During my sixty-one years in the law, I have always sought balance in all the publications and law-related education programs and publications with which I was involved or over which I had influence, including programs conducted by the California District Attorneys Association (CDAA) and the California Center for Judicial Education and Research (CJER). As a related example, in the late 1970s, while executive director of CDAA and testifying before the Assembly Criminal Justice Committee, a lobbyist for the ACLU, Brent Barnhart, interrupted me several times. I interrupted his interruption with a question: "Why don't we ask for a recess so we can go outside this room, talk this over, and seek common ground?" His reply was cryptic, "That is not what we do." In an effort to build bridges and, perhaps, move toward a more productive relationship with the ACLU and with criminal defense lobbyists generally, I asked Barnhart to write an article for the *Prosecutor's Brief*, a magazine published sometimes monthly, sometimes bimonthly, by CDAA. He did and I published it without revision, Brent Barnhart, "'Losing Our Grip' in Sacramento," *Prosecutor's Brief*, p. 17 (September/November 1977). I sent him a copy and later called him with a suggestion: "Why don't you write a column 2-3 times a year for publication in the *Prosecutor's Brief* and allow me to write a column 2-3 times a year for publication in a similar ACLU publication." Barnhart declined. Also see, fn. 23, *infra*, and for other examples of trying to build bridges, see Doug Potts, "Leading Us Out of the Cultural Divide, Can Court Outreach Inspire the Public to Dialogue with Opposing Factions on Contentious Social Issues? It Did Just That with a Group of Judges and Lawyers in Sacramento," *Los Angeles Daily Journal* (December 13, 2017), section 1, p. 1, <https://www.dailyjournal.com/articles/345198-leading-us-out-of-the-cultural-divide>; George Nicholson, "Lawyers and Judges: Mitigating Public Demonization and Division," *Los Angeles Daily Journal* (July 22, 2021), <https://www.dailyjournal.com/articles/363588-lawyers-and-judges-mitigating-public-demonization-and-division>, and, George Nicholson, "A Judicial Role in Calming Our Divided Nation," *Journal of Appellate Practice and Process* 21 (2021): 231, <https://journals.librarypublishing.arizona.edu/appellate/article/id/2937>.

law firm and litigation boutique, representing Fortune 500 companies, individuals in complex civil litigation, and criminal investigations.<sup>19</sup> He testified on November 17, 2023, before the U.S. Commission on Civil Rights in connection with the commission report, “Federal Efforts in Examining Racial and Ethnic Disparities among Victims of Violent Crime,” discussed in footnote 13, *supra*, with related text.

While writing this Introduction, I learned that Paul Robinson, Colin S. Diver Professor of Law, University of Pennsylvania Carey Law School, and two colleagues just published, in August 2024, a relevant book—Paul H. Robinson, Jeffrey Seaman, and Muhammad Sarahne, *Confronting Failures of Justice: Getting Away with Murder and Rape*.

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<sup>19</sup> For more of Hogan’s related literary efforts, go to <https://www.city-journal.org/person/thomas-hogan>; and for further context, see “The Institute for Innovation in Prosecution,” <https://www.prosecution.org>, located at John Jay College, which is part of the taxpayer-funded City University of New York. Cyrus Vance, then Manhattan District Attorney, created the Institute in 2016, with a significant California connection: Vice President Kamala Harris, while California Attorney General, was on the Institute’s initial advisory board. George Gascón, District Attorney, Los Angeles County, and Chesa Boudin, while District Attorney, San Francisco City & County, helped along the way. (Melissa Klein, Jon Levine, and Conor Skelding, “John Jay College Think Tank is Ground Zero for Woke DAs,” *New York Post* (February 5, 2022), <https://nypost.com/2022/02/05/manhattan-college-think-tank-is-ground-zero-for-woke-das>; After his recall by voters, Boudin is now Executive Director, Criminal Law & Justice Center, UC Law–Berkeley. Angela J. Davis, Distinguished Professor of Law at American University Washington College of Law, has done immense related work, including “Reimagining Prosecution: A Growing Progressive Movement,” *UCLA Criminal Justice Law Review* 3 (2019): 1, <https://escholarship.org/uc/item/2rq8t137>, “Abstract: Prosecutors are the most powerful officials in the criminal justice system. At least ninety percent of all criminal cases are prosecuted on the state level, and in all but five jurisdictions, the chief prosecutor (also known as the district attorney) is an elected official. Most district attorneys run unopposed and serve for decades. However, in recent years, a number of incumbent district attorneys have been challenged and defeated by individuals who pledged to use their power and discretion to reduce the incarceration rate and eliminate unwarranted racial disparities in the criminal justice system. These so-called ‘progressive prosecutors’ have enjoyed some modest successes, but many have faced challenges—from within and outside of their offices. This Article discusses some of these successes and challenges and proposes guidelines to assist newly elected district attorneys who are committed to criminal justice reform.” Davis is a former director of the Public Defender Service for the District of Columbia. The American Bar Association launched a Prosecutorial Independence Task Force in February 2024, [https://www.americanbar.org/groups/criminal\\_justice/committees/taskforces/prosecutorial-independence](https://www.americanbar.org/groups/criminal_justice/committees/taskforces/prosecutorial-independence). Task Force members include Rachel Marshall, Executive Director, Institute for Innovation in Prosecution, John Jay College of Criminal Justice. Learn, “Who are the inspiring new leaders redefining prosecution in the 21st Century? Watch our new video featuring the elected prosecutors leading the way,” <https://fairandjustprosecution.org>. ¶ Paul Cassell presents something pertinent to the tensions that currently exist between progressive and traditional prosecutors in his, “My New Article on the Role of Mercy and Crime Victims in the Criminal Justice Process, I argue that the criminal justice actors need to listen to all crime victims ... merciful and otherwise,” *Reason* (October 17, 2024), <https://reason.com/volokh/2024/10/17/my-new-article-on-the-role-of-mercy-and-crime-victims-in-the-criminal-justice-process>; Paul G. Cassell, “On the Importance of Listening to Crime Victims. . . Merciful and Otherwise,” 102 *Texas Law Review* 1381, [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4973380](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4973380); but, see, Doug Potts, “Religious Conviction and Judicial Decision-Making: Weighing Justice and Mercy,” *Sacramento Lawyer* (March/April, 2017), at p. 10, [https://issuu.com/milenkovlais/docs/v2\\_mb\\_saclaw\\_mar-apr\\_\\_2017\\_web/10](https://issuu.com/milenkovlais/docs/v2_mb_saclaw_mar-apr__2017_web/10), reporting a discussion by three judges, Justice Carol Corrigan, California Supreme Court; Justice Patricia Bamattre-Manoukian and Justice Nathan Mihara, both of the Court of Appeal, Sixth Appellate District, State of California. Uniquely, these three justices were judges and lawyers for more than 40 years each and were then still serving with great distinction. Even more uniquely, Justice Corrigan and Justice Bamattre-Manoukian are California Judicial Council Jurists of the Year and Catholic Church St. Thomas More Award recipients, the highest legal honors bestowed by their profession and by their faith.

