ARTICLES

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Ladies Justice:

Celebrating Seven Trailblazing Female Firsts on the California Court of Appeal

Introduction: Pretty Lawyers Waiting for Clients?

Over a century ago, the San Francisco Examiner ran a cartoon captioned, "Shades of Blackstone, Gaze on Portia! Pretty Lawyers Do Needlework in Office." The cartoon showed two lady lawyers with their hair in buns in an office building sewing curtains waiting for their first client. The client appeared in the last frame as a man with a top hat who had dropped a button. The cartoon was the lead-in to an article that began as follows: "But that's only to kill time while waiting for clients; two turn up, but first day is devoted to making curtains. Mr. Blackstone never dreamed of anything like this!"[1]

Who were these lady lawyers? Marguerite Ogden and Annette Abbott Adams, the latter who would go on to become California's first female appellate court justice 29 years later. It was not an easy road from the cartoon pages of the San Francisco Examiner to a chambers at the glorious and historic Library and Courts Building across from the State Capitol in downtown Sacramento. Nor was it for the other trailblazing female justices profiled here.

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* Shama Hakim Mesiwala is a native Californian, born in Stanford in 1974 and raised in Cupertino among the fruit orchards and burgeoning technology industries of Silicon Valley. Her father immigrated from Mumbai, India in the 1960s for educational opportunities and freedoms found only in America. She attended all public schools, graduating from UC San Diego magna cum laude in three years. She started law school at UC Davis King Hall at age 20. Justice Mesiwala devoted her legal career to public service. She represented indigent criminal defendants at the Office of the Federal Public Defender in Sacramento and the Central California Appellate Program, where she argued cases before the California Supreme Court and California Courts of Appeal. Justice Mesiwala then transitioned to working for the judiciary. She spent 13 years as an attorney for the California Court of Appeal, Third Appellate District, including serving as a chamber's attorney for Justice Ronald B. Robie for over a decade. She then spent six years on the Sacramento Superior Court, first as a commissioner and then as a trial judge. On Valentine's Day 2023, Justice Mesiwala was unanimously confirmed as an associate justice on the California Court of Appeal, Third Appellate District, having been nominated by Governor Gavin Newsom. She was rated exceptionally well qualified. Justice Mesiwala lives in Yolo County with her spouse of over 20 years and their lively son. She is the first South Asian female justice and first Muslim American female justice on any California Court of Appeal.

[1] *Shades of Blackstone, Gaze on Portia! Pretty Lawyers Do Needlework in Office*, S.F. Examiner (Jun. 13, 1913) p. 3.

Our Seven Trailblazing Female Justices

This article identifies and celebrates seven trailblazing female justices who are California's firsts:

(1) The first woman, Annette Abbott Adams, appointed to any California state appellate court (Third Appellate District in 1942 by Governor Culbert Olson);

(2) The first African American woman, Arleigh Woods, appointed to any California state appellate court (Second Appellate District, Division Seven, in 1980 by Governor Jerry Brown);

(3) The first Jewish American woman and youngest intermediate appellate court justice, Sheila Prell Sonenshine, appointed to any California state appellate court (Fourth Appellate District, Division Three, in 1982, at age 37 and 5 months, by Governor Jerry Brown)

(4) The first Asian American woman, the first immigrant woman, the first non-native English-speaking woman, and the first disabled woman, Joyce Kennard, appointed to any California state appellate court (Second Appellate District, Division Five, in 1988 by Governor George Deukmejian);

(5) The first Hispanic woman, Ramona Godoy Perez, appointed to any California state appellate court (Second Appellate District, Division Five, in 1993 by Governor Pete Wilson);

(6) The first and only female military veteran, Eileen Moore, appointed to any California state appellate court (Fourth Appellate District, Division Three, in 2000 by Governor Gray Davis); and

(7) The first openly lesbian, Therese Stewart, appointed to any California state appellate court (First Appellate District, Division Two, in 2014 by Governor Jerry Brown).

Let's begin our travels.

Annette Abbott Adams: California's first female justice (1942)

The Third Appellate District holds the distinction of having the first woman appointed to a California Court of Appeal, Annette Abbott Adams, in 1942. Adams also was the state's first female presiding justice, and became the first woman to sit on the California Supreme Court when she sat *pro tempore* for one case to celebrate that court's centennial in 1950.[2]

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[2] Mesiwala, *First All-Female Panel Convened at the Third Appellate District* (July/August 2012) Sacramento Lawyer, at p. 16.

Adams grew up on a Plumas County ranch, rode horses with her girlfriends, and was known for hanging onto the horses' tails and swinging out over precipices. She became an elementary school teacher and one of the state's first female school principals. While a resident of Plumas County, she befriended a superior court judge. The judge was impressed by her intellect and convinced Adams to attend law school. She chose Boalt Hall. Adams's biography on the California Courts website succinctly tells her remarkable story: She was "'one of the first two women to receive a law degree from the University of California, one of the first women to be admitted to the California Bar, the first woman to serve as a U.S. Attorney, the first woman appointed Assistant U.S. Attorney General, and the first woman to serve as an appellate court justice in California.'"[3]

It wasn't always smooth sailing, though. After graduating from Boalt Hall, Adams could not find a job and hired a vocal coach to help her change the timbre of her voice to sound more masculine. She then began practicing family law with another woman, Marguerite Ogden, infamously portrayed together in the San Francisco Examiner's cartoon pages upon the opening of their firm. Later, Adams found a mentor who was an Assistant U.S. Attorney in San Francisco, and she eventually was hired by that office. She became a litigator and prosecuted cases under the Alien Sedition Act.[4]

Adams was active in politics, and her name was advanced by women delegates and leaders of the Democratic convention for possible nomination as the first female Vice President of the United States. When Governor Culbert Olson named Adams to the Third Appellate District, he appointed her directly as presiding justice, where she became known for her elegant and to-the-point opinions. Her lifestyle was a quiet one: She lived in a modest home in Sacramento with a woman friend and spent most evenings reading by the fire. Adams left the court in 1952, and died in her home in 1956.[5,6]

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[3] *Id*. at p. 17.

[4] *Ibid*.

[5] *Id*. at pp. 17–18; *Annette Adams Is Proposed as Candidate for Vice-President*, S.F. Examiner (Jun. 16, 1920) p. 1.

[6] The year Adams was appointed (1942) was the same year that the immediate past editor of this publication, Selma Moidel Smith, became a lawyer. Smith is a renaissance woman who has always been ahead of her times. One of her early efforts for women's legal rights was successfully lobbying for legislation to give married women the right to their own paychecks, which was signed into law in 1951. Internationally, her paper that advocated for clinical training in law schools was presented by invitation at the Hague. She is a composer with more than 100 piano and instrumental pieces to her name. (American Bar Association Women Trailblazers Project: *Biography of Selma Moidel Smith* <https://abawtp.law.stanford.edu/exhibits/show/selma-moidel-smith/biography [as of April 5, 2024], archived at: < https://perma.cc/XHX7-VF3H>.) At age 105, Smith continues to practice law and to serve on the editorial board of this publication.

Arleigh Woods: California's first female African American justice (1980)

Thirty-eight years separated the appointment of Adams and our next trailblazer, Arleigh Woods, California's first African American female justice. In the span of those years, there were only five more female justices appointed. Next was Woods.

Woods came from a family of prodigies who included strong, gifted women.[7] Her mother was a pianist who came to California to study music at University of Southern California but did not complete her degree because she met Woods's father and "got sidetracked."[8] Her mother went back to school in her early forties and became a certified public accountant. Her grandmother "was absolutely committed to educating" her four daughters, "so all of them had degrees." But none besides Woods's mother had children, so Woods "had four mothers." Woods was very "much love[d] growing up" and was "so protected that [she] didn't understand racial issues."[9] She graduated from high school "a little early" and went to her first dance with a chaperone.[10] She attended Chapman College in Orange County because it was a smaller school and, at the time, on a smaller campus.[11] On campus, she met her husband, Bill, who was working as an installer for the telephone company while going to engineering school at University of Southern California.[12] Upon seeing Woods, Bill told his coworker "that was the woman he was going to marry." Two years later when she was 20, he did.[13]

Woods's dream was medical school. But she "couldn't get admitted to a local medical school" and thought that was "the first time . . . [she] probably experienced some overt discrimination."[14] Her family didn't want her going to the East Coast for medical school because they were still very protective, so her mother enrolled her in Southwestern Law School.[15] At 22, Woods became the youngest woman and the fourth African American woman to be admitted to the California State Bar.[16]

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7 California Appellate Court Legacy Project (interview with Arleigh Woods) Video Interview Transcript (May 19, 2009) < https://www.courts.ca.gov/documents/Arleigh_Woods_6377.pdf> [as of March 12, 2024], archived at: < https://perma.cc/R5LD-FYPL> pp. 1–2.

8 *Id.* at p. 1.

9 *Id.* at p. 2.

10 *Id.* at p. 3.

11 *Ibid.*

12 *Id.* at pp. 4, 10.

13 *Id.* at p. 5.

14 *Id.* at pp. 5–6.

15 *Id.* at pp. 5–6, 8.

16 Obituary of Arleigh Constance Woods (July 2022) Brown's Funeral Home & Cremation Services < https://brownsfh.com/tribute/details/2256/Arleigh-Woods/obituary.html> [as of March 12, 2024], archived at <https://perma.cc/9G9T-394L>.

Woods came of age as a lawyer when her contemporaries like Sandra Day O'Connor, Shirley Hufstedler, and Mildred Lillie could not get jobs as lawyers. So before Woods got her bar results, she and her husband, Bill, "rented an office and bought office furniture and started getting all set up." When she passed the bar and opened her law firm, she "didn't know anyone or anything." But one day a man walked in, told her he "'want[ed] [her] to take care of [his] boys' [a]nd proceeded to put down little stacks of cash on [her] desk." "[T]urned out he was the premier bookmaker of Los Angeles and Pasadena." So Woods developed "a very lucrative criminal [law] practice for a year or so, getting bookmakers out of jail in the middle of the night."[17]

Woods and her husband, Bill, who had become an attorney a few years after her, "grew tired" of the nature of their practice, so Woods accepted an offer from a law firm doing workers' compensation cases. She "loved the work."[18] She then joined a major law firm that represented the United Auto Workers and several other large labor unions, later becoming a named partner.[19] She was being noticed as "one of the premier women lawyers in Los Angeles."[20]

But her husband, Bill, saw that firm life was taking a toll on Woods, and he suggested the bench. Woods felt she was "the mother of the firm" and was "not really ready to sever that relationship the first time [she] was offered a judgeship."[21] But a couple of years later she was, and it was "the best thing [she] ever did in [her] life."[22] She was appointed to the Los Angeles Municipal Court in 1976.[23] Her first assignment was to the north central district, where she was greeted with the newspaper headline, "'Black Woman to Sit In Glendale-Burbank Courts.'" [24] Glendale was a city that when Woods was a child had signs that read, "'No Blacks After 6 p.m.'" "It was probably the most racist community immediately contiguous to Los Angeles."[25] The first

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[17] California Appellate Court Legacy Project (interview with Arleigh Woods) Video Interview Transcript, *supra*, at p. 9.

[18] California Appellate Court Legacy Project (interview with Arleigh Woods) Video Interview Transcript, *supra*, at pp. 9–10.

[19] Obituary of Arleigh Constance Woods (July 2022) Brown's Funeral Home & Cremation Services, *supra*.

[20] California Appellate Court Legacy Project (interview with Arleigh Woods) Video Interview Transcript, *supra*, at p. 12.

[21] *Id.* at p. 13.

[22] California Appellate Court Legacy Project (interview with Arleigh Woods) Video Interview Transcript, *supra*, at p. 14.

[23] Biography of Arleigh Maddox Woods <https://www.courts.ca.gov/documents/WoodsA.pdf> [as of March 12, 2024], archived at: <https://perma.cc/9QKR-W4NX>.

[24] California Appellate Court Legacy Project (interview with Arleigh Woods) Video Interview Transcript, *supra*, at pp. 14–15.

[25] *Id.* at p. 15.

morning Woods took the bench, she heard noises coming from her courtroom and saw people standing around the courtroom walls. She thought, "' Oh, my God.' And it turned out that the bar was there to let [her] know how welcome [she] was." They had a party with cake and coffee, and after that, Woods "never questioned that [she] was welcome."[26] Three years later, she became supervising judge of the district.[27] "[B]ut before [she] could even get [her] feet wet [she] was elevated" to the Second District Court of Appeal, Division Seven, by Governor Jerry Brown.[28]

Woods was very surprised she had even been considered for the Court of Appeal and learned that the driving forces were the bar's acceptance of her, her work, and the labor unions she had represented. But her appointment was held up for a year, because the Lieutenant Governor "gave away [her] seat" when Governor Jerry Brown was out of state.[29] When the Governor came back, he "disclaimed" the Lieutenant Governor's nominations "and renominated the persons [the Governor himself] had nominated." Woods's confirmation took almost another year "while it was in litigation as to who had the power. And the decision was made that the Lieutenant Governor did have the power to fill any vacancy, but if before confirmation of the persons whom he had nominated[,] the Governor returned and withdrew these names, then the Governor could still nominate."[30, 31]

Woods served as associate justice for 2 years and presiding justice of the Second Appellate District, Division Four, for 13 more.[32] When asked about her cases, Woods commented on two. The first as she described it involved UCLA scientists repeatedly taking a patient's cells without his consent and patenting a

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[26] *Id.* at p. 16.

[27] Obituary of Arleigh Constance Woods (July 2022) Brown's Funeral Home & Cremation Services, *supra*.

[28] California Appellate Court Legacy Project (interview with Arleigh Woods) Video Interview Transcript, *supra*, at pp. 15, 18; Biography of Arleigh Maddox Woods, *supra*.

[29] California Appellate Court Legacy Project (interview with Arleigh Woods) Video Interview Transcript, *supra*, at p. 17.

[30] *Id.*

[31] Woods's description of her precarious nomination is alluded to in the State Bar of California's description the history behind the Judicial Nominees Evaluation (JNE) Commission. The State Bar's Board of Trustees had been evaluating judicial candidates as a matter of practice, not as a requirement. But in 1979, legislators "codified the commission's role after Lt. Gov. Mike Curb, acting as Governor in the absence of Gov. Jerry Brown, made a decision to appoint a judge. Brown later rescinded the appointment. [¶] But that appointment led to Government Code Section 12011.5, which now requires the Governor to submit the names of all judicial candidates to the JNE Commission for review." (*Judicial Nominees Evaluation Background* The State Bar of California Website <https:// www.calbar.ca.gov/About-Us/Who-We-Are/Committees/Judicial-Nominees-Evaluation/Background#:~:text=Before%20the%20JNE%20Commission%27s%20creation,Gov> [as of March 12, 2024], archived at: https://perma.cc/8SVU-SADG.)

[32] Biography of Arleigh Maddox Woods, *supra.*

"serum."[33] The patient sought some of the profits. With Woods in the majority, the patient won in the appellate court, but that opinion was reversed in part by the California Supreme Court. Woods "always regretted . . . that our opinion didn't prevail."[34] The second was "the first AIDS case [they] got." "[T]his man had gone [in] for a pedicure and they had refused him service." Woods "wrote an opinion saying, 'You can't do that.'" "It was in the era when people thought if they were in the room with someone with AIDS they were going to contract AIDS, and it was ridiculous. All they had to do was use [rubbing] alcohol, and they were perfectly protected. Plus, when you give a pedicure, you're not supposed to be cutting up someone's feet anyway, you know."[35]

Woods's tenure on the appellate court was marked by collegiality and "[w]ithout it, it can be a very difficult experience."[36] When she was administrative presiding justice, her division went out to lunch almost every day.[37] It gave them the opportunity to socialize and if anything "c[a]me up that might have caused a little rancor, it[] [was] smoothed out." She loved her time on the appellate court and "really enjoyed sitting with the research attorneys and having the time to go over the cases."[38] While she "was able to become a recluse again" as she had been in her years as an only child indulging her love of reading, she was able to be "involved in so many committees and commissions."[39] This included serving on the Judicial Council and chairing the Commission on Judicial Performance.[40] She also was "'[t]he [m]other of CAP,'" having founded the California Appellate Project in Los Angeles, which is the entity that provides direct representation to criminal defendants following conviction.[41] And separately she chaired the Habeas Corpus Commission that secured counsel for 173 people on death row.[42]

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[33] California Appellate Court Legacy Project (interview with Arleigh Woods) Video Interview Transcript, *supra*, at p. 26.

[34] California Appellate Court Legacy Project (interview with Arleigh Woods) Video Interview Transcript, *supra*, at p. 26, referring to *Moore v. Regents of Univ. of California* (1988) 215 Cal.App.3d 709, review granted and opinion superseded by *Moore v. Regents of Univ. of California* (1990) 51 Cal.3d 120.

[35] California Appellate Court Legacy Project (interview with Arleigh Woods) Video Interview Transcript, *supra*, at pp. 26–27, referring to *Jasperson v. Jessica's Nail Clinic* (1989) 216 Cal.App.3d 1099.

[36] California Appellate Court Legacy Project (interview with Arleigh Woods) Video Interview Transcript, *supra*, at p. at p. 21.

[37] *Id.* at p. 20.

[38] *Id.* at pp. 21, 23.

[39] *Id.* at pp. 21–22.

[40] *Id.* at pp. 24–25.

[41] *Id.* at p. 28.

[42] *Ibid.*

Woods was asked about her lists of firsts that included: "the youngest woman admitted to the bar; . . . probably the third black woman admitted to the bar; . . . first black woman to hold the position of senior partner in a law firm; . . . the only woman supervising judge in North Central; . . . the first black woman on the Court of Appeal; [and] the first woman to chair the Commission on Judicial Performance . . . ." Woods responded, "It's more a sense of responsibility than pride. You feel that you must excel . . . not to embarrass anyone, and to make it less difficult . . . for the next person who comes along. And so, being given the opportunity to do that . . . that gave me great pride, because I do feel that I opened some doors for other people."[43]

Woods retired after 19 years on the bench and went on to serve as one of the top mediators in California.[44] She died in 2002 at the age of 92 in Washington, where she and her husband, Bill, had built a house on the Lewis River.[45]

Sheila Prell Sonenshine: California's first female Jewish American justice and California's youngest intermediate appellate court justice (1982)

Our next trailblazer was appointed to the Court of Appeal only 2 years after Woods, much shorter than the 38 years that separated our first two. Here is her story.

Sheila Prell Sonenshine grew up in Las Vegas as the only child of parents who were supportive, involved, considerate, and wonderful.[46] Neither had finished high school, but her father was a very successful businessman in the gaming industry, and she knew she wanted to be a lawyer from age seven. It was probably because she had an uncle who was a lawyer and when everyone else her age said they wanted to be a nurse and she responded "lawyer," "it must have gotten a lot of positive response."[47]

Sonenshine's family lived in a hotel "in a very adult environment," and she "always enjoyed being at the head of the line." "It never occurred to [her] that [she] would get there on somebody's arm." And she "probably

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[43] California Appellate Court Legacy Project (interview with Arleigh Woods) Video Interview Transcript, *supra*, at p. 14.

[44] Obituary of Arleigh Constance Woods (July 2022) Brown's Funeral Home & Cremation Services, *supra*.

[45] California Appellate Court Legacy Project (interview with Arleigh Woods) Video Interview Transcript, *supra*, at p. 39; Biography of Arleigh Maddox Woods, *supra*.

[46] California Appellate Court Legacy Project (interview with Sheila Prell Sonenshine) Video Interview Transcript (April 10, 2007) < https://www.courts.ca.gov/documents/Sheila_Prell-Sonenshine_6033.pdf> [as of March 13, 2024], archived at: < https://perma.cc/B9R6-Y4QR> pp. 1–2.

[47] *Id.* at p. 2.

realized that [she] wasn't going to make it as a showgirl."[48] So she "nagg[ed] and pester[ed]" her parents to send her away to boarding school, so she could "find out if the success that [she] was having in school and socially was because of [her parents] or because of [her]."[49] And when she was 11 and entering the sixth grade, her parents agreed, and she went off to boarding school at Chadwick in Palos Verdes.[50]

Sonenshine's education was marked by diversity, excellence, and service. The two most important lessons she learned at Chadwick were "the diversity of people and learning from them" and "the total lack of gender bias," which was "pretty unusual . . . graduat[ing] from high school in 1963."[51] She started college at Brandeis in Massachusetts but transferred to UCLA after her first year, sticking with her economics major.[52] For two years at UCLA she worked for Neighborhood Legal Services, "which was the first poverty, pro-bono program, in the United States on a national level."[53] She sought out the job because she had never tested her hypothesis that she wanted to be a lawyer.[54] She did everything from typing, to interviewing clients and summer hires, to "semi-r[unning]" the office, which gave her "an abiding interest" in pro bono work.[55]

During college, Sonenshine met her husband, Ygal, who had just finished serving in the Israeli Army and was living with his sister who was teaching at UCLA. The couple graduated on Wednesday, got married on Sunday, and she started at Loyola Law School that August.[56]

Sonenshine loved Loyola Law School and her law school jobs, but the situation was precarious. In her second month of law school, Sonenshine's father had a disabling stroke and was treated for a year at Cedars-Sinai Medical Center in Los Angeles.[57] She visited him every day in the hospital while still attending law school and freelancing for different lawyers. She also

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[48] California Appellate Court Legacy Project (interview with Sheila Prell Sonenshine) Video Interview Transcript, *supra*, at p. 2.

[49] *Id.* at p. 1.

[50] *Id.* at pp. 2, 4.

[51] California Appellate Court Legacy Project (interview with Sheila Prell Sonenshine) Video Interview Transcript, *supra*, at pp. 4–5.

[52] *Id.* at pp. 5, 6.

[53] *Id.* p. 9.

[54] *Ibid.*

[55] *Id.* at p. 10.

[56] California Appellate Court Legacy Project (interview with Sheila Prell Sonenshine) Video Interview Transcript, *supra*, at p. 7.

[57] California Appellate Court Legacy Project (interview with Sheila Prell Sonenshine) Video Interview Transcript, *supra*, at pp. 8–9.

worked for the labor law department of Mattel Toys, having an affinity for labor economics because her father had a very good relationship with the labor unions while president of the hotel association in Las Vegas. By the time she finished law school, she had taken every labor law course and knew that was what she wanted to do.[58]

Sonenshine started looking for a job long before she was visibly pregnant.[59] But "it was not an easy or fruitful job search." She was told: "none of the wives would feel comfortable"; "[n]one of the secretaries would take orders from a girl lawyer"; "[n]one of the clients would pay for legal advice from a woman"; and the "partners would feel uncomfortable." "So the bottom line was that [she] didn't have a job."[60]

Sonenshine took the bar eight months pregnant, her first son, Coby, was born in October, her bar results arrived in December, and she was sworn in as a member of the bar in January.[61] One day when her husband, Ygal, came home from work and she was still in her nightgown, he asked why she just didn't open up her own law firm. She responded, "Well, because I'd just stare at the windows and the walls." And he said, "Well, you're staring at the walls now; at least you'd be dressed." So she opened up her own law firm in Newport Beach, almost walking distance from their home. From the first month, it was "an unbelievably successful practice." She was in an office suite with two men, "one who drank a lot and the other who did deals." They were "intrigued" by Sonenshine and said, "You mean you'll take some of our cases?" She got business from them and from the labor law firms that had earlier rejected her. She joked that "they fe[lt] guilty" but were confident she could do the work.[62] She took whatever cases came through her door including criminal, corporate, and estate planning.[63] Within a few months, she formed a partnership with Wayne Armstrong who was a Loyola classmate, and within a year and a half, they added some associates.[64]

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58 *Id.* at p. 11.

59 California Appellate Court Legacy Project (interview with Sheila Prell Sonenshine) Video Interview Transcript, *supra*, at p. 12.

60 *Id.* at p. 13.

61 California Appellate Court Legacy Project (interview with Sheila Prell Sonenshine) Video Interview Transcript, *supra*, at pp. 11, 13.

62 *Id.* at pp. 14–15.

63 *Id.* at p. 16.

64 *Id.* at p. 18.

"[T]he one thing [Sonenshine] didn't want to do was family law . . . because that's what girl lawyers were supposed to do."[65] But family law cases kept coming, she really enjoyed them, and she "was in the first group of certified family-law specialists."[66] She recalled one case in which she represented a Vietnam veteran returning from war who wanted custody of his son or at least substantial visitation. When the probation report came back, it said, "they were concerned about his ability to be a good parent because he loved the child so much; he was so caring. What they were really saying was, 'You're showing attributes of a mother, and therefore we question your paternal capabilities.'" In thinking back to that case, "the real issue was not wom[e]n lawyers; the real issue is the decision-making process and how gender is affected."[67]

Sonenshine enjoyed all her cases and was proud her firm still "continued to do everything," which gave her a chance to frequently appear in court. During that time, "there was one judge who literally anytime a woman lawyer came in his courtroom, he would walk off the bench or he'd let you start and then he'd say, 'I can't listen to this anymore; you're wasting my time.' " Sonenshine's strategy? She had "an arrangement with his clerk that whenever [she] was assigned to him that somehow the file could get out and go someplace else."[68]

Sonenshine's firm had grown to 10 lawyers in 10 years when she was appointed to the Orange County Superior Court in 1981. There, she adjudicated cases for one and a half years, including serving as presiding judge of the family law panel.[69] She was one of only a handful of female judges. She used to routinely stand at her clerk's desk at recesses or at lunch, and the attorneys would ask her, "'So, what's this judge like?'" She would respond, "'Oh, brilliant.'" Some of the attorneys, though, were disrespectful to her face, knowing exactly who she was. One said, "'My, I think the court looks nice today. I think the court has lost weight.'" She thought to herself, "'Would you ever do that to a man?'"[70]

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[65] California Appellate Court Legacy Project (interview with Sheila Prell Sonenshine) Video Interview Transcript, *supra*, at p. 18.

[66] *Id*. at p. 19.

[67] *Id*. at p. 20.

[68] California Appellate Court Legacy Project (interview with Sheila Prell Sonenshine) Video Interview Transcript, *supra*, at pp. 19–20.

[69] One Woman's Quest for Equality and Fairness: The Impact of Gender Bias on the Judicial Decision-Making Process (March 29, 2022) <https://www.jamsadr.com/blog/2022/one-womans-quest-for-equality-and-fairness-the-impact-of-gender-bias-on-the-judicial-decision-making-process> [as of March 14, 2024, archived at: < https://perma.cc/NLX5-8SFU>; California Appellate Court Legacy Project (interview with Sheila Prell Sonenshine) Video Interview Transcript, *supra*, at p. 22.

[70] California Appellate Court Legacy Project (interview with Sheila Prell Sonenshine) Video Interview Transcript, *supra*, at pp. 22–23.

At age 37 and 5 months and 18 days, Sonenshine was elevated to the newly created Court of Appeal, Fourth District, Division Three in 1982, a position about which she had never dreamed.[71] She remains the youngest intermediate appellate justice ever appointed in California.[72] She was one of the division's original four justices, and the first three weeks of the division were spent adjudicating cases in the kitchen of the presiding justice.[73] Her philosophy in deciding and writing up cases was: "Find the question, [confirm the facts,] and then find every single bit of precedent to determine what the answer is," realizing "in so many cases, the question was different than that which was actually presented."[74] She wrote her opinions "by longhand," when the term "cut-and-paste ha[d] a whole new meaning." She "literally took scissors and cut things up and stapled" them. And when Wang computers were first introduced at the appellate court, only the secretaries had access to them.[75] In looking back at her opinions from the 16 and a half years she was on the appellate court, she did not think hers had changed much: she always tried to be concise. And she thought that having computers "ma[d]e it easier to be shorter."[76]

When asked about her cases, Sonenshine singled out three, beginning with one she said could have written in two sentences. That one involved a man who went to a car wash on ladies' day and then a bar on ladies' night and was denied the free services given to women. He filed two actions under the Unruh Act. She was assigned the appeal and initially wrote: "This violates the Unruh Act . . . . [I]t was discrimination on the basis of gender in the offering of its services." But neither colleague would sign it, so she wrote a dissent with which the California Supreme Court agreed in an opinion authored by Chief Justice Rose Bird.[77]

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[71] One Woman's Quest for Equality and Fairness: The Impact of Gender Bias on the Judicial Decision-Making Process, *supra*; California Appellate Court Legacy Project—Interviewee Biography: Justice Sheila Prell Sonenshine https://www.courts.ca.gov/documents/Sonenshine_Sheila_P_Biography.pdf [as of March 14, 2024], archived at: < https://perma.cc/V8GD-EXSF>; California Appellate Court Legacy Project (interview with Sheila Prell Sonenshine) Video Interview Transcript, *supra*, at p. 26.

[72] The youngest justice appointed in California was Hugh Murray who was 26 when Governor John McDougal appointed him to the California Supreme Court in October 1851. A year later, he became California's youngest Chief Justice. (Shuck, History of the Bench and Bar of California (1901) pp. 435–436, archived at: https://perma.cc/4NKG-3DHQ.)

[73] One Woman's Quest for Equality and Fairness: The Impact of Gender Bias on the Judicial Decision-Making Process, *supra*; California Appellate Court Legacy Project (interview with Sheila Prell Sonenshine), Video Interview Transcript, *supra*, at p. 24.

[74] California Appellate Court Legacy Project (interview with Sheila Prell Sonenshine), Video Interview Transcript, *supra*, at p. 35.

[75] *Id*. at p. 29.

[76] *Id*. at p. 31.

[77] California Appellate Court Legacy Project (interview with Sheila Prell Sonenshine), Video Interview Transcript, *supra*, at p. 33, referring to *Koire v. Metro Car Wash* (1985) 40 Cal.3d 24, 27.

The second was also a dissent adopted by the California Supreme Court. The issue was "when one gives up one's right to search and seizure, whether one gives up one's right to have it be reasonable search and seizure?" As Sonenshine's father used to say, "'If you have to ask the question, you already know the answer.'" The Supreme Court wrote as follows: "As Justice Sonenshine, dissenting below, observed: . . . To condition warrantless probation searches upon reasonable cause would make the probation order superfluous and vitiate its purpose."[78]

And the third was a question for which Sonenshine found the answer in a case from the 1800s: "When a lease doesn't specify how [an option is] to be exercised, then how is it to be exercised?' The answer was that if the lease provides merely for an extension, the tenant's remaining in possession is sufficient notification of the tenant's decision."[79]

In addition to her jurisprudence, Sonenshine's career was marked by public service involving women, the law, pro bono efforts, and her temple.[80] When she first started practicing law, she was asked to set up the "human rights section" of the bar "because the women's section . . . would have been [considered] too discriminatory." She later joined the first statewide judicial commission regarding gender bias, uncovering that juvenile girls got harsher sentences for the same types of crimes than juvenile boys, "because . . . while assaults are never acceptable—they're more acceptable coming from juvenile boys than they are from juvenile girls."[81] When she was appointed to the trial bench, she was involved with a domestic violence shelter named Human Options, which tied into her work at Neighborhood Legal Services. The shelter was run out of an apartment building in Laguna where she would go at night after court and "just talk to the women and give them some credibility within their own selves." Human Options has been "tak[en] . . . to the next generation" by Sonenshine's second son, Danny, who was on its executive committee and whose wife was its board chair.[82]

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[78] California Appellate Court Legacy Project (interview with Sheila Prell Sonenshine), Video Interview Transcript, *supra*, at p. 35, referring to *People v. Bravo* (1987) 43 Cal.3d 600, 610.

[79] California Appellate Court Legacy Project (interview with Sheila Prell Sonenshine), Video Interview Transcript, *supra*, at p. 36, referring to *Shamp v. White* (1895) 106 Cal. 221, 222 and *ADV Corp. v. Wikman* (1986) 178 Cal.App.3d 61, 66.

[80] California Appellate Court Legacy Project (interview with Sheila Prell Sonenshine), Video Interview Transcript, *supra*, at p. 37.

[81] *Id.* at p. 40.

[82] *Id.* at p. 37.

The year after Sonenshine was appointed to the appellate bench, she initiated at the Fourth Appellate District, Division Three, a "unique and aggressive settlement program" in response to the growing number of pending civil appeals. At first, one-third of the civil cases were included in the settlement program and eventually that number grew to 95 percent with a 40 percent settlement rate. Sonenshine credits the program's success to "[t]he ability to craft [a] result . . . to achieve justice for all concerned . . . . . [T]he parties working together can better resolve their differences and devise a more equitable compromise than can the court."[83]

And five years before she retired as an appellate justice, Sonenshine created the annual Sonenshine Pro Bono Reception. The driving force was that "only three California State Bar IOLTA funded agencies serve Orange County's three million plus people." The reception provided "a venue to explore opportunities and make a pro bono commitment" by "[b]ringing together legal . . . professionals and social service agencies, as well as arts and cultural organizations."[84] The reception celebrates its 30th anniversary this year.

Of these experiences, Sonenshine said "one of the most exciting things about my career in Orange County" was the opportunity "to be at the beginning of so many different things."[85] One of those exciting things was helping found Temple Bat Yahm. It was there Sonenshine and her then 13-year-old daughter, Mandy, had their joint b'not mitzvah ceremony, together becoming "daughter[s] of the commandments." Neither of Sonenshine's parents were particularly religious, "but they were always Jewish." Her mother believed the whole purpose of religion was to do good, "so by that measure, she [was] the most religious person" Sonenshine knew. "After marrying [her husband, Ygal], helping found Temple Bat Yahm, and watching her own two sons become b'nai mitzvah," she decided that one day, too, she "would take her place among the Jewish congregation." She met regularly with the rabbi for about three years "to get a grasp of the ancient body of Jewish teachings" and "lugged her books and notes on sometimes arcane religious subjects to vacations in London and Paris." The mother-daughter b'not mitzvah ceremony was unlike any the rabbi had ever conducted, "[b]ut this is a very unique family."[86]

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[83] Sonenshine, *Real Lawyers Settle: A Successful Post-Trial Settlement Program in the California Court of Appeal* (1993) 26 Loy. L.A. L. Rev. 1001, 1002, 1004.

[84] Sonenshine Pro Bono Reception About Us < https://sonenshinereception.wordpress.com/about/ [as of July 8, 2024], archived at: <https://perma.cc/277W-NJ2W>.

[85] California Appellate Court Legacy Project (interview with Sheila Prell Sonenshine), Video Interview Transcript, *supra*, at p. 40.

[86] Schwartz, A Mother, Daughter Face Rites as a Team, L.A. Times (Mar. 9, 1991) p. B6.

Sonenshine was recently asked how the legal profession has evolved with regard to gender bias. This is what she said: "In the past 50-plus years since I became a lawyer, our judiciary, mediators and arbitrators have made significant progress on hearing matters based on facts and law, not their personal conscious or subconscious prejudices or assumptions. I am heartened to see the strides made by our judiciary regarding race, gender, age and religious diversity. But being completely candid, I think we have a long way to go and are nowhere near where we need to in terms of equality and inclusiveness."[87]

Joyce Kennard: California's first female Asian American justice, California's first female immigrant justice, California's first female non-native English speaking justice, and California's first female disabled justice (1988)

In terms of equality and inclusiveness, our next trailblazer exemplifies the "only in America" story that makes our country the greatest in the world.

Joyce Kennard "'was born during World War II on the island of Java, then a part of the Dutch colonial empire.'"[88] Her father, Johan, "was mix of Dutch, Indonesian and German." Her mother, Wilhelmine, "was Chinese-Indonesian with a sprinkling of Dutch and Belgian."[89] Her father "died in a Japanese concentration camp when [she] was a year old," and she and her mother "went to a protective camp for women and children on Java, and there they waited out the war."[90] At the camp, her mother was "fiercely protective of her only child" and once "finagled medication from the camp's guard when [Kennard] was deathly ill."[91]

After the war ended and Kennard and her mother left the camp, Kennard had a "pleasant but barebones life." But around age five, her playmate showed her a "brief glimpse at a different world."[92] She took out "the thickest, most beautiful book [Kennard] had ever seen. It had thousands of toys and pretty dresses, things [she] had never had, things [she] associated with a fairytale world. It was a Sears catalogue!"[93]

Five years later, after Indonesia gained independence from the Dutch, Kennard and her mother "left for the last remaining Dutch colony in the East

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87 One Woman's Quest for Equality and Fairness: The Impact of Gender Bias on the Judicial Decision-Making Process, *supra.*

88 Vrato, The Counselors (2002) p. 157.

89 Kort, *Fairly Unpredictable*, L.A. Times (Feb. 7, 1993) p. 46.

90 Vrato, The Counselors, *supra*, at p. 157; Kort, *Fairly Unpredictable*, *supra*, at p. 46.

91 Kort, *Fairly Unpredictable*, *supra*, at p. 46.

92 Kort, *Fairly Unpredictable*, *supra*, at p. 46.

93 Vrato, The Counselors, *supra*, at p. 157.

Indies—the western half of New Guinea," following Kennard's aunt Marie.[94] Her mother became a typist for a Dutch oil company, and as "'nonwhites,' they had to live in the Indonesian section of the company-owned town, which meant inferior housing, stores and education."[95] They shared a small Quonset hut with four other families. "The bathroom was an outdoor enclosure containing an oil drum filled with water; the toilet was a filthy ditch at the edge of a jungle."[96] English was the third language Kennard learned, after Dutch and German.[97] To learn English, she "borrow[ed] the fattest book from the library in Java because it lasted the longest," she listened to pop songs on Radio Australia, picking up a lot of "simple words related to love and heartbreak," and "practic[ed] business correspondence—like writing fictitious orders to bicycle companies in England."[98]

Kennard's mother was determined to seek out new opportunities for her daughter's education and "realized that the wild jungles of New Guinea . . . was no place for a fourteen-year-old girl." Her mother decided they should leave for Netherlands where she "found a job in a restaurant peeling onions" and Kennard "experienced such wonders as making [her] very first telephone call and getting [her] first peek at television."[99] Her mother "talked the director of a high school into accepting [Kennard] on a trial basis," and, as a quick study, Kennard seemed university bound.[100] But her schooling came to an abrupt end when she discovered a tumor on her right leg. "[D]iagnosed as a life-threatening condition" although Kennard "is still not sure if it was a malignancy," her leg was amputated above the knee.[101] She "'knew [she] could never catch up in school. And there were no second or third chances in Holland at the time.'" So she "learned typing and shorthand and became a secretary at sixteen."[102]

Kennard "'never expect[ed] much, and then things just happen[ed].'" Right before she was set to take the exam for Dutch/English interpreting, "the United States said it would accept a large immigrant quota of Dutch nationals."[103] Her mother insisted that Kennard go alone to America, so

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94 Vrato, The Counselors, *supra*, at p. 157.

95 Kort, *Fairly Unpredictable*, *supra*, at p. 46.

96 Vrato, The Counselors, *supra*, at p. 157.

97 Kort, *Fairly Unpredictable*, *supra*, at p. 32.

98 Vrato, The Counselors, *supra*, at p. 158; Kort, *Fairly Unpredictable*, *supra*, at p. 46.

99 Vrato, The Counselors, *supra*, at p. 158.

100 Vrato, The Counselors, *supra*, at p. 158; Kort, *Fairly Unpredictable*, *supra*, at p. 46.

101 Kort, *Fairly Unpredictable*, *supra*, at p. 46.

102 Vrato, The Counselors, *supra*, at p. 158.

103 Kort, *Fairly Unpredictable*, *supra*, at p. 46.

Kennard could return home to Netherlands if she didn't make a life for herself in America.[104] "America exceeded [Kennard's] wildest expectations."[105] With "' no illusions of grandeur,'" she hoped "only for a factory job." But her shorthand skills landed her a $280-a-month secretarial position at Occidental Life Insurance. "'Success had arrived.'" She was 20 years old.[106]

Kennard's mother had a chance to visit her daughter only once at Kennard's home in South Pasadena. Seven years into her job at Occidental, Kennard learned her mother was dying of cancer, so Kennard flew back to Netherlands. She tended to her mother for two months, and two days after Kennard returned to California, her mother died.[107] But her mother had left an unexpected gift: "'her entire life saving of five thousand dollars'" that she had "'scraped [] together'" "'at great personal sacrifice.'"[108] "That legacy was the key to [Kennard's] education."[109] She became a college freshman at age 27 starting out at Pasadena City College and completed four years of coursework in three, while still working at least 20 hours a week.[110] She graduated from University of Southern California magna cum laude and Phi Beta Kappa.[111] Her boss, for whom she had been working as a legal secretary, encouraged her to try law school. She had "no great aspirations to be a lawyer, but thought a law degree would 'open doors.'"[112] She ended up pursuing a joint degree program in law and public administration, again at University of Southern California, receiving an American Jurisprudence Award in the law school, a 4.0 grade point average, and the outstanding thesis award in the school of public administration.[113]

After graduating and passing the bar, Kennard applied to be an attorney in the civil division of the state's attorney general office, but the only opening there was as a secretary. "'Don't do it!'" said Bob Kennard, the tall and

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104 Vrato, The Counselors, *supra*, at p. 159; Kort, *Fairly Unpredictable*, *supra*, at p. 46.

105 Vrato, The Counselors, *supra*, at p. 159.

106 Kort, *Fairly Unpredictable*, *supra*, at p. 46.

107 Kort, Fairly Unpredictable, *supra*, at p. 46.

108 Vrato, The Counselors, *supra*, at p. 159.

109 Kort, *Fairly Unpredictable*, *supra*, at p. 46.

110 Vrato, The Counselors, *supra*, at p. 159; Kort, *Fairly Unpredictable*, *supra*, at p. 46; California Supreme Court Historical Society biography of Supreme Court Associate Justice Joyce Kennard https://www.cschs.org/history/california-supreme-court-justices/joyce-l-kennard/> (as of March 18, 2024), archived at: < https://perma.cc/DWT5-Q93K>.

111 *Ibid*.

112 Kort, Fairly Unpredictable, *supra*, at p. 46.

113 Vrato, The Counselors, *supra*, at p. 159; California Supreme Court Historical Society biography of Supreme Court Associate Justice Joyce Kennard, *supra*.

handsome Kentuckian whom she was dating.[114] Taking the advice of the man who would become her husband, Kennard applied to the criminal division and worked there as a deputy attorney general for four years, then transitioning to a research attorney for the Court of Appeal in Los Angeles for seven more.[115]

Once Governor George Deukmejian "discovered [Kennard], she was on a bullet train."[116] In 1986, he appointed her to the Los Angeles Municipal Court; in 1987, to the Los Angeles Court Superior Court; in 1988, to the Second District Court of Appeal, Division Five; and in 1989, to the California Supreme Court. She was the second woman ever appointed to that court.[117] At that swearing, Kennard read letters she had received from a group of 7th graders that included the following: "There are a lot of male judges and it's time for a woman on the court." Her 70-year-old aunt Marie from Netherlands was there to celebrate.[118]

Kennard was known on the high court as a voracious worker who stood out for her intellect, independence, judicial flair, and vigorous questioning at oral arguments.[119] Among her "blockbuster rulings" was a 4–3 decision "that said corporations could be liable for deceptive advertising if they made misleading public statements about their operations and conduct. The court's decision stemmed from statements Nike had made in defending itself against charges that its products were made in Third World sweatshops. Without determining whether Nike lied, Kennard wrote that corporations must speak truthfully when making factual representations about their products." [120] "She was also among the 4–3 court majority that overturned California's ban on same-sex marriage in 2008."[121] "Many of Kennard's dissents [were] adopted by the U.S. Supreme Court, the U.S. 9th Circuit Court of Appeals and the Legislature."[122] "In a 2000 case on spousal support, Kennard refused to go along with the majority in holding that prenuptial agreements could be enforced even if they caused one spouse hardship. The Legislature later passed a law that reflected her views."[123]

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[114] Kort, Fairly Unpredictable, *supra*, at p. 46.

[115] Kort, Fairly Unpredictable, *supra*, at p. 46; California Supreme Court Historical Society biography of Supreme Court Associate Justice Joyce Kennard, *supra*.

[116] Kort, Fairly Unpredictable, *supra*, at p. 46.

[117] Kort, Fairly Unpredictable, *supra*, at p. 46; Vrato, The Counselors, *supra*, at p. 159; California Supreme Court Historical Society biography of Supreme Court Associate Justice Joyce Kennard, *supra*.

[118] Kort, Fairly Unpredictable, *supra*, at p. 47.

[119] Dolan, *State Court Justice to Retire*, L.A. Times (Feb. 12, 2014) p. AA–3.

[120] Dolan, *supra*, *State Court Justice to Retire*, at p. AA–3, referring to *Kasky v. Nike, Inc.* (2002) 27 Cal.4th 939, 946.

[121] Dolan, *supra*, *State Court Justice to Retire*, at p. p. AA–3, referring to *In re Marriage Cases* (2008) 43 Cal.4th 757, 857.

[122] Dolan, *supra*, *State Court Justice to Retire*, at p. AA–3.

[123] Dolan, *supra*, State Court Justice to Retire, at p. AA–3, referring to *In re Marriage of Pendleton & Fireman* (2000) 24 Cal. 4th 39, 55, (2000) dissenting opinion of Kennard)

Despite her rigorous work schedule, Kennard made time for "seemingly unlikely audiences—from justices of the peace in Lake Tahoe to the Sacramento Women/Men Amputee Group."[124] And her list of awards and accolades on her official court biography spans four pages and includes the first Justice Rose Bird Memorial Award from the California Women Lawyers, the First Annual Netherlands-American Heritage Award, the Trailblazer Award from the National Asian Pacific American Bar Association, the Award from the Governor's Hall of Fame for People with Disabilities, and the American Bar Association's Margaret Brent Women Lawyers of Achievement Award.[125]

Kennard holds the record as California's longest serving female Supreme Court justice, with a 25-year tenure, retiring when she was 72. When she announced her retirement, she wrote, "'As an immigrant who came to this country at age 20 in 1962 with just the rudiments of an education, any success I achieved could have happened only in America, a land that encourages impossible dreams, a land where anyone can succeed against all odds. I never felt that America owed me anything. I am indebted to America for letting me in.'"[126]

Ramona Godoy Perez: California's first Hispanic female justice (1993)

Our next trailblazer was appointed as a justice five years after Kennard started as a justice on the Court of Appeal. Although she was not an immigrant like Kennard, Godoy Perez was the child of immigrants. Here is her story.

Godoy Perez remembered the moment she decided to become a lawyer. She was a sophomore in high school and had just told her teacher she wanted to be a legal secretary because she'd pass out if she were a nurse, and she couldn't be a teacher "if the kids . . . acted the way the ones [did in her] class." Her teacher responded she was smart enough to be a lawyer.[127] It was "quite an eye opener . . . that there was another possibility for a woman and that was going into law."[128]

Being a lawyer never occurred to Godoy Perez because it was a profession that women didn't enter, and she was the first person in her family who was "going into high school [who] was close to graduating . . . ."[129] She grew up in the Watts area of Los Angeles but moved to the Norwalk area and graduated

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[124] Kort, *Fairly Unpredictable*, *supra*, at p. 47.

[125] California Supreme Court Historical Society biography of Supreme Court Associate Justice Joyce Kennard, *supra*.

[126] Dolan, *supra*, *State Court Justice to Retire*, at p. AA–3.

[127] *The History Project Volume 9* (interview with Ramona Godoy Perez, Associate Justice) Women Lawyers Association of Los Angeles (Mar. 13, 2000) p. 1, archived at <https://perma.cc/JWG2-DG5V>.

[128] *Id.* at p. 2.

[129] *The History Project Volume 9* (interview with Ramona Godoy Perez, Associate Justice), *supra*, at p. 1

from Santa Fe Springs High School and then California State University, Fullerton with a political science degree.[130]

Godoy Perez was "so embarrassed" about having selected law as a profession that she didn't talk about it to anyone until she was in law school. She enrolled in University of San Diego School of Law, where she was one of five women in a class of about 250.[131] She was prepared for law school from her days as a political science major, which had acclimated her to being among a sea of men. Her male colleagues didn't really treat her differently, but her professors did, calling on her and her female colleagues a little bit more, trying to put them in the hot seat.[132] When out of the hot seat, she was a campus leader, including co-founding and directing the Mexican-American Legal Clinic, co-chairing the Chicano Law Students organization, and serving as the first female vice-president of the student bar association.[133]

Like many women before her, Godoy Perez found it challenging to find a job in a law firm when she graduated in 1972, being told, "it might be difficult for the partners to accept [you]."[134] In thinking about her next steps, she recalled her community work as a law student and realized that "[her] calling was to work for the benefit of other people."[135] She was accepted to the Legal Services Corporation's Reginald Herbert Smith fellowship program and got her choice assignment, working for Fresno County Legal Services, where she focused on welfare reform, school children rights, and farm worker rights.[136] She worked with parents to help their children, some of whom were being indefinitely suspended. She and the parents met with school board members, and she could see the difference her involvement made.[137] While working as an advisor to farm workers, she met Cesar Chavez, an experience she never forgot. She knew Chavez's son-in-law when they both worked in San Diego, and he became Chavez's bodyguard. Chavez was based in Delano, but when

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[130] Latino Judicial Officers Association, LJOA Newsclip (March 18, 2021) p. 1; University of San Diego, The Advocate (Fall/Winter 1995/1996) p. 13.

[131] *The History Project Volume 9* (interview with Ramona Godoy Perez, Associate Justice), *supra*, p. 2; California Court of Appeal Court biography Associate Justice Ramona Godoy Perez; <https://www.courts.ca.gov/documents/PerezR.pdf> [as of March 20, 2024], archived at: < https://perma.cc/WVX2-WJH8>.

[132] *The History Project Volume 9* (interview with Ramona Godoy Perez, Associate Justice), *supra*, pp. 3–4.

[133] University of San Diego, The Advocate, *supra*, p. 13.

[134] *The History Project Volume 9* (interview with Ramona Godoy Perez, Associate Justice), *supra*, p. 4; California Court of Appeal biography Associate Justice Ramona Godoy Perez, *supra*.

[135] *The History Project Volume 9* (interview with Ramona Godoy Perez, Associate Justice), *supra*, at p. 4.

[136] *The History Project Volume 9* (interview with Ramona Godoy Perez, Associate Justice), *supra*, at p. 4; Latino Judicial Officers Association, LJOA Newsclip, *supra*, at p. 1.

[137] *The History Project Volume 9* (interview with Ramona Godoy Perez, Associate Justice), *supra*, at p. 5.

he would come to Fresno, Chavez's son-in-law "made it a point of coming over and introducing [her]."[138]

The work Godoy Perez was doing as a "'Reggie Fellow'" was being noticed. About a year into her tenure, the director of the Western regional office of the United States Commission on Civil Rights travelled to Fresno to ask if she wanted to move to the Los Angeles area to be the first-of-its-kind attorney advisor investigating complaints of civil rights violations. Godoy Perez accepted and spent the next three and a half years reviewing discrimination complaints and making recommendations to local prosecutorial agencies, school boards, and other agencies that had impact in bringing about changes in areas the commission thought were discriminatory.[139]

After Godoy Perez had been working as a lawyer for four and a half years, she decided it was time to get some courtroom experience. She had only been to court as a legal services attorney when she was defending civil matters brought by landlords or jewelers who attempted to collect from her poor clients. She learned that the Los Angeles City Attorney's Office was hiring lawyers who had been practicing for a while, so hopefully with that experience in other jobs, they would be stronger prosecutors. So she went to work as a deputy city attorney under Burt Pines, whom she credited with "bringing about a number of these innovative changes."[140]

While working at the Los Angeles City Attorney's Office, Godoy Perez was active in the Mexican American Bar Association of Los Angeles and the Women Lawyers Association of Los Angeles. She helped establish the Mexican bar's lawyer referral service and at one of the bar's meetings, she met her future husband, Hector Perez. She rose to president-elect of the Mexican bar and was slated to be the first women to assume the presidency.[141]

Those plans changed as the good work of Godoy Perez began being noticed by those connected to Governor Jerry Brown's administration. She was introduced to Governor Brown's Judicial Appointments Secretary, J. Anthony Kline, who interviewed her and wanted her to join the Governor's office. She said no because she still wanted to get her trial experience. But the office all remembered her, so when there was talk about "appointing more minority women" and they asked for names, hers were among those tendered,

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138 *Id.* at pp. 5–6.

139 *The History Project Volume 9* (interview with Ramona Godoy Perez, Associate Justice), *supra*, at pp. 5–6; Latino Judicial Officers Association, LJOA Newsclip, *supra*, at p. 1.

140 The History Project Volume 9 (interview with Ramona Godoy Perez, Associate Justice), *supra*, at pp. 6–7.

141 Latino Judicial Officers Association, LJOA Newsclip, *supra*, at pp. 1–2.

and Kline called her to submit her judicial application.[142] She talked it over with then-attorney Carlos Moreno who was also at the Los Angeles City Attorney's Office. He was "exuberant about [the idea] and told her she had to [apply]."[143] She was appointed by Governor Brown to the Los Angeles Municipal Court in July 1980.[144]

The Los Angeles Municipal Court was a very large bench, so Godoy Perez volunteered to do a little bit of everything: traffic, arraignments, preliminary hearings, and trials.[145] She also remained active in the legal community. She represented Women Lawyers Association of Los Angeles at Law Day in East Los Angeles, taking students with her.[146] And she participated in a program with the county bar to prepare minority student repeat bar takers for success by reading through their bar exam essays and suggesting improvements.[147]

Godoy Perez decided she wanted to try for the superior court, but "Governor Brown was no longer around." It was now Governor Deukmejian. She was supported by the Mexican American Bar Association and was then interviewed by both Governor Deukmejian and his judicial appointments secretary, Marvin Baxter. Baxter was from Fresno, so she thought "maybe he had this affinity towards [her] because she had worked in Fresno."[148] Governor Deukmejian appointed her in October 1985, and she felt "really [] fortunate again" for her elevation.[149] While on the superior court, she mentored Latinx lawyers for the bench and was active on the National Association of Women Judges.[150]

When it came time for Godoy Perez to think about the Court of Appeal, it was yet another Governor who was in office. She didn't have any strong connections to any one of the Governors who appointed her, but she was always supported by Hispanic groups and women's groups. If she had it to do over again, she would select a mentor. "Women tend to . . . be a little more reluctant to come forward and be as aggressive in moving forward . . .

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142 The History Project Volume 9 (interview with Ramona Godoy Perez, Associate Justice), *supra*, at p. 8.

143 Interview of Supreme Court Associate Justice retired Carlos Moreno by Associate Justice Shama Hakim Mesiwala (Jan 25, 2024).

144 Court of Appeal biography Associate Justice Ramona Godoy Perez, *supra*.

145 *The History Project Volume 9* (interview with Ramona Godoy Perez, Associate Justice), *supra*, at p. 11; Latino Judicial Officers Association, LJOA Newsclip, *supra*, at p. 2.

146 *The History Project Volume 9* (interview with Ramona Godoy Perez, Associate Justice), *supra*, at p. 14.

147 *Id.* at pp. 12–13.

148 *The History Project Volume 9* (interview with Ramona Godoy Perez, Associate Justice), *supra*, at p. 12.

149 *The History Project Volume 9* (interview with Ramona Godoy Perez, Associate Justice), *supra*, at p. 14; California Court of Appeal biography Associate Justice Ramona Godoy Perez, *supra*; Court of Appeal biography Associate Justice Ramona Godoy Perez, *supra*.

150 Latino Judicial Officers Association, LJOA Newsclip, *supra*, at pp. 1–2.

and saying that this is what I intend to do." Women should get out there, be ambitious, and let people know you are. Select mentors who are in positions to assist you. It's not overbearing. It's normal. And it's what's expected.[151]

Governor Pete Wilson nominated Godoy Perez to the Second Appellate District, Division Five, and she was confirmed in January 1993.[152] On the appellate court, she was known for her "commitment to justice and for her sunny disposition and ever present-smile."[153] Her smile "carried over in the way she worked with colleagues and staff."[154]

Godoy Perez was also known for her jurisprudence. In a prescient case from the 1990s, she held that producers of a reality TV show could be sued for taping the air rescue of two car accident victims without their consent.[155] A "'heavily divided'" California Supreme Court "'all concurred in her analysis and what she drew as the issues.'"[156] In another case, she held that the statute of limitations in a childhood sexual abuse case was tolled when the victim claimed she first saw the connection between her current psychological ailments and her abuse only when she entered therapy.[157] Everyone who knew Godoy Perez thought very highly of her and her work, so much so that when the Clinton administration was looking for possible United States Supreme Court nominees, her name "came up several times."[158]

During her judicial career, Godoy Perez was raising three children and "handling their daily needs."[159] When asked about her life as a working mother, Godoy Perez had a lot to say. "Women, no matter what you do, you still have your children. You're the primary caregiver." The men on the bench "they come in with lunches that their wives had prepared for them" and she thought, "wouldn't that be a luxury to be able to come home and say, 'what's for dinner'" instead of "'what am I going to make for dinner.'" "You have to be equally competent in two different jobs." "And you cannot allow your personal life to interfere with your professional life because then of course you'd be considered a weakling." "It's about time that we finally said, that's enough.'" "'We've got

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151 *The History Project Volume 9* (interview with Ramona Godoy Perez, Associate Justice), *supra*, at pp. 15–17.

152 Court of Appeal Court biography Associate Justice Ramona Godoy Perez, *supra*.

153 Latino Judicial Officers Association, LJOA Newsclip, *supra*, at p. 2.

154 *Court of Appeal Justice Ramona Godoy Perez Dies at 54*, Metropolitan News (June 7, 2001) obituary, p. 1 <http://www.metnews.com/articles/2001/pere0607.htm> [as of Mar. 20, 2024] archived at: <https://perma.cc/JT95-PMPF>.

155 *Id.* at p. 2; *Shulman v. Grp. W Prods., Inc.* (1996) 51 Cal.App.4th 850.

156 Keating, *Illness Probably Will Prevent Justice's Return*, Daily Journal (May 11, 2001) p. 2., referring to *Shulman v. Grp. W Prods., Inc.* (1998) 18 Cal.4th 200.

157 *Sellery v. Cressey* (1996) 48 Cal.App.4th 538, 547.

158 Keating, *supra*, *Illness Probably Will Prevent Justice's Return*, at p. 1.

159 Latino Judicial Officers Association, LJOA Newsclip, *supra*, at p. 2.

to be able to say, sometimes our work may suffer because of home, sometimes our home may suffer because of our work, but at any event, we're pretty good and everything.'" "'So we should be president, too.'"[160]

Godoy Perez served 13 years on the trial court and 8 years on the appellate court before her untimely death by cancer at age 54 in 2001.[161] Her three children were 19, 17, and 14.[162] The day she died, the California Supreme Court adjourned its morning session in her memory.[163] Her legacy as a trailblazer was cemented 20 years after her death when the Latino Judicial Officers Association printed for the first time that she was "the first Latina appointed to the California Court of Appeal." When asked in a interview conducted by Women Lawyers Association of Los Angeles in 2000 if she "realize[d] she was breaking new ground" she answered simply, "No. I didn't have a clue. Didn't even occur to me. In fact it didn't occur to me until you've asked me now."[164]

Eileen Moore: California's first and only female military veteran justice (2000)

Our next trailblazer also didn't know she was breaking new ground when she travelled to Vietnam as a combat nurse and rose from humble roots in a family of 10 to California's first and only female military veteran justice.[165] Here is her story.

Eileen Moore won a high school essay contest for all of Philadelphia and proclaimed to her father she would like to go to college and become a journalist. "He became real quiet" and suggested she become a nurse because they had to save their money for the boys to go to college.[166] But Moore found out that becoming a nurse was expensive, too, and when army recruiters came to her nursing school, she enlisted in 1966 to help defray the cost.[167] That year, she was sent to Vietnam for a tour of duty.[168]

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[160] The History Project Volume 9 (interview with Ramona Godoy Perez, Associate Justice), *supra*, at pp. 17–18.

[161] Court of Appeal Court biography Associate Justice Ramona Godoy Perez, *supra*; Keating, *State Appellate Justice Succumbs to Cancer at 54*, Daily Journal (June 8, 2001) p. 1.

[162] Keating, *supra*, *State Appellate Justice Succumbs to Cancer at 54*, at p. 1.

[163] Court of Appeal Justice Ramona Godoy Perez Dies at 54, Metropolitan News, *supra*, at p. 1

[164] The History Project Volume 9 (interview with Ramona Godoy Perez, Associate Justice), *supra*, at pp. 14–15.

[165] California Appellate Court Legacy Project (interview with Eileen C. Moore) Video Interview Transcript (April 10, 2007) < https://www.courts.ca.gov/documents/Moore-Transcript-FINAL.docx> [as of March 21, 2024], archived at: < https://perma.cc/6RVP-Q3H2> pp. 1–2.

[166] California Appellate Court Legacy Project (interview with Eileen C. Moore) Video Interview Transcript, *supra*, at p. 1.

[167] California Appellate Court Legacy Project (interview with Eileen C. Moore) Video Interview Transcript, *supra*, at pp. 2–3; DeBenedicits, Profile Justice Eileen C. Moore, Daily Journal (April 4, 2013).

[168] Dizon, The War Within, L.A. Times (Nov. 12, 1993) p. B1 (hereafter Dizon); California Appellate Court Legacy Project (interview with Eileen C. Moore), *supra*, at p. 4.

During Moore's tour of duty at the 85th Evacuation Hospital in Qui Nhon, she "watched many soldiers die and helped nurse many others back to health."[169] "She once spent 12 hours reading mail and singing Irish songs to a pilot who lost both legs and an arm. He died shortly after she had to leave."[170] One of Moore's most vivid memories of the war "was of a young soldier who was regaining consciousness following the amputation of his severely injured leg." He asked Moore if he was still alive. She told him, "'yes . . . but that he lost one of his legs.'" His response: "Thank God. . . . I don't have to go back.'"[171] She realized that "dying so far away from home was the biggest fear of our boys. Our soldiers in Vietnam only wanted to remember the America of their dreams . . . . When they opened their eyes in a hospital, just a tent or a Quonset hut really, to see an American nurse standing there, relief flooded their faces. Sometimes tears came to their eyes. All they knew that part of America was beside them, taking care of them. Wherever they were, they were safe."[172]

American nurses in Vietnam "usually worked six days per week, twelve hours per day," and they worked all the time if there were emergencies. They "treated U.S. servicemen, Allied troops, American civilians, and Vietnamese men, women, and children side by side." "Disease admissions accounted for 69 percent of the admissions between 1965 and 1969. Army Nurse Corps officers grew grimly familiar with malaria, viral hepatitis, diarrheal diseases, skin diseases, venereal diseases, and fevers of unknown origin."[173] They "reported their roles as women and nurses in the war []as complex, ambiguous, and guilt ridden. In the days prior to military service, they acted in ways they had been raised and trained—feminine, nurturing, passive and reactive. In the space of a few days, they were called upon to be medically assertive, active and in charge." "When they got angry, the women didn't have the option of release through the use of violence or weapons or drunkenness. The women felt isolated because there were so few of them. They had to make decisions about which patients received attention or equipment, often to the sounds of constant mortar attack."[174]

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169 Dizon, *supra*, p. B5.

170 DeBenedicits, Profile Justice Eileen C. Moore, Daily Journal, *supra*.

171 Dizon, *supra*, p. B1.

172 Eileen C. Moore, Vietnam Taught You Can Hate a War and Still Love our Warriors, address on Veteran's Day (Nov. 12, 2015), p. 3 <https://voiceofoc.org/2015/11/moore-vietnam-taught-you-can-hate-a-war-and-still-love-our-warriors/> [as of March 21, 2024] archived at: < https://perma.cc/H7NB-AZ3V>.

173 Moore, *The Women Who Served in Vietnam*, Daily Journal (Mar. 11, 2024), pp. 2–3.

174 *Id.* at p. 4.

Moore's service in Vietnam was "too short a time to witness the ultimate destruction of the country, but long enough to watch the unfolding of the devastation and its lasting effects on the psyche of Americans who lived through the era."[175] Moore completed her tour of duty in West Germany, where she was stationed for two and a half years.[176] Thinking back on her service in Vietnam, Moore reflected, "I don't think I realized it at the time and I didn't realize it for a few decades afterwards, but it probably stamped me for a lot of what I do today."[177]

After her military service, Moore returned to the United States as a nurse in Chicago and ultimately in Mission Viejo, California. "'I realized the further west I came, the more opportunities there were for a young woman with no money.'"[178] She remembered reading a book called the "'Feminine Mystique'" and it "lit a fire under me." "I realized that me, a nothing, the daughter of a high school dropout, a girl, that I could actually study at a university . . . and I grabbed for that brass ring, and I never looked back."[179]

Moore enrolled in West Los Angeles Community College and then moved to Orange County and attended University of California at Irvine in the early 1970s, where she "sometimes felt out of place."[180] She might have been the only student "'who wore both lipstick and a bra.'" "But she also joined some demonstrations, marching with Cesar Chavez."[181] At UC Irvine, Moore was part of a special grant for women coming back to school called the "Vera Christie Project. The project had sociologists, psychologists, educators, business people, and academicians, all of whom interviewed the students and told them what they might excel in. From what they told her, Moore inferred that what they were really saying was, "with my mouth, I might make a good lawyer!" When asked if that influenced her decision to pursue law, Moore replied, "It sure did . . . . It gave me the confidence to do something like that . . . ."[182]

Upon graduation from UC Irvine, Moore enrolled in Pepperdine University School of Law, which at the time was in Anaheim with a view of

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175 Dizon, *supra*, p. B1.

176 *Id.* at p. B5.

177 California Appellate Court Legacy Project (interview with Eileen C. Moore) Video Interview Transcript, *supra*, at p. 3.

178 DeBenedicits, Profile Justice Eileen C. Moore, *supra*, Daily Journal (April 4, 2013).

179 California Appellate Court Legacy Project (interview with Eileen C. Moore) Video Interview Transcript, *supra*, at p. 4.

180 DeBenedicits, Profile Justice Eileen C. Moore, *supra*, Daily Journal (April 4, 2013); California Appellate Court Legacy Project (interview with Eileen C. Moore) Video Interview Transcript, *supra*, at p. 4.

181 DeBenedicits, Profile Justice Eileen C. Moore, *supra*, Daily Journal (April 4, 2013).

182 California Appellate Court Legacy Project (interview with Eileen C. Moore) Video Interview Transcript, *supra*, at pp. 5–6.