Robinson and his colleagues attempt to demonstrate in their new book, “Most murderers and rapists escape justice, a horrifying fact that has gone largely unexamined until now. This groundbreaking book tours nearly the entire criminal justice system, examining the rules and practices that regularly produce failures of justice in serious criminal cases. Each chapter outlines the nature and extent of justice failures in present practice, describing the interests at stake, and providing real-world examples. Finally, each chapter reviews proposed and implemented reforms that could balance the competing interests in a less justice-frustrating manner and recommends one—sometimes completely original—reform to improve the system.”<sup>20</sup>

Eugene Volokh, Gary T. Schwartz Distinguished Professor of Law, UCLA Law, posted a comment on Robinson, Seaman, and Sarahne’s book and announced two of the three authors, Robinson and Seaman, would be guest bloggers on Volokh’s website on *Reason*. Robinson and Seaman subsequently made posts over five consecutive days in late September 2024, addressing, (1) “Academia and policymakers shouldn’t ignore the problem of unpunished crime,” (2) “Serious crime and failures of justice aren’t going away,” (3) “Counting the many costs of failures of justice,” (4) “How should society balance competing interests in criminal justice policy?” and (5) “A sample list of reforms to reduce failures of justice.”<sup>21</sup>

*Confronting Failures of Justice: Getting Away with Murder and Rape*, I respectfully suggest, is a must read for presidents, governors, and all federal and state legislators, judges, prosecutors, defenders, crime victims’ advocates, peace officers, and probation, parole, and corrections officials, as well as prisoner and parolee advocates, whatever their political, philosophical, jurisprudential,

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<sup>20</sup> From the Amazon summary, <https://rowman.com/ISBN/9781538191767/Confronting-Failures-of-Justice-Getting-Away-with-Murder-and-Rape>.

<sup>21</sup> Eugene Volokh, “Prof. Paul Robinson & Jeffrey Seaman Guest-Blogging About ‘Confronting Failures of Justice: Getting Away with Murder and Rape,’” *Reason* (September 22, 2024), <https://reason.com/volokh/2024/09/22/prof-paul-robinson-jeffrey-seaman-guest-blogging-about-confronting-failures-of-justice-getting-away-with-murder-and-rape>; Paul Robinson and Jeffrey Seaman, “It’s Time to Confront Failures of Justice (Part I), Academia and Policymakers Shouldn’t Ignore the Problem of Unpunished Crime,” *Reason* (September 23, 2024), <https://reason.com/volokh/2024/09/23/its-time-to-confront-failures-of-justice-part-i>; Paul Robinson and Jeffrey Seaman, “It’s Time to Confront Failures of Justice (Part II), Serious Crime and Failures of Justice Aren’t Going Away,” *Reason* (September 24, 2024), <https://reason.com/volokh/2024/09/24/its-time-to-confront-failures-of-justice-part-ii>; Paul Robinson and Jeffrey Seaman, “It’s Time to Confront Failures of Justice (Part III), Counting the Many Costs of Failures of Justice,” *Reason* (September 25, 2024), <https://reason.com/volokh/2024/09/25/its-time-to-confront-failures-of-justice-part-iii>; Paul Robinson and Jeffrey Seaman, “It’s Time to Confront Failures of Justice (Part IV), How Should Society Balance Competing Interests in Criminal Justice Policy?,” *Reason* (September 26, 2024), <https://reason.com/volokh/2024/09/26/its-time-to-confront-failures-of-justice-part-iv>; Paul Robinson and Jeffrey Seaman, “It’s Time to Confront Failures of Justice (Part V), A Sample List of Reforms to Reduce Failures of Justice,” *Reason* (September 27, 2024), <https://reason.com/volokh/2024/09/27/its-time-to-confront-failures-of-justice-part-v>.

or penological perspectives. We all should read the book because ideology and ignorance are pervasive and currently cloud much of the “what is” and “what should be” in the administration of criminal justice. We all should read the book and then decide for ourselves whether we find it credible and, if we do, contemplate seriously whether we ourselves are on the right track in the administration of criminal justice. The same goes for Smith and Stimson’s book and for Professor Kelso’s commentary, “Bringing Humanism to California’s Prisons,” presented elsewhere in this issue.

Progressive prosecutors were an appropriate subject for a White House Conference.<sup>22</sup> Don’t you think progressive prosecutors, as discussed by Smith and Stimson, and related matters, as discussed by Robinson, Seaman, and Sarahne in their new book, collectively, are appropriate subjects for a similar White House Conference and, therefore, appropriate subjects for all of us to read and ponder seriously? How about a related Governor’s Conference in Sacramento? How about a related conference in every state governor’s office? Crime and violence may seem overstated to some political and legal leaders, but they surely aren’t to the citizens of California and the nation.

I conclude this section of my Introduction with the actual words of the authors of *Confronting Failures of Justice: Getting Away with Murder and Rape*, as reflected in their *Reason* post number V, cited and linked in my footnote 21, *supra*:

Reasonable people can and will disagree on some of our reform proposals, just as they may disagree on how society should balance certain interests. But what reasonable people should agree on is that failures of justice are a serious problem and one that society must not ignore. The lack of serious study of the problem is also an indictment against modern legal academia, which is so obsessed with getting criminals out of prison that it forgets how few crimes ever lead to punishment in the first place. As we conclude in the book:

The tragic irony of the American justice system is that so little justice is done by it. Change begins with awareness, however, and this book has attempted to investigate the reasons why justice fails so frequently and suggest ways to make it succeed more often.