Disneyland's Matterhorn. She graduated from the Malibu campus in 1978.[183] Her time in law school coincided with a cultural shift of women entering the legal profession. The professors weren't used to having women in the class, and it showed. Moore recalled a lecture in her criminal law class about a case where a baby died from malnutrition and the wife was charged with murder. "[T]he husband thought that the baby was the product of an extramarital affair, and he didn't want to wife to feed the baby, and she didn't feed the baby." Moore raised her hand and asked her professor, "'Is there any way to tell whether or not the husband was charged with the murder?'" "And with that, the professor pulled out the Bible and he went to three or four places where women were supposed to suckle the babe and it's a woman's job to feed children . . . ."[184]

Upon graduation, Moore went to work at the Newport Beach office of a well-known Claremont plaintiffs' attorney, where she remained for a decade until becoming a judge.[185] In her first major case as an attorney, she represented a 16-year-old boy who had lost his kidneys and spleen after he used an antibiotic to treat his acne. She got a court order to inspect documents of the pharmaceutical company in Kalamazoo, Michigan to see if there were "complaints or any information about something being wrong with the product."[186] "'They had no idea I was a registered nurse. I had my little summer dresses'" and "'I could just feel them sizing me up as a zero.'"[187] They put her in a freezing room with a guard standing over her dressed in wool sweater with "these million documents" that they had taken out of folders and scattered around the table in no particular order. What she found were documents showing problems with the antibiotic—"things like somebody lost their kidney, there was blood in the urine. . . somebody collapsed . . . shortly after taking [the antibiotic]."[188] The lawyers on the other side "had never gone through all those documents . . . but they just thought I was a dummy and they

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[183] California Appellate Court Legacy Project (interview with Eileen C. Moore) Video Interview Transcript, *supra*, at p. 6; California Court of Appeal Court biography Associate Justice Eileen C. Moore <https://www.courts.ca.gov/3821.htm> [as of March 22, 2024], archived at: < https://perma.cc/7ZSA-2RDR>.

[184] California Appellate Court Legacy Project (interview with Eileen C. Moore) Video Interview Transcript, *supra*, at p. 7.

[185] DeBenedicits, Profile Justice Eileen C. Moore, *supra*, Daily Journal (April 4, 2013); California Court of Appeal Court biography Associate Justice Eileen C. Moore, *supra*.

[186] California Appellate Court Legacy Project (interview with Eileen C. Moore) Video Interview Transcript, *supra*, at p. 9.

[187] DeBenedicits, Profile Justice Eileen C. Moore, *supra*, Daily Journal (April 4, 2013).

[188] California Appellate Court Legacy Project (interview with Eileen C. Moore) Video Interview Transcript, *supra*, at p. 9.

never sorted through and pulled out the evidence, but we had it and we used it." The result? A $6 million plaintiff's verdict in 1981. Moore was three years out of law school.[189]

Moore became interested in becoming a judge after regularly appearing in court and thinking, "'I wonder if I could do that?'" Unbeknownst to her, her boss had written to the Governor: "Deuk, I need Eileen for about a year because she is working on a case for me, so don't take her yet.'" And then "it was the quickest appointment . . . . I put my application in November—and the following May 19[89] I was appointed."[190]

Moore was litigating in law and motion on Friday and by Monday morning she was sworn in. When she walked into the judges' lunchroom that afternoon, her soon-to-be presiding judge had a riddle for her: "'What do you say to a woman lawyer with an IQ of 70? . . . . 'Good afternoon, Your Honor.'" Shaking inside, Judge Moore asked him a riddle of her own: "'What do an intelligent male judge and a UFO have in common? . . . We hear them talked about a lot, but you seldom spot one.'" Then she "just sat down and ate [her] lunch, and everything was fine."[191] Moore presided over civil cases for several years and then spent several more in a criminal assignment.[192] In that criminal assignment, she presided over what the media dubbed "'the evil twin case, '" where she sentenced a young woman to 25 years to life in prison for plotting to kill her twin sister.[193]

About four years into Moore's tenure on the superior court, the Women's Vietnam War Memorial was dedicated in Washington D.C. in 1993.[194] It is a statue of "three nurses tending a wounded solider. It sits just a few bushes away from the Wall and the Three Soldiers Statue."[195] It symbolizes the 10,000 women who served in Vietnam, 80 to 85 percent of them nurses, and 78.8 percent of whom tested positive for lifetime post-traumatic stress disorder.[196] But the nurses' statue was not without controversy. "One newspaper article said that adding a women's memorial was like ' painting the Statue of Liberty

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189 *Id.* at p. 10.

190 California Appellate Court Legacy Project (interview with Eileen C. Moore) Video Interview Transcript, *supra*, at pp. 10–11.

191 California Appellate Court Legacy Project (interview with Eileen C. Moore) Video Interview Transcript, *supra*, at p. 11.

192 DeBenedicits, Profile Justice Eileen C. Moore, *supra*, Daily Journal (April 4, 2013).

193 DeBenedicits, Profile Justice Eileen C. Moore, *supra*, Daily Journal (April 4, 2013), referring to *People v. Jeen Han* (Super. Ct. Orange County, 1996, No. 96HF1017).

194 Dizon, *supra*, p. B1.

195 Moore, *The Women Who Served in Vietnam*, Daily Journal, *supra*, at p. 2.

196 *Id.* at pp. 2, 5.

in Day-Glo pink.'"[197] Moore said, "'I think the nurses deserve [the memorial] and the public deserves to understand a little bit more about what the nurses and other American women who were there went through. We had to care for these young fellows and tell them they were missing an arm, a leg or an eye, and we were more traumatized than the public realized.'"[198]

After 11 years on the trial court, Moore was nominated to the Fourth District Court of Appeal, Division Three, in 2000 by Governor Gray Davis.[199] She described the job like "'dying and going to heaven.'" She "'always loved the scholarly side of the law and . . . always enjoyed writing.'"[200] Her mentor on the superior court became her mentor on the appellate court and also her presiding justice. He told her that "'being an appellate justice is like being in an arranged marriage with no possibility of divorce.'" Moore found that "absolutely" true.[201] One of the appellate cases she authored that remains memorable to her involved a teenager who was decapitated in an automobile accident.[202] Two peace officers emailed photographs of the teenager's mutilated corpse to the public unrelated to the accident investigation, the pictures "spread across the Internet like a malignant firestorm," and Internet users at large then "taunted [the teenager's family] with the photographs, in deplorable ways."[203] Moore changed California law by holding that "family members have a common law privacy right in the death images of a decedent, subject to certain limitations," so the trial court erred in sustaining the demurrers of the officers as to the family's invasion of privacy claim.[204]

When asked about her dissents, Moore pointed out one she wrote the year before the automobile accident privacy case.[205] It involved a boy who had been given "two life sentences, running consecutively and totaling 50 years to life," that Moore wrote was "disproportionate and cannot withstand scrutiny under either the California Constitution or the United States Constitution."[206] The boy's sentence was based on the felony-murder doctrine for aiding and

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197 *Id.* at p. 3.

198 Dizon, *supra*, p. B1.

199 California Court of Appeal Court biography Associate Justice Eileen C. Moore, *supra*.

200 DeBenedicits, Profile Justice Eileen C. Moore, *supra*, Daily Journal (April 4, 2013).

201 California Appellate Court Legacy Project (interview with Eileen C. Moore) Video Interview Transcript, *supra*, at p. 14.

202 *Id.* at p. 16, referring to *Catsouras v. Department of California Highway Patrol* (2010) 181 Cal.App.4th 856, 863.

203 *Catsouras v. Department of California Highway Patrol*, *supra*, 181 Cal.App.4th at p. 863.

204 *Id.* at p. 864.

205 California Appellate Court Legacy Project (interview with Eileen C. Moore) Video Interview Transcript, *supra*, at p. 16, referring to *People v. Em* (2009) 171 Cal.App.4th 964.

206 *People v. Em*, *supra*, 171 Cal.App.4th at p. 978.

abetting robbery or conspiring to commit robbery.[207] "A 50-year-to-life term for an immature 15-year-old with an underdeveloped sense of responsibility, who was an aider and abettor and not the shooter, and who had a relatively minor criminal record, is not within the limits of civilized standards. It is cruel and unusual punishment."[208] Our Supreme Court denied the petition for review but Justice Joyce Kennard and Justice Kathryn Werdegar were of the opinion that petition should be granted.[209]

Away from her dissents and opinions, Moore has been a fierce advocate for veterans' issues, recalling when her advocacy started.[210] It was around the mid-1990s, and she had been asked to speak at the Nixon Presidential Library by the local chapter of Vietnam Veterans of America.[211] After her speech, rows of "disheveled" men in their "tattered fatigues" surrounded her and touched her somewhere—her arm, shoulder, or back." She thought these must be homeless, self-medicated Vietnam veterans, and they reminded her of the young men she treated during the war who reached out to touch her "just to make sure [she was] there . . . and it wasn't a mirage." She used her position on the Judicial Council to advocate for a committee devoted to veterans' issues that turned into the Veterans in the Court and Military Families Subcommittee for the Judicial Council, which she chairs to this day.[212] One of its most important accomplishments was creating the MIL-100 form to identify veterans coming into the court system. Moore realized that once some veterans got "sideways with the law," they were "so ashamed" thinking they had "let everybody down" that they did not want to admit they were in the military. Now every criminal defendant who comes into the trial court must be offered the form that on the back contains a summary of the benefits available to them.[213]

Moore has also been a voice for women veterans whose treatment needs are growing and may differ from the men who served our country.[214] They have specific stressors like service at a "young age, severity of the casualties, danger to the nurses' lives, sexual harassment, and survival guilt."[215] "The

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[207] *Id.* at p. 967.

[208] *Id.* at p. 978.

[209] *Id.* at p. at 964 (review den. June 10, 2009).

[210] California Appellate Court Legacy Project (interview with Eileen C. Moore) Video Interview Transcript, *supra*, at pp. 17–18.

[211] *Id.* at p. 17.

[212] *Id.* at p. 18.

[213] *Id.* at p. 19.

[214] Moore, *The Women Who Served in Vietnam*, Daily Journal, *supra*, at pp. 5–6.

[215] *Id.* at p. 4.

consistent exposure to severe combat casualties, death and dying, workload extremes, personal deprivation, loss, and danger all took a significant emotional toll."[216] And given the statistically significant higher rates of gender-based trauma experienced by women veterans, the much lower rates of recidivism by those who participate in veterans treatment courts, the increase of women in the military, and the increase of women who are incarcerated, Moore says "it's time to have gender-specific treatments available in our courts."[217]

Most recently in 2022, Moore became one of 15 nationwide members of the Veterans Justice Commission. It is headed by former United States Defense Secretary Chuck Hagel and includes another former United States Defense Secretary, Leon Panetta. The Veterans Justice Commission reports directly to Congress and works to keep military veterans out of the criminal justice system.[218]

At a speech one Veterans Day, Moore summed up her thoughts this way: "Ours in a wonderful country. When we realize we've made a mistake, we try to make this right. Since Vietnam, we have learned that even when we hate a war, we can still love our warriors."[219]

Therese Stewart: California's first openly lesbian justice (2014)

Our final trailblazer, Therese Stewart, didn't know exactly how she came up with the idea to become a lawyer. Around the time she was in first grade, President Kennedy was assassinated, and a teacher asked her what she wanted to be when she grew up. She pictured herself in a suit with a briefcase and said, "congressman."[220] Neither of her parents were lawyers or politicians for that matter—her mother was a nurse and her father was an accountant.[221] They raised her as a third-generation San Franciscan in the Castro District "'which is apt,'" she supposed.[222] Her father and siblings went on a lot of backpacking trips, which "made her care about the environment," so when she was at Boalt Hall, she served as editor-in-chief of the Ecology Law Quarterly. The journal

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[216] *Id.* at p. 5.

[217] *Id.* at p. 6.

[218] Council on Criminal Justice <https://councilоncj.org/veterans-justice-commission/> [as of May 6, 2024], archived at: <https://perma.cc/K7FT-TWQT>.

[219] Moore, Vietnam Taught You Can Hate a War and Still Love our Warriors, address on Veteran's Day, *supra*, at p. 4.

[220] The Portia Project (interview with Therese M. Stewart) Video Interview Transcript (May 2, 2022) < https://www.portiaprojectpodcast.com/episodes/episode-16-therese-m-stewart> [as of April 3, 2024], archived at: < https://perma.cc/W73B-CXZP> p. 4.

[221] Burke, *Justice Therese Stewart: Reflections on a Pioneering Career* (Spring 2019) San Francisco Attorney Magazine, at 31.

[222] Burke, *Justice Therese Stewart: Reflections on a Pioneering Career*, *supra*, at 31; University of California College of the Law San Francisco biography Adjunct Professor Therese Stewart <https://www.uclawsf.edu/people/therese-stewart/> [as of April 3, 2024], archived at: < https://perma.cc/P3HA-LTQ4> p. 2.

"reinforced Stewart's short-on-thrills view of environmental advocacy." But while taking a criminal trial practice class, she "found she liked litigation, particularly developing trial strategy."[223]

So after graduating Order of the Coif and clerking for a federal circuit judge, Stewart began as an associate in the San Francisco law firm where she litigated a "wide range of business cases at the trial and appellate level.[224] It turned out she was a natural who had "so much fun" litigating even liability insurance matters during "the old days when litigation wasn't so expensive." She became the "go-to associate, the one [who senior counsel] loved to work with." "She was a great commercial litigator and she rapidly became a first-chair lawyer."[225] But "the partners told her she looked too young. So Stewart studied how women in her firm "used their wardrobes to integrate their dual identities of person and lawyer" and "emulated their 'dress like a girl' outfits."[226] She rose to become one of the firm's early female partners in 1988.[227] "Then once [she] became partner, [she] ditched all that.'"[228]

Stewart's book of business included a significant pro bono practice. In her first pro bono case, she represented single mothers who were denied head of household tax benefits by the State of California. Undeterred by her loss in court, "she persuaded the responsible state agency to change its interpretation of the law."[229] In another pro bono case, she volunteered to defend the City of San Francisco for enacting a groundbreaking ordinance that "said if you did business in the city, you had to provide domestic partner benefits to employees." Stewart "got to know folks in the [City Attorney's] [O]ffice and saw that the quality of work that they did was very high."[230]

Stewart stayed in private practice for 20 years and remained committed to community service.[231] While partner, Stewart served as the first openly LGBT

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223 Burke, Justice *Therese Stewart: Reflections on a Pioneering Career*, *supra*, at 30–31.

224 University of California College of the Law San Francisco biography Adjunct Professor Therese Stewart, *supra*, at pp. 1–2; Roemer, *Profile Justice Therese M. Stewart*, Daily Journal (Aug. 28, 2015) p. 1.

225 Roemer, *Profile Justice Therese M. Stewart*, Daily Journal, *supra*, p. 1.

226 Burke, Justice *Therese Stewart: Reflections on a Pioneering Career*, *supra*, at 32.

227 American Bar Association biography Therese M. Stewart (2013) https://www.americanbar.org/content/dam/aba/administrative/women/therese-stewart-bio.pdf [as of April 3, 2024], archived at: <https://perma.cc/29RX-GGC2 p. 13.; Roemer, Profile Justice Therese M. Stewart, Daily Journal, *supra*, p. 1.

228 Burke, Justice *Therese Stewart: Reflections on a Pioneering Career*, *supra*, at 32.

229 American Bar Association biography Therese M. Stewart (2013), *supra*, at p. 13.

230 The Portia Project (interview with Therese M. Stewart) Video Interview Transcript, *supra*, at p. 6.

231 Governor Newsom Announces Judicial Appointments (Oct. 7, 2022) <https://www.gov.ca.gov/2022/10/07/governor-newsom-announces-judicial-appointments-10-7-22>/ (as of April 4, 2024, archived at: https://perma.cc/7VYL-YUEM>; Roemer, Profile Justice Therese M. Stewart, Daily Journal, *supra*, p. 1.

president of the Bar Association of San Francisco.[232] She had initially become involved with the bar association at the request of the board of Bay Area Lawyers for Individual Freedom to insert LGBT rights into the Bar Association of San Francisco's committee for minority hiring in San Francisco law firms and legal organizations. When Stewart first raised the idea, the Bar Association of San Francisco's committee "hesitated, feeling that taking on LGBT issues would dilute the committee's focus on racial minority hiring, which received too little attention as it was." Stewart could understand that sentiment: "'You're already in the club if you're white.'" And she believed there was a "great urgency for the legal profession to hire and promote more racial minorities." So they waited two or three years before the Bar Association of San Francisco created the LGBT committee "similar to the minority hiring one."[233] Stewart's "proudest accomplishment" from her tenure on the board of the Bar Association of San Francisco was the school-to-college mentorship program she cofounded in the 1990s to help San Francisco's kids of color and immigrants go to college.[234] The program helped hundreds of students prepare for, apply for, and select colleges.[235]

Of her community service to the city in which she grew up, Stewart said, "I feel like I am of and for the city. I am a third generation San Franciscan." She continues to live there with her attorney wife, Carole Scagnetti, where they raised their daughter as a fourth-generation San Franciscan.[236]

Stewart decided to move to the San Francisco City Attorney's Office, where she started in 2002 as its chief deputy.[237] "[T]he breadth of the practice was so much greater" than the cases she would see in private practice and also "[t]he number of cases [the City] had that went to appellate courts and even the US Supreme Court far exceeded what [she] would typically see in private practice." She "saw everything and it was super interesting." Once late in the day she was notified that "a tiger kill[ed] a teenager" at the zoo. "It was alleged that . . . three teenagers had . . . taunted the tiger and the tiger got out of its enclosure." A lawsuit ensued and "although it was mostly being handled by insurance defense counsel," "[a]t the same time , the politic[ians] [we]re having a hearing on the safety of the zoo" and she had to consider

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232 Burke, Justice Therese Stewart: *Reflections on a Pioneering Career*, *supra*, at 31.

233 *Id.* at p. 32.

234 Burke, Justice Therese Stewart: *Reflections on a Pioneering Career*, *supra*, at 32; American Bar Association biography Therese M. Stewart (2013), *supra*, at p. 13.

235 American Bar Association biography Therese M. Stewart (2013), *supra*, at p. 13.

236 Burke, Justice Therese Stewart: *Reflections on a Pioneering Career*, *supra*, at pp. 33–34.

237 Governor Newsom Announces Judicial Appointments (Oct. 7, 2022), *supra*; Roemer, Profile Justice Therese M. Stewart, Daily Journal, *supra*, p. 1.

their legitimate concerns. As a result of these experiences, she "got a different, broader, and further education" than she did in private practice.[238]

When Stewart moved to the San Francisco City Attorney's Office, she "didn't think anything LGBT-related would come up."[239] But then Mayor Gavin Newsom directed the county clerk "to issue 4,000 marriage licenses to same-sex couples in 2004."[240] As chief deputy city attorney, Stewart "led the city's defense of Newsom when then-California Attorney General Bill Lockyer sued the city to stop the same-sex marriages."[241] "The California Supreme Court declined to decide the issue of marriage equality on the merits but instead considered only whether the City and County of San Francisco had violated then-existing laws prohibiting the issuance of marriage licenses to same-sex couples." "Stewart drafted a brief defending Newsom's actions as not unlawful. But in August 2004, the California Supreme Court found that Newsom had violated then-existing marriage statutes" and "ordered San Francisco officials to stop issuing marriages licenses to same-sex couples," while at the same time "invit[ing] the local government to challenge the constitutionality of the marriage laws."[242]

So Stewart filed "San Francisco's challenge to the state's discriminatory marriage laws."[243] She prevailed in San Francisco Superior Court, but the First District Court of Appeal reversed over a dissent written by Justice J. Anthony Kline. The *In re Marriage Cases* was decided by the California Supreme Court in 2008 where Chief Justice Ronald George wrote for the majority that "marriage is a basic civil right, and that state law excluding same-sex couples from marriage discriminates on sexual orientation, in violation of California's equal protection clause."[244]

When Proposition 8 passed in 2008, Stewart represented a group of cities and counties that challenged it in state court. When unsuccessful in state court, San Francisco intervened as a plaintiff in federal litigation challenging Proposition 8, and Stewart and her team "were instrumental in obtaining district court and Ninth Circuit rulings holding that Proposition 8 violat[ed] equal protection." When the proponents of Proposition 8 petitioned the United States Supreme Court for review, the high Court held they lacked standing to

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238 The Portia Project (interview with Therese M. Stewart) Video Interview Transcript, *supra*, at p. 6.

239 The Portia Project (interview with Therese M. Stewart) Video Interview Transcript, *supra*, at p. 8.

240 Burke, Justice Therese Stewart: Reflections on a Pioneering Career, *supra*, at 32; American Bar Association biography Therese M. Stewart (2013), *supra*, at p. 13.

241 Burke, Justice Therese Stewart: Reflections on a Pioneering Career, *supra*, at 32.

242 *Id.* at p. 33.

243 American Bar Association biography Therese M. Stewart (2013), *supra*, at p. 13.

244 Burke, Justice Therese Stewart: Reflections on a Pioneering Career, *supra*, at 33.

appeal, "effectively affirming the district court decision and returning marriage equality to California."[245] The marriage equality litigation that Stewart and her team handled spanned nine years of her life.[246]

"Throughout her years as a practicing attorney, Stewart considered a judicial career 'on and off,'" eventually "'forg[etting] about it because [she] was having too much fun litigating.'" But then the justice who had written the appellate court dissent in the marriage equality case encouraged her to apply for the bench. "Though Stewart and Kline had taken the city's side for different reasons—Stewart based on equal protection, and Kline based on privacy and autonomy—they shared a collegial relationship based on mutual respect."[247] She "'thought long and hard about it,'" decided to put her name in and "'if it happens, it happens. If it doesn't, that's my answer.'"[248] She was appointed directly to the Court of Appeal in 2014, realizing that she had been in a job for so long that "involved quick decision-making" and she wanted this new position because it allowed her to study more, write more, and collaboratively figure out the answer.[249]

During her beginning week as a justice on the First District, Division Two, Stewart was "specially welcomed by a group of LGBT staff and Justice [James] Humes [the first openly gay man appointed to the state appellate bench]." Their visit made her aware that "joining their ranks was something that made them proud."[250] She "believes that the governor having appointed both an openly gay and an openly lesbian appellate court justice sends a message that LGBT people in this state can aspire to do whatever interests them and that the barriers continue to come down."[251]

After eight years as an associate justice, Stewart was confirmed as the first lesbian presiding justice on any California appellate court. She succeeded the presiding justice who had first encouraged her to apply for the bench, J. Anthony Kline, and it was Kline who presided over her enrobing ceremony. James Humes, the first openly gay justice on any California appellate court,

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[245] American Bar Association biography Therese M. Stewart (2013), *supra*, at p. 13.

[246] The Portia Project (interview with Therese M. Stewart) Video Interview Transcript, *supra*, at p. 8.

[247] Burke, Justice Therese Stewart: Reflections on a Pioneering Career, *supra*, at 33.

[248] The Portia Project (interview with Therese M. Stewart) Video Interview Transcript, *supra*, at p. 11.

[249] The Portia Project (interview with Therese M. Stewart) Video Interview Transcript, *supra*, at p. 12; University of California College of the Law San Francisco biography Adjunct Professor Therese Stewart, *supra*, at p. 1; Governor Newsom Announces Judicial Appointments (Oct. 7, 2022), *supra*.

[250] Kendall, *Profile Judge Therese Stewart*, The Recorder (Dec. 22, 2014) < https://www.law.com/therecorder/almID/1202707217728/> (as of April 4, 2024), archived at :< https://perma.cc/FG3E-835X>; Governor Newsom Announces Judicial Appointments (Oct. 7, 2022), *supra;* University of California College of the Law San Francisco biography Adjunct Professor Therese Stewart, *supra*, at p. 1.

[251] Kendall, *Profile Judge Therese Stewart*, The Recorder (Dec. 22, 2014), *supra*.

offered gracious remarks after he cast one of the three unanimous votes to confirm her. Humes said, "What impresses me the most about you is the way you have lived your entire professional career as an open and proud lesbian. You started your career 40 years ago when it was not a career builder to be out, far from it." Humes brought with him a copy of California Lawyer Magazine from 1992 that included a profile of Stewart as one of the few out attorneys working in California. He noted that it "prompted a slew of negative letters that the publication published two months later." "The reason I mention this is because being an openly honest lesbian in the legal profession was not easy and that was 30 years ago."[252]

The copy of the California Lawyer Magazine that Humes brought with him dated September 1992 has a picture of Stewart in a flowing long sleeve silk blouse.[253] Her more recent pictures are in a pant suit, along the lines of how she pictured herself when she was asked what she wanted to be when she grew up.[254]

Conclusion: A Thank You and Dedication

When I received a phone call from the inimitable Justice George Nicholson (ret.) during Thanksgiving week 2023 asking if I'd consider writing an article on California women justices, I told him I'd get back to him. I paused before saying yes, realizing that whatever I produced would take a lot of time to research and write. The credit for the herculean research goes to my dear friend and colleague, Holly Lakatos, law librarian of the Third District Court of Appeal. Thank you, Holly, for your tremendous work and friendship.

I close by dedicating this article to Rashida Hakim Mesiwala and Lynn Robie—trailblazing women in their own right.

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[252] Bajko, *Stewart Becomes 1st Lesbian Presiding CA Appellate Court Justice*, The Bay Area Reporter (Nov. 30, 2022) <https://www.ebar.com/story.php?ch=news&sc=latest_news&id=321012> (as of April 4, 2024), archived at < https://perma.cc/GC8J-W5W6>.

[253] Goldman, *Gays at Law* (Sept. 1992) California Lawyer 36.

[254] Burke, Justice Therese Stewart: Reflections on a Pioneering Career, *supra*, at 30–32.

CHARLES J. MCCLAIN*

Chinese Immigrants in the California Supreme Court:

The Earliest Civil Cases

Introduction

In April, 1862 California enacted a law that imposed a capitation tax of $2.50 per month on all adult "Mongolians" residing in the state, with a few exceptions. According to its caption, its purpose was to discourage the immigration of the Chinese into California. A San Francisco Chinese named Lin Sing, acting almost certainly with the support of Chinese organizations, challenged the law and his challenge was sustained by the California Supreme Court. In the case of *Lin Sing v. Washburn*[1] it ruled that the law was an attempt by a state to regulate foreign commerce, which included immigration, and as such trenched impermissibly on a federal power that was paramount in this

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[1] 20 Cal. 534 (1862). I would like to thank Mark Gergen and Mae Ngai for helpful comments on an earlier draft of this article. As usual I am indebted to the Berkeley Law Library reference staff for their always helpful responses to my many requests for information.

domain. The case is of considerable significance for what it had to say about the extent of the federal immigration power vis-a-vis the states. It was also the first instance in which Chinese litigants succeeded in having a California law declared unconstitutional.

Lin Sing was not the first time that Chinese immigrants found themselves involved in major Supreme Court civil litigation. In the previous decade, roughly the first decade of substantial Chinese immigration into the state, Chinese civil litigants appeared six times before the California tribunal either as petitioners or respondents. The purpose of this article is to examine these very early cases, as much for what they reveal about the structure and dynamics of the early immigrant community as for what they may tell us about the court or for any legal significance they might have. I reserve until the end a more detailed discussion of the *Lin Sing* case.

The Huiguan

Four of the six cases, and quite possibly five, involve one or more of the so-called Chinese district associations, the *huiguan*. A word therefore is appropriate regarding what have been styled "the most important social units" in the nineteenth-century Chinese immigrant community.[2]

With few exceptions, the Chinese who immigrated to California in these early years hailed from Guangdong province, specifically from the Pearl River Delta. Though they came from the same general geographic area, they lived in distinct districts within that area and spoke different varieties of the Cantonese dialect. Soon after arriving in California merchants, it appears, took the lead in forming organizations based on these geographic and linguistic affinities. They were known as *huiguan*, most often translated as "meeting house."

Huiguan records from this early period are extremely sparse so one must rely in the main on outside sources for information. Drawing on these the following can be said with some confidence about them. They served primarily as mutual aid and protection societies. They provided temporary lodging for newly arrived immigrants, the vast majority of whom were en route to the gold fields of the Sierra Nevada foothills. (According to the 1860 census some 87% of the Chinese in California were engaged in mining.)[3] They facilitated transit to these regions, possibly providing loans to those who needed them. They provided care for sick Chinese and would assist them in returning to

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[2] William Hoy, *The Chinese Six Companies* (San Francisco, 1942).

[3] Sucheng Chan, *This Bittersweet Soil: The Chinese in California Agriculture, 1860–1910,* (Berkeley, Ca., 1989) Table 3, pp. 54–55. This pioneering work, based on exhaustive archival research, documents the very large role nineteenth-century Chinese immigrants played in the development of California agriculture.

China if they were indigent. Some maintained rooms for religious services. They arbitrated disputes between their members or between their members and Chinese belonging to other *huiguan*. They had paid officers and staff, and their officers were elected. While based in San Francisco, they had branches in other California cities.[4] It appears that virtually all immigrants belonged to a *huiguan.* European nationality groups had their own immigrant receiving societies, providing various forms of assistance to those newly arrived in America, but it is doubtful that any had quite as broad an agenda as the Chinese *huiguan.* Certainly, none came to assume as much importance in those ethnic communities as did the *huiguan* among the Cantonese.[5]

Considerable evidence suggests that the California *huiguan* were American adaptations of a Chinese model, one that, as the distinguished scholar Him Mark Lai has put it, was centuries old.[6] When Chinese, mainly merchants, from any one part of the country traveled in any number to another part or abroad, with the intention of staying there for some time, their custom was to organize associations of their regional compatriots. The leading scholar on this subject, H.B. Morse, styles them "provincial clubs." These clubs provided support and protection to their members while sojourning in distant places. They offered temporary lodging to newly arriving compatriots. They arbitrated disputes between their members. They also existed, as Morse states, to protect

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[4] It is not clear whether *huiguan* officers were elected by vote of the general membership or by a more limited constituency. There is evidence that they filed election reports with the state. See *Daily Alta California,* September 25, 1867, noting that the Kong Chow *huiguan* had filed a certificate of the election of trustees in the Fifteenth District Court. It is not clear what state law required this filing.

[5] There are several contemporary accounts of the *huiguan* in this early period of their history. The earliest is to be found in an 1853 report issued by a committee of the California legislature. The report documents a meeting the committee had with the leaders of the then four *huiguan* in San Francisco, a meeting arranged by the associations' "legal adviser." The date of the meeting is not given, but it appears to have occurred either in early 1853 or the previous year. The report included information on the structure and operation of the *huiguan* the committee said the *huiguan* leaders had provided. In addition to providing this information the leaders voiced complaints about mistreatment of the Chinese in the mining districts. See "Report of the Committee on Mines and Mining Interests," Doc. No. 28, Appendix, Assembly Journal (Sacramento, 1853). The fullest and most reliable early description of the *huiguan* by an outsider is the article devoted entirely to the subject published in 1868 by the Rev. A.W. Loomis, a Presbyterian minister, fluent in Chinese, who had been active in the Chinatown immigrant community since 1859. See "The Chinese Six Companies," *Overland Monthly* (Sept., 1868), pp. 221–7. See also William Speer, *The Oldest and the Newest Empire: China and the United States* (Hartford, Conn., 1870), pp. 557–567. Speer was Loomis's predecessor at the Chinatown mission. His book is devoted principally to the history of China but contains a chapter on the *huiguan,* which, among other things, includes translations of the rules of two of the district associations.

The leading scholarly work on the *huiguan*, tracing their history from their beginnings to the recent past, is Him Mark Lai, "Historical Development of the Chinese Consolidated Benevolent Association/*Huiguan* system," *Chinese America: History and Perspectives* (San Francisco: Chinese Historical Society of America, 1987. Hereafter, Lai, "Historical Development.") For more recent accounts see Madeline Hsu, *Dreaming of Gold, Dreaming of Home: Transnationalism and Migration Between the United States and China, 1882–1943* (Stanford, CA., 2000), pp. 125 &ff.; Yong Chen, *Chinese San Francisco: 1850–1943: A Trans-Pacific Community* (Stanford, CA, 2000), pp 71 & ff; Mae Ngai, *The Chinese Question: The Gold Rushes and Global Politics* (New York, 2021), pp. 38, 51 & ff. For their involvement in litigation challenging discriminatory state and federal legislation, see Charles McClain, *In Search of Equality: The Chinese Struggle Against Discrimination in Nineteenth-Century America* (Berkeley, CA., 1994) *passim.*

[6] Lai, "Historical Development," p. 14.

their members "against the hostility of the natives" and "harsh dealing and oppression by the authorities of the place." They were financed by members' contributions and owned property. It appears that to do business in the new locale, one would have to belong to one of these clubs. Noting the similarities between the Chinese and the American *huiguan* should not obscure what would appear to be their significant differences, the principal one being that while the Chinese *huiguan* consisted almost entirely of merchants, the overwhelming majority of Chinese members of the California *huiguan* did not belong to that class. The American *huiguan* also seem to have been considerably more fractious than their Chinese counterparts.[7]

The California *huiguan* were well financed organizations in large part because virtually every Chinese immigrant belonged to one and paid "dues" to it. According to some, these contributions were voluntary. According to others, members were assessed dues and, because of an arrangement with the steamship companies, could not return to China if these dues or other debts were unpaid. Be that as it may, with these funds the *huiguan* were able to have paid officers and staff and, at an early date, to purchase real estate in San Francisco. Several maintained funds for legal expenses.[8]

The exact dates of the founding of the first *huiguan* are unknown, but by 1851 it is clear that two were operating in San Francisco. These were the Sam Yup (Sanyi) or "three-district" association, consisting of immigrants speaking the same dialect from three contiguous districts around the capital of Guangdong province, Guangzhou (Canton)and the Sze Yup (Siyi) or "four-district association," consisting of Chinese coming from four districts in another part of the area and speaking a different sub-dialect of Cantonese. In 1852, another geographically based association, the Young Wo (Yanghe), formed. And the following year, immigrants speaking the non-Cantonese dialect of Chinese known as hakka, split off from the Young Wo and established their own *huiguan*, the Sun On (Xin'an) association. By 1853, then, as Him Mark Lai observes, the Chinese immigrant community in California had "become organized into four regional dialect groupings." Later years would see the

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7 H. B. Morse, *The Gilds of China: With an Account of the Gild Merchant or Co-Hong of Canton*, (London, 1909), p. 45. Both the Rev. Speer and the Rev. Loomis saw the California *huiguan* as American adaptations of a Chinese model. Speer, p. 555; Loomis, p. 222.