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<sup>22</sup> “John Jay’s Institute for Innovation in Prosecution and the White House Co-Host a Roundtable on the Role of the Prosecutor,” John Jay College of Criminal Justice (October 24, 2016), <https://www.jjay.cuny.edu/news-events/news/john-jays-institute-innovation-prosecution-and-white-house-co-host-roundtable-role-prosecutor>. This connection is obvious, Meg Reiss, Institute for Innovation in Prosecution, and Roy Austin, Deputy Assistant to President Barack Obama, “Focusing on Prosecutors Is Vital to Criminal Justice Reform,” *White House Blog*, (December 16, 2016), <https://obamawhitehouse.archives.gov/blog/2016/12/16/focusing-prosecutors-vital-criminal-justice-reform>; Nancy Gertner, Judge, U.S. District Court of Massachusetts, ret., Senior Lecturer on Law, posted a related note here at the time, <http://www.nancygertner.com/news/john-jay-s-institute-innovation-prosecution-and-white-house-co-host-roundtable-role-prosecutor>.

This volume is not a work of one-sided activism but acknowledges and confronts the serious tradeoffs faced in creating criminal justice policy. As such, it is our hope that it can be useful to everyone—from academics to policymakers to concerned voters—of whatever political persuasion who wish to make the American justice system a more just system for all. Our ultimate goal is simple: a system that punishes the guilty in proportion to their blameworthiness, protects the innocent from liability and crime, and upholds the moral credibility of the law in the eyes of the community. We hope this work will help further that end.

If that goal resonates with you, we hope you give *Confronting Failures of Justice* a read, a think, and a share.

### **Recalling and Learning from History**

Justice **Daniel Kolkey**, retired, writes in this issue on the importance of history to the practice of law and, in that regard, “The Critical Role and Benefits of the California Supreme Court Historical Society.” Cumulatively, for almost a half century, he has been an appellate justice and a member and partner in one of the world’s great law firms, Gibson, Dunn, and Crutcher. He believes we must recall and learn from history because “history plays a critical role in the maintenance of a stable, functioning legal system.” He has worked very hard during his still unfolding term as president of the Society to bring the history of the law in California to life through his vigorous support and encouragement of the Society’s two publications, the *Review* and *California Legal History*, and of the Society’s varied educational programs, receptions, archival projects, oral history projects, and student writing competitions. He is dedicated to leaving the Society and all its various educational works better than he found them. That is not to denigrate past presidents of the Society, only to say that is what all leaders should do in whatever domains, public or private, they temporarily occupy and control.

### **Open Minds in the Classroom**

Emeritus Professor **Alan Brownstein**, UC Law-Davis, has taught law for more than forty years. In the classroom or out, he has been a legendary lighthouse for liberty all that time. He held the Boochever and Bird Chair for the Study and Teaching of Freedom and Equality at UC Law-Davis for decades. Before becoming a professor, he clerked for Judge Frank M. Coffin, United States Court of Appeals, First Circuit. Professor Brownstein is well known for his scholarship on the Establishment Clause of the First Amendment. He served for many years on the legal committee of the ACLU of Northern California.

In this issue, he writes in his commentary, “Teaching Controversial Subjects,” that it is his job as a law professor “to make sure that both sides of difficult issues are critically discussed and evaluated in this class, whether I agree with a particular side or not. I will do my best to achieve that result.”

Professor Brownstein is a moral exemplar of a law professor. He teaches his students what everyone in law must aspire to doing: that is, truly competent lawyers and judges must come to their work with open minds. Just as law professors must, lawyers and judges must divest themselves of their personal ideologies, biases, and predilections, if they are to excel and endure as respected, faithful servants of the law.<sup>23</sup>

His approach is profoundly more important now than ever as the jurisprudence of the contemporary U.S. Supreme Court unfolds in ways some legal scholars, including Jesse Wegman, assess as a crisis.<sup>24</sup>

Randy E. Barnett, Patrick Hotung Professor of Constitutional Law, Georgetown Law, and Josh Blackman, Professor of Law and Centennial Chair of Constitutional Law, South Texas State College of Law, respond to Wegman, “Is there a ‘crisis’ in teaching constitutional law? In our view, there is not. Still, we can empathize. As libertarian-conservative-ish law professors, for years we taught Supreme Court decisions that we disagreed with. We

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<sup>23</sup> Law professors, lawyers, and judges owe common fealty to objectivity, integrity, and ethics. They must shoulder and share the duty of educating law students and young lawyers on all three virtues. That duty entails teaching introspection and a commitment to the search for truth. As a small example of my efforts in that regard, while I was executive director, California District Attorneys Association, I published a regular feature in the Association’s magazine, *Prosecutor’s Brief*, “Both Sides Now,” in which I published opposing leaders in debate, in writing, some controversial issue of immediate concern. I mention here but two of those written debates. *The first debate* was on whether journalists should be able to protect the identity of confidential sources in court, with C. K. McClatchy, editor, *Sacramento Bee*, *Modesto Bee*, and *Fresno Bee*, arguing they should, and Judge Denver Peckinpah, Superior Court, County of Fresno, arguing they shouldn’t, in the centerfold of the *Prosecutor’s Brief* (October 1976), pp. 8–9. Catalyst for the debate was the court case involving four newsmen, the “Bee Four,” jailed by Judge Peckinpah for refusing to identify sources. California now has a shield law, *Cal. Const.* article 1 § 2(b), *Cal. Evidence Code* § 1070, *Cal. Code of Civ. Proc.* § 1986.1; and more recently, see, Editorial Board, “A Reporter’s Shield Law Is Vital to Prevent Abuses of Power,” *New York Times* (October 14, 2024), <https://www.nytimes.com/2024/10/14/opinion/editorials/press-act-reporters-leaks-whistleblower.html>. The California Supreme Court has since held that the shield law’s protection is not an absolute privilege, as it may yield to a criminal defendant’s constitutional right to a fair trial. *Delaney v. Superior Court* (1990) 50 Cal. 3d 785, 805. *The second debate* was on the deterrent utility of capital punishment with Assemblyman Alister McAlister arguing it is, and former Governor Edmund G. “Pat” Brown arguing it isn’t, in the centerfold of the *Prosecutor’s Brief* (March 1977), pp. 22–23, was occasioned by *Rockwell v. Superior Court* (1976) 18 Cal. 3d 420, in which the court found the then-extant death penalty laws were unconstitutional. For further discussion of providing both sides in the *Prosecutor’s Brief*, see footnote 18, *supra*.