8 On the source of *huiguan* finances, contrast Speer, Loomis, 1853 Legislative committee report, information on finances found in the Ah Thaie case, and H.M. Lai.

creation of others, largely as the result of secessions from existing ones.[9]

As the successive secessions evidence, there was tension within the *huiguan*, and even greater tensions between them, these arising from a variety of sources but accentuated in part, no doubt, by linguistic differences. Still, if need arose, the *huiguan* were capable of acting together in the interest of the immigrant community as a whole. As noted above, at a very early date they together aired grievances before a committee of the California legislature. Eventually, a coordinating council of the *huiguan*, first informal and later formal, was created and became a kind of Chinese civil rights organization, sponsoring challenges to anti-Chinese laws enacted by local, state and federal authorities, but this is not part of the present story.[10]

Of the four *huiguan* named above, the largest in these early years was the Sze Yup (Four District) association, counting about 12,000 members in 1851. And either it or its officers are named appellate litigants in four of the six cases decided by the Supreme Court before the *Lin Sing* case, including the first to reach that tribunal.

Ah Thaie v. Quan Wan and Kan: California's First Class-Action Lawsuit?

Him Mark Lai, in his general history of the *huiguan*, notes that in 1853 a dispute within the Sze Yup company caused Chinese from the Xinning district, its largest subdivision, to secede and form a new *huiguan,* the Ning Yung (Ningyang) Association. One of the reasons for the rupture, according to Lai, was a major physical altercation between Xinning members and others that had occurred that year in San Francisco. Additional illumination can be found in a lawsuit filed by two Xinning plaintiffs in San Francisco's Fourth District Court in May, 1853. The case would eventually reach and be decided by the California Supreme Court.[11]

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[9] Lai, "Historical Development," p. 17. Hoy, *The Chinese Six Companies,* offers a different account of the early history of the district associations. A note on the Romanization of Chinese names in this text. In the interest of historical authenticity, I have left Chinese names as they appear in California Supreme Court reports and in trial court records unaltered though they correspond to no recognized system of romanization. One suspects that they were rendered this way by the lawyers for the Chinese based on what they heard or thought they heard from their clients. The names of the individual *huiguan* are Romanized as they commonly appear in modern scholarly literature (cf. Hoy, Lai). All other Chinese terms are rendered in pinyin, the system adopted by the Chinese government for Romanizing standard Chinese. On first appearance of the individual *huiguan* names, I have included in parentheses the pinyin versions of these names.

[10] On the formation of coordinating bodies of the *huiguan*, see Lai, "Historical Development," p. 24.

[11] Id. "Historical Development," p. 17. The California court system at the time consisted of a Supreme Court and trial courts. There were no intermediate courts of appeal. The trial courts were divided into District Courts, County Courts, Justice of the Peace Courts, and Courts of Sessions. The District Courts stood at the top of the trial court hierarchy, with exclusive jurisdiction over all important civil and criminal matters. County Courts had authority to review decisions of Justice of the Peace Courts.

The plaintiffs stated in their complaint, filed May 28, that they were members of the Sun Ning (Xinning) subdivision of the Sze Yup company, the largest one, numbering about five thousand members, out of a total Sze Yup membership of twelve thousand. They alleged that they were suing on behalf of all members of the Sun Ning branch, whose authorization they claimed. They sued in their own names alone, they stated, because of the impracticality of making all Sun Ning members named plaintiffs. (Such lawsuits were expressly authorized by California's first civil procedure act.[12]) They alleged that the defendant, named in the complaint as Ah Thaie, was employed by the company only as an interpreter and agent but was addicted to gambling and that he had taken control of the funds of the Sze Yup company and had been squandering those funds to indulge that vice.[13] They claimed that out of the funds of the Sze Yup company a large sum of money was due and owing to the Sun Ning branch in particular. They asked for an injunction, restraining the defendant from selling or in any way disposing of Sze Yup property and ordering him to account for funds so far spent. They asked finally that a receiver be appointed to take charge of the property of the Sze Yup company pending further orders of the court.

The complaint included information on the organization, purposes and funding of the Sze Yup company. According to the plaintiffs (or their attorney) the company had been organized in 1851 for the purpose, of securing a fund of money to aid sick and destitute Chinese and "for speculative purposes." In pursuit of such purposes large sums of money had been lent to Chinese arriving without means, enabling them thereby to go to the mines. Company funding came from several sources. Under the terms of the agreement forming the Sze Yup company, each Chinese bound himself to contribute nineteen dollars to the company. The company also exacted a fee of fifty cents from every Chinese arriving in San Francisco. In addition, most loans had been repaid with interest. The Sze Yup company was therefore in possession of substantial funds. According to the plaintiffs, very few company funds had been used to aid sick Chinese. Since this account is embedded in an adversary pleading and filtered through the pen of American counsel it is not clear how much weight it is to be given.[14]

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[12] Act to regulate proceedings in Civil Cases, in the Courts of Justice of this State, ch. 5, § 14, 1851 Cal. Stat. 52.

[13] The reference is clearly to the important *Sze* Yup leader, Yee Ahtye, who is referred to elsewhere as George Athei and George Athaie. See Him Mark Lai, "Historical Development of the Chinese Consolidated Benevolent Association/*Huiguan* System," Chinese America History and Perspectives, 1987. He had been one of those present at the 1852/3 meeting with the California legislative committee.

[14] Supreme Court case file, Transcript on Appeal, *Thaie v Quan*, pp. 3–6.

The plaintiffs secured a writ of injunction from the court and at the same time executed a surety bond in the amount of $5,000, the maximum amount they agreed to pay to the defendant in the event the court should eventually decide that the plaintiffs were not entitled to the injunction. In short order the defendant went to court to contest the lawsuit and on June 18, 1853 the court found in his favor, dissolving the injunction. There is no record of the hearing and one cannot say what the basis of the court's decision was. The defendant, Ah Thaie, now the plaintiff in his own action, then sued to collect on the surety bond, listing total damages of $5,000, including some $1200 in attorney's fees, the amount he said he had spent to procure the injunction's dissolution. The original plaintiffs, now the defendants, demurred on the complaint, alleging, among other things, that attorney's fees were not recoverable as damages in actions of this sort. The court overruled the demurrer and entered judgment for the plaintiff, Ah Thaie. The defendants appealed, and the case went up to the California Supreme Court on the sole issue of the recoverability of counsel fees. Both sides were represented by prominent members of the fledgling California bar, Ah Thaie by George Tingley, a former member of both the California Assembly and Senate.

Counsel for the appellants had two strings to his bow. In America, as opposed to England, attorneys' fees are generally not recoverable by the winning party in civil litigation. He was able, too, to cite a decision handed down by the Supreme Court two years earlier, holding that attorneys' fees constituted no part of the damages in an action on a bond for a wrongly issued attachment, a type of case similar to the one before the court. But the court distanced itself from this earlier opinion, looking instead to a British precedent for guidance. Justice Alexander Wells in an opinion issued in its July, 1853 term affirmed the judgment of the lower court. The language of the bond the original plaintiffs had executed, it declared, was broad enough to embrace the counsel fees defendant, Ah Thaie, had felt compelled to pay to procure the dissolution of the injunction they had obtained. Such an outcome, he declared, was "just in equity" and "sound in law."[15]

The case raises fascinating questions. Naturally one is moved to ask what would have prompted Chinese immigrants in May, 1853, so soon after the first Chinese arrived in the state, to go to a California court to ask it to put a stop to perceived misconduct in their *huiguan*. But they would doubtless have known that earlier in the year or perhaps in 1852 *huiguan* leaders had retained a lawyer to represent their interests before the state legislature. So, the availability

[15] *Thaie v. Quan,* 3 Cal. 216 (1853).

of lawyers to address grievances would have been widely understood in the community and it would have been a short step from thinking about legislative committees to thinking about courts. One would of course like to know who facilitated the dissident Sze Yup members' contact with lawyers in this particular case. One could ask the same question of the original defendant, Ah Thaie. But these are questions that cannot be answered.

The case is of some significance in the legal history of California. It was surely one of the state's first, if not the first, "class action" lawsuits, certainly the first to reach the California high court. The case is of doctrinal importance as it established a principle that has held up over time and remains good law to this day, viz., that attorneys' fees, normally not recoverable in legal actions, are a recoverable element of damages in an action on an injunction bond.[16] It is not clear whether the amount awarded by the court, some $47,000 in today's money, was ever paid by the plaintiffs in the original lawsuit or the faction of the Sze Yup they claimed to represent.

Justice Alexander Wells, California Supreme Court, authored the opinion in Thaie v. Quan in 1853. Photograph published here courtesy of the California Supreme Court.

[16] Cited with approval most recently in the 2016 Superior Court case of *Ehansipour v. Stephan*, San Mateo Superior Court, 2016 Cal Super LEXIS 14876.

Eldridge v. See Yup Co., A Novel Question in the Law of Trusts

One of the allegations in the complaint filed by the original plaintiffs in the *Ah Thaie* case was that the defendant had used funds belonging to the Sze Yup company to purchase real estate, the implication apparently being that the purchase was made for his own personal benefit. And, indeed, on May 14, 1853, two weeks before the filing of their complaint, the defendant, using the name George Athei, had in fact purchased a piece of real estate in San Francisco for $7,000 (about $250,000 in today's money). According to a report of the purchase in the Daily Alta California, the city's leading newspaper, it was made for the purpose of there erecting a church, "devoted to moral and religious instruction," the premises to be "under the supervision of George Athaie of the Sze Yup company." The article did not mention the exact location of the property, but other sources identify it as being on Pine St., near the cross street, Kearney.[17] Whatever the intention, within a couple of years the property had become entangled in complex litigation, litigation that raised novel questions of law and eventually found its way to the California Supreme Court.

Subsequent to the purchase a man by the name of Edward Caney sued Athei for a debt allegedly owed him (the nature of the debt is not clear). In October, 1855, he obtained a money judgment against Athei, executed on the judgment and at a sheriff's sale got a deed to the property Athei had purchased. In 1856 he conveyed the property to a John Eldridge, who the following month filed a suit in ejectment in the Fourth District Court against the Sze Yup company, asking the court to oust it from the premises. The company answered that it, and not Athei, was the true owner of the property, basing its case on the wording of the original deed. The deed, it claimed, had vested legal ownership of the property in Athei but equitable ownership in it. Athei, in short, held the property in trust for the company. George Tingley, who had represented Ah Thaie, the Superintendent of the Sze Yup company in the 1853 case discussed above, represented the company itself in this case.[18]

On April 6, 1857, the case was submitted by stipulation to a referee appointed by the court, who held a hearing April 16–17. Argument turned on the intent of the language found in the deed. Counsel for the plaintiff pointed to the deed's clause, granting every interest, legal or equitable, that the owners

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[17] Daily Alta California, July 15,16, 1853.

[18] *Eldridge v. See Yup,* Supreme Court case file. Complaint, Transcript on Appeal, pp. 1–4; Answer, pp. 7–9. In 1852, as a member of the California Senate, Tingley had introduced a bill that would have made enforceable through the criminal law labor contracts entered into between foreigners and U.S. citizens resident in California. The bill encountered strong opposition and was never enacted into law. It is unclear how he came to represent the Chinese litigants in this and the Ah Thaie cases. On Tingley's proposal see, Mae Ngai, *The Chinese Questions: the Gold Rushes and Global Politics,* pp.82–3.

had in the property to Athei, his heirs and assigns. Defense counsel countered that this language was followed immediately by words stating that the property was being transferred to Athei, described as the superintendent of the Sze Yup company, "for the use of a Chinese church or place for religious worship and moral instruction" and in conformity to the rules of the company. It was thus not an unqualified transfer to Athei but a transfer in trust though that particular word did not appear. The Sze Yup company sought to introduce external evidence, its exact nature not specified, that it had paid the purchase price for the property deeded to Athei, the theory apparently being that such payment would have created a resulting trust in the company's favor. The referee, however, refused to let this evidence in. Only one witness was heard from, Charles Carvalho, who described himself as a Chinese interpreter. He testified that he was familiar with the property in question and with the Sze Yup company. The company existed, he stated, to provide temporary accommodations to passengers from China, prior to their departure for the gold fields in the interior, and the same to Chinese, returning from the gold fields, prior to their departure for China. Most of the building was devoted to these purposes, he stated, with about a quarter set aside for religious worship or, as he at one point called it, "idol worship."

The referee issued his report and opinion, a lengthy one, April 30. Interestingly, he rejected out of hand the plaintiff's argument that the dedication of the premises to "idol worship" violated the public policy of the state. Such an interpretation, he wrote, would run afoul of the state constitution, which guaranteed freedom of religion and conscience to all so long as religious practices did not endanger the peace and safety of the state. His determination of the issue before him, he wrote, would have to rest entirely on the words of the original deed, a document that he characterized as "unfortunately drawn." He could find nothing in it, he wrote, that evidenced an intention to create a trust for the benefit of defendant. The clause stating that the premises were to be used for religious purposes was but a limitation as to use and was without any legal effect. He was of the opinion, he concluded, that the plaintiff was entitled to a judgment in his favor.[19] In short order, the defendant's attorney filed exceptions to the referee's report and moved to set it aside. And on August 19, 1857, the court granted the motion and entered judgment for the Sze Yup company, the grounds unclear from the record. The plaintiff filed a notice of appeal, and the case went up to the California Supreme Court for decision. Almost two years would elapse before appellate briefs were filed in the case, another six months before the High Court would hand down its opinion, an ambivalent one, as it turned out.

[19] Referee's report, *Eldridge v. See Yup Company,* Supreme Court case file, Transcript on Appeal, pp. 15–20.

Surveying the facts of the case, as presented, and relevant cases (all foreign as California had not yet developed its own trusts jurisprudence), it felt compelled to conclude that legal title to the property was in George Athaie and that he did not hold it in trust for the Sze Yup company. Consonant with the reasoning of the referee, it interpreted the reference to the property's use as words of limitation, having no legal effect. "The mere direction in the deed, as to how the property was to be used [by Athaie]," it declared, "neither qualified the title nor raises a use or trust." There were, however, too many unresolved questions for it to order judgment for the plaintiff. Did the purchaser at the sheriff's sale, for example, have notice of a possible equitable defense on the part of the Sze Yup company? Did the Sze Yup company in fact pay the purchase price for the property? The referee had excluded testimony to this effect, but that was error on his part, it declared. It remanded the case to the trial court for a full exploration of these and other issues.[20] There is no record of any further proceedings in the case. Nor is there any evidence that the Sze Yup company ever lost possession of its Pine St. property until 1866 when, according to the historian Him Mark Lai, George Athei transferred ownership to the Kong Chow association, the *huiguan* formed by remnants of the Sze Yup association after the secession of several of its constituent parts.[21] One would of course like to know more about George Athei, central character in each of these first two cases.

Speer v. See Yup Company, The Question of Chinese Testimony

In 1854, the California Supreme Court, in one of its most notorious decisions, decided that Chinese could not testify either for or against whites in criminal cases. The 1850 law regulating criminal proceedings provided that "no black or mulatto person, or Indian, shall be permitted to give evidence in favor of, or against, any white man." A white man had been convicted of murder based on the testimony of Chinese witnesses. Chief Justice Hugh Murray, writing for a 2–1 majority, reversed the conviction, holding that when the law was written the word "Indian" was broad enough to include inhabitants of Asia, who were thought to have originally peopled the North

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[20] *Eldridge v. See Yup Co.*, 17 Cal. 44 (1860).

[21] Lai, p. 17. Evidence of the Sze Yup's and then the Kong Chow's continued possession of the Pine St. property can be found in a number of places. The Sze Yup property was assessed for property taxes in tax years 1859–1860 and 1860–61 and was sold at two successive tax sales for an alleged failure of the association to pay the assessments. But both tax sales were voided by the California Supreme Court in a decision handed down in 1863. *Roberts v. Chan Tin Pen*, 23 Cal. 260 (1863). See *Marysville Daily Appeal*, Jan. 21, 1865, article on Buddhist temples in San Francisco, listing one belonging to the Sze Yup company, "on Pine above Kearney." Stockton Independent, April 18, 1866, reporting that a Chinese man who had been killed in an explosion in San Francisco two days earlier had died at the "See Yup asylum on Pine St." Daily Alta, Oct. 9, 1867, reporting that the Fourth District Court had given the Kong Chow Association permission to mortgage a lot on Pine St. near Kearney.

American continent. The word "black," he wrote, was meant broadly to include all non-whites and included the Chinese, a race, he wrote, "whose mendacity is proverbial."[22]

An 1851 law regulating civil proceedings barred Negroes and Indians from being witnesses in California civil cases as well. A high court affirmation that this statute applied to Chinese came about in peculiar fashion.[23]

In August, 1858, James Speer (no relation of the Presbyterian clergyman of the same last name) filed suit in San Francisco's Fourth District Court, alleging that the Sze Yup company owed him money. The claim was based on five promissory notes, four for $600, one for $700, allegedly given by the company in 1854–5 to a Chinese man by the name of Zip Wing Kam and endorsed over to him, Speer, for valuable consideration. The notes, it alleged, were payable on demand and the company had rejected a demand for payment. Speer asked for judgment in the amount of $3100 plus any interest owing on the notes.

The Sze Yup company denied all the allegations in the complaint. It denied that it had ever borrowed any sum of money from the plaintiff's assignor or executed any promissory notes in his behalf. Indeed, it claimed that it had never borrowed money from anyone. It admitted that it had occasionally loaned money to Chinese to enable them to go to the mining districts, but borrowing money, it claimed, would not have been permitted under the company's rules and regulations. It asserted that the plaintiff had brought the suit with the intention of defrauding it of its funds but also, *"for the purpose, among others, of excluding Chinese testimony,"* [emphasis added] knowing that had Zip sued in his own name, his fraud could have been exposed, but since suit was being brought by a white man it would be prevented by California law from presenting Chinese witnesses who could testify in its behalf. More flesh would be put on the bones of this rather surprising assertion in the course of the trial of the action.[24]

The case went to trial before a jury in the Fourth District Court October 26, 1858. The first witness to testify for the plaintiff was Charles Carvalho, the Chinese interpreter. The notes in controversy, written in Chinese, were presented to him and he translated them into English. Some of the notes were made payable to one Man On Tong, but he stated that this was Zip Wing Kam's place of business and that it was common Chinese practice to make

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[22] *People v. Hall*, 4 Cal. 399, at 405 (1854). Justice Wells, author of the opinion for the court in *Ah Thaie,* dissented.

[23] Ch. 99, 1850 Cal. Stat. 229,230. 1851 Cal. Stat. 114. *People v. Hall*, supra, 4 Cal. at p. 405. Chinese were never barred from testifying in federal courts.

[24] Supreme Court case file, Transcript on Appeal, *Speer v. See Yup Co*. Answer of defendant, pp. 14–15.

notes payable in this fashion. There was a seal on the back of the notes which was Zip's private seal and indicated a transfer of the notes. Recounting how he had become involved in the case, he testified that he had been called to the office of a man named Sawyer and had there met Zip and Speer, the part owner of a storage business, for the first time. Zip spoke no English and Speer no Chinese. While there, he had seen Speer endorse the notes. At Speer's request, he stated, he had accompanied him and Zip Wing Kam to the Sze Yup company, had presented the notes to the company president for payment but that payment was refused. He was familiar with the Sze Yup company's habit of doing business, knew that it frequently loaned money at interest, but had no knowledge of its borrowing money. There was a seal on the notes, which had writing that could be translated as "note of the Sze Yup company." On cross examination he testified that he could not say who made the notes nor could he say that the seal on the notes was that of the Sze Yup company.

Plaintiff then called the attorney, George Tingley, to the stand, the attorney who had represented the plaintiff Ah Thaie in *Thaie v. Quan*, and the Sze Yup company in the *Eldridge* case, discussed above. He claimed that he was more familiar with the Sze Yup company than any American, a plausible claim at that time. The only other non-Chinese who might have known more than Tingley were the Presbyterian missionaries, noted above. But the Rev. Speer had left the San Francisco mission in 1857, and his replacement the Rev. Loomis, did not arrive until 1859. The interpreter, Charles Carvalho, certainly knew a great deal about the Chinese community, but it seems doubtful that he would have known more than Tingley about the internal affairs of the Sze Yap. Tingley stated that he had frequently visited the company house and had seen Sze Yup papers with seals similar to the one on the notes in controversy but could not identify those in evidence as company seals. He acknowledged that he knew no Chinese.[25]

Plaintiff Speer then offered to call Zip Wing Kam, the alleged original payee and assignor of the notes, as a witness. And here the case took a dramatic turn. The defendant, Sze Yup company, objected on the grounds that the statutes of California prohibited the examination of a Chinese witness in any case in which a white person was a party. The court sustained the objection. An offer to call another Chinese witness met with the same objection, which was again sustained. The plaintiff excepted to both rulings and then rested his case. The defendant moved for an order dismissing the case, claiming that the plaintiff had failed to prove a case sufficient to submit to the jury. The court agreed and

[25] Supreme Court case file, Transcript on Appeal, *Speer v. See Yup Co.*, pp. 20-26.

ordered judgment for the defendant. The plaintiff, Speer, moved for a new trial but the motion was overruled. The proceeding had taken a single day.[26]

In December Speer filed a Notice of Appeal to the Supreme Court, but his attorneys did not seriously pursue the appeal, submitting no written argument to the tribunal. The defendant, now the respondent, Sze Yup company, submitted a perfunctory handwritten brief, stating simply that under the state's Civil Practice Act Indians were not permitted to testify in proceedings in which whites were a party and that the court in the 1854 case of *People v. Hall* had ruled that Chinese were comprehended under the term "Indian." This was the sum and substance of the one-paragraph opinion affirming the trial court judgment handed down by the high court in April, 1859.[27]

This case, the most fascinating and puzzling of the lot, raises many questions, most of which cannot be answered. On what basis, for example, did the Sze Yup company make the claim that Speer was bringing his action for the purpose of excluding Chinese testimony? Did it have information about Speer that led it to this conclusion? How did it, or perhaps more properly, the Sze Yup lawyers expect him to accomplish this objective? Unfortunately, nothing is known about the man other than what appears in the judge's account of trial testimony, namely that he was part owner of a storage business in San Francisco. Certainly, there is some circumstantial evidence to support the claim. The fact that he did not seriously pursue his appeal in the Supreme Court perhaps suggests that, notwithstanding his nominal opposition to the trial court's ruling, he was in fact satisfied with it and the principle it stood for.[28]

But then one must ask, was it right for the Sze Yup company to be the vehicle through which the ban on Chinese testimony in civil cases was established? There was at the time no law on the books explicitly excluding Chinese testimony in civil cases. The statute governing civil proceedings excluded only "Negroes and persons having one half or more Negro blood" and "Indians or persons having one fourth or more of Indian blood." And the Supreme Court had up to that point not ruled that the ban on Chinese testimony in criminal cases applied to civil cases as well. Still that it did must have been the widely

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[26] Id., p. 26. According to the one newspaper report of the proceedings that exists, the trial judge "intimated that it would be well to bring the question again before the Supreme Court to apply to cases similar to the one at bar." *Daily National Democrat,* Oct. 29, 1858.

[27] *Speer v. See Yup Co.,* 13 Cal. 73 (1859).

[28] At the start of the 1857 session a bill had been introduced in the California legislature that would have given Chinese a limited right of testimony for or against whites in civil as well as criminal cases. To do so the bill, which failed of passage, repealed the relevant racial provisions of both the 1850 act regulating crimes and punishments, and the 1851 act to regulate proceedings in civil cases, the assumption presumably being that the latter measure applied to Chinese, notwithstanding the lack of a court ruling to that effect. Might Speer have brought his case to provoke just such a definitive Supreme Court ruling?

shared supposition, a supposition reflected in the form of the objection made by the Chinese to the introduction of Zip's testimony. They claimed that the statutes [plural] forbade such testimony. Given the deep hostility to Chinese testimony generally on display in *People v. Hall*, any reasonable observer must have presumed that the California court, should the question arise, would have interpreted the criminal and civil statutes i*n pari materia*. Furthermore, the statute regulating civil proceedings banned Indians from testifying, and the court in *Hall* had said that the legislature intended to comprehend the Chinese under that term. Did the Sze Yup company or its lawyers simply decide that they would take advantage of what appeared to be the most expeditious way to scuttle the plaintiff's case, not believing that they were establishing any new legal principle? Lacking any direct evidence, one is relegated to speculation.

In 1863, the California legislature codified the ban on Chinese testimony in criminal and civil cases contained in the two Supreme Court decisions. Five years later the Fourteenth Amendment was added to the United States Constitution, containing, among other provisions, a clause forbidding any state from denying to any person within its jurisdiction the equal protection of the law. Following its adoption San Francisco prosecutors in two separate cases argued that the laws barring Chinese testimony were repugnant to this provision of the Constitution and won favorable rulings from trial courts, but the California Supreme Court in the 1871 case of *People v. Brady* ruled that they were not.[29] The following year enactment of new criminal and civil codes by the California legislature finally ended the ban on Chinese testimony in criminal and civil cases.[30]

Rochester v. See Yup et al

Despite tensions between the various *huiguan*, if need arose, the associations were capable of acting together in the interests of the immigrant community as a whole. As noted above (see ftn. 5), in 1853 leaders of the then existing four *huiguan* requested and got a meeting with members of the California legislature, in order, among other reasons, to voice complaints about treatment of the Chinese in the mining districts. A murder in Amador County in late 1857 again prompted them to take concerted action.

On November 7, 1857 Horace Kilham, the owner of a business engaged in the buying and selling of gold near Jackson, California, returned from a trip

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[29] 40 Cal. 198 (1871).

[30] For a full account of the battles over the admission of Chinese testimony in the courts and the applicability of both the Fourteenth Amendment and the Civil Rights Act of 1870 to the Chinese, see McClain, *In Search of Equality,* pp. 31–42.

to Sacramento to discover his safe empty of all its gold dust and coins. He could not find his principal employee, Martin Griswold, nor could anyone advise him where Griswold might be. The next day Griswold's body was discovered in a bedroom on the company premises, stuffed under the cot of a Chinese cook also in Kilham's employ. He had apparently been bludgeoned to death. The cook had left the area, so suspicion immediately fell upon him and two or three other Chinese, thought to be his accomplices, who had also disappeared from the scene.[31]

On November 19, an advertisement appeared in San Francisco's Daily Alta, offering a reward of $1500 for the arrest of the cook, identified as one Fou Seen, "charged with the murder" of Griswold, it stated, and $800 each for the arrest of "his accomplices," identified as Sen Yee, Cheon Koon Yao, and Koon See. The total offered reward of $3100 would be the rough equivalent of $110,000 in today's money, a substantial sum. The advertisement had been placed by the Boards of Directors of the five then existing Chinese *huiguan*. (The advertisement may have appeared in other California newspapers as well.) The *huiguan* leaders also caused handbills in Chinese to be distributed, fairly widely, it would appear, in the state's gold mining areas. How they were able to identify the alleged perpetrators so soon after the event must remain something of a mystery.[32]

On August 4, 1859, William Rochester and Isaac Treadway filed suit in San Francisco's 12th District Court against the five *huiguan* that had offered the reward, according to the complaint: "the Sam Yup Company, the See Yup Company, the Ning Yung Company, the Yung Wo Company, and the Yan Wo Company," alleging that Treadway and a man named Jesse Goodwin had arrested Griswold's alleged killers, Fou Chen and Chow Yee, in the city of Marysville and turned them over to the authorities, that Goodwin had assigned his interest in the claim to Rochester, that the two had demanded payment of the reward that the companies had offered and had been refused. They asked for judgment against the companies in the amount of $2300 plus interest. It is the first time that the name of any *huiguan* other than the Sze Yup company appears in the Supreme Court records or in the records of any California court so far as I can ascertain. And it is interesting to note that the defendant first named in the complaint is the Sam Yup company, a *huiguan* controlled, more than the others by merchants, that by this time had come to assume a

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31 *Amador Ledger Dispatch*, November 14, 1857.

32 *Daily Alta California*, Nov. 19, 1857.

dominant position in the community.[33]

In response the companies filed what is captioned an "Answer," but in the body of the document is styled a "demurrer." They admitted that they had offered a reward for the arrest of Fou Chen and Chow Yee but claimed that a Chinese living in Marysville by the name of Yu Kow was the man who had actually arrested the suspects and delivered them to the authorities. Yu Kow, they claimed, had employed the two Caucasians to assist him in making the arrest and in return for their services had promised them one third of the reward money. Upon the conviction of the two, they alleged, they became liable to Yu Kow and to satisfy this liability had paid him the reward of $2300. They claimed that Rochester and Treadway had filed suit against them "as an afterthought" after they had encountered difficulty in collecting their one third form Yu Kow.[34]

On November 18, 1859, attorneys for the two sides stipulated that the case be referred to a referee, and on the same day, Samuel Dwinelle, a San Francisco attorney, was appointed by the court to try the issues. Dwinelle held no hearing in the matter, relying instead on the depositions of three witnesses taken a few weeks earlier.

The depositions of James Anderson and Jesse Goodwin had been taken in Marysville, October 31, before a notary public/justice of the peace. Anderson's testimony had been brief. He stated that Goodwin and Treadway had brought the two Chinese to him at "the station house" in Marysville and asked him to take charge of them. He had kept them overnight and brought them the next morning to the county jail. An Amador County sheriff took custody of them there. That was all that he knew. Counsel for the *huiguan* objected to Goodwin being sworn on the grounds that he had assigned his interest in the matter and as such was barred from testifying under California law. The objection was overruled. Goodwin's testimony differed somewhat from that of Anderson. He stated that he and Isaac Treadway had arrested the two Chinese in Marysville December 30, 1857, and taken them to the station house "for safekeeping." The next morning, he and Treadway had handed them over to Horace Kilham, "to be delivered to the authorities of Amador county."

Goodwin was then asked what induced him and Treadway to arrest the two Chinese. It was, he said, the reward offered by the defendants. And

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[33] Transcript on Appeal, *Rochester v. See Yup Co.*, pp. 1–4. The names given in the complaint correspond closely to the names given by Him Mark Lai to the five then existing *huiguan* to wit: the Sze Yup, the Sam Yup, the Young Wo, the Ning Yung, and the Sun On (aka as the Yan Wo). For the background that led to the secession of a large number of Sze Yup members and the formation of the Ning Yung company, see above pp. [ ].

[34] Transcript on Appeal, pp. 9–13.

how had they found out about it? He stated that Treadway had brought him a paper written in Chinese. They asked several Chinese to translate it and learned that it was an offer of reward. Counsel objected on the grounds that he could not produce either the paper or the interpreters but he was allowed to proceed. (Goodwin admitted that he had lost the paper.) He testified that in the spring of 1858 he had gone down to San Francisco in the company of the Chinese translator, Charles Carvalho. He had there shown the reward paper to officers of the five Chinese companies, who had agreed that it was their offer of reward. In July, he testified, he had sold his interest in the claim for reward to William Rochester for $900. On cross examination he acknowledged the assistance of the Chinese man, Ah Cow. Ah Cow, he stated, "had put us on the track of them."[35]

The deposition of Horace Kilham, the business owner on whose premises the murder had taken place, was taken ten days later, on November 11, 1859, in Sacramento, again before a Justice of the Peace and Notary Public. In response to defense counsel's questions, Kilham testified that he was in Marysville, December 30, for the purpose of identifying the two Chinese, Fou Seen and Chow Yeen. He knew of the reward offered for their apprehension. He was accompanied by a Chinese man said to be the president of one of the companies that had offered the reward. He knew both Ah Cow and Jesse Goodwin and saw them both on that day in Marysville. He was asked if he had any conversation with Goodwin about the reward. He had spoken with Goodwin on the street, he replied, and from what he heard, he said, his understanding was that Goodwin was to have one third of the reward and the balance was to go to Ah Chow. Ah Cow, he stated, "had all the generalship in getting those two parties into town," having told Goodwin ten days earlier that he would decoy them into going to Marysville.

On cross examination by plaintiff's counsel Kilham testified that he knew that Goodwin and Treadway had actually arrested the two Chinese suspects, by which he meant, he explained, "manually made them prisoners." He restated his belief, however that it was Ah Cow who had maneuvered them to a place where the arrest could be made. Kilham had offered a reward of his own for the arrest of the two Chinese. He was shown a document bearing his name, described as a "receipt," in which he certified that Kilham and Treadway had arrested the two accused Chinese, that he (Kilham) had agreed to pay them the reward, and that they were entitled to recover it. When questioned about the document, he stated that he did not know how to account for the difference between its contents and

[35] Transcript on appeal, pp. 46–53.

his testimony, but that he stood firmly behind his testimony. Kilham's deposition was the last taken in the case. Presumably because the Supreme Court had ruled the previous year that Chinese testimony was not admissible in civil cases involving whites, no Chinese witnesses were heard.[36]

On July 9, 1860, based on his reading of the deposition transcripts, Dwinelle found that Goodwin and Treadway had arrested the two Chinese suspects and turned them over to the authorities and that Ah Cow had not employed them "to assist him." He recommended that the plaintiffs recover judgment against the defendants in the amount of $2510, the sum representing the full amount of the reward offered by the defendant *huiguan* plus interest. Dwinelle did not elaborate on how he reached his conclusion. On July 12, the Twelfth District Court duly entered judgment in their favor. Defense counsel then moved that the referee's report be set aside and for a new trial on the grounds that Goodwin had offered material testimony and that he was by law an incompetent witness. The court granted the motion and the case went up to the California Supreme Court on the sole question of Goodwin's competency as a witness.[37]

The California law affecting the rights of assignors of claims to testify on behalf of their assignees had a convoluted history. By the time this case came up for decision, the relevant statute prohibited assignors from testifying in support of claims based on "an account, unliquidated demand, or thing in action not arising out of contract." Counsel for respondents argued principally that the claim being sued on was an "unliquidated demand," i.e., for an amount uncertain, inasmuch as there was dispute as to who had actually performed the services. Appellants argued to the contrary that the lawsuit arose out of a promise to pay money in exchange for the performance of a service, that the service was performed, that the amount to be paid had been fixed ahead of time and that therefore what was being sued on was a liquidated as opposed to an unliquidated demand. Such scant law as existed was on the appellants' side and in a brief opinion the court found in their favor, reversing the lower court order that had set aside the referee's report.[38]

Mining District Cases: Ex parte Ah Pong, Ah Hee v. Crippen

Rochester was decided by the Supreme Court in its July, 1861 term. In its October term of that year, it handed down two important decisions involving individual Chinese working in the mining districts, the area where, as noted

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[36] Transcript on appeal, pp. 33–42.

[37] Transcript on appeal, pp. 18–22,57.

[38] *Rochester v. See Yup Co.*, 18 Cal. 413 (1861).

above, the vast bulk of the Chinese population was concentrated. One at least may well have had *huiguan* support, *Ex parte Ah Pong,* a habeas corpus case, arose out of a peculiar provision of the state's Foreign Miners License law, a law that required foreign miners ineligible to citizenship to pay a monthly fee in exchange for the right to work in the mines. (It was the consensus at the time that Chinese were ineligible for naturalization.) The provision in question declared that all such foreigners residing in the mining districts should be considered miners under the law.[39] The tax collector of El Dorado County sought to collect the Foreign Miners License tax as a monthly fee from Ah Pong, a "washerman" according to the case report, living near Placerville in that county. He refused to pay and was ordered to work on the public roads to pay off the amount due. He refused to do so, was arrested, tried before a Justice of the Peace and sentenced to twenty days imprisonment in the county jail. He made application to the El Dorado County court for a writ of habeas corpus but the application was denied. He then made application to Chief Justice Stephen Field of the Supreme Court, who issued the writ. This is about as much as can be said about the proceedings below. There appear to be no county court records bearing on it and the California Supreme Court case file is missing. A scan of the California Digital Newspaper Collection produces a single newspaper article, merely summarizing the Supreme Court decision.[40]

The court's opinion was terse and tinged with some sarcasm. It ordered the prisoner discharged. The provision designating as a miner any foreigner living in the mining district, wrote Justice Joseph Baldwin, could no more be supported than could a law designating as a merchant anyone living in a certain section of the state, whatever his occupation.[41] The case was argued on Ah Pong's behalf by the San Francisco firm of Byrne and Freelon, the same firm that had represented the *huiguan* in the *Rochester* case. It seems doubtful that a laundryman could have borne the costs of this litigation solely on his own and so one is moved to wonder whether one or more of the *huiguan* might have lent him support.

Much more can be said about the case of *Ah Hee v. Crippen,* another mining district case decided at the end of December, 1861. Ah Hee was mining for gold on property in Mariposa County that he had leased from the large California landowner, John C. Fremont. More must be said about this land. Fremont's title to the property traced back ultimately to a Mexican land grant and that title had been confirmed by a patent, a kind of second deed, issued by

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[39] Statutes 1861, Revenue Act, Sec. 93.

[40] *Mountain Democrat*, 16 November, 1861.

[41] *Ex parte Ah Pong*, 19 Cal. 106 (1861).

the United States government. A question had arisen, however, as to whether these patents conferred title to the minerals, including precious metals in the soil, as well as to the land itself. In January of that year, in companion cases, involving Fremont's property and that of another landowner, the California Supreme Court had ruled that they did.[42]

At the beginning of March 1861 the Sheriff of Mariposa County, who was ex officio tax collector for the county, demanded of Ah Hee payment of the Foreign Miners License tax. Ah Hee refused and the sheriff seized a horse that the Chinese miner owned. Ah Hee then filed suit in the District Court for Mariposa County court asking for return of the horse and $50 in damages. He alleged that he was a bona fide resident of the state and was exempt from payment of the tax inasmuch as he was mining on private property (as opposed to lands owned by the United States or by the state). On March 18, the Mariposa trial court ruled in Ah Hee's favor. The court did not address the private property claim. Rather it based its decision on a provision of the California Constitution. According to the court the issue was whether a bona fide resident of the state could be forced to pay a monthly tax for mining on leasehold land by virtue of a law which did not impose the same tax on a native-born citizen. The California Constitution, it declared, gave foreigners who were bona fide residents the same rights with respect to property as were enjoyed by native-born citizens. If a native-born citizen had the right to mine on land that he owned without having to pay a monthly tax, a bona fide resident had the same right. A law to the contrary, it ruled, was unconstitutional.[43] The opinion is interesting for its recognition of Chinese immigrants as bearers of (state) constitutional rights, perhaps the first court to so rule.

The case went up on appeal to the California Supreme Court where it was fought out mainly on the question of whether the statute imposing the Foreign Miners License tax applied to mining on private property or only to mining on the public lands. And that was the only question addressed in Chief Justice Stephen Field's opinion for the court, handed down December 28, 1861, affirming the lower court decision. For Field the outcome of the case followed from the title litigation decided by the court earlier that year. The court had there ruled that Fremont's patent from the United States had given him full ownership of the land, including its precious metals. He could either mine for gold himself or allow others to mine for it. And his rights "could neither be enlarged nor extracted by any license from the state." Notwithstanding

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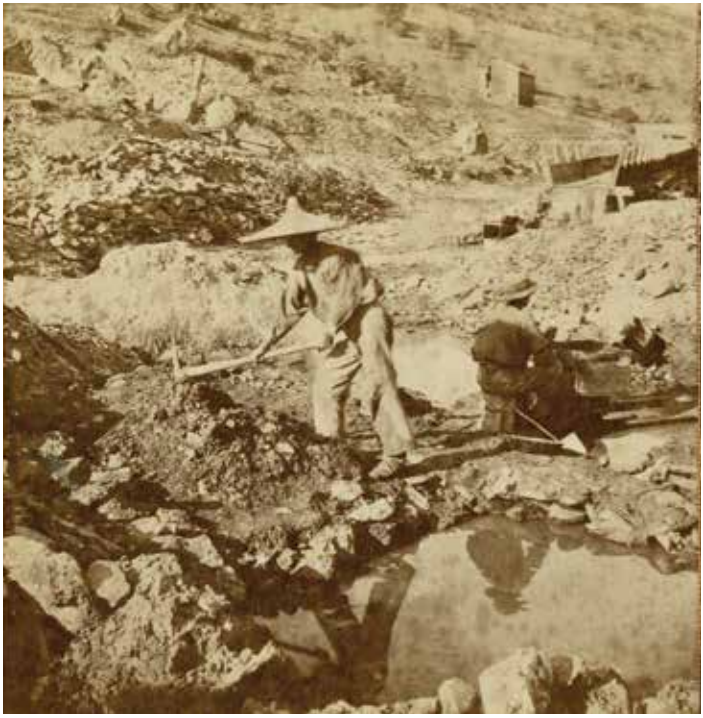
[42] *Moore v. Smaw and Fremont v. Fowler,* 17 Cal. 199 (1861). It was a highly controversial decision. The alternative view, supported by significant authority, was that the U.S. government retained title to precious metals.

[43] Supreme Court case file, *Ah Hee v. Crippen*, Transcript on Appeal, pp. 5–11.

the statute's general language, it was clear, Field declared, that the legislature intended it to apply only to public lands. In support he cited a previous foreign miners licensing statute, with one section containing similar general language, but with another indicating an intent to have the law apply only to public lands. It is doubtless significant to note that Ah Hee was represented in his appeal by an attorney named Charles T. Botts, a lawyer who had represented the other landowner in the companion title cases decided earlier that year. The decision, of course, was as much a victory for Fremont as it was for Ah Hee.[44]



Chinese miners using pick and rockers while mining for gold in the California foothills. Photograph by Eadweard Muybridge. Published courtesy of the California Historical Society, San Francisco, PC-PM-Muybridge_008.

[44] *Ah Hee v. Crippen*, 19 Cal. 491 (1861).

Chinese miner with rocker on way to mine gold. Photograph is a gift of the Estate of Anne Protopopoff to the Oakland Museum of California and published here courtesy of the Museum.

Lin Sing v. Washburn[45]

On February 27, 1862, the five district associations published in San Francisco's Daily Alta an open letter to the legislature and people of California. It was an impassioned complaint against the state's mistreatment of its Chinese population. It devoted much space to the ban on Chinese testimony, a ban, they declared, that had cost the lives of Chinese in the mining districts. It also detailed the many ways in which the Chinese had contributed to California's economy. The immediate impetus for the letter, however, was the several capitation taxes on Chinese immigrants that the current session was then considering. These taxes, imposed without regard to income or property holdings, would fall, they said, with heavy weight on a population that was by no means well off or in a position to bear them. That these proposed taxes were a matter of great concern to the Chinese community is evidenced by a letter sent the next day by the Rev. A.W. Loomis, the Presbyterian minister to the San Francisco Chinese, to his superiors in Philadelphia. The community,

[45] For an earlier account of the case see McClain, *In Search of Equality*, pp. 27–29.

he wrote, was in "a great ferment" about bills to tax the Chinese pending in Sacramento.[46]

The Chinese pleas were of no avail. And on April 26, 1862, the so-called "Chinese Police Tax" went into effect. Captioned "An Act to protect Free White Labor against competition with Chinese Coolie Labor and to Discourage the Immigration of the Chinese into the State of California," it imposed a monthly tax of $2.50 on each person of the Mongolian race, male or female, over eighteen years of age. Exempted were Chinese with business or mining licenses and those working in certain agricultural fields. Persons liable to the tax who refused to pay were to have their property seized and sold at public auction. Employers of liable persons were made equally responsible for payment of the tax, and the tax collector was empowered to seek payment from them at any time.

The authorities moved quickly to implement the new measure. And the Chinese moved just as quickly to challenge its legitimacy. The Sacramento Daily Union reported on June 6, that "the several Chinese organizations in this city and State" were consulting with lawyers about "arrangements to test in the Supreme Court the constitutionality of the Police Tax law." In fact, proceedings aimed at doing just that had already begun, the day before, in San Francisco.[47]

On June 3, 1862 the Tax Collector of San Francisco, E.H. Washburn, had demanded the sum of five dollars from a Chinese by the name of Lin Sing, the amount he allegedly owed under the tax measure. He is described in the press as a merchant though this designation appears nowhere in the official case documents. When Lin Sing refused to pay, Washburn seized a clock belonging to him and threatened to sell it in satisfaction of the debt allegedly due. To prevent that from happening Lin Sing paid over the five dollars. Two days later he filed suit against Washburn in Justice Court praying for the return of that sum. He was represented by the prominent San Francisco law firm of Hepburn and Dwinelle. The defendant filed the briefest of demurrers, claiming simply that the plaintiff had no legal basis for his case. On June 9, the Justice Court sustained the demurrer. That decision was in turn appealed to the County Court, which affirmed it on June 23. The case then went up on appeal to the California Supreme Court.[48] It is quite clear that the proceedings below were pro forma, aimed at getting the question of the legitimacy of the "Chinese Police Tax" before that court as expeditiously as possible. It was a question, as

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[46] *Daily Alta California*, Feb. 27, 1862. The five *huiguan* listed themselves as: the Heung Wau Company, the Ning Heung Company, the See Yup Company, the Yan Wau Company, and the Sam Yup Company. A.W. Loomis to Walter Lowrie, Feb. 28, 1862 (microfilm, San Francisco Theological Seminary Library, San Anselmo, California.)

[47] *Sacramento Daily Union*, June 6, 1862.

[48] Transcript on Appeal, California Supreme Court, *Lin Sing v. Washburn*, pp. 1–9.

the California Supreme Court would say, a question of large public interest, "involving considerations of the highest importance."[49]

In mid-July, 1862, while the case was pending in the high court, another party entered the lists. The San Francisco Anti-Coolie Association retained three attorneys, Harvey Brown, W.H. Patterson and W.W. Stow, to assist Attorney General Frank Pixley in defense of the law, a law, it declared, that was under attack by the city's "wealthy Chinese companies."[50] The case was argued before the Supreme Court on July 8. Extensive briefs were submitted afterward by the parties and the Anti-Coolie Association. The court issued its decision September 25.

There was not a great deal of precedent federal or state, on what rights a state might have to regulate immigration. The leading federal case was *The Passenger Cases*, decided in 1849.[51] There the U.S. Supreme Court had ruled that a tax imposed by two Eastern states on alien passengers arriving at its ports trenched impermissibly on the paramount federal power to regulate foreign commerce. Those laws had imposed a tax on immigrants for the privilege of landing. The California law taxed them once landed. But, in a lengthy and capable opinion Justice Warner Cope declared that the difference was not dispositive. Sifting quite capably through the several opinions found in *The Passenger Cases*, he wrote that the principles those cases stood for applied to the California law in question. The purpose of the law was clear from its title, he wrote. Its aim and necessary effect were to discourage Chinese immigration. But, according to the U.S. Constitution and Supreme Court precedent, the power to regulate foreign immigration belonged exclusively to the national government. States could certainly exclude paupers, fugitives and obnoxious persons, but there was no evidence that Chinese could be put into this category. He characterized the law as a measure of "special and extreme hostility to the Chinese" and clearly saw it as of a piece with a state law his own court had struck down five years earlier.

In the 1857 case of *People v. Downer*, the court had invalidated an 1855 California statute, imposing on the owners or masters of any ship bringing Chinese immigrants into the state a tax of fifty dollars per passenger. California, Cope seemed to be saying, was here seeking to do indirectly what it had earlier sought in vain to do directly.[52]

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[49] *Lin Sing v. Washburn*, 20 Cal. 534, at 565.

[50] *Sacramento Daily Union*, July 14, 1862.

[51] 7 How. (48 U.S.) 283 (1849).

[52] *Lin Sing v. Washburn*, 20 Cal. 535 (1862). *People v. Downer,* 7 Cal. 169 (1857). 1855 Stats. 194, Chap. 153. The act struck down in that case was captioned "An Act to Discourage the Immigration to the State of Persons Who Cannot Become Citizens Thereof."

Chief Justice Field dissented. For him the statute was a legitimate exercise of the state's taxing power. It imposed a tax on Chinese immigrants only after they had landed and taken up residence in the state. It did not interfere with their landing and was therefore not a tax on immigration. As such, it was not in conflict with the federal Constitution. To be sure, he declared, the law's title was open to criticism, but it was an established principle of statutory interpretation that a law's title or caption should not be allowed to control its meaning.[53] In October Attorney General Pixley filed a petition for a re-hearing, but it was denied, and so the matter was definitively concluded.

While there is no direct evidence that Lin Sing's challenge to the police tax was a project of the district associations, there is ample indirect evidence pointing in that direction. The interest of "Chinese organizations" in challenging the tax is evidenced by the Sacramento Daily Union's early June report. It is hard to imagine what Chinese organization other than the *huiguan* the paper might have had in mind, and, as noted earlier, the *huiguan*, though headquartered in San Francisco, had branches in other California cities. The *huiguan* were, as William Hoy explained, the most important social units in the nineteenth-century Chinese community, the organizations that naturally would have taken the lead in addressing any matter of concern to that community. They were the ones who had published the open letter in the Daily Alta, complaining bitterly about the taxes on Chinese that the legislature was considering. No strangers to the California courts by now, it seems natural that they would have considered resorting to those tribunals to challenge what they surely saw as an unjust enactment. And here it is no doubt worthy of noting that by 1862, the year of the Lin Sing litigation, a kind of informal congress of the district associations had formed, one of whose functions, the Rev. Loomis observed in his 1868 article, was to consult, as he put it, on means of seeking "relief from *unconstitutional* [emphasis added] or burdensome laws." If, as seems likely, he was referring to the past as well as the future, the only instance before 1868 when the Chinese sought relief from an allegedly unconstitutional state law was in the case of *Lin Sing v. Washburn*.[54]

Those defending the law certainly appear to have seen the *huiguan* as the driving force behind the litigation. The Anti-Coolie Association claimed that the law was under attack by "wealthy Chinese companies," and Attorney General Pixley, in his petition for re-hearing, argued that Lin Sing, the individual, was

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[53] *Lin Sing v. Washburn*, 20 Cal., 582–86.

[54] Loomis, "The Six Chinese Companies," p. 226. On the founding of the congress, see Him Mark Lai, "Historical Development ... ," p. 24.

being "put forward as the representative of great commercial companies." When reference was made by non-Chinese to "Chinese companies" at that time, it was almost always a reference to the district associations, a designation the *huiguan* themselves invariably used when communicating with the non-Chinese world.[55]

Justice Warner W. Cope, California Supreme Court, "characterized the 'Chinese Police Tax' as a measure of 'special and extreme hostility to the Chinese' and clearly saw it as of a piece with a state law his own court had struck down five years earlier." Photograph published here courtesy of the California Supreme Court.

[55] See advertisement of reward, *Daily Alta*, Nov. 1857; *Daily Alta*, February 27,1862, open letter to the legislature and the people of California.

Final Observations

The cases discussed in this article shed additional light on early Chinese immigrant society, on the *huiguan* in particular. They corroborate the picture of these organizations that one finds in the literature, to wit, they formed very early and they possessed significant resources, enough, for example, to make large real estate purchases and to hire lawyers for a range of purposes when needed. But they helped to fill out that picture in significant ways, alerting us to how large the law and the courts loomed in the affairs of these organizations in the first years of their existence, with the largest of them, the Sze Yap, embroiled in Supreme Court litigation a mere two years after its founding and involved in four, possibly, five major Supreme Court cases in the succeeding decade. The other *huiguan* would themselves be drawn into litigation before that tribunal in these early years. The cases confirm the fact as well that they were from the outset riven by internal tension and factionalism, with the *Ah Thaie* case making clear how deep that tension ran. Yet, the cases, *Rochester* and *Lin Sing* specifically, also confirm that despite tensions within and between the *huiguan*, leaders were able to come together to promote common community goals when that proved necessary. Moving beyond the *huiguan*, the mining district cases reveal that individual Chinese were also prepared to go to court to press their claims.

The cases finally enhance our understanding of the California judiciary during this first decade of its existence. Noticeable is the lack of any obvious anti-Chinese bias in the cases, certainly not at the level of the California Supreme Court, this at a time when anti-Chinese sentiment was rampant in the state and, as the *Hall* case shows, could be found in the decisions of the high court itself.[56] In each of the three cases in which the state was an adverse party —the two mining cases and *Lin Sing*—Chinese litigants prevailed against the state. Nor does there seem to be bias in any of the other cases decided by the high court. These were fought out on technical issues—the recoverability of attorneys' fees, the rules governing trust language, the competency of a witness to testify —and the court's analysis in deciding them seems very consonant with the sort of analysis one would have expected had the litigants been non-Chinese. *Speer v. See Yup* did extend the ban on Chinese testimony to civil cases but that decision, ironically, resulted from a motion made by Chinese litigants.

[56] This statement needs to be qualified, however. The notorious opinion in *People v. Hall* was handed down in 1854. The two judges who constituted the *Hall* majority, Murray and Heydenfeldt, were no longer on the court after 1857, Murray having passed away and Heydenfeldt having resigned in that year. The court that decided the later cases was thus an entirely different court.

The first case, *Ah Thaie v. Quan Wan*, decided in 1853, should be seen as standing apart from the others. This case pitted a Chinese litigant against other Chinese litigants so there would have been scant opportunity for anti-Chinese bias to work its way into the high court'sthe deliberations.

There is no clear evidence of bias at the trial court level either —with one possible exception. Here too, whether one is looking at the actions of trial court judges or referees, one finds the same sort of workmanlike legal analysis as one finds at the level of the high court. Indeed, one finds several positive nods in the direction of the Chinese. The referee in the *Eldridge* case, for example, rejected out of hand the white litigant's attempt to play on prejudice by bringing in the Sze Yap *huiguan's* alleged dedication of part of its premises to "idol worship." Such an argument, he stated, would run afoul of the state Constitution's guarantee of religious freedom. In *Ah Hee v. Crippen,* the Mariposa County trial court went out of his way to rule that Chinese enjoyed the same property rights vis a vis the state as did other foreigners, apparently, as noted, the first instance in which any California court had said that Chinese immigrants were the bearers of (state) constitutional rights.

Rochester v. See Yup, the reward case, may bear closer examination for signs of bias. Might anti-Chinese sentiment have moved the referee to disregard the powerful testimony of Horace Kilham in support of the *huiguan* litigants in the Rochester case? Possibly, though Kilham's testimony on direct examination was undermined to some extent by what he had to say on cross examination.

All things considered, by the time the Chinese capitation tax was enacted, the Chinese, the *huiguan* in particular, had had sufficient experience in civil litigation to be very familiar with the legal landscape and to be reasonably confident that if they challenged the measure in court, they would get a fair hearing.

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JOHN R. WIERZBICKI, JR.*

South Dakota v. Brown:

The Forgotten Decision on the Extradition of American Indian Movement Leader Dennis Banks

1978 was a momentous year for the California Supreme Court—featuring the decision upholding the constitutionality of Proposition 13[1] and a highly contentious retention election—so it is not surprising that the case of *South Dakota v. Brown*,[2] decided that March, has been largely forgotten. But that would be a mistake. For it was the only known time in United States history that one state attempted to use another state's court system to force that state's governor to extradite a fugitive. And he was not just any fugitive. He was Dennis Banks, founder of the American Indian Movement, and a prominent advocate for the civil rights of Native Americans. The case also had implications for the relationship between the states, for the relationship between the executive and the judiciary, and for the role of discretion in the law. But beyond that, the controversy surrounding the decision, and the Court's response to it, foreshadowed events that the Court would face just a few months later that year.

The Fugitive

At 8:30 on the morning of January 24, 1976, the FBI and local police surrounded a small house in El Cerrito, California. It was the home of Lehman Brightman, the director of the Native American studies program at

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1 *Amador Valley Joint Union High School District v. State Board of Equalization*, 22 Cal.3d 208 (1978).

2 *South Dakota v. Brown*, 20 Cal.3d 765 (1978)

Contra Costa Junior College.[3] Brightman had co-founded the United Native Americans in 1968[4] and was involved in the unlawful occupation of the then-vacant Alcatraz Island in November, 1969. With the takeover and ensuing media attention, the treatment of Native Americans in the U.S. burst into public consciousness in California and throughout the country.

Up through the late 1960s, the U.S. Government pursued a policy of assimilation, which involved terminating the reservations and relocating Native Americans into cities.[5] Those children who remained on the reservations were involuntarily placed into boarding schools run by either the federal government or religious institutions, where they were isolated from their families and forbidden to speak their native language.[6] And, whether they were in the cities or on the reservations, many Native Americans in the 1960s faced oppressive poverty.[7]

By 1970, the plight of Native Americans had reached the zeitgeist.[8] Celebrities visited the Alcatraz encampment, including actors Marlon Brando and Jane Fonda.[9] Historian Dee Brown, in his best-selling book *Bury My Heart at Wounded Knee,*[10] chronicled the U.S. Government's bloody war against its native population. The movie *Little Big Man*,[11] starring Dustin Hoffman, portrayed General George

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3 "FBI Nabs Banks Here," *Oakland Tribune* (01/25/1976), p. 1.

4 Brightman explained the organization's adoption of "Native American" instead of the prevailing "American Indian" in a 1969 speech: "We call ourselves native American because we were given the name Indian by some dumb honky who thought he landed in India." Despite this, most sources from that time continued to use the term "American Indian." https://www.spiritofchange.org/remembering-native-american-civil-rights-pioneer-lehman-brightman/ (accessed 09/02/2024). This article will generally use the terms "Native Americans" but will also employ the terms as they exist in the sources without alteration. For more on this topic, see https://equity.ucla.edu/know/resources-on-native-american-and-indigenous-affairs/native-american-and-indigenous-peoples-faqs (accessed 09/02/2024).

5 Paul Chaat Smith & Robert Allen Warrior, *Like a Hurricane: The Indian Movement from Alcatraz to Wounded Knee* (The New Press: NY, 1996), pp. 7–9.

6 An investigation by the Secretary of the Interior in 2024 discovered that nearly a thousand students had died at the schools. (See https://www.theguardian.com/world/article/2024/jul/30/native-american-children-government-boarding-schools (last accessed 09/02/2024)). For a first-hand account, see Banks and Erdos, *Ojibwa warrior: Dennis Banks and the rise of the American Indian Movement* (Univ. of Oklahoma Press, 2004), chap. 3. For a history of the boarding schools and the harm caused to Native American families, see Ann Murray Haag, *The Indian Boarding School Era and Its Continuing Impact on Tribal Families and the Provision of Government Services* (2007) 43 Tulsa L. Rev. 149.

7 See Angelique EagleWoman & Wambdi A. WasteWin, *Tribal Nations and Tribalist Economics: The Historical and Contemporary Impacts of Intergenerational Material Poverty and Cultural Wealth Within the United States* (2010) 49 Washburn L.J. 805.

8 On the influence of the Native American civil rights movement on American culture, see Smith, Sherry L., *Hippies, Indians, and The Fight for Red Power* (Oxford Univ. Press: NY, 2012), Chapter 5.

9 See https://www.kqed.org/arts/13869074/brando-fonda-and-beyond-how-celebs-rallied-around-the-alcatraz-occupation (last accessed 09/02/2024).

10 Dee Brown, *Bury My Heart at Wounded Knee: An Indian History of the American West* (Holt, Rinehart & Winston: NY, 1970). For a contemporary review of the book and its influence, see Vine Deloria, Jr., *Custer Lives on: Bury My Heart at Wounded Knee: An Indian History of the American West by Dee Brown. New York: Holt, Rinehart & Winston. 1970. Pp. Xvii, 487. $10.95* (1972), 50 Tex. L. Rev. 435.

11 Arthur Penn (Dir.), *Little Big Man* [film] (Cinema Center Films, 1970).

C. Custer not as a hero[12] but as a narcissistic psychopath who saw a path to high political office through wholesale slaughter of Indigenous Peoples.

The success of the Alcatraz takeover inspired emulation. In 1970, a group under the banner of the American Indian Movement ("AIM") took over an abandoned naval station at the Minneapolis/St. Paul airport, citing as it's rationale the Fort Laramie Treaty of 1868, which it claimed gave American Indians the right to reclaim abandoned federal land.[13] AIM was led by Dennis Banks, who had recently visited the encampment on Alcatraz in the company of Brightman.[14] Other illegal occupations followed, including at an abandoned coast guard station in Wisconsin,[15] at Mount Rushmore,[16] and at Plymouth Rock during the 350-year celebration of the Pilgrims' landing.[17]

In October 1972, Banks joined a multi-car caravan of supporters headed to Washington, D.C., which they called, "the Trail of Broken Treaties."[18] They sought to present a list of demands to the government they believed would help alleviate the poverty of Native Americans and give them greater autonomy rather than being treated as wards of the state.[19] The contingent arrived a few days before the presidential election and made its way to the Bureau of Indian Affairs (BIA) building near the White House. Believing the BIA to be stonewalling them on their requests for a meeting and accommodations for the large number of protesters, Banks and others from AIM forcibly took over the building. The occupation lasted 6 days.[20]

Violence soon broke out elsewhere. In January 1973, a Native American was stabbed to death in Buffalo Gap, South Dakota. His white assailant was charged with second-degree manslaughter, and crowds gathered in the county seat of Custer in protest. At the courthouse, Banks and other AIM leaders were arguing for a murder charge when fighting broke out. Two police cars

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[12] Custer had been portrayed in films in a generally positive light up to that point, most recently by actor Robert Shaw (Robert Siodmark (Dir.), *Custer of the West* [film] (Security Pictures, 1967)). Ronald Reagan also took a turn as Custer. (Michael Curtiz (Dir.), *Santa Fe Trail* [film] (Warner Bros., 1940)).

[13] Banks and Erdos, p. 108.

[14] Id. at p. 106.

[15] Id. at p. 109.

[16] Id. at 109–111. Brightman and Banks both participated in this protest.

[17] Id. at p. 111–113.

[18] An homage to the notorious "Trail of Tears" in which more than 60,000 Indigenous people (primarily of the Cherokee, Chickasaw, Choctaw, Muscogee, and Seminole nations) who refused to assimilate were forcibly moved from the ancestral homes Southeastern United State to the area of eastern Oklahoma.

[19] Id. at p. 126. For an overview of the abuse of the trust relationship by the federal government with Native Americans, see Mya L. Johnson, *The Lack of Trust in A Trust Relationship: Indian Affairs and the Federal Government* (2016) 42 T. Marshall L. Rev. Online 3.

[20] https://www.washingtonpost.com/history/2021/01/24/native-americans-occupied-bureau-indian-afffairs-nixon/ (last accessed 09/02/2024).

and a small chamber of commerce building were torched while Banks jumped through a window to escape the melee and tear gas. Banks was later arrested and charged with assault and rioting.[21]

In February, members of the Oglala Sioux nation occupied Wounded Knee, South Dakota, the site where soldiers of the U.S. 7th Cavalry had massacred several hundred Sioux in 1890.[22] AIM leaders, including Banks, soon joined them while federal and local law enforcement surrounded the site with the U.S. military providing support. The stand-off lasted 71 days, resulting in two deaths and several wounded.[23]

The federal government tried Banks in federal court in Saint Paul, Minnesota for conspiracy and assault related to the events at Wounded Knee, along with fellow AIM leader Russell Means. After an eight month trial, the jury acquitted both on the conspiracy charge. Judge Fred Nichol then granted a defense motion to dismiss the other charge, declaring that "the misconduct by the government in this case is so aggravated that a dismissal must be entered in the interests of justice." In his decision, Nichol identified several acts of bad faith by the prosecution, included offering, and then failing to correct, obviously false testimony and other deceptions on the court.[24]

South Dakota then tried Banks in state court on the charges stemming from the disturbance in Custer. William Janklow, the Attorney General of South Dakota, chose to try the case himself. The acrimony between Banks and Janklow ran deep. Janklow had been the BIA attorney on the Rosebud Sioux reservation. Years later, Banks brought charges against Janklow in tribal court claiming that Janklow had raped a minor on the reservation during his time there. Janklow did not appear at tribal court, so no trial was held.[25] For his part, Janklow was reported to have said that the way to deal with Banks and the AIM was to put a bullet into Banks's head.[26]

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21 Banks and Erdoes, p. 157.

22 In 1990, the U.S. Congress passed a resolution of apology for the incident. https://www.nytimes.com/1990/10/29/us/congress-adjourns-century-afterward-apology-for-wounded-knee-massacre.html (last accessed 09/02/2024).

23 Marlon Brando showed his support for the occupiers by refusing his Oscar award for Best Actor while the occupation was ongoing. See https://archive.nytimes.com/www.nytimes.com/packages/html/movies/bestpictures/godfather-ar3.html (last accessed 09/02/2024).

24 *U.S. v. Banks,* 383 F.Supp. 389 (D.S.D. 1974). For an account of the FBI's notorious COINTELPRO operation against AIM, see Ward Churchill and Jim Vander Wall, *Agents of Repression: The FBI's Secret Wars Against the Black Panther Party and the American Indian Movement* (South End Press: Cambridge, MA, 2002), 2nd edition, Vol. 7.

25 Banks & Erdoes, pp. 270–274.

26 Janklow later explained that he meant that the AIM leaders should be shot only if they were armed and threatening others. "Shoot gunmen: Janklow, explains Banks quote," *Mitchell Daily Republic* (S.D.) (03/23/1976), p.1.

Banks's trial took place in the courthouse where the disturbance took place. He later recalled that steel plates covered the courthouse windows and the judge's bench, and that forty uniformed state police stood guard in the courtroom. Janklow personally read out the charges and questioned the witnesses.[27] The jury found Banks guilty. Although he faced up to fifteen years in state prison, the court permitted Banks to remain free on a presentencing bond. By the time he was due back at court for sentencing, Banks had fled.

After staying for a time at the Rosebud Sioux reservation in South Dakota, Banks met up with Brando in Los Angeles, who provided Banks with a motor home and cash. From there, he headed for the Pacific Northwest. Other supporters joined, following just behind the motor home in a station wagon. When Oregon state troopers stopped the group, Banks managed to escape, leaving behind a cache of weapons.[28]

Banks arrived at the Brightman home in El Cerrito, where he hid in plain sight, even attending a card game with Brightman that included federal DEA agents.[29] But his trek ended there. On the morning of January 24, 1976, with more than 40 FBI and local police officers standing watch outside the house, Banks gave himself up.[30]

Captured

Banks was arraigned in federal court in San Francisco for fleeing prosecution in Oregon on federal weapons charges and released on bail.[31] A few days later, California Governor Jerry Brown received South Dakota's extradition demand. Evelle Younger, California's Attorney General, and Anthony Kline, Brown's Legal Affairs Secretary, would be responsible for addressing the demand.[32] Kline assigned it to Alice A. Lytle,[33] his Deputy Legal Affairs Secretary, but both Kline and Brown stayed personally involved in the

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[27] Banks & Erdoes, pp. 290–291.

[28] Id. at pp. 301–311.

[29] Id. at 313.

[30] "FBI Nabs Banks Here," *Oakland Tribune* (01/25/1976), p.1.

[31] "Banks, Leader of Indian Protests, Arraigned in S.F.," *Los Angeles Times* (01/27/1976), p. C6; "Indian Leader Lectures Courtroom," *Oakland Tribune* (01/27/1976), p.3. Brightman was charged with harboring a fugitive. ("College Teacher's Career on Line?" *Oakland Tribune* (01/30/1976), p.62).