<sup>24</sup> Jesse Wegman, “The Crisis in Teaching Constitutional Law,” *New York Times* (February 26, 2024), <https://www.nytimes.com/2024/02/26/opinion/constitutional-law-crisis-supreme-court.html>. Wegman is a member of the *New York Times* editorial board, where he has written about the Supreme Court and legal affairs since 2013. Will Baude, Harry Kalven, Jr. Professor of Law and the Faculty Director of the Constitutional Law Institute at the University of Chicago Law School, promptly responded to Wegman, “Teaching Constitutional Law in a Crisis of Judicial Legitimacy, The Real Crisis Seems to Be in Academia, Not at the Court,” *Reason* (February 26, 2024), <https://reason.com/volokh/2024/02/26/teaching-constitutional-law-in-a-crisis>.

teach constitutional law as a historical narrative that began at the founding and continues to this day. The narrative approach underscores the contingent nature of what at any given time appears to be fixed and unchangeable. The narrative also remains remarkably stable from year to year even as new cases are added. This approach also makes preparing one's syllabus relatively easy to do each year, regardless of what the Supreme Court may have decided in its most recent term."<sup>25</sup>

Whatever views law professors take in the foregoing discussion, they must maintain, especially with their students and academic colleagues, all the essential qualities lawyers and judges must maintain in their daily work, including intellectual integrity, civility, humility, common sense, and common decency. It is particularly important for law professors not to poison the minds of their students, or the public, with their personal biases and prejudices. To do otherwise may contribute to the growing hostility some of their students and many members of the public now display. Some prominent politicians have deliberately taken overtly to attacking the nation's highest court and some of its justices by name. The irrational hostility they foster among misguided segments of the public contributes to the development of serious threats and attempts to murder high court justices, which are becoming all too common.

All the contemporary dissention and division has led us to a dangerous place. A place in which too many among us seem to have forgotten their professional duties. "The phrase 'rule of law' has rather lost its meaning, with both sides in the political debate often using it simply as a shorthand for decisions with which they agree. But what the 'rule of law' truly connotes is that we live in a society where all of us adhere to the law, including judicial decisions."<sup>26</sup>

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<sup>25</sup> Abstract, Randy E. Barnett and Josh Blackman, "Coping with a Court One Disagrees With," Abstract (September 11, 2024), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4954176](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4954176). In the fall of 2023, Professor Baude spoke during a conference on "Teaching in a Time of Change and Conflict," and his presentation is now available, "Teaching Constitutional Law in a Crisis of Judicial Legitimacy," (February 26, 2024), *Chicago-Kent Law Review*, forthcoming, <https://ssrn.com/abstract=4739308>. And for more see an internet post by, Paul L. Caron, Duane and Kelly Roberts Dean, Professor of Law, Caruso School of Law, Pepperdine University, "NY Times Op-Ed: The Crisis in Teaching Constitutional Law," *TaxProf Blog* (February 27, 2024), [https://taxprof.typepad.com/taxprof\\_blog/2024/02/ny-times-op-ed-the-crisis-in-teaching-constitutional-law.html](https://taxprof.typepad.com/taxprof_blog/2024/02/ny-times-op-ed-the-crisis-in-teaching-constitutional-law.html).

<sup>26</sup> Jonathan Adler, Johan Verheij Memorial Professor of Law and founding Director of the Coleman P. Burke Center for Environmental Law, Case Western Reserve University School of Law, "Kannon Shanmugam on the Legitimacy of the Supreme Court, A Prominent Appellate Practitioner Responds to Recent Attacks on the Justices and the Court," *Reason* (September 23, 2024), <https://reason.com/volokh/2024/09/23/kannon-shanmugam-on-the-legitimacy-of-the-supreme-court>. Kannon Shanmugam, the central figure in this post, is a remarkable and humble lawyer whose experience and words are worthy of careful reflection by all of us.

## Art, Literature, Music, Architecture, Walt Disney, and Perry Mason

Justice **Arthur Gilbert**, a judge for a half century, writes in this issue about, “Literature and Music—Keys to Judging, My Personal Journey. We Are More Than Our Professions.” He presents a soaring, personal story, in music and literature as well as law, with tales of his heroic family roots in the theater and his own lofty experiences on stage as a skilled concert and jazz pianist. It is a story you must read to believe.<sup>27</sup> Justice Gilbert is friends with another, very able musician, Gary Greene, the founder and leader of the Los Angeles Lawyers Philharmonic Orchestra.

I am sure Justice Gilbert and Maestro Greene agree with George Eliot’s suggestion from more than 150 years ago, “Life seems to go on without effort when I am filled with music.”<sup>28</sup> For his part, Greene seems to have had that in mind when he writes in this issue about, “Lawyers and Judges in Harmony.” He has been an actively practicing lawyer for forty years and a musician all his life. His story tells of his remarkable conception and formation of the Los Angeles Lawyers Philharmonic Orchestra, comprised of 115 musicians; its Legal Voices, comprised of more than 100 talented singers; and the Big Band of Barristers, emulating the music of the Big Band era of the 1930s and 1940s, comprised of 18 musicians. In 2012, the Big Band of Barristers took first place in the American Bar Association’s nationwide competition, “Battle of the Lawyer Bands,” making it America’s #1 Legal Band. Greene and his colleagues actually work together to make wonderful music the “old way.” They do not merely actuate computers artificially mimicking music. Later in this Introduction, I have more to say on Big Bands and Robert K. Puglia, a former appellate justice, who revered them.

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<sup>27</sup> On September 7, 2024, Presiding Justice Arthur Gilbert received the Bernard E. Witkin Medal in San Jose during proceedings held by the California Lawyers Association (CLA). The association issues a variety of awards annually, including the Witkin Medal, to celebrate attorneys, judges, and programs that demonstrate an extraordinary commitment to promoting justice and high ethical standards. Past winners of the Witkin Medal, among others, include Justice Anthony M. Kennedy; Chief Justice Ronald George; Justices Ming Chin, Cruz Reynoso, and Carlos Moreno; Deans Erwin Chemerinsky, Herma Hill Kay, and Susan Westerberg Prager; and Justice Bernard S. Jefferson. And, of course, Bernie received the first Witkin Medal in 1993.