[32] In 1980, Brown would appoint Kline as a superior court judge, and two years later, as Presiding Justice of the Court of Appeal for the First District. (See https://appellate.courts.ca.gov/district-courts/1dca/publication/j-anthony-kline) (last accessed 09/02/2024).

[33] Lytle would later become California's first female African American Superior Court Judge. (Darrell Smith, "Pioneering 'Judge of the People' Alice Lytle dead at 79," *Sacramento Bee* (01/06/2019) (https://www.sacbee.com/news/local/obituaries/article223940180.html) (last accessed 09/02/2024).

matter.[34] Banks was then arraigned in San Francisco Municipal Court on the South Dakota extradition demand and again released on bail.[35]

At a federal court hearing in February, Banks waived removal to Oregon, but said he would fight extradition to South Dakota because to return would result in his death. Afterwards, Banks told reporters of his plan to gather two million signatures from Californians asking Brown to refuse extradition.[36] The campaign against extradition attracted prominent allies. California U.S. Senate candidate Tom Hayden took up Banks's cause and helped him to set up meetings in Sacramento with legislators and the Governor's office to lobby against extradition.[37] The Los Angeles Times also published a flattering portrait of Banks, saying that he had been anointed a "latter-day Sitting Bull."[38]

On March 11, Younger advised Brown that South Dakota's demand appeared to substantially comply with the requirements of the extradition laws but deferred action on the request pending resolution of the federal charges.[39] It turned out that those charges would not take long to resolve. On March 30, Federal District Court Judge Robert Belloni[40] granted a defense motion to suppress evidence of dynamite on the grounds that the FBI had destroyed the explosive and its packaging material before permitting the defense access to it, thus substantially prejudicing the defense. When the case was called for trial on May 12, the government responded that it was not ready to proceed. Citing the prosecution's delay, Belloni dismissed the case with prejudice.[41] After that, Banks returned to California.

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[34] "Oral History Interview with Hon J Anthony Kline" conducted by Germaine LaBerge (State Government Oral History Program) (1990–1991), pp. 20–21.

[35] "Dennis Banks Out on Bail," *Oakland Tribune* (02/19/1976), p. 67.

[36] "Banks Yields to Oregon," *Oakland Tribune* (02/21/1976), p. 6.

[37] Hayden was a defendant in the famous "Chicago Seven" trial stemming from rioting at the 1968 Democratic Convention. (See William Endicott, "Hayden Seeks to Bar Indian's Extradition," *Los Angeles Times* (03/05/1976), p. B29.)

[38] Ed Meagher, "Indian Looks for Sanctuary in California," *Los Angeles Times* (03/08/1976), p. B3. Sitting Bull was the legendary Lakota chief who defeated the U.S. 7th Cavalry at the battle of Little Bighorn. The article goes on to say that Banks was on the run after being convicted "in connection with a relatively minor AIM protest melee at the Custer courthouse."

[39] *South Dakota v. Brown,* 138 Cal.Rptr. 14, 18 (1977).

[40] Belloni is perhaps best known for his decision in the consolidated cases of *Sohappy v. Smith* and *United States v. Oregon*, 302 F.Supp. 899 (1969), in which he upheld the fishing rights of the Native American tribes along the Columbia River that had been guaranteed to them by treaty. (https://www.oregonencyclopedia.org/articles/belloni-robert-c/) (last accessed 09/02/2024).

[41] On dismissing the case, Judge Belloni declared: "I am ready to try this case commencing today. Both parties have had ample time to prepare. The defendants are ready to go to trial. For some reason, which I do not understand, the Government is not, even though two of the counts are not even concerned with the subject of previously suppressed evidence. I do not want to dismiss this case without a trial. The factual and legal dispute should be heard and decided, but there is no way the Court can force the Government to call its witnesses. My only recourse is to dismiss this case against these four defendants. Clearly, there has been unnecessary delay in bringing these four defendants to trial. Clearly it is the fault of the Government." (See *U.S. v. Loud Hawk,* 564 F.Supp. 691, 694 (D. Or. 1983)).

South Dakota's Petition

South Dakota, which had grown tired of waiting on California's response to its demand, filed a writ petition in the California Supreme Court asking it to compel Brown to extradite Banks. The Court, absent Chief Justice Rose Bird (who had recused herself),[42] transferred the matter to the Court of Appeal for the Third Appellate District for resolution. A three judge panel, led by Presiding Justice Robert Puglia, would take up the matter.[43] But first, the Court of Appeal issued an order to show cause to Brown why it should not grant South Dakota's writ petition.

Brown responded that it was his decision as Governor, and his alone, whether to extradite a fugitive. Neither the courts nor the Legislature could compel him "to exercise his discretion in any particular manner or to force him to make decisions which he is not yet prepared to make." If he is answerable to anyone on this, he declared, it is to the voters.[44] Besides, he had the right under the California Penal Code to first investigate the matter.[45] Lytle also filed an affidavit averring that the Governor's office had received many letters, petitions, and affidavits opposing the extradition and not yet completed its review of that evidence.[46]

Puglia was no stranger to the extradition requirements in California. Just a few months before, in *In re Golden*,[47] a fugitive from Washington State had asked the California court to investigate whether Washington State had probable cause to charge him with the crime before he could be extradited. Writing for a unanimous panel, Puglia declared that this was not a matter for California to figure out: "the focus of judicial inquiry in the asylum state [California] is necessarily upon the fugitive status of the accused and not upon the substantive crime." Any investigation by a California court, he reasoned, is limited to whether (1) the person is a fugitive from justice from that state and (2) that state had "substantially charged" the person with a crime. Once those questions were satisfactorily answered, the extradition should go forward.[48]

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[42] Bird said that she recused herself because in her prior role as a member of Brown's cabinet, she had been privy to information on the Banks case. (William Endicott, "Rose Bird: Prop. 13 Adds Fuel to Fire," *Los Angeles Times* (06/20/1978), p. B21.

[43] Puglia was a former Korean War infantry sergeant who after the war obtained his law degree from Berkeley and then served in the District Attorney's office for Sacramento County. He had moved on to private law practice when then Governor Reagan appointed him first to the Superior Court (in 1971) and then to the Court of Appeal. (See https://appellate.courts.ca.gov/district-courts/3dca/bio/robert-k-puglia) (last accessed 09/02/2024).

[44] *South Dakota v. Brown*, 138 Cal.Rptr. 14, 18 (1977).

[45] California Penal Code § 1548.3.

[46] Id. at 19.

[47] *In re Golden*, 65 Cal.App.3d 789 (1977).

[48] Id. at 796.

Now, California's Governor claimed the right to a broad investigation, and he faced a skeptical court.

On April 20, 1977, the Court of Appeal issued its decision.[49] In it, Puglia first addressed why South Dakota had brought this case to the California courts. The extradition clause of the U.S. Constitution mandates that the state in which a fugitive from justice is residing must, on demand, hand that fugitive back to that state from which the fugitive fled.[50] But in an 1861 case, *Ex parte Kentucky v. Dennison*,[51] the U.S. Supreme Court had declared that the federal government had no power to compel a state governor to do so. South Dakota brought this action so that a California court would do what a federal court could not—force the Governor to perform this duty. If the Court can enforce the duty to extradite, it must therefore do so under California state law, not federal law.[52]

California had adopted the Uniform Extradition Act of 1936,[53] which originally provided that a state governor shall sign the warrant of arrest for the fugitive, "[i]f the Governor decides that the demand be complied with." The Legislature had altered this to instead read that the Governor shall sign the warrant of arrest where the demand "conforms to the provisions of this chapter."[54] When the Legislature rewrote this language, Puglia concluded, it eliminated the Governor's discretion whether or not to extradite.[55] This was consistent with the rest of the Act,[56] and California caselaw, which had "repeatedly emphasized the nondiscretionary nature of the Governor's duty with respect to extradition."[57] Extradition under the Act was a ministerial duty, and California courts have the power to compel the Governor to perform such a duty.[58]

Consistent with *Golden*, a governor's investigation is limited to whether

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49 *South Dakota v. Brown,* 138 Cal.Rptr. 14 (1977).

50 Article IV, §2, clause 2 of the California Constitution states that "A person charged in any State with Treason, Felony or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.

51 *Ex parte Kentucky v. Dennison,* 65 U.S. (24 How.) 66, 16 L.Ed. 717 (1861).

52 *South Dakota v. Brown,* 138 Cal.Rptr 14 (1977). "Because of South Dakota's reliance upon state law, it is unnecessary for us to decide whether the obligations created by the federal provisions are enforceable in state court, and we expressly decline to do so." Id. at 16.

53 As of the date of the decision, 46 states and territories, including both South Dakota and California, had adopted the Act. Ibid.

54 Cal. Pen. Code § 1549.2.

55 *South Dakota,* p. 16.

56 Ibid., notably Cal. Pen. Code § 1554.

57 Id. at 17.

58 Id. at 17, 18.

the requesting state's demand conforms to the statutory requirements.[59] Here, Brown conceded that it did. "Having made this determination, there is nothing further to investigate. He must issue the warrant of extradition. Since he has failed or refused to perform this mandatory ministerial duty, South Dakota's petition must be granted."[60] Brown must send Banks back to South Dakota.

News accounts proclaimed the ruling as "historic." Kline blasted it as an "unprecedented" undermining of the governor's authority.[61] Brown sought a rehearing before the Court of Appeal, which rejected the request, and sought review of the decision.[62] On June 22, four justices of the California Supreme Court, the minimum necessary, agreed to hear the case.[63]

Duty to Decide

The Court held oral argument on November 10, 1977, more than 21 months after Banks's apprehension in El Cerrito. Court of Appeal Justice John Racanelli[64] sat in place of the absent Chief Justice. Banks watched the proceedings from the spectator's gallery.[65]

Chester S. Battles, representing South Dakota, argued that the Court of Appeal had gotten it right—Brown had a duty to extradite and his continuing delay was a denial of extradition. Deputy Attorney General Gregory Baugher responded that Brown had discretion to deny some extraditions, particularly if the fugitive's safety was threatened if returned. He insisted that was the case here: "The governor has some information [about the threat to Banks] that is extremely volatile and confidential." He did not explain further, nor did Kline do so afterwards to reporters, stating: "We are aware of facts that have not been made public and I don't intend to make them public."[66]

More months went by. In February 1978, Banks joined Hayden and California Lieutenant Governor Mervyn Dymally in a public protest against proposed federal legislation that they charged would terminate tribal treaties and remove reservations from federal trusteeship.[67] Banks again vowed never

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59 Cal. Pen. Code § 1548.3.

60 *South Dakota*, p. 19.

61 "Appeals Court Orders Brown to Extradite Banks," *Los Angeles Times* (04/26/1977), p. A3.

62 "Court Rejects Brown Request to Review Banks' Extradition Order," *Los Angeles Times* (05/25/1977), p. e3.

63 "State Justices to Rule on Extraditing Indian Leader," *Los Angeles Times* (06/24/1977), p. e3.

64 Racanelli was a justice on the First District Court of Appeal. (See https://appellate.courts.ca.gov/district-courts/1dca/bio/john-t-racanelli) (last accessed 09/02/2024).

65 "Attorney Says Secret Data Prevents Banks' Extradition," *Los Angeles Times* (11/11/1977), p. B3.

66 Ibid.

67 Dallas Burtraw, "Indians Launch March For Rights," *California Aggie* (Davis) (02/13/1978), p. 1.

to return to South Dakota and spoke of making "long-range plans to stay in California."[68]

On March 20, the California Supreme Court issued its decision. It ruled that Brown had discretion whether or not to extradite, and the Court could not compel his decision one way or the other. What he could not do is simply do nothing. Writing for the majority, Associate Justice Frank Richardson[69] emphasized the "very limited" nature of the court's inquiry: "Our sole function is to resolve, under applicable law, the question whether [the Governor] possesses any discretionary power to refuse a demand for extradition which is in proper form."[70]

The opening discussion of the opinion read much like that of the Court of Appeal. Concluded Richardson: "It is generally accepted that federal courts lack any authority to compel a governor to deliver up a fugitive to a demanding state."[71] But the opinion parted ways on whether California courts have the power to compel a governor to extradite under state law. True, a California state court can compel the Governor to perform a ministerial duty. But in no other case has a state court ever compelled a governor to extradite anyone. "We may not lightly ignore this fact. The absence of such authority appears to reflect the uniform acceptance of the highest state courts that […] the constitutional duty of the state executive to extradite a fugitive is not judicially enforceable by either federal or state sanction."[72] The Court recognized this in an 1855 case involving a demand for extradition, in which it stated that "the Courts of the State possess no power to control the Executive discretion, and compel a surrender (of a fugitive)."[73]

Pointing to an article that "our esteemed colleague, Justice Mosk" had written for the state bar journal in 1939, Richardson quoted him as agreeing that "the Governor, not the courts, has the 'final authority' in extradition matters."[74] Hence, while the governor had a mandatory duty to extradite under the Constitution, neither the federal nor the state court were empowered to enforce that duty. "Rather, the Constitution leaves the faithful execution of the extradition obligation in the hands of the state executive, trusting … in the

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68 "Banks Vows Never to Return," *Desert Sun* (Palm Springs) (03/13/1978), p. A1.

69 Richardson was appointed to the Court by Republican Governor Ronald Reagan. By the time of his retirement in 1983, he was considered to be the Court's only conservative justice. (John Balzar and Philip Hager, "Richardson to Resign; Lone Conservative on State Court," *Los Angeles Times* (11/04/1983), p. A15.

70 *South Dakota v. Brown* (1978) 20 Cal.3d 765, 768.

71 Id. at 769.

72 Id. at 770.

73 Ibid.

74 Ibid.

Governor's 'fidelity' to the federal Constitution."[75]

The Court of Appeal had not, of course, based its decision on a constitutional duty, but on California's Uniform Extradition Act, which it read as having eliminated the governor's discretion. Not so, Richardson declared. The Act, he concluded, "when read as a whole and examined within its historical context, does not support such an interpretation."[76]

California courts had interpreted the state's first extradition statute, whose language was "substantially similar to the Extradition Act," as giving the Governor discretion whether to extradite despite its use of mandatory language.[77] The Legislature knew this when it passed the 1937 Act. "It seems logical to conclude that if such a radical departure from existing law was intended, the Legislature would have made such intent abundantly clear either by directly circumscribing the exercise of executive discretion or by authorizing increased judicial participation in and review of the extradition process."[78] There is "nothing whatever" in the legislative history to show that the legislature intended such a change. "Instead, the Legislature readopted language bearing an historic interpretation precluding judicial enforcement."[79]

Other provisions of the Extradition Act reinforced this interpretation. California Penal Code section 1554 permits a Governor to recall a warrant of arrest. To impose a judicially enforceable duty to issue an extradition warrant would create an absurd situation where a court could require the Governor to issue a warrant that the Governor then could recall "whenever he deems it proper."[80] California Penal Code section 1548.3 permits the Governor to authorize an investigation into the "situation and circumstances of the person so demanded" and a report as to whether the fugitive "ought to be surrendered." A finding that the Governor had mandatory duty to extradite would render this provision "pure surplusage."[81]

At least four prior California governors over the past 40 years had declined to honor extradition requests. While not determinative, this fact was entitled

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75 Id. at 771.

76 Ibid.

77 Id. at 772. The 1851 statute stated that "A person charged in any State or Territory of the United States, with treason, felony, or other crime, who shall flee from justice, and be found in this State, shall on demand of the executive authority of the State or Territory from which he fled, be delivered up by the Governor of this State, to be removed to the State having jurisdiction of the crime." (Stats.1851, ch. 29, §665, p. 286.)

78 Id. at 773–774.

79 Id. at 774.

80 Id. at 775.

81 Ibid.

to "great weight."[82] Sister state governors have also declined to extradite, including to California.[83] Having gubernatorial discretion further serves the ends of justice, for the Governor could appropriately respond to situations in which the fugitive had become a law-abiding citizen, the fugitive's physical safety or right to a fair trial could not be assured in the demanding state, or the offense charged did not constitute a crime in California.[84]

Now that the Governor's discretion has been clarified, the Governor had to make a decision. "No principle of law applicable to the case justifies a refusal by the Governor, within a reasonable time, either to grant or deny the demand properly before him. Faced with such a demand the Governor may say yes or no. What he may not do is say nothing."[85] Acting Chief Justice Mathew Tobriner, and Justices Wiley Manuel, Frank Newman, and Racanelli, all signed Richardson's opinion.

Mosk Responds

In his dissent, Stanley Mosk (joined by Justice William Clark) bluntly stated his disapproval. "[T]he people of California now have at large in their midst a fugitive convicted felon." For two years, Governor Brown had neither acted nor chosen not to act. He had simply done nothing. "This inaction constitutes a contemptuous rebuff to the administration of justice in a sister state and a blow to cooperative law enforcement among the states."[86]

According to Mosk, "every provision of the California Constitution and laws relating to extradition all speak in mandatory terms."[87] Interstate rendition (or extradition) is a matter of the "absolute right" of the demanding state[88] and to permit the Governor discretion misreads the law and gives the Governor unlimited authority in extradition that the Legislature never intended.[89]

As for his 1939 article, Mosk pointed out that its key paragraph stated that the Governor's inquiry is limited only to whether a crime was committed when the fugitive was present in the demanding state, whether the fugitive fled from that state and is now in custody in this state, and whether the demand papers were in the correct form.[90] That prior California governors may have declined

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82 Id. at 777.

83 Id. at 778.

84 Id. at 779.

85 Id. at 780.

86 Id at 781.

87 Id at 782.

88 Id. at 783.

89 Ibid.

90 Id. at 784, 785.

to grant extradition has no bearing on the legality of their choice because it had never been tested in court. But at least those governors took a stand. "Here the Governor has failed to make that kind of forthright decision; he has declined to act in any manner."[91]

Mosk noted that more than two years have passed since the extradition request and the governor claims to *still* be investigating.[92] "The Governor apparently insists he has some undefined inherent right to sit in perpetual contemplation of the matter…[t]his court stultifies itself by placing approval on such whimsical disregard of constitutional and statutory duty."[93] In the "interests of an effective and impartial criminal justice system, and the prevention of discord and retaliation among the states of the union," Mosk would issue the writ requiring extradition.[94]

Brown Makes A Decision

Shortly after the opinion's release, Younger criticized Brown but not the Court's reasoning: "I believe the governor should have permitted Banks to be extradited. I believe he was not legally required to do so. He made the wrong decision, but he had the right to make the wrong decision."[95] But Brown still had not decided Banks' fate. On April 2, 1978, the *Los Angeles Times* editorialized that Brown continuing equivocation abused his discretion: "Two years should have been enough time for him to reach a decision."[96]

Two weeks later, on April 19, Brown finally announced his decision—Banks could stay in California. He called Banks "a law-abiding citizen" and said that he had received sworn statements "that raises substantial question of the likelihood of danger to Mr. Banks if he were returned[.]" When reporters pressed Kline to provide more details regarding the danger, he declined.[97] Later, he would reveal that a "very extensive" investigation by his office culminated in 31 affidavits, 16 recorded conversations, and 6 surveys.[98] Younger, and the other contenders for the Republican nomination to challenge Brown for the governorship that year, immediately issued statements condemning Brown's

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91 Id. at 785.

92 Ibid.

93 Id. at 787.

94 Ibid.

95 Alan Lecker, "Maddy may get money, miss votes," *Californian* (Salinas) (03/23/1978).

96 "An Abuse of Discretion," *Los Angeles Times* (04/02/1978), p. G4.

97 "Brown Rejects Extradition of Banks to South Dakota," *Los Angeles Times* (04/20/1978), pp. B1, B34. For a more recent study on conditions faced by Native Americans in South Dakota prisons, see Richard Braunstein, Steve Feimer, *South Dakota Criminal Justice: A Study of Racial Disparities* (2003) 48 S.D. L. Rev. 171.

98 George Skelton, "Rivals Attack Brown Over Banks Decision," *Los Angeles Times* (04/21/1978), pp. B3, B19.

action.[99] Later, Younger publicly released a letter that he sent to Brown after the Court's decision, urging him to extradite Banks.[100]

Banks naturally praised the governor and called his action a "courageous decision" that had struck "a strong blow" against racist attitudes. His attorney, Dennis Roberts, compared Brown's decision to that taken by governors before the Civil War who refused to return runaway slaves.[101] Now joined by his spouse and their children, Banks had moved to Dixon, and became Chancellor of Dekanawida-Quetzalcoatl University.[102] Janklow vowed to continue the effort the bring Banks back to South Dakota.[103]

In December 1983, after learning that California's newly elected Governor George Deukmejian wanted to extradite him, Banks sought refuge in the Onondaga reservation in New York.[104] The following October, he returned to South Dakota after receiving assurances of leniency. He was sentenced for three years and served for one year and two months.[105] He thereafter continued the struggle for the rights of Native Americans, but this time peaceably.[106]

In 1987, the U.S. Supreme Court overturned *Kentucky v. Dennison* and declared that federal courts had the power to compel a state governor to extradite a fugitive residing in that state.[107] In so doing, it rendered unnecessary requests to compel extradition based on state law, such as that in *South Dakota v. Brown*.[108] Thus, the Banks case remains the only attempt by one state to force another state to extradite a fugitive by petitioning the fugitive state's courts.

But there was another facet to the case, which emerged just a few days before the Court released its decision. And this time, it concerned the Court itself.

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[99] Evelle Younger called it "a dangerous precedent," George Deukmejian charged that Brown "has shown extreme contempt for equal justice," and Ken Maddy asked "are fugitives throughout the country going to find refuge in California under Jerry Brown?" (Ibid.)

[100] "Younger Denies Shifting Stand on Banks," *Los Angeles Times* (04/22/1978), p. A27.

[101] Duffy Jennings, "Brown Won't Extradite Dennis Banks," *San Francisco Chronicle* (04/20/1978), pp. 1, 14.

[102] Banks and Erdoes, p. 323.

[103] Jennings, "Brown Won't Extradite Dennis Banks," p. 14.

[104] Banks and Erdoes, p. 326–331.

[105] Banks and Erdoes, p. 339–340.

[106] Banks and Erdoes, p. 348.

[107] *Puerto Rico v. Branstad,* 483 U.S. 219 (1987).

[108] For more on this topic, see Jay P. Dinan, *Puerto Rico v. Branstad: The End of Gubernatorial Discretion in Extradition Proceedings* (1988) 19 Univ. Toledo. L. Rev. 649; Richard Eldon Davis, *Puerto Rico v. Branstad* Restoration of Integrity for the Constitution's Extradition Clause (1989) 19 Cumberland L. Rev. 109.

Conflict Of Interest?

On April 6, 1976, several weeks after his apprehension in El Cerrito, Banks spoke to a packed auditorium at Golden Gate University Law School. Karen Spelke, a former GGU law student, accompanied him. The law school newsletter described her as:

> [O]ne of the primary legal workers in Dennis' fight against extradition and his struggle for justice within the judicial system. Karen quit school during her third year because her work demanded a full-time commitment. Her decision was difficult and carefully thought out. She felt, however, that giving up her class standing, graduation, and the opportunity to take the bar did not compare with fighting to save an innocent man's life and ultimately the lives of many Native Americans.[109]

Banks had retained Oakland attorney Dennis Roberts to defend him against both the federal charges in Oregon and the extradition demand.[110] Roberts employed Spelke as a legal assistant and in that role, she quickly became immersed in the Bank's defense against the federal charges. When co-defendant Annie Mae Aquash was discovered dead in South Dakota, Spelke investigated on behalf of Robert's legal team.[111] She sat with Banks and Roberts at the defense table when Judge Belloni dismissed the charges.[112] When the case went to the Ninth Circuit Court of Appeals, Spelke (who had since passed the California Bar) argued before the court sitting en banc.[113] But Spelke's role wasn't limited to the federal case. According to a law student who worked with Roberts and Spelke on Banks's behalf, "Karen Spelke worked tirelessly to thwart South Dakota's efforts to extradite Banks back from California."[114]

In early 1978, the family of Herb Powless, an AIM leader and inmate at a Sioux Falls prison, hired Spelke to demand an investigation into a stabbing of another Native American prisoner. On Saturday, March 11, she attempted to enter the prison to meet with her client but the warden refused to allow it.

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[109] Cindy Duncan, "Dennis Banks Speaks at GGU," Caveat (GGU) (04/13/1976), p. 2.

[110] Id. at pp. 76–77. Kunstler represented Russell Means at the Wounded Knee trial, and recommended Roberts to Banks.

[111] Id. at p. 94. Aquash was initially thought to have died of exposure. It was then determined that she had been shot in the back of the head. For more on Aquash, see Joanna Brand, *The Life and Death of Anna Mae Aquash* (J. Lorimor, Toronto 1978).

[112] Id. at pp. 162, 163.

[113] "Another attempt to renew charges on Banks opens," *Huron Daily Plainsman* (S.D.) (11/10/1977), p. 8. When the San Francisco Examiner article wrongly credited Roberts with the argument, he wrote in to correct the error: "[T] argument on behalf of Mr. Banks and the other appeals was made by Karen Spelke. To appear en banc (before the entire court) is a rare privilege and I am sorry that you denied her the proper press recognition for the excellent job which she did." (Dennis Roberts, "Editor's mail box: Where credit is due," *San Francisco Examiner* (11/18/1977), p. 38.)

[114] Id. at p. 356.

The warden later charged that Spelke had attempted to create false rumors of racial bias at the prison to thwart Banks's extradition from California.[115] In seeking to enter the prison, Spelke purportedly also claimed to be working for the California Supreme Court.

On Tuesday, March 14, Battles alerted the Court to Spelke's attempt to enter the prison and her representation that she worked for the Court. According to Battles, Spelke sought information regarding the treatment of inmates, and told them "she could 'get it to someone who would do you a lot of good[.]'" Battles claimed that he knew Spelke worked as a legal researcher for Justice Wiley Manuel, and that a former law clerk had told him that Spelke said she would "have nothing to do with the [Banks] case." But in light of Spelke's activities in South Dakota, Battles believed that a "grave impropriety" may have been committed, especially if she were acting on behalf of one of the Justices. He asked the court to reinstate the Court of Appeal decision, or at least that Justice Manuel should consider recusing himself. He also asked that the matter be investigated and he be told of its outcome.[116]

On Friday, March 17, both California and South Dakota newspapers ran articles revealing that Banks's lawyer worked at the Court while the Court considered Banks's extradition case.[117] Janklow was appalled: "It raises an awful serious specter to me when one of the court's employees doing their legal research is one of the party's lawyers. That never even happened in Watergate."[118] A court official who asked not to be identified confirmed that Spelke was a research attorney. Spelke declined to comment.[119]

On Monday, March 20, Younger asked the Court to delay its decision until an independent investigation could take place:

> [T]he Court [should] withhold its decision in South Dakota v. Brown and … this matter be referred to some independent agency, such as the Commission on Judicial Performance, to determine whether and to what extent Ms. Spelke's alleged misconduct may have influenced, directly or

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115 "S.D. prison warden sued," *Huron Daily Plainsman* (S.D.) (03/16/1978), p. 14.

116 Letter from Charles S. Battles Jr. to The Honorable Rose E. Bird, Chief Justice and the Associate Justices of the Supreme Court of the State of California (03/14/1978), with a copy to Younger.

117 E.g., Doug Willis, "Indian's Lawyer in Conflict?" *Sacramento Bee* (03/17/1978), p. B1; "Conflict of interest?: Attorney for Banks now court employee," *San Francisco Examiner* (03/17/1978), p. 43; "Past Banks' lawyer on staff of court," *Huron Daily Plainsman* (03/17/1978), p. 2.

118 "Conflict of Interest?" at p. 43.

119 Spelke told the AP reporter who contacted her at home: "I'm not confirming, admitting, denying or anything. I'm just referring you to my attorney, and I have nothing further to say to you." She then hung up. Willis also reported that her attorney, Dennis Roberts, did not respond to phone calls. Willis, "Indian's Lawyer in Conflict?" p. B1.

> indirectly, the Court's consideration of that case. Only after an independent inquiry will the parties, their attorneys and members of the public be in a position to determine what measures should be taken to assure the unimpeachable integrity of this Court and of the judicial process.[120]

Justice Mathew Tobriner (as acting chief justice due to Bird's recusal) responded on the Court's behalf. In a letter dated March 20, he wrote:

> May I convey to you on behalf of the court our appreciation for your promptness in bringing these matters to our attention. After a careful investigation of the circumstances referred to in your letter, the court has authorized me to advise you of its firm and abiding conviction that nothing has occurred in respect to the above matters which has affected in any way either the decision itself, the opinions, or the processes of the court in reaching our decision. I assure you that Ms. Spelke did not act for this court or any member of it.[121]

The letter provided no further details. Also on that day, the Court released its opinion in *South Dakota v. Brown*. It made no public statement about Spelke.

Seven days later, on March 27, the Sacramento Union reported that Spelke had quit her position at the Court.[122] The article noted that Battles had written to the Court about Spelke on March 14 and it quoted Tobriner's letter from March 20.[123] Spelke refused to comment on the report.[124]

More was to come. Daniel O'Neill of *The Sacramento Bee* had obtained a copy of Younger's letter urging the court to delay releasing the opinion so that the Commission on Judicial Performance, or a similar agency, could investigate the charges. O'Neill's story, which appeared on the front page of the *Bee* on March 28, led with the news that the court issued its decision on the very day that Younger requested its postponement. It also provided more details of Spelke's involvement with Banks and AIM.[125]

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120 Letter from Evelle J. Younger, Attorney General, to The Honorable Rose E. Bird Chief Justice and Associate Justices (03/20/1978), with a copy to Battles.

121 Letter from Mathew O. Tobriner, Acting Chief Justice, to Charles S. Battles, Jr. (03/20/1978), with a copy to Younger.

122 See "Indian Leader's lawyer quits Supreme Court job," *San Bernardino Sun* (03/26/1978), p. 11. *The Sacramento Union* (which ceased publication in 1994) has not yet been digitized for this time period.

123 "Banks' Attorney Quits Post With High Court," *Sacramento Bee* (03/26/1978), p. B4. Janklow characterized Tobriner's letter as the equivalent of Nixon's denial of involvement in Watergate. "Lawyer for Banks resigns court job," *Huron Daily Plainsman* (S.D.) (03/26/1978), p. 2.

124 "Willis, "Indian Lawyer in Conflict," p. B1

125 Daniel O'Neill, "Younger Pushed For Probe of Extradition Case Figure," *Sacramento Bee* (03/28/1978), pp. A1, A12.

Aftermath

After the O'Neill article came out, no further reports appeared in the press on the controversy. Several causes could account for this. First, the court's opinion narrowly focused on whether the Governor had discretion in extradition. Any information that Spelke could have been gathering about conditions in South Dakota prisons would have been superfluous to that holding. Second, Spelke had resigned, which seemed to have concluded the matter for the Court. The issue of whether Manuel should have recused himself never arose because it was never publicly identified that Spelke worked for Manuel. If it had, this would likely have been a bigger story because Manuel was one of the justices up for retention that year. Finally, public attention naturally shifted from the Court to the Governor and his decision not to extradite Banks.

Today, both California's Government Code and the Code of Ethics for Court Employees serve to prevent such a situation as that in the Banks case from reoccurring. Government Code section 19990 prohibits a state employee from engaging in employment incompatible with the employee's duties. Tenet Five of The Code of Ethics for the Court Employees of California also proscribes an employee's acceptance of "outside employment that conflicts with the employee's duties." The guideline for that tenet further elaborates that improper behavior would include "accepting outside employment that interferes with the employee's effectiveness or conflicts with the proper discharge of official court duties."[126]

Although the controversy surrounding the Court in *South Dakota v. Brown* fell from public view, the atmosphere it created may have influenced events occurring later that year. Younger, dissatisfied with the Court's response as concluding the matter, privately asked the Judicial Council to promulgate new rules governing research attorneys.[127] In October, Younger (now the Republican gubernatorial candidate) publicly charged that the Court had withheld the release of dozens of controversial opinions so as not to politically harm the Justices up for retention. A spokesperson for the Court denied the charges.[128] It is not known to what extent Younger's experience in the Banks case may have contributed to his suspicions of the Court when he made these accusations. But the elements of the controversy in *South Dakota v. Brown*—the charges of impropriety at the Court, the leaking of non-public information,

[126] Tenet Five. The Code was adopted in 1994 and revised in 2009.

[127] Letter from Evelle J. Younger, Attorney General, to Chief Justice Rose E. Bird, Chairperson, and Council Members, Judicial Council of California (03/31/1978). He also asked the State Bar to investigate allegation of serious misconduct by Spelk. (Letter from Evelle J. Younger, Attorney General, to The State Bar of California, Disciplinary Section (03/31/1978.)

[128] "State court deflates Younger charge," *San Francisco Examiner* (10/11/1978), p. 9.

and questions about the timing of the release of an opinion—reappeared that fall during the retention election and its aftermath. One final echo was still to come. In March, 1978, Younger had urged the court to bring in the Commission on Judicial Performance to investigate the potential conflict of interest in the Banks case. That letter was leaked to the press. In November, 1978, the Chief Justice proactively called for the Commission to examine the accusations. But this time, she publicly released a copy of the letter requesting the investigation.[129]

What occurred after the Commission agreed to investigate has been subject to much analysis.[130] In essence, the Commission conducted a nearly year-long investigation that included televised hearings and the testimony of justices that revealed previously internal deliberations of the court into public scrutiny. In the end, the Commission "produced no finding as to whether Bird or other justices had purposely delayed the announcement of decisions" despite the investigation having done "serious damage" to the court.[131] But absent from any of these accounts is a discussion of *South Dakota v. Brown*[132] despite its importance in Court history to rights of Native Americans, its uniqueness in American law in state to state relations, and its role as a harbinger for the Court's later crisis. It is instead a forgotten case.