<sup>28</sup> George Eliot, *Middlemarch: A Study of Provincial Life* (Broadview Press, 2005), 640, originally published in 1871–1872; and music is more than you might think, “An 18th-century writer Johann Wolfgang von Goethe stated, ‘Music is liquid architecture and Architecture is frozen music.’ Goethe’s statement is probably in reflection with the Baroque architecture style of those times—The graceful contours, the twisting elements and the dramatic spatial sequences all mimicking the harmony, rhythm and texture in music. ¶ But this statement holds true in many different contexts. One of which is that, just like music, architecture has the capability to invoke emotions in its audience. This blog lists examples of such places that hold this power.” Feby Susan Philip, “Architecture is Frozen Music,” *Elemental* (March 10, 2022), <https://www.elemental-architects.com/post/architecture-is-frozen-music>.

**Gary Greene**, Esq., and his orchestra, chorus, and big band, collectively comprise a 501(c)(3) nonprofit corporation with a mission to bring together and enhance the lives of legal professionals in harmony, provide an outlet away from the trials and tribulations of their daily work, raise funds for organizations that provide legal services for those who cannot afford such services, as well as for other charitable causes and civic events, and most importantly, entertain the public by their concerts. The musicians of the Los Angeles Philharmonic are represented by Professional Musicians, Local 47, American Federation of Musicians.

During their fifteen years' existence so far, the three musical groups have raised huge funding for organizations such as the American Diabetes Association, Bet Tzedek Legal Services, Beverly Hills Bar Foundation, Los Angeles County Bar Association's Counsel for Justice, Hollywood Remembers World AIDS Day, Inner City Law Center, Magen David Adom, Public Counsel, Salvation Army, Shriners Hospitals for Children, Thaliens, UCLA Center for Autism Research/Treatment, and Ascencia (which raises funds for the homeless).

The orchestra, chorus, and big band perform in numerous venues, including Walt Disney Concert Hall, Dorothy Chandler Pavilion, Moss Theater, Shrine Auditorium, UCLA Royce Hall, the Academy of Motion Picture Arts and Sciences' Samuel Goldwyn Theater, The Wallis, Wilshire Ebell Theatre, Saban Theatre, Los Angeles City Hall, Catalina Club, Cicada Club, and the LA Law Library, as well as performances in the Art Institute in Chicago and in the Library of Congress in Washington, D.C.

A sidebar to Greene's story, "Building an Icon: The Making of Walt Disney Concert Hall," tells of the creativity, time, and cost of conceiving and constructing the Hall. The story suggests the Hall "captured the eyes and ears of the world from the moment it opened, radically reshaping the cultural landscape of Los Angeles." As referenced in footnote 28, *supra*, Johann Wolfgang von Goethe would surely view the architecture of this Hall as mellifluous.

**Terry Flanigan**, an artist and a lawyer for a half century, has been judicial appointments secretary to two governors, provides us with his, "Legal Passages," a lithograph illustrating a woman moving toward the California

bench in the 1970s.<sup>29</sup> It is a visual way to suggest times were changing. Soon they would change dramatically.<sup>30</sup>



<sup>29</sup> Gail Sheehy, a journalist and pop social commentator, wrote a book, *Passages, Predictable Crises of Adult Life*. It was published in 1976. *Passages* quickly became a bestseller and the inspiration for Flanigan's lithograph, "Legal Passages," created during the early years of his legal career. The four figures in "Legal Passages" represent an early 1970s law student, then a newly minted practitioner, followed by a seasoned practitioner and mother who eventually becomes a judge. Ironically, this lithograph was created almost a decade before Flanigan became Governor George Deukmejian's Judicial Appointments Secretary. The large original hung on Flanigan's capital office wall behind his desk where he interviewed countless women then appointed by Governor George Deukmejian and later Governor Pete Wilson. In the 1980s, with Flanigan's help, the two governors facilitated significant change in the face of justice. To learn more about Flanigan's career as a lawyer and as an artist, see, Jennifer Goto, "A California Patrician," *California Conversation Magazine* (2007), [http://www.californiaconversations.com/index.php/politics/fullarticle/a\\_california\\_patrician](http://www.californiaconversations.com/index.php/politics/fullarticle/a_california_patrician). Former Justice Elizabeth Baron, Court of Appeal, Second Appellate District, Division Four, is researching and writing an article on Flanigan to be published in either the 2025 or the 2026 issue of *California Legal History*. "Legal Seasons" is part of a *Legal Lithograph Series* originally drawn in pen and ink by Flanigan. Of his related work, he says, "In depicting various aspects of the legal profession, my lithographs are in the tradition of similar works by the great French lithographer, Honoré Daumier (1808–1879), and the British caricaturist, Sir Leslie Ward, whose familiar pseudonym, 'SPY,' appeared on his drawings in *Vanity Fair* from 1873 to 1909. Yet, unlike Daumier and Ward, and many other legal artists, the images expressed in my works emerge from the imagination and experience of a practicing lawyer. I am an artist aware of his legal training and a lawyer utilizing his artistic skills."

<sup>30</sup> To learn how dramatically times have changed, see George Nicholson, "Visionary Becomes State's New Judicial Appointments Secretary: Few People Outside the Legal Profession Realize That Luis Cespedes, the Governor's Newly Named Judicial Appointments Secretary, Has Been a Leader in Increasing Diversity and Inclusivity Among Lawyers and Judges for More Than 30 Years," *Los Angeles Daily Journal* (January 11, 2021), <https://www.dailyjournal.com/articles/361034-visionary-becomes-state-s-new-judicial-appointments-secretary>; George Nicholson, "Chong, Céspedes, and Shepard: Mentors and Role Models," *Sacramento Lawyer* (Fall 2021), p. 16, [https://issuu.com/milenkovlais/docs/sacramento\\_lawyer\\_magazine\\_fall\\_2021\\_web/1](https://issuu.com/milenkovlais/docs/sacramento_lawyer_magazine_fall_2021_web/1).