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[129] Letter from Chief Justice Rose Bird to Justice Bertram D. Janes, chair of the Commission on Judicial Performance (11/24/1978), reprinted in Stolz, *Judging Judges*, pp. 152–153.

[130] The principal histories include: Scheiber, ed., *Constitutional Governance and Judicial Power*, pp. 450–456; Preble Stolz, *Judging judges; the investigation of Rose Bird and the California Supreme Court* (The Free Press: NY, 1981); Betty Medsger, *Framed: the new right attack on chief justice Rose Bird and the courts* (Pilgrim Press: NY 1983); and Kathleen Cairns, *The case of Rose Bird: gender, politics and the California courts* (Bison Books: Lincoln 2016).

[131] Harry N. Scheiber, "The Liberal Court: Ascendency and Crisis, 1964–1987," Chapter 5 in Scheiber, ed., *Constitutional Governance and Judicial Power*, p. 455.

[132] Stolz mentions it in a footnote in *Judging Judges*, but only to comment on Bird's recusal in the case. (Stolz, *Judging Judges*, p. 71.)

J. CLARK KELSO*

Bringing Humanism to California's Prisons

I. Introduction

California's prisons have been in a state of nearly constant change and adjustment for several decades now. Many of the changes are in response to judgments entered in a number of class action lawsuits, both state and federal.[1] However, many of the changes reflect the Legislature's and public's reaction to the consequences of longer, determinate sentences that were part of a "tough on crime" set of policies enacted during the 1980s and 1990s. The consequences included a multi-billion-dollar prison construction program, dramatically increased annual expenditures on prisons, a dramatic spike in overcrowding that ultimately led to a Supreme Court decision affirming a trial court order to reduce overcrowding from 175% of design capacity to no more than 137.5% of design capacity,[2] and stubbornly high recidivism rates. In short, a prison system that failed to meet the goals set out for its performance notwithstanding over one hundred billion in expenditures over the decade.

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1 *See, e.g., Coleman v. Wilson* (E.D. Cal. 1995) 912 F. Supp. 1282 (California's prison mental health system is unconstitutional); *Armstrong v. Davis* (9th Cir. 2001) 275 F.3d 849 (affirming claims under the Americans with Disabilities Act and Rehabilitation Act*) abrogated on other grounds*, *Johnson v. California* (2005) 543 U.S. 499; *Plata v. Schwarzenegger* (N.D. Cal. 2007) 2007 U.S. Dist. LEXIS 68365 (medical health system is unconstitutional); *Perez v. Tilton* (N.D. Cal. 2006) 2006 Westlaw 2433240 (approving stipulated settlement in case involving unconstitutional dental care); *Madrid v. Gomez* (N.D. Cal. 1995) 889 F. Supp. 1146 (Federal court appointed special master to oversee prison with a history of excessive violence, cruel and unusual punishment, and substandard medical care).

2 *Brown v. Plata* (2011) 563 U.S. 493. *See* Margo Schlanger, "*Plata v. Brown* and Realignment: Jails, Prisons, Courts, and Politics (2013) 48 *Harv. C.R.—C.L.L. Rev.* 165.

Until recently, most of these changes were essentially incremental. Not exactly moving around the deck chairs on the Titanic, but also nothing that fundamentally altered the overwhelming feeling when one enters a prison that its primary, unrelenting purpose is to punish. For example, reducing the population from 175% of design capacity to 137.5% of design capacity or less is undoubtedly a significant change, but it actually doesn't change the prison environment or its operations, and in that sense, it is an incremental change. The prison is still a prison.

This article will introduce the reader to recent developments in how California's prisons are operated, beginning with how healthcare is delivered, suggesting a more fundamental pivot away from the very long, unfortunate history of using prisons as places where pervasive, systematic dehumanization through continuous punishment and exploitation has been the operational reality, as well as the animating philosophy. California prisons can escape that history and adopt the morally and philosophically superior position, grounded in humanist principles and philosophies, that all people, even felons, are worthy of the respect that is owed to each of us simply by virtue of being human. The state can then focus its correctional philosophy much more on public safety and rehabilitation, and less on retribution and punishment. That will be good for everyone.

II. Correctional Practices and Philosophies in Western History

The modern prison, its architecture and operational practices, is a recent phenomenon, historically speaking. We cannot truly understand just how historically recent without taking a journey through correctional practices and philosophies throughout western history. This means starting 2,600 years ago in ancient Greece, and surveying correctional history in ancient Rome, the Middle Ages, the Renaissance, the Protestant Reformation, the Enlightenment, England, and the American colonies. As we will see, certain aspects of our modern correctional perspectives are very deeply ingrained and explain many of our current practices, while some other features are of only historically recent vintage. The magnitude and importance of a pivot away from punishment to a more humanistic approach can be fully appreciated only with this brief historical survey.

A. Correctional Practices in Ancient Greece

So step back with me to antiquity in ancient Greece. The birthplace of democracy. Home to the Pythagoreans, Socrates, Plato and Aristotle, to name just a few of the leading thinkers of that age, thinkers whose philosophies are

directly traceable through Europe to modern times. The site of one of the great wonders of the ancient world, the Acropolis. Surely we can rely upon the ancient Greeks for some deep thinking about how to handle the problem of people who break the law and breach the peace.

Actually, not so much. Remember, after all, it was a Greek jury that sentenced the elderly Socrates to death on charges of failing to acknowledge the gods which had been recognized by the city and of corrupting the city's youth. It was a close vote—around 280 to convict and 220 to acquit—but close or not, he was convicted and sentenced to die by drinking the poison hemlock. Under the prevailing practices of the time, Socrates apparently could have purchased his freedom and left Athens forever, but his own principles kept him from taking the easy path.

To the great Greek thinkers listed above, we can add the name of "Draco" (sometimes Drako or Drakon), who history records as the first legislator of Athens. Prior to Draco's work, Athenian law had been for hundreds of years a system of only oral law which resulted frequently in private justice and family feuds. Around 621 or 622 B.C., Draco produced a written code of law for the city.

Draco's laws did not remain in effect for long. Twenty-five years later, Solon was chosen as chief magistrate. He repealed nearly all of Draco's code. According to Plutarch's version of history,

> [Solon] repealed the laws of Draco, all except those concerning homicide, because they were too severe and their penalties too heavy. For one penalty was assigned to almost all transgressions, namely death, so that even those convicted of idleness were put to death, and those who stole salad or fruit received the same punishment as those who committed sacrilege or murder. . . . And Draco himself, they say, being asked why he made death the penalty for most offences, replied that in his opinion the lesser ones deserved it, and for the greater ones no heavier penalty could be found.[3]

If the name Draco sounds vaguely familiar in the context of punishment, it is because the harsh and severe penalties in his code are immortalized in the word, "draconian."[4]

With death as the predominate penalty, there was no need to construct a building that could house large numbers of convicts for lengthy sentences.

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[3] Plutarch, *Complete Works of Plutarch*, "Life of Solon," 17.1–2, Delphi Ancient Classics Book, 196.

[4] Richard Dargie, *Changing Times Ancient Greece: Crime and Punishment*, Compass Point Books, 2007, 7.

There was no need for what we today would call a prison.[5] There was no need to develop a theory for correctional or rehabilitative practices. Draco's policy was simply to permanently exclude criminals from being present in the city, and death was the surest way of accomplishing that goal.

The less draconian criminal penalties adopted by Solon and subsequent rulers still did not require construction and operation of a prison in the modern sense of that word.[6] Execution was still a prominent penalty even in the revised systems. But in addition to execution, the more moderate laws included banishment and exile from the city, corporal punishments such as public flogging, and imposition of fines. Banishment and exile were almost as bad as execution because the spaces between the Greek city states were a dangerous no-man's-land where people travelled without protection. A person exiled from one city was by no means guaranteed entry into any other city.

Punishments for crime in Greece cannot be fully understood without an appreciation of the prevalence of slavery. Ancient civilizations generally viewed slavery as a completely natural and legitimate institution.[7] Slaves were property. Information about the number of slaves in ancient societies is lost to history, with estimates ranging from 10% of the population to as high as one-third of the population.[8] By comparison, the percentage of the U.S. population who were enslaved in 1860 was around 13%.[9] Slaves in ancient times came from the losing side in wars, or were bought at slave markets supplied by merchants or pirates, or were the offspring of female slaves, or were farmers in debt to landlords who defaulted on their debts, or, of greatest interest to us, had been convicted of crimes.[10]

The crimes leading to slavery were generally "private" crimes against individuals, such as theft. For these minor crimes, the convict might be sentenced to become a slave of the victim, or a fine might be imposed which, if not paid, would result in the debtor becoming a slave of the judgment creditor. A minor crime committed by a slave of one family against another family might result

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5 There was clearly a need to build and operate what today we would call a jail to hold someone accused of crime and in the short period of time between conviction and implementation of sentence, and such facilities were built in Greek cities.

6 Imprisonment as a punishment is described in Plato's *Laws*, but historical scholars have concluded that "[h]is prison system appears to be a theoretical construct for there is no evidence that anything like it ever existed in the Athens of his day or that his prison sentences had any counterparts in Athenian law." J. Thorsten Sellin, *Slavery and the Penal System,* Classics of Law & Society—Quid Pro Books, 2016, 15.

7 *Id.* 1.

8 *Id.* 2.

9 Wikipedia, 1860 United States Census (https://en.wikipedia.org/wiki/1860_United_States_census accessed on Sept. 4, 2024).

10 Sellin, *Slavery and the Penal System*, 2.

in the transfer of the slave to the victim family. In this way, slavery became part of the criminal justice system in dealing with minor crimes.

B. Correctional Practices in Rome

Ancient Rome followed most of the practices adopted in Greece. Prisons in Rome were generally used only to hold a person awaiting trial or execution.[11] The concept of sentencing a criminal to a long term of years in a prison—where the state would become responsible for the care of the convict—did not exist. Most serious crimes were punishable by execution. A few, particularly members of the upper classes, could avoid execution by banishment. Those not exiled faced death by various means from simple execution to public crucifixion to being forced into the games at the Colosseum, along with slaves and gladiators.

Rome's primary innovation in punishing criminals was in the variety of ways someone could be put to death: simple decapitation, being beaten to death, thrown from the Tarpeian Rock, burning alive or being thrown to wild animals.[12] For the crime of patricide, the culprit was treated to the penalty of the sack: "He was sewn into a leather sack in company with a dog, a monkey, a snake and a rooster, and was thrown into the sea or a river."[13]

Slavery continued to play a large role in criminal punishments, just as it did in Greece. Rome's primary innovation was to establish hard labor colonies where slaves performed some of the hardest work in mines and quarries in support of public construction. Because of the greater demand for slave workers, slavery became a more regular alternative to death or exile. Slaves were not well treated, needless to say.

The overall philosophy for convicts, as in Greece, was to remove them from society by death or banishment or slavery. Public safety by exclusion was the policy. Recidivism was not an issue. Dead men don't recidivate.

Physically, Rome's prisons—used to hold the accused for trial or the convicted until implementation of sentence—were more like what we would today call a dungeon.[14] The prisons—such as the Mamertine in Rome[15]—were underground, dark, damp, had little to no air circulation, and no separate cells.

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[11] Richard A. Bauman, *Crime & Punishment in Ancient Rome*, Routledge, 1996, 23.

[12] *Id.* 28.

[13] *Id.* 45.

[14] Wikipedia, "Prisons in Ancient Rome" (accessed at https://en.wikipedia.org/wiki/Prisons_in_ancient_Rome on Sept. 7, 2024).

[15] Wikipedia, "Mamertine Prison" (accessed at https://en.wikipedia.org/wiki/Mamertine_Prison on Sept. 8, 2024).

They were filthy. Friends and family were expected to provide for the prisoners' needs. And they were, of course, overcrowded. Terrible living conditions and overcrowding are recurring themes throughout the history of jails and prisons, a powerful symbol of the anti-humanist sentiment that prisoners are not worthy of common human respect.

There was of course no real expectation that prisons in Rome would be anything other than horrific; after all, the likelihood of being found guilty at a trial was very high, and a guilty verdict resulted in death or banishment. So time spent in prison waiting trial was just a precursor to expelling that person from society. There was no need for treating that person as anything but an outcast and sub-human.

C. Correctional Practices During the Middle Ages and Renaissance

The collapse of the Roman Empire led to a long period of chaotic governance throughout Europe characterized by a significant decline in overall population, reduced trade between cities and a substantial increase in migration. During the Early Middle Ages (i.e., 5th to 10th centuries), there was also a conspicuous scarcity in written works or cultural development. The governance that existed tended to be localized within family and kinship groups loosely assembled into tribes. Conflicts between families and tribes were common.[16]

Within the family, the head of household had essentially unlimited disciplinary power.[17] Crimes within a family or kinship group were private matters and generally handled within the group. A violent crime by a member of one kinship group against another kinship group would often lead to a war between the groups. Crimes that threatened the tribe itself usually resulted in death. Property crimes committed by freemen could result in punishments short of death, such as a payment of indemnities.[18] There also appears to be an increased use of mutilating punishments such as amputation of a hand, castration, or blinding, along with the use of other methods of torture.[19]

Towards the end of the Middle Ages (i.e., 1300 to 1500), after a series of plagues and famines, including the Great Famine of 1315–17 and the Black Death (1346–1353), Europe found its overall population cut by over 50%, putting great stress upon society and triggering virtually non-stop warfare.[20]

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[16] Sellin, *supra* note 7, at 31.

[17] *Id.* 870.

[18] *Id.* 916.

[19] *Id.* 930.

[20] The late 1300s was the time of the Jacquerie peasant uprising in France, the Peasants' Revolt in England and the Hundred Years' War.

Around 1440, Johannes Gutenberg invented the movable-type printing press. This invention, which presaged the spread throughout Europe of literature, including most significantly the Bible and other religious texts, a mechanism for organized scientific discovery, and a growth in general knowledge, education and culture, was a major contributor to the start of the Renaissance, the rediscovery of the grandeur of Ancient Greece and Rome.

When it came to the topic of punishment for crime, there really wasn't much to rediscover, as shown by the history related above, but the Renaissance, with encouragement from the Protestant Reformation of the 1500s, did witness one important innovation that would ultimately lead to the modern prison system. That innovation was the workhouse prison, the best examples of which were the Rasphius of Amsterdam (1596) and Bridewell Prison in England (1553).[21] Prior to the creation of these institutions, punishment for crime at this time was a continuation of everything described above. Frequent use of the death penalty, banishment, corporal punishment, branding, mutilating punishments and torture.[22] A recent addition to this list was sentencing the stronger convicts to serve as "galley slaves" in the growing fleets of ships dedicated to commerce and defense.[23] Convict slaves were also used to work on public works projects.[24]

There does not appear to be a single precipitating event or reason for the creation of workhouses or their use as prisons.[25] In part, they appear to be a reaction to an increase in poverty and vagrancy in urban centers, along with an increase in petty theft. In part, the Protestant Reformation encouraged the productive use of labor as well as a softening of the almost uniformly harsh penalties that had become standard practice in responding to crime. In part, the Renaissance encouraged renewed interest in Plato's works which, as noted above, included a detailed description of a prison system where imprisonment was to be employed as the punishment for certain crimes.[26] That Plato's description was theoretic and not actually used in Athens did not matter; it inspired new thinking during the Renaissance. And finally, sentencing a convict to work in the workhouse was not far removed from the well accepted practice

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[21] J. Thorsten Sellin, *Pioneering in Penology—The Amsterdam Houses of Correction in the Sixteenth and Seventeenth Centuries*, University of Pennsylvania Press, 1944. *See also* Wikipedia, "Bridewell Palace" (https://en.wikipedia.org/wiki/Bridewell_Palace accessed on Sept. 10, 2024).

[22] *Id.* 2–8.

[23] *Id.* 8. *See also* Sellin, *Slavery and the Penal System*, 43.

[24] Sellin, *Pioneering in Penology—The Amsterdam Houses of Correction in the Sixteenth and Seventeenth Centuries,* 8.

[25] *Id.* 12–17.

[26] *See* note 7, *supra*.

of sentencing a convict to slavery.[27]

D. Correctional Practices During the Age of Enlightenment

The workhouses in Amsterdam and London symbolized changing attitudes regarding punishment for crime.[28] During the Age of Enlightenment, those changes were given a broad, solid philosophical grounding with the 1764 publication of a set of essays by Cesare Beccaria, the father of modern criminal justice, titled "On Crimes and Punishments."[29] Beccaria's importance can most easily be seen in three principles that he emphasized throughout the essays:

- First, that it is only the law that should determine the punishment of crimes, and that, therefore, "[n]o magistrate then . . . can, with justice, inflict on any other member of the same society punishment that is not ordained by the laws."[30]
- Second, "that the intent of punishments is not to torment a sensible being, nor to undo a crime already committed. . . . The end of punishment, therefore, is no other than to prevent the criminal from doing further injury to society, and to prevent others from committing the like offence. Such punishments, therefore, and such a mode of inflicting them, ought to be chosen, as will make the strongest and most lasting impressions on the minds of others, with the least torment to the body of the criminal."[31]
- Third, there should be proportionality between the crime committed and the resulting punishment.[32] "That a punishment may produce the effect required, it is sufficient that the evil it occasions should exceed the good expected from the crime, including in the calculation the certainty of the punishment, and the privation of the expected advantage. All severity beyond this is superfluous, and therefore tyrannical."[33]

Beccaria's work was extraordinarily influential. The proportionality and moderation that he called for in punishments fit perfectly within the construct

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[27] Ultimately, when slavery itself became disfavored and illegal, the practice of forcing prisoners to work would be continued by recharacterizing the practice as "involuntary servitude." *See* United States Constitution, Thirteenth Amendment ("Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.") In California, the November 2024 ballot will include as Proposition 6 a measure to remove from the California Constitution the similar language permitting "involuntary servitude" in jails and prisons. *See* https://voterguide.sos.ca.gov/propositions/6/index.htm.

[28] Sillen, *Pioneering in Penology—The Amsterdam Houses of Correction in the Sixteenth and Seventeenth Centuries*, 1 ("They were concrete symbols of a gathering revolt against the sanguinary and dishonoring penalties of the past, and while from the point of view of modern penology they were modest and timid rebels against tradition, there was a magnificence about them which is often attached to the work of pioneers.")

[29] Cesare Beccaria, *On Crimes and Punishments*, Seven Treasures Publications, 2009.

[30] *Id.* 13.

[31] *Id.* 34.

[32] *Id.* 20 ("There ought to be a fixed proportion between crimes and punishments.")

[33] *Id.* 70–71.

of an institutionalized workhouse/prison environment. All of the ingredients for the development of modern prisons were now on the table.

E. Correctional Practices in Our Colonies and the Early United States

We can now turn to correctional practices in the United States and in the colonies before the United States came into being. If you travelled back in time to the 17th century, the early colonial years, you would discover that prisons did not exist. We really hadn't progressed very much from ancient Greece and Rome. Just as in Greece and Rome, prisons were not needed, and the reason was the same. It wasn't that there was no crime; it was because the penalty for crimes—execution, banishment, or brief, public, corporal punishment—did not create a demand for prisons. Corporal punishment (think of the stocks, where passers-by could humiliate criminals and entertain themselves by pelting convicts with food and feces, public floggings, brandings, and such) did not require long-term housing in a prison-like structure, and capital punishment was swift and sure in those days. Banishment removed convicts from society as surely as capital punishment.

Most serious crimes were punishable by death, and serious crimes even included offenses such as adultery or breaking the sabbath. The convict might not actually get the death penalty for a first offense, but repeat offenders faced death. The corrections philosophy was public safety by permanent exclusion with the addition of public, corporal punishment.

The early colonies did have buildings with cells where people were held for short periods of time. Usually, these cells were occupied by people who were waiting to be tried, and their stays could be days or weeks. With just a few exceptions, we would recognize those facilities as the modern equivalent of jails.

The primary difference between colonial jails and modern jails is that occupants in colonial jails were required to work during their stay, based on the model of similar facilities in Amsterdam and London. In other words, jails were essentially workhouses where occupants worked to earn money for the owners to maintain the jail. Perhaps a more accurate description is that workhouses were used in part as jails. And, of course, the business model for a successful workhouse necessarily included essentially involuntary labor at significantly reduced or no wages. Prisoners, then, were economically handy to a workhouse, whose other residents would have included poor and homeless, orphans and abandoned children, disabled persons, and persons suffering from mental illness. All of these could be and were taken advantage of in a workhouse.

F. Correctional Practices in the Early 1800s and the Birth of Modern Prisons

By the late 1700s and early 1800s in the United States, there arose significant resistance to the use of capital punishment for so many crimes, resistance based in part on the new humanistic philosophies that were part of the Protestant Reformation and Age of Enlightenment and in part on the long-standing opposition of Quakers in Pennsylvania to capital punishment. Criminal laws were changed to reserve capital punishment for only the most serious crimes. For less serious crimes, a term of incarceration was the alternative, and these three-, four-, and five-year terms created the need for a place to house the prisoners for lengthy stays. This, finally, was the birth of the modern prison.

In 1816, the Auburn State Prison opened in Auburn, New York. Auburn became a model for state prisons around the country. It was essentially a successor to workhouses, and it operated on principles of silence, corporal punishment for violation of silence or other rules, and congregate labor. The prison earned profits from prisoner labor.

An alternative model was established in Pennsylvania at the Walnut Street Prison and subsequently at the Eastern State Penitentiary where prisoners were generally isolated from each other and required to perform prison labor in their own, individual cells. Jobs included nail making, shoe making, stone sawing, weaving and picking and carding wool. General isolation from other prisoners lasted for only a decade or so because the prison quickly became overcrowded, although the concept of solitary confinement lived on for many purposes.

Aside from the overt commercialization of forced prison labor, proponents of these prison models argued that the system would teach good work habits which would ostensibly promote rehabilitation of the prisoners. So now we can add to punishment and exclusion from society, a theory of rehabilitation to justify the terrible living conditions and forced labor.

G. Correctional Practices in Early California

That brings us to the birth of California and San Quentin, our first state prison.[34] The gold rush resulted in a dramatic increase in population in Northern California and, in particular, in San Francisco. Many of the gold rushers were ultimately disappointed that they didn't immediately strike it rich, and some of those turned to crime. Others no doubt were criminals before coming to California and perhaps saw the chaos in San Francisco as a good opportunity.

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[34] This section is drawn largely from my article, J. Clark Kelso, "San Quentin Prison's Birth Story," (Fall/Winter 2024) CSCHS *Review*, 2.

At the beginning, in the 1840s, there was no state prison, and criminals were detained in jails, although these jails were mostly made of adobe and did not do a very good job of actually holding prisoners.[35] Escapes were common.

In 1849, one solution was proposed by a city councilman, Sam Brannan, who had purchased and then retrofit a ship in the harbor to serve as a jail. He was of course hoping to make a profit from charging for housing prisoners. A more permanent solution was for the county to build a proper county jail. But at least in San Francisco initially, the county jail project ran out of money.

The state legislature realized there was a problem in having no state prison, but its initial solution was to simply declare that all county jails were also state prisons, a very early form of re-alignment. Leave it to the counties. This wasn't just a cram down on the counties, however, because by virtue of being a state prison, the county jails could then lawfully force prisoners to work on public works projects. That was the deal. So counties now could pursue profitable public works projects using forced labor. This type of tradeoff between the state legislature and local governments is of course a common feature of California governance even today.

In 1851, the Legislature was approached by James M. Estill and General Mariano Guadalupe Vallejo with the idea of the State leasing to Estill and Vallejo state prison grounds and requiring counties to deliver to Estill and Vallejo all state prisoners. The deal was for Vallejo and Estill to give the state $137,000 and they would agree to build a state prison in Solano County, staff it, clothe and feed all of the prisoners in exchange for the Legislature moving the state capitol from San Jose to a city yet to be built in Solano County that would be named Vallejo, and authorizing Vallejo and Estill to use all convict labor for their personal profit. The Legislature approved the deal.

Things did not turn out well for Vallejo, either the city or the General. The Legislature quickly decided the City of Vallejo was not suitable for its needs, and it moved to nearby Benicia for a year and then to Sacramento. General Vallejo lost interest in the prison project, but his partner, James Estill, pushed on.

Estill now had state prisoners, but no prison had yet been built. In the meantime, he kept prisoners in a dungeon on a ship anchored near Angel Island, and prisoners were put to work quarrying stone in a quarry leased by Estill. The stone from this work would be used to build the first cellblock.

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[35] As noted in Hon. Barry Goode and John S. Caragozian, "California Without Law: 1846 Through 1850" (2023) 18 *California Legal History* 167, between 1846 and 1850, people living in California faced the uncertainty of the transition in governance from Mexico to California, a period of time they fairly described as a "legal void." *Id.* 167.

Ultimately, in 1852, the state paid $10,000 to buy 20 empty acres on the southern shore of a place called Punta de Quentin. It was renamed San Quentin. Construction began.

Estill's economic interest was in building as cheaply as possible consistent with reducing the number of escapes and maximizing the number of inmates whose forced labor was the basis for any profits to him. So prison conditions were predictably terrible and the prison was almost immediately overcrowded.

Conditions at the prison deteriorated so much that in 1858, the Legislature authorized the Governor to take immediate control of the prison, and the lease agreement was declared illegal. The Governor personally entered San Quentin and with the assistance of his armed guards secured the keys to the prison and evicted Estill's successor in interest, John McCauley. From that time onward, state prisons became the direct responsibility of the state.

State management did not mean much of a change in conditions. An 1875 report by the Directors of the State Prison paints a dismal picture of San Quentin:

> The Surgeon's report draws a sad picture of the crowded prison, the insufficient ventilation, and the practice of huddling together the prisoners without any regard to health or comfort…. [W]e have four rooms with forty-five men in each, with all the others equally crowded, and one-half, if not more of them, afflicted with maladies, and locked up for thirteen or fourteen hours out of the twenty-four, sleeping and existing in a fetid and poorly ventilated atmosphere, made absolutely poisonous by the exhalations from diseased lungs, and to a great extent unwashed surfaces, and the effluvia arising from the accumulation of excrementious matter deposited in a common receptacle during all these hours.[36]

This report helped drive the Legislature to construct a second state prison, this one located in Folsom, near Sacramento. Another prison would not be built in California for the next 60 years.

H. Recap on the History of Correctional Practices and Philosophies

Now is a good time for a short recapitulation. From ancient times until the late 1700s, the primary philosophy for dealing with persons convicted of any serious crime was permanent exclusion from society usually by death and sometimes by banishment. Exclusion promoted public safety, and of course a secondary goal was deterrence, the hope that people in society would be deterred from crime given the consequences of being caught. By the 1600s

[36] Biennial Report of the Directors of the State Prison, p. 151 (1875).

and 1700s, all other criminals were sentenced to some form of public, corporal punishment, or sentenced to slavery. Executions and corporal punishments were often occasions for public entertainment.

Public attitudes started changing in the late 1700s. As a result of growing criticisms that capital punishment was excessive for many crimes to which it applied, sentencing laws and practices changed, and many felons began to be sentenced to confinement. Sentencing to a prison increasingly became the punishment of first choice. This change created a need for prisons where these felons could be confined for years or decades. And with prisons now starting to be built, the need for public, corporal punishment vanished. As Michel Foucault carefully and persuasively documented, punishment for crime increasingly vanished from a public spectacle to an institutional practice behind high walls and tall fences.[37]

Because no one actually wanted to pay for the earliest prisons, the model adopted for early prisons was the workhouse where construction and operational costs could be defrayed by using convict labor to produce goods for sale. An overall profit was also anticipated by investors. I do not believe there was really any correctional philosophy behind this development of the prison as a workhouse. It was just the economic and political reality of the time. But human beings are very good at rationalizing behavior and coming up with justifications—reason in service of reality or desired reality. So a justification for this approach to prisons based on the idea of rehabilitation was quickly adopted. Convicts would be rehabilitated for reentry by making them work hard while in prison; it just so happened that the prisons might pay for themselves and make a profit.

California's first prison was what today we would call a private prison, and it was definitely built and run on the workhouse model to generate profits. However, profits never materialized, and prison conditions were horrific. Within ten years, the State took over the prison. To alleviate serious overcrowding at San Quentin, the Legislature authorized construction of Folsom State Prison. Punishment and forced labor as a form of rehabilitation were the twin goals for California's prison system, except in cases of capital punishment, where exclusion was the guiding principle. And all of these sanctions were supported by the theory of deterrence.

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[37] Michel Foucault, *Discipline and Punish*, Vintage Books, 1995, 104.

III. The Change to Determinate Sentencing and the Resulting Explosion in Prison Population

Corrections in California was essentially stable for the next 60 years after Folsom was built in 1880. During that period, the incarceration rate dropped from its high in 1878 of 0.18% of the state's population to about 0.07% in the mid-1970s. However, the population in California exploded beginning in 1941, so even though the incarceration rate was still going down, the total number of prisoners started going up. To alleviate the inevitable overcrowding, the state built 8 prisons between 1941 and 1965. And then there was again a pause and more stability until 1976.

Everything changed in 1976 when the State rejected its long-standing indeterminate sentencing system in favor of determinate sentencing.[38] In an indeterminate sentencing system, most felons were sentenced to prison for an indeterminate term with time of release determined by the parole board or Governor based on an evaluation of an individual inmate's readiness for release and risk to public safety. One consequence of this system was that the Administration essentially had control over how many inmates were held at any one time in the state's prisons. In order to hold the prison population at a reasonable level and to avoid overcrowding, prison officials and the Administration would usually release hundreds of prisoners between Christmas and New Year's. That is how the incarceration rate was kept at a pretty stable 0.1% of the population from 1940 through 1970.

Under determinate sentencing, by contrast, a felon was sentenced to a term of years, and a complex sentencing scheme was born with the length of a sentence determined by a set of factors resulting in possible low, medium and high terms that could be lengthened by special sentencing factors, like whether the crime was committed with a gun.

One of many problems with determinate sentencing is that there really isn't any basis for determining what constitutes a proportionate sentence. How long should someone serve in prison for burglary? For robbery? And so on. There is no objective measure for how long is long enough, particularly since there are competing justifications for incarceration, some of which point to longer sentences and some of which point towards shorter sentences.

Second problem, if the 2,500 years of history described above teaches us anything, is that the public enjoys watching and knowing that other people, not "us" or our family or friends of course, but other people, are getting punished

[38] Kara Dansky's *Understanding California Sentencing* (2008) 43 U.S.F. L. Rev. 45, is one of the best recent historical reviews of California's sentencing policies.

and hurt in some way. It is the criminal sentencing equivalent of that old joke about taxes: Don't tax you, don't tax me, tax the guy behind the tree. As a species, we seem to tend towards violence and retribution against "others." Perhaps these characteristics gave us an evolutionary advantage prior to the creation of modern society and government, and we simply have difficulty now moving beyond those deeply held feelings.

The third problem is that determinate sentencing puts control over the length of sentences in the hands of the people and the people's representatives. If the people or the Legislature think a sentence is not long enough, they can change the law and make any sentence longer, and with retribution on their minds, that is exactly what they did. Courts and corrections lost control.

Now, when you combine the lack of a metric for determining proportionality with a system that gives control over the length of sentences to the People with what appears to be an inherent human tendency of the People to desire more and more retribution, you have a recipe for spiraling incarceration rates.

That is why the sentencing laws in California were amended over 1,000 times during the 1980s and 1990s, and every one of those amendments lengthened sentences. That is why we went from an incarceration rate of 0.07% in 1976 to a rate of 0.47% in 2008, a 670% increase in the rate of incarceration over 30 years. That is why the State built 21 new prisons over that time period. That is why the prison population exploded from around 25,000 to over 170,000. The war on drugs and passage of Three Strikes clearly were big contributors to the prison population.

The change to determinate sentencing and the explosion in incarceration cannot be seen as anything other than a sharp turn towards harsher punishment, retribution and exclusion from society as the predominate corrections philosophy. It is a philosophy that inevitably results in dehumanization of both inmates and staff who work in the prisons.

IV. Humanism in California's Prisons

We are finally ready to consider the progressive changes that have occurred during the last 20 years where humanization of various aspects of prison life have occurred. Some of those changes have been driven by the courts; the most recent innovation is being led by the Newsom Administration.

A. Court-Led Change in the Practice and Philosophy of Prison Healthcare

The court-led changes began with several class action lawsuits challenging the constitutionality of mental health, dental and medical care within

California's prisons. That there would be these lawsuits, and that they would be successful in finding liability should be no surprise to anyone. The purpose of prison had been punishment, retribution and exclusion. The housing was terrible, the food was awful, inmates were essentially in charge of the level of violence and drugs in prisons, and there were insufficient resources for pretty much everything. Healthcare was not given serious consideration in this environment.

In 2005, Judge Thelton Henderson placed the prison medical system under receivership. The Author was appointed as the second receiver in 2008 with the task of improving the medical care delivery system within the California Department of Corrections and Rehabilitation so that medical care would satisfy the minimum requirements imposed by the Eighth Amendment. Humanization of the healthcare system was a key strategy to meeting those requirements.

1. The Eighth Amendment's "Deliberate Indifference" Standard

A prison official violates the Eighth Amendment when he or she acts with "deliberate indifference" to the serious medical needs of an inmate.[39] There are two components to this standard. First, the deliberate indifference must be with respect to the serious medical needs of one or more inmates. Second, liability attaches only if a prison official has been deliberately indifferent to those serious medical needs.