**John Caragozian** is a lawyer with forty-five years' experience at the Bar and is Vice President and General Counsel Emeritus of Sunkist Growers. He is a member of the Board of Directors, California Supreme Court Historical Society. He presents, "Erle Stanley Gardner: America's Best-Selling Author and a California Lawyer," introduces Gardner's leading character, Perry Mason, and supplies a surprising look at Gardner's exemplary career in the courtroom.

## Oral Histories

### Chief Justice Malcolm Lucas

We continue our traditional practice of presenting the oral history of a former justice of the California Supreme Court; in this instance, with an expansive exposition of how a troubled era in the court's history was calmed, "How 'Collegiality' and a 'Steady Hand' Reset a Court in Crisis, An Oral History," **Laura McCreery**, cloaked with an introduction and conclusion by lawyer and journalist **Ryan Carter**.

### Remembering Justice Keith Sparks

A special in memoriam session of the Court of Appeal, Third Appellate District, was held on August 19, 2024, to remember Associate Justice Keith Sparks who served on the court from October 21, 1981, until August 1, 1997. Presiding Justice **Laurie Earl** and Associate Justice **Harry Hull** spoke during the session. Their words are republished in this issue.

### "Justice Puglia's 'Passin'"

Robert K. Puglia was presiding justice of the Third Appellate District for a quarter century. He served with Justice Keith Sparks throughout the latter's sixteen years on the court. Both men were former prosecutors and former trial judges. Justice Sparks, as did all of us on that court, respected Justice Puglia beyond words.

With a tip of the hat to Judge Learned Hand, Justice Puglia's colleagues on the court and many other colleagues up and down the state viewed him as the greatest judge never to sit on the California Supreme Court.<sup>31</sup> He and I were friends for thirty-five years when he died in 2005. I served on the Third Appellate District with him during his final eight years on the court. He earlier swore me in as a municipal court judge in 1987. During his tenure, Justice Puglia was the wise elder of the appellate system. He also had a profound, wry

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<sup>31</sup> Peter Schrag, "Bob Puglia: Paying the High Price of Integrity," *Sacramento Bee*, B7 (December 9, 1998).

sense of humor and a photographic memory for law, history, music, and most other things.

Justice Puglia delivered his final public speech before a San Joaquin County Bar Association luncheon, “Freedom is Not Free,” on Law Day in 1998.<sup>32</sup> He concluded with:

Thomas Jefferson said, “The tree of liberty must be refreshed from time to time with the blood of patriots and tyrants.” A few hundred yards from the Jefferson Memorial in our nation’s capital the same sentiment is expressed somewhat less starkly: “Freedom is not free.” . . . The rule of law relies on a fragile consensus which remarkably has endured and allowed us, uniquely, among the nations of the world, to have lived as free people for more than 200 years. It is the guarantor of our freedoms. It emits the glow that illuminates the shining city on the hill, the glow that is never so brilliant as when contrasted to the ominous shadows cast by the brutal tyrannies which have threatened our national existence in this century. More than anything else, the rule of law is at the heart of American exceptionalism, that is, the unique place that America occupies among the community of nations.

Former Presiding Justice Arthur Scotland and I visited Justice Puglia when he was near death. We were deeply moved when we heard him lament that he had a single regret, “So many of my friends and colleagues have called wanting to visit and I am just too weak to allow it.” We decided to bring some of his friends to him in a way that did not further weaken him. We began an effort to arrange an hour-long commercial-free radio tribute for him.

At the time, a single radio station, 1320 AM in Sacramento, was an entirely musical Big Band radio station. We visited the station manager, John Geary, and told him about Justice Puglia. He was sympathetic and decided to broadcast an hour-long tribute, free of ads. Tom Pate, the station’s senior account executive, was assigned to work with us. With the help of Justice Puglia’s wife, Ingrid, we borrowed the necessary vintage Big Band records from Justice Puglia’s world-class collection. As a teenager in the 1940s, he traveled all over the Midwest on the rear seat of his best friend John Tingley’s

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<sup>32</sup> Robert K. Puglia, “Freedom Is Not Free,” 36 *McGeorge Law Review* 36 (2005): 751.

motorcycle to hear Big Bands.<sup>33</sup> We contacted key friends and colleagues. All of them helped us.

The program, once it was recorded, ran seventy minutes, instead of an hour as anticipated. Tom Pate called and suggested we cut ten minutes, but after we talked a few minutes, he left briefly to talk with Geary. Pate said he and Geary decided they would broadcast the full seventy minutes.

Justice Puglia and his family very soon heard the broadcast. All were in tears. It was barely a week before he died. Each “speaker” on the broadcast said whatever he or she wished and then introduced one of Justice Puglia’s favorite Big Band tunes. Here is the full list of well-wishers:

Justice Anthony M. Kennedy, U.S. Supreme Court; Judge Connie Callahan, U.S. Court of Appeals, Ninth Circuit; Judge Morrison England, U.S. District Court, Eastern District, California; Justice Janice Rogers Brown, Supreme Court, State of California; Presiding Justice Arthur G. Scotland, Court of Appeal, Third Appellate District; Justice Coleman Blease, Court of Appeal, Third Appellate District; Justice George Nicholson, Court of Appeal, Third Appellate District; Dick Osen, Managing Partner, McDonough, Holland & Allen; Professor J. Clark Kelso, McGeorge School of Law; Bob Hemond, Executive Vice President, Sacramento River Cats; Steve Brenneman, Senior Lawyer, Court of Appeal, Third Appellate District, State of California, and Justice Puglia’s final senior chambers’ law clerk; and David Puglia, Justice Puglia’s son.

Justice Puglia was an Ohio State man. The radio show’s narrator was the “Voice of the Ohio State Buckeyes,” Jerry Healey, who donated his time. Although he had never met Justice Puglia, Healey, at his own expense, flew into Sacramento for his memorial service. I asked Healey why he had come so far

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<sup>33</sup> Tingley remained in Ohio and joined the Bar there. The two boys also visited Ebbets Field together in 1946 and had lunch there with Branch Rickey, a lawyer and president of the Brooklyn Dodgers, shortly before he brought Jackie Robinson to play for the Dodgers. Tingley’s father arranged the luncheon. He was general counsel of the minor league Columbus Redbirds and knew Rickey well. That was not surprising. Before he joined the Dodgers in 1942, Rickey had been manager and then general manager of the St. Louis Cardinals, 1917–1941, the Redbirds Big League parent club. Once, when he tried to bring a black player to St. Louis, Rickey almost lost his job and was run out of town on a rail. During his luncheon at Ebbets Field with Puglia and Tingley, Rickey never said a word of his imminent plan to break the twentieth-century color barrier in Big League ball. Almost half century later, Justice Puglia became friends with Branch Rickey III, the elder Rickey’s grandson. For several years, the Sacramento River Cats annually honored Sacramento’s star high school baseball players and softball players with “Robert K. Puglia Awards for excellence on the field and in the classroom.” Justice Puglia presented the awards at Raley Field each year before he died. Raley Field is now called Sutter Health Park. Long before, Rickey had a short but strong connection with California. The Sacramento franchise in the Pacific Coast League (PCL) was originally known as the Senators. Branch Rickey purchased the team in 1935 and renamed it the Sacramento Solons. Rickey’s close friend and business partner Philip Bartelme served as the Solons’ president from 1936 to 1944. His grandson, Branch III, as President of the Pacific Coast League in 2000, was instrumental in bringing a new PCL franchise, the River Cats, to Sacramento.

to attend a memorial service for a man he never met. He promptly replied, “I came to pay tribute to the remarkable man to whom I had been ‘introduced’ during the production of the radio program.”

Old judges accrete wonderful stories, sometimes alone, sometime with others. Here are two such small musical stories. Together, Justice Art Gilbert and Justice Puglia performed in New York at the Judges College. Justice Gilbert was on the piano, while Justice Puglia sang a number of old standards. Justice Puglia loved to sing. On a later occasion, he and another of his old, close friends, Neil Tocher,<sup>34</sup> who happened to be Merle Haggard’s lawyer and neighbor, once went with Haggard to a country music concert in New Mexico. That concert featured both Haggard and Willie Nelson. The two justices actually sang back-up for Haggard and Nelson and their band before thousands of cheering fans. If they were off key, neither they nor anyone in the vast audience noticed.

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<sup>34</sup> Tocher owned the Twin Valley Ranch, a grand 500-acre spread east of Redding, CA, on which, besides his own, he built several houses for his many visiting guests to enjoy. He built a two-story, very open, acoustically well-designed, and nostalgically appealing cabaret with two large, arched windows framing double glass doors with an arched window above them, all behind the stage. By sunlit day or moonlit night, the windows and glass doors bring inside the facility a beautiful mountain façade beyond a lush, verdant meadow, all very reminiscent of the grand vistas in Yosemite National Park. The walls of the cabaret were adorned with historic musical instruments actually owned and played by Louis “Satchmo” Armstrong and other notables. Intermingled with the instruments were autographed photographs of great singers of a variety of musical genres, including “Satchmo,” Frank Sinatra, and other headliners. Tocher purchased and installed two sophisticated audio mixers in his cabaret. Why would a lawyer go to such expense and trouble so far out in the wilderness? Well, as noted, Tocher was Merle Haggard’s lawyer and neighbor for roughly forty years. Haggard owned a large ranch nearby. Haggard and his band would occasionally come over and rehearse in Tocher’s cabaret. Tocher fancied himself a country music song writer and singer. He played the guitar and was learning the piano. Justice Puglia and his former colleague, Justice George Paras, visited Tocher’s wilderness retreat from time to time to sing with Tocher, Haggard, and the boys in the band. Tocher, in his early days in the law, was a prosecutor and civil trial lawyer in Sacramento. He often returned to a favorite haunt, the Pheasant Club in West Sacramento, for lengthy lunches with his buddies from the “old days.” I helped him get these groups together. Haggard once called Tocher and told him to get ready immediately to fly to Washington, D.C., for a huge dinner during which Haggard was to be honored. After arriving in D.C., the two went directly to the dinner. When they arrived, the head table was largely unoccupied. Haggard told Tocher to take a certain seat at the head table. Tocher sat down there alone as Haggard was distracted and walked off. Soon Hank Williams Jr. walked up to the head table and spoke to Tocher. He said, “Who the hell are you?” Tocher told him he was Haggard’s lawyer and friend, and Haggard told him to sit there. Williams lamented, “Well, I just wanted to find out who had bumped me from the head table.” Tocher was a World War II combat veteran. From time to time, Tocher hosted small groups of Medal of Honor recipients on fishing trips to Alaska. He was especially proud of the 2004 recording of his own song, “Wings of Freedom.” He wrote the song to honor veterans and to commemorate the World War II Memorial in Washington, D.C., also dedicated in 2004. Tocher hosted some thirty-plus World War II combat veterans at his ranch to perform and record his song. The veterans sang the chorus. Tocher and Haggard sang the verses. Tocher is gone now. He died in 2021 at ninety-four. A heroic part of his life arose from a single tragic criminal case. The case came sometime after he left the prosecutor’s office in Sacramento. He came to the case almost exactly as did Atticus Finch in Harper Lee’s *To Kill a Mockingbird*. A Shasta County judge drove out to his ranch and told him of his problem finding a lawyer who would take the case. He asked Tocher to take it. Tocher took it. After the case unfolded and ended, Tocher engaged in what surely must be the single most notable and sensitive series of events in his amazingly long life and legal career. The story of those events endures as a towering tribute to Tocher’s sense of duty, dedication, and integrity as a lawyer, and his generosity, humility, and decency as a man. I hope to tell that story in the next issue of *California Legal History*.

More than 1,500 people, including Neil Tocher, gathered for Justice Puglia's Memorial Service on March 21, 2005, at the Sacramento Memorial Auditorium. Among the eulogists, Judge Janice Rogers Brown was probably the most eloquent and certainly the most emotional. She teared up as she brought tears to every other eye as well. In this troubled era of racial division and disharmony, you should note Judge Brown is black as you read her story of affection and respect, even awe of her fallen, white hero.

"My favorite movie scene," she says, "is in 'To Kill a Mockingbird.' It is the scene where Atticus Finch has argued brilliantly and raised much more than a reasonable doubt, virtually proving the innocence of the accused, but the jury still returns a guilty verdict. Most of the spectators file noisily into the street, gossiping and celebrating. Upstairs, relegated to the balcony, another audience has watched the proceedings and remains seated. As Atticus Finch gathers his papers and walks slowly from the courtroom, they rise silently in unison. The Black minister, Reverend Sykes, taps Scout on the shoulder and says: 'Miss Jean Louise, stand up. Your father's passin'.' To me, this silent homage to a good and courageous man, who respects and believes in the rule of law—and is willing to defend it even at great personal cost—is the most moving moment in the whole film.

"Justice Puglia was just such a man. And he was not a fictional character. Most of us have risen to our feet many times to mark his passage because he was a judge. Court protocol required us to show respect for the robe and what it represented. But Justice Puglia was the kind of man who earned and could command our respect by virtue of his life and character. In a way, the robe was superfluous.

"We have had the great good fortune to know this extraordinary man. We can remember what he taught us. We need not be fearless to have courage. We can be tough and tender. We can do the right thing—and face the bad that cannot be avoided unflinchingly. We can laugh. And we must sing—even when people frown at us and advise us to keep our day jobs. We can care for the people around us. We can be generous. We can make our way, against the tide, without rancor or bitterness. And when we are tired and overburdened and feel we are not brave enough to go on, we will hear his voice in our ear. Hear him say in that quiet and steely tone: 'Yes, you can. You can.' And we will know that we are being true to his legacy. The legacy of one who loved liberty. We will know that we are standing up . . . because Justice Puglia is passin'."<sup>35</sup>

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<sup>35</sup> Janice Rogers Brown, "A Man to Match My Mountains," *McGeorge Law Review* 36 (2005): 733, <https://scholarlycommons.pacific.edu/mlr/vol36/iss4/11>.

Presiding Justice Art Scotland and I asked and when they agreed, helped the editors of the *McGeorge Law Review* to collect and organize various tributes and eulogies, including Judge Brown's, that were delivered prior to and during the memorial service, and include them in a special section in one issue of the *Review*. Judge Brown's eulogy continued to resonate widely. For example, it was read on the floor of the United States Senate during her successful confirmation proceedings for the United States Court of Appeals, D.C. Circuit. Many senators attributed their vote to the sheer eloquence of that eulogy.

### **Prize-Winning Articles from the Selma Moidel Smith Student Writing Competition**

Each year, the California Supreme Court Historical Society conducts its annual Selma Moidel Smith Student Writing Competition and awards cash prizes for the top three student essays. Laura Kalman, Distinguished Research Professor, History Department, UC Santa Barbara, and Sarah Barringer Gordon, Arlin M. Adams Professor of Constitutional Law and Professor of History, University of Pennsylvania, administer the annual competition. Both professors have been president of the American Society of Legal History, Professor Kalman in 1997–1999, and Professor Gordon in 2017–2019.

Here are the 2024 award-winning students:

**Gabrielle Braxton**, a Stanford Law School student, placed first and received \$5,000 for her essay, “Guess Who’s Coming to Stanford? The Battle for Desegregation of an Elite Law School.”

**Douglas Sangster**, a UC Law-Berkeley student at the time of the competition, placed second and received \$2,500 for his essay, “The Codification of Independent Living.”

**Caroline Lester**, a UC Law-Berkeley student, placed third and received \$1,000 for her essay, “Justice Denied and Forgotten: The Hidden History of Alaska’s World War II Internment Camps.”

### **Carlucci, Ashford, and Motley, Civil Rights Pathfinders**

Caroline Lester’s story of hidden history in Alaska, brings to my mind another story of hidden history, this one in Alaska and nearby Canada. It is the story of Cesare “CeCe” Carlucci, the only umpire in the Pacific Coast League (PCL) Hall of Fame, a sterling character whose patience and humility left an indelible, if hidden impact on Major League Baseball. The old umpire’s story, “Carlucci, Ashford, and Motley, Civil Rights Pathfinders,” and its extended reach are told next, as the final piece in this issue.

Carlucci's story has never been denied or forgotten; it has simply never been fully told. His story began during World War II. Afterwards, it rippled throughout his life and professional career, especially in his later work with two umpires, Emmett Ashford and Bob Motley, who were in friendly competition to become Major League Baseball's first black umpire. Ashford won in 1966, just as he dreamed he would long before while resting on his bed in a military barracks listening to a radio sports broadcast in 1947. It was then he learned Branch Rickey signed Jackie Robinson to play for the Brooklyn Dodgers as the first black player in the major leagues in the twentieth century. Ashford instantly resolved to be the first black umpire in the major leagues. The impact of his resolve and that of other black players, umpires, and referees, soon grew in all sports after Rickey signed Robinson. Those men and women are sometimes called "Jackie's disciples."

### Some Final Thoughts

The special twentieth anniversary edition of *California Legal History*, to be published next year, 2025, will include many fine articles by distinguished authors, including as but two examples:

Dr. David Dalin will write on Jewish justices on the California Supreme Court. He is already well into his research and excited by what he is finding. Such work is nothing new for him. He is the author of *Jewish Justices of the Supreme Court, from Brandeis to Kagan*, and eleven other books.

Tim Sandefur, Vice President for Legal Affairs, Goldwater Institute, will write two articles to observe the 250th anniversary of the signing of the Declaration of Independence. Although the actual observance date is July 4, 2026, Sandefur will write one anticipatory article in 2025, with an eye on California history and its evolving connections with the Eastern states through the Gold Rush, free statehood, and the present. He will write a second article in 2026 on the Declaration, its conception, execution, and continued impact on our nation and its citizens, and the evolution of political and legal perceptions of it. As with Dr. Dalin, such work is nothing new for Sandefur. He is author of *The Conscience of the Constitution: The Declaration of Independence and the Right to Liberty, Frederick Douglass: Self-Made Man*, and seven other books. His two articles for us and his book on the Declaration of Independence will surely help California to join in AMERICA250, the long-planned major national observance.<sup>36</sup>

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<sup>36</sup> "America 250 Years in the Making," <https://america250.org>.

It has been a privilege and honor to serve as editor-in-chief of *California Legal History* these past two years. Dan Kolkey, Jake Dear, Molly Selvin, Stu Greenbaum, Kate Cook, Ben Thompson, Ryan Carter, Alison Britton, and the many authors, were crucial to the success of both editions. With their continuing help, I look forward to my final year as editor-in-chief, in 2025. My successor will be a distinguished scholar who now works for UC Law-Berkeley. His identity will soon be announced.

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