(a) "Serious Medical Needs"

A "serious medical need" exists when the failure to treat an inmate's physical condition may result in further significant injury or the unnecessary and wanton infliction of pain.[40] "The existence of an injury that a reasonable doctor or patient would find important and worthy of comment or treatment; the presence of a medical condition that significantly affects an individual's daily activities; or the existence of chronic and substantial pain are examples of indications that a prisoner has a 'serious' need for medical treatment."[41]

(b) "Deliberate Indifference"

"Deliberate indifference" is shown by an act or failure to act done with the purpose of denying an inmate medical care that would address an inmate's serious

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[39] *Farmer v. Brennan* (1994) 511 U.S. 825, 828. *See Estelle v. Gamble* (1976) 429 U.S. 97.

[40] *Jett v. Penner* (9th Cir. 2006) 439 F.3d 1091, 1096.

[41] *McGuckin v. Smith* (9th Cir. 1992) 974 F.2d 1050, 1059–60, *overruled on other grounds by WMX Techs., Inc. v. Miller* (9th Cir. 1997) 104 F.3d 1133.

medical needs,[42] or where the actor "knows of and disregards an excessive risk to inmate health and safety."[43] In other words, to show deliberate indifference, an inmate must show that the course of action chosen was "medically unacceptable under the circumstances" and that the prison official "chose this course in conscious disregard of an excessive risk to plaintiff's health."[44]

Liability under the constitutional deliberate indifference standard is limited when compared with civil liability in an ordinary tort action for medical malpractice. In particular, "an inadvertent failure to provide adequate medical care does not, by itself, state a deliberate indifference claim for § 1983 purposes."[45] Because of this limitation, "a plaintiff's showing of nothing more than a difference of medical opinion as to the need to pursue one course of treatment over another [is] insufficient, as a matter of law, to establish deliberate indifference."[46]

If this below-negligence standard applied to my work, I could essentially create a system that regularly produced really poor results—results that would constitute malpractice in a free-world context. In this way, the duty owed to prisoners would be significantly less than the duty owing to free-world human beings. Prisoners would be treated as less than fully human. That is not how I interpreted the applicable law.

2. Individual versus Systemic Claims

So how did I avoid being in charge of a system that regularly produces sub-standard results?

First, I recognized that there are two very different types of cases alleging deliberate indifference with respect to inmate medical care. The first type of case—an individual case—is typically brought by a single inmate alleging that the medical care given to that inmate violates the Eighth Amendment deliberate indifference standard. The second type of case—a systemic case—alleges that one or more elements of the system of inmate medical care is so deficient that it deprives a class of inmates (often defined as inmates with serious medical needs) of constitutionally adequate care.

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42 *Id.*, 974 F.2d at 1096.

43 *Estelle*, 429 U.S. at 106.

44 *Jackson v. McIntosh* (9th Cir. 1996) 90 F.3d 330, 332.

45 *Wilhelm v. Rotman* (9th Cir. 2012) 680 F.3d 1113, 1122. *See also Estelle v. Gamble* (1976) 429 U.S. 97, 106 ("[A] complaint that a physician has been negligent in diagnosing or treating a medical condition does not state a valid claim of medical mistreatment under the Eighth Amendment. Medical malpractice does not become a constitutional violation merely because the victim is a prisoner.").

46 *Id.*

There are also significant differences between cases seeking damages for harm that has already occurred and cases involving prospective injunctive relief.

(a) Individual Claims

In individual cases, the complaint will often allege specific decisions or actions to deny, delay or intentionally interfere with the delivery of medically necessary care. For example, a complaint might allege that a specific type of surgery or treatment is medically necessary for that inmate and that the prison has refused to authorize that surgery or treatment. Or, a complaint might allege that a prison has failed to make medically necessary drugs available to the plaintiff to treat a particular condition.

The application of the Eighth Amendment's standards to these types of individual complaints is relatively straightforward. For purposes of a complaint seeking damages, the plaintiff must establish both the medical necessity of the surgery or other treatment that was denied as well as a sufficiently culpable state of mind which entails more than mere negligence (at a minimum, the plaintiff must show that the prison officials had actual knowledge of an excessive risk to inmate health or safety and disregarded that risk). For purposes of a complaint seeking prospective injunctive relief, the plaintiff must show that the requested surgery or treatment is medically necessary and that failure to provide the surgery or treatment would create an excessive risk to the inmate's health. If those showings are made, the defendant's further refusal to provide the requested surgery or treatment would necessarily satisfy the heightened culpability required for deliberate indifference.

Other complaints by individual plaintiffs may involve allegations that medical care was delivered to the plaintiff, but that the care delivered was constitutionally deficient, perhaps because of one or more errors committed by the treating physician(s). These cases require the court to distinguish merely bad care from care that is so bad that it violates the Eighth Amendment. The distinction is important because, as noted above, mere negligence or medical malpractice, without more, generally does not violate the Eighth Amendment.[47] In such cases, even if a prison doctor's performance falls below a community or national standard of care, that will ordinarily not be enough to constitute an Eighth Amendment violation. Put another way, isolated instances of medical malpractice do not, by themselves, violate the Eighth Amendment.

[47] *Snow v. McDaniel* (9th Cir. 2012) 681 F.3d 978, 987, *overruled, in part, on other grounds by Peralta v. Dillard* (9th Cir. Mar. 6, 2014) 2014 U.S. App. LEXIS 4226.

(b) Systemic Claims

The analysis is fundamentally different and more complex when a case involves broad claims that an entire prison system of medical care violates the Eighth Amendment. The constitutional challenge in these cases is to the system of care itself, not to the care delivered to any particular plaintiff. Of course, there clearly is a relationship between the system of care and the care delivered to individual patients. In particular, if one or more elements of the system of care are absent or significantly deficient, it is highly likely that care is not appropriately being delivered to a significant number, or perhaps even all, patients, thereby creating a risk of serious harm to patients.

For example, if the system of care is so grossly understaffed that it cannot see patients in a timely manner as required by their medical needs, then there would be a significant risk that the understaffing would result in serious risks of harm to inmates, significantly increasing the risk of morbidity and mortality. Well-functioning systems are what help ensure that adequate care is actually being delivered. For purposes of prospective injunctive relief, once prison officials are aware that understaffing is creating these risks, the constitutional violation has been established. As the Ninth Circuit noted in *Parsons v. Ryan*,[48] "we have repeatedly recognized that prison officials are constitutionally prohibited from being deliberately indifferent to policies and practices that expose inmates to a substantial risk of serious harm."[49]

Although there is a relationship between the system of care and the care actually delivered to individual patients, it is important to remember that the primary remedial focus in a case alleging systemic violations is on the critical elements of the health care system, not on individual-level care. Stated another way, the remedial goal is to improve the critical systems that support appropriate medical care delivery, and when those systems have been improved to a level of adequacy and are actually being implemented routinely and reliably, that should be sufficient to satisfy the Eighth Amendment's requirements in a case challenging the system of care.

3. Constitutionality in a Systemic Claims Case

The legal discussion above frames the practical question of how to go about determining whether California's prison medical system has reached the level of constitutional adequacy. The overarching factual issues in a systemic claims case are: (1) whether, as a matter of pattern or regular practice, inadequacies

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[48] (2014) 754 F.3d 657.

[49] *Id.* 677.

in the medical system expose inmates to a serious risk of harm, and (2) to the extent it does, whether the state or responsible state officials are deliberately indifferent to any such system deficiencies. Once an Eighth Amendment violation has been found (i.e., once there have been findings under both (1) and (2)), the remedial focus shifts to the first element of the test since, at that point, any deficiencies that are allowed to persist will readily support a finding of deliberate indifference in fixing those deficiencies.

In determining whether there are systemic deficiencies that expose inmates to a serious risk of harm, we take into account the standard of care and performance set by free-world medical systems. In other words, we provide access to a medical system based on the quality of free-world health care systems with only those adjustments necessary to operate in a prison. Our doctors treat our patients in the same way as doctors treat patients who are not incarcerated—a humanistic approach to prison healthcare.

Putting the law aside for now, the transformation in prison health care in California's prisons has been nothing short of remarkable. When San Quentin first opened in 1851, there was no health care at all. A few years in, one Napa Valley doctor was put on contract. There were no facilities to provide medical care, and the one doctor was insufficient for the hundreds of patients.

One hundred and fifty years later, things weren't much better. In its October 3, 2005, opinion appointing a receiver, the district court in *Plata* chronicled serious deficiencies throughout the system of medical care encompassing the following elements:

- Lack of Medical Leadership
- Lack of Qualified Medical Staff
- Lack of Medical Supervision
- Failure to Engage in Meaningful Peer Review
- Intake Screening and Treatment
- Patients' Access to Medical Care
- Medical Records
- Medical Facilities
- Interference by Custodial Staff with Medical Care
- Medication Administration
- Chronic Care
- Specialty Services
- Medical Investigations

There were two major reasons why the medical system was so bad. First, there is the problem of resources. Almost every system at a prison is under-resourced because there really isn't a strong interest within the Legislature to spend money on prisons and felons. From the very beginning of San Quentin, the Legislature didn't want to spend money on prisons. That is consistent with our 2,500-year review above.

Second, the overriding philosophy and culture in prison was punishment. The idea that prisoners were people who should receive medical care like people in the free world just wasn't given serious consideration. As the Supreme Court expressed it in *Youngberg v. Romero*, the "conditions of confinement [in prison] are designed to punish."[50]

Within the first 90 days of my appointment, I produced a draft Turnaround Plan of Action to remedy the constitutional deficiencies. The Court approved the plan on June 16, 2008.

The Turnaround Plan of Action set forth 6 goals:

- Ensure Timely Access to Health Care Services
- Establish a Prison Medical Program Addressing the Continuum of Health Care Services
- Recruit, Train and Retain a Professional Quality Medical Workforce
- Implement a Quality Assurance and Continuous Improvement Program
- Establish Medical Support Infrastructure
- Provide for Necessary Clinical, Administrative and Housing Facilities

In effect, we have been transforming that portion of California's prisons that deals with medical care into a system not based on conditions of punishment, retribution and dehumanization, but based on how we treat ordinary people in a free world medical system. We try to treat our patients humanely and without considerations of punishment. That is the very core of the humanistic tradition. It is also supported by an enlightened interpretation of the Eighth Amendment.[51]

B. Other Efforts to Redirect the Focus to Rehabilitation

So what about the rest of the prison's systems? Do they operate without punishment and with humanity? Not exactly, but over the last twenty years,

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[50] (1982) 457 U.S. 307, 321–22 ("Persons who have been involuntarily committed are entitled to more considerate treatment and conditions of confinement than criminals whose conditions of confinement are designed to punish.")

[51] *Brown v. Plata* (2011) 563 U.S. 493, 510 ("As a consequence of their own actions, prisoners may be deprived of rights that are fundamental to liberty. Yet the law and the Constitution demand recognition of certain other rights. Prisoners retain the essence of human dignity inherent in all persons. Respect for that dignity animates the Eighth Amendment prohibition against cruel and unusual punishment."). *See also* J. Clark Kelso, "Corrections and Sentencing Reform: The Obstacle Posed by Dehumanization," (2014) 46 *McGeorge L. Rev.* 897.

there have been serious efforts underway to move away from punishment as the daily fare in California's prisons, although it has clearly been an incremental, incomplete, start-and-stop process.

First, we have clearly seen a renewed emphasis on rehabilitation programs. Symbolic of that emphasis, in 2004, the department's name was formally changed from the California Department of Corrections to the California Department of Corrections and Rehabilitation.

Second, the federal courts established a limit on the degree of overcrowding that could exist within California's prisons. The population reduction was initially accomplished simply by offloading non-violent, non-serious, non-sex felons to the jails. The population came down from over 170,000 to around 125,000, a dramatic improvement which meant that CDCR no longer had to triple bunk inmates in gymnasiums like cords of wood.

Jails mostly went along with this change in return for promises of state money for local jails and because most big jails in California already had established court-ordered procedures for early release of prisoners to avoid overcrowding. So it was easier for the jails to accomplish jail de-population than it would have been for CDCR to accomplish prison de-population.

Third, in 2016, *Proposition* 47 recategorized certain nonviolent offenses as misdemeanors, rather than felonies, which diverted defendants to the jails and away from the prisons. The crimes affected were:

- Shoplifting, where the value of property stolen does not exceed $950;
- Grand theft, where the value of the stolen property does not exceed $950;
- Receiving stolen property, where the value of the property does not exceed $950;
- Forgery, where the value of forged check, bond or bill does not exceed $950;
- Fraud, where the value of the fraudulent check, draft or order does not exceed $950;
- Writing a bad check, where the value of the check does not exceed $950;
- Personal use of most illegal drugs (Below a certain threshold of weight).

Fourth, in 2016, Assemblymember Weber's bill, AB 2590, amended Penal Code Section 1170, which is the heart of the determinate sentencing scheme. Before the amendment, Section 1170(a)(1) provided that "the purpose of imprisonment for crime is punishment." That language was replaced with the following: "The Legislature finds and declares that the purpose of sentencing is public safety achieved through punishment, rehabilitation, and restorative justice. When a sentence includes incarceration, this purpose is best served by terms that are proportionate to the seriousness of the offense with provision for

uniformity in the sentences of offenders committing the same offense under similar circumstances." Cesare Beccaria would be smiling.

Assemblymember Weber explained the intent of the change as follows: "AB 2590 (Weber), the Restorative Justice Act, is a modest but important step to move California's criminal laws away from a system that relies solely upon incarceration and punishment. While current law assumes that punishment (i.e., prison) is the only legitimate response to crime, AB 2590 recognizes that alternatives to incarceration, including restorative justice solutions, may sometimes be appropriate."[52]

And fifth, in November 2016, the voters approved Proposition 57 which, among other things, expanded consideration for parole to certain felons convicted of non-violent crimes and authorized more sentence credits for rehabilitation, good behavior and education.

C. Public Safety and Rehabilitation Instead of Retribution and Punishment

These have all been good steps forward, in my judgment, but they still don't really get at the core problem which is that, on a daily basis, life in prison—for both staff who work there and inmates who live there—punishes the heart, soul and spirit. It is a place built to punish people every day of their sentence, and the environment essentially encourages staff to treat inmates as less than human which inversely dehumanizes the staff. There is very little reason to expect that rehabilitation programs can be effective in that overall environment of punishment. And, thus, we will still end up releasing thousands of inmates every year who will, more likely than not, reoffend. The incremental steps to achieve rehabilitation aren't enough when the overwhelming culture is one of dehumanization and violence.

It's time to try something completely different. Governor Newsom is trying something completely different. In March 2023, the Governor announced a program called "The California Model" to transform how California's prisons operate. Based on a corrections model developed first in Norway,[53] the California Model endeavors to promote public safety by changing prison operations so that prisoners learn how to live in free world environments instead of learning how to live in a prison. The California Model will implement

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[52] Assembly Committee on Public Safety, Hearing on AB 2590 (Weber), April 19, 2016.

[53] *See* Jerome F. Buting, "Correctional Reform: The Norwegian Model" (2023) 47—Jul Champion 36. The leading champion of the Norway Model in the United States is Dr. Brie Williams at the University of California San Francisco. Dr. Williams is the Founder and Director of AMEND, which promotes a public health approach to addressing prison harms. *See* https://amend.us/ (accessed on Sept. 9, 2024).

system changes that create an environment rich in rehabilitation, a safer and more professionally satisfying workplace for all staff, and improves outcomes and opportunities for success through robust re-entry efforts.

Instead of prison being simply a place for punishment, the California model "draws on national and international best practices to change culture within our prisons and improve our correctional environment through staff training, tools, and resources that promote the health and well-being of those who work and live in them."[54] One of the model's distinguishing features is the focus on the harm that current prison practices inflicts upon the staff who work in the prisons:

Providing a safer environment where staff want to go to work and add value will reduce the trauma and toxic stress experienced daily. The CA Model also aims to help incarcerated individuals prepare to become better neighbors when they return to our communities. This is how we can best promote public safety. It's a vitally important statewide effort that is expanding to every aspect of [the prison]. The CA Model is not going to stop all our bad days, but it will reduce the number of bad days our staff have now.[55]

The following pillars form the foundation of the California Model:[56]

1. Dynamic Security: an approach that promotes positive relationships between staff and incarcerated people through purposeful activities and professional, positive, and respectful communication.
2. Normalization: aims to bring life in prison as close as possible to life outside of prison. The more life in prison resembles life in the community, the easier it will be for people to transition and adjust to life in the community upon release.
3. Peer Support: seeks to train incarcerated individuals to use their lived experiences to provide recovery and rehabilitative support to their peers.
4. Becoming a Trauma Informed Organization by changing the practices, policies, and culture of the entire Department, educating staff at all levels to recognize the impacts of trauma and ensure the physical and emotional safety of all staff and incarcerated individuals.

Now it is clear that the department will need to decide which inmates can benefit from this type of approach, and which inmates will still need to be isolated. There are probably thousands of inmates who would not be able to

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[54] California Department of Corrections and Rehabilitation, "The California Model Magazine," p. 2 (Summer 2024).

[55] *Id.*

[56] *Id.* 3.

adjust their behavior to live in a more normalized environment. But it is just as clear there are tens of thousands more for whom this new approach will increase the likelihood of a successful reintegration into our communities.

The department has developed a "California Model Measurement Plan" to assess both the department's progress in implementing the plan and whether the California Model actually produces the hoped for impacts, changes and results. For the purposes of this article, the results measures are of greater importance. Using a combination of staff and incarcerated person surveys and process and outcome measures extracted from the department's data warehouses, the department intends to measure at least the following:

- Job satisfaction and wellness ratings;
- Indications of staff trauma / burnout, such as worker's compensation claims, levels of unplanned leave, long-0term leave, and staff turnover;
- Indications of violence or threat of harm in the workplace, including serious rule violation reports, use of force and other incident reporting;
- Program feedback and recommendations for future improvements;
- Program participation and completion rates, including attendance at education, vocational training, work assignments, rehabilitation groups and health care appointments;
- Health outcomes for the incarcerated population, such as suicide and self-harm, hospitalizations and overdoses; and,
- Post-release outcomes, including re-arrest and recidivism.

Implementation of the model has been underway at eight institutions, with eight more soon to follow, and implementation at all institutions is anticipated by June 2026.

IV. Conclusion

In closing, it is worth reminding ourselves about the long trajectory of prison practices and philosophies. For most of western history, the philosophy was simply to exclude those convicted of crimes by capital punishment or banishment. Public corporal punishment was added to the mix for lesser offenses. With prisons came involuntary labor and the reality of punishing prisoners on a daily basis.

Throughout this history, prisoners have been seen as unworthy of the basic respect that we accord to all other people. Prisoners are sub-human, and the lack of humanity is reinforced in pretty much everything that happens in prison. Even with the moderation and proportionality introduced after the Age of Enlightenment, prisoners were still slaves in cages.

We have been working to reform healthcare in California's prisons as much as we can to restore humanity to the equation. But healthcare is only one part of the correctional environment and system.

Rehabilitation has been promised for two hundred years. But trying to rehabilitate someone who, at the very same time, is routinely subject to dehumanizing punishment has never worked and never will work. We end up producing people who know how to survive in prison, but not how to thrive in the free world.

We need to do better. The current approach still dehumanizes inmates while simultaneously debasing staff who work in corrections. We need to embrace more fully the principles of humanism embodied in Age of Enlightenment philosophies. The California Model recognizes the work that needs to be done and represents a strong pivot away from the dehumanization that too often characterizes the modern prison environment and operations.

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PAT NOLAN* & LAWRENCE STIRLING**

"I Was in Prison and You Visited Me":

Prison Fellowship Volunteers Help Inmates Embrace Good Behavior

"Nothing works." It's a phrase that is frequently used to cut off discussions about ways prisons can be revamped so that inmates leave prison better than they enter. The nothing works mantra is a cynical excuse for allowing prisons to remain merely human warehouses. Yet, doing nothing puts the public at risk because, after those prisoners who have been idle, warehoused, and leave, they return to their communities—and over 95% of inmates are eventually released—with neither their hearts nor habits changed.

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* Pat Nolan served in the California State Assembly from 1978-94 and was Republican Leader from 1984-88. He was an early advocate for victims' rights for which Parents of Murdered Children presented him with the Victims' Advocate Award. Nolan pleaded to a single count involving campaign contributions and served 29 months in federal custody. Nolan received a full Presidential pardon. While Nolan was in prison, Chuck Colson contacted him to offer him the position of President of Justice Fellowship, the criminal justice reform arm of Prison Fellowship. Nolan worked with Colson for the next 18 years. Nolan was called as an expert witness for many hearings before committees in both the House and Senate, as well as before the U.S. Sentencing Commission. The Prison Rape Elimination Commission, the Fund for the Improvement of Schools and Teaching, and the National Commission on Safety and Abuse in America's Prisons. Nolan was instrumental in the passage of several important measures, including the Second Chance Act, the Prison Rape Elimination Act, and the First Step Act. He joined three presidents in the Oval Office when they signed four legislative bills he had helped shepherd through Congress.

** Judge Lawrence Stirling graduated from San Diego State University in 1964. He enlisted in the US Army in 1965, was selected for Officer Candidate School, and in 1966 was commissioned. He served 20 years as an Infantry officer including a year in command of a large Army company in Korea in 1967–8. He then served 16 years in the reserve including 12 years with the 12th Special Forces (green berets) and the final four years in the Pentagon working for the Deputy Chief of Staff for Personnel. Upon relief from active duty, Judge Stirling worked for the San Diego City Manager as an administrative analyst and subsequently for the San Diego Chief of Police as an operations analyst which resulted in a major overhaul of the SDPD. After serving four years as the first finance director for the San Diego Association of Governments, Judge Stirling was elected to the San Diego City Council in 1977. He was then elected to four terms in the State Assembly, and was chair of the Committee on Public Safety. In 1988, he was elected to the State Senate where he served until appointed to the Municipal Court by Governor George Deukmejian. He was later elevated to the Superior Court where he served to retirement in 2012. He is now the senior partner of the law firm of Adams Stirling, the largest home owners association law firm in California.

We think the naysayers are wrong. The authors have witnessed criminals whose lives were transformed in prison—who have returned to be contributing members of their communities as well as good neighbors. We reached that conclusion through our extensive experience with criminal law, in state courts or in the California Legislature.

In this paper, we explore how one Christian ministry, Prison Fellowship,[1] has worked inside and outside America's prisons for nearly half a century to help transform the lives of offenders and their families. It has also worked with governors, legislators, prison officials, and judges to improve prison conditions, establish non-prison alternatives for non-violent offenders, aid the victims of crime and their families, and better equip the criminal justice system to mitigate the harm caused by crime—and thus better serve offenders and their families, victims and their families, and our nation's people.

Chuck Colson Founds Prison Fellowship

In 1976, Chuck Colson founded Prison Fellowship, which is now the world's largest Christian outreach to prisoners, former prisoners, and their families, as well as a leading advocate for criminal justice reform. Prison Fellowship began with volunteers working in a tiny two-room office, arranging for small groups of inmates to come to the Washington, D.C. area on furlough for a couple of days to study Christianity and to learn how to live out their faith while imprisoned and after.

The road that brought Colson to found the ministry is a remarkable story of transformation. He had been a man driven by a desire to excel. He graduated with honors from prestigious Brown University, went on to become the youngest captain in the U.S. Marines Corps, and then earned his law degree from George Washington University with honors. Colson quickly became a highly successful lawyer representing some of the largest corporations in the United States.

In 1969, President Richard Nixon appointed him to be White House Counsel. At just 38 years of age, Colson became one of the most powerful people in the country. But then it all came crashing down during the Watergate scandal. For someone who had risen fast in the world of law and politics, he suffered an even quicker fall. He went from the office next to the Oval Office to a bunk at Maxwell federal prison in Alabama—Inmate 22326.

During his years of success in law and politics, Colson had been a nominal Christian. His life showed no evidence of faith. He was called President Nixon's hatchet man, and for good reason. He once said he would "run over

[1] Prison Fellowship, https://www.prisonfellowship.org.

his grandmother for Nixon."

Nothing in his life prepared him for this fall from grace. Colson later recounted, "I was in the depths of deep despair over Watergate, watching the president I had helped for four years flounder in office. I'd also heard that I might become a target of the investigation as well. In short, my world was collapsing."[2]

He went to visit Tom Phillips, a long-time friend and former client. Colson described the visit, "That night he read to me from Mere Christianity, by C. S. Lewis, particularly a chapter about the great sin that is pride. A proud man is always walking through life looking down on other people and other things, said Lewis. As a result, he cannot see something above himself immeasurably superior—God."

Phillips offered to pray with Colson, but Colson felt uncomfortable. He demurred and quickly departed. Colson later explained, "But when I got in the car that night, I couldn't drive it out of the driveway; ex-Marine captain, White House tough guy, I was crying too hard, calling out to God. I did not even know the right words. I simply knew that I wanted Him."

A small group of Christian politicians took Colson under their wing to teach him the basic tenets of Christianity and help him apply them to his life. They counseled him through his indictment and his hard decision to plead guilty to obstruction of justice in the Daniel Ellsberg case. And they supported him during his imprisonment.

Colson's conversion story began almost a year before he ever saw the inside of Maxwell federal prison. In fact, his conversion is what led him to drop his claim of innocence and plead guilty, knowing it meant he would be sent to prison.

Colson, who had been on top of the world, now found himself at the bottom—deprived of his freedom and separated from his family. He thought his life was over. That being labeled a "convict" would kill his chances of doing anything meaningful with his life.

Colson's time in prison was difficult. His father died while he was there and his son, Chris, was arrested for possession of marijuana. But it was also a time of spiritual growth. He formed a fellowship with other Christian inmates similar to the group that had nurtured him in his faith.

Colson is released from prison

The day finally arrived for Colson to be released. As he was packing his few belongings, a large prisoner named Archie confronted him.

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[2] *Breakpoint*: Chuck Colson's Conversion, https://breakpoint.org/breakpoint-chuck-colsons-conversion.

"Hey, Colson," he snarled, "You'll be out of here soon. What are you going to do for us?"

Colson told Archie, "I'll help in some way. I'll never forget you guys or this stinking place."

"Bull!" Archie yelled back, "I've seen big shots like you come and go. They all say the same things while they're inside. Then they get out and forget us fast. There ain't nobody cares about us. Nobody!"[3]

Contrary to Archie's prediction, Colson kept his word. He emerged from prison with a new mission: mobilizing the Christian church to minister to prisoners. In his memoir, *Born Again*, Colson wrote about the promise he made to his bunkmates at Maxwell federal prison, "I found myself increasingly drawn to the idea that God had put me in prison for a purpose and that I should do something for those I had left behind."

The creation story of the world's largest prison ministry

Though certain of God's call on his life, Colson was uncertain how he could accomplish it. He envisioned bringing inmates out of prisons for a weekend of deep study of their Christian faith. Colson met with everyone he could think of who might be able to help him in this new task. Weeks and weeks passed, and he got nowhere. Doors seemed to be closed.

Colson turned to the small group that had counseled him before prison. Senator Harold Hughes, a Democrat from Iowa, was part of that group. A burly former long haul truck driver, Hughes was a man of action. When Colson suggested going to Norm Carson, Director of Prisons, Senator Hughes blurted, "Nothing to lose," turned to his secretary, told her to call Carlson and set up a meeting for Colson. They got their meeting—the very next day.

When Senator Hughes and Colson were ushered into Carlson's office, he greeted them, "Hiya, fellas. Come on in." Colson told Carlson that his prisons weren't working; they failed to rehabilitate. In some places, Colson observed, the recidivism rate was 80 percent. There was only one person in the world, he declared, who had the power to remake lives, who could break the desperate cycle of habit, and deprivation that led many prisoners, after their release from custody, to quickly re-offend. That was Jesus Christ.

Colson later wrote that he was afraid that Carlson would not take their proposal seriously. Colson plunged ahead with his proposal: Would Carlson issue an order permitting Colson, Hughes, and their fellowship to select inmates to bring to Washington to teach them the principles of Christianity so

[3] Prison Fellowship, *The Promise of Hope*, https://www.prisonfellowship.org/2016/08/promise-hope.

that they would return to their prisons to form prayer groups and Bible studies among their fellow inmates?

Recalling his own experience in forming the prayer group in Maxwell federal prison, Colson hoped to affect an inmate-led Christian revival throughout the entire federal prison system. A few little platoons of faith, propagating by the grace of God, were all that were needed. With the Lord's blessing, he believed, "literally thousands of men could through this very limited concept and very simple technique be lifted out of the barren wasteland of despair in which they now live."

"I'll issue the order," Carlson said. "Get together with my staff and work out the details." Researcher Dr. Kendrick Oliver wrote, "It is the creation story of the world's largest prison ministry."

Prison Fellowship encounters some initial setbacks

Colson's analysis of the failings of the prison system was right in line with the growing consensus among corrections professionals that it was ineffective to force inmates to participate in rehabilitative programs.

As researcher Kendrick Oliver noted:

> The only successful rehabilitations were those for which inmates themselves volunteered. In particular, it was concluded, correctional institutions should try to involve local communities in their rehabilitation programs, increasing the variety of provision and offering inmates a meaningful prospect of support and assistance once they were released.
>
> Significantly, correctional professionals were identifying a need to breach the walls that separated prisons from the world beyond at the very same moment that many organizations—religious groups prominent among them—were lining up on the other side of those walls expressing a similar intent.
>
> The rise of Prison Fellowship, then, has been profoundly consequential. Since that first meeting in Carlson's office, Prison Fellowship has pioneered techniques that have carried evangelical religion into almost every corner of the American prison system and declared the authenticity and necessity of faith-based social action within the precincts of the state.[4]

Colson said that prison rehabilitation programs failed because of one common flaw, "Most prisoners, simply trust no one who receives his monthly payment from the government." If a program was to be effective, it had to be independent of the prison administration and "largely self- sustaining," a product of its own participants' determination to be transformed.

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[4] Kendrick Oliver, "'Hi, Fellas. Come on in.' Norman Carlson, the Federal Bureau of Prisons, and the Rise of Prison Fellowship." *Journal of Church and State*, vol. 55, no. 4, 2013, pp. 740–57.

Carlson shared Colson's view that any inmate who wished to change, "must be given every opportunity to do so," but the role of the prison in this process was to facilitate, not coerce. In addition, Carlson was working a "quiet revolution" to increase interaction between each prison and the community outside its walls. He encouraged the local population to become involved with rehabilitation of inmates and established community-based programs like work-release programs and halfway houses.[5] That was a good fit with Colson's efforts.

However, Prison Fellowship's Discipleship Seminars met strong resistance from federal wardens and chaplains. A Prison Fellowship staffer noted that many prison officials "do not like this program and want to find ways of ending it." Chaplains in particular felt the program threatened their jobs; they feared that they would become irrelevant if the inmates returned from the Discipleship Seminar and established Bible studies and classes independent of the chaplains.

And the Discipleship Seminars encountered some bumps along the way. The first seminar went very well, but in the second, a few of those selected turned out to be problems. Colson later commented that one was a "seductress" flirting with the other participants and wearing provocative clothes. Then matters got severely out of hand in the fourth seminar when one participant arranged for his girlfriend to come to Washington, D.C., and sometime during the seminar breaks got her pregnant.

Despite these unfortunate incidents, the Bureau of Prison Terms assessed the seminars were successful. The Bureau of Prisons report observed that the inmates from the first five training seminars had played an instrumental role in reviving religious programs within their prisons after they returned. Carlson said the seminars were "a model for quality community-based religious programming for prisons."

Notwithstanding Carlson's support for the Discipleship Seminars, the warden at the federal penitentiary in Oxford, Wisconsin, flatly refused to allow the inmates to travel to the District of Columbia for a seminar. Instead, he challenged Prison Fellowship to put on a workshop inside his prison.

This posed a dilemma for Prison Fellowship. The seminars were not structured to take place inside a prison. However, Colson accepted the challenge instead of going to Carlson to overrule the warden. Because he accepted the challenge, Prison Fellowship created a model for in-prison workshops. The workshop at Oxford was a success. Prison Fellowship decided to expand the in-prison program to other federal prisons.

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[5] Norman A. Carlson, "The Law and Corrections," *University of San Francisco. Law Review* (October 1971): 77–86.

This expansion posed another challenge for Prison Fellowship. Where would the volunteers come from to follow up after the in-prison seminars? It turns out that they didn't need to worry. Colson's book, *Born Again,* published in 1977, quickly became a best seller, generating thousands of offers from Christians from across the nation to volunteer for Prison Fellowship.

This posed yet another challenge for Prison Fellowship. It had no program to train volunteers for in-prison ministry. Colson and his team faced this hurdle just like each problem before—they adapted. Prison Fellowship designed a training curriculum from scratch. Over time, it became the gold standard for prison volunteers, and it was much appreciated by prison officials. Soon, they conducted workshops in federal prisons in Minnesota, Kentucky, and Georgia. The nimbleness of the ministry in adapting to changed circumstances has been remarkable, and a credit to the team Colson attracted to Prison Fellowship's work.

Colson and team weren't done there, however. It soon occurred to them the same in-prison program they were taking into federal prisons would also be appropriate for state prisons as well. Colson saw this as important for the long-term future of the ministry: "We cannot have all of our eggs indefinitely in the federal basket."

Prison Fellowship volunteers lead Bible studies and life skills workshops in prisons across the United States. Published here by permission from Prison Fellowship.

Expanding the ministry to state prisons required attracting thousands of new volunteers

This was a huge step for Prison Fellowship, because in state prisons they would reach seven times as many prisoners as in federal prisons. But where would Prison Fellowship find the thousands of new volunteers necessary for ministry in the states? Colson stepped up and traveled across the country giving speeches recruiting for Prison Fellowship. Colson had become a much sought after speaker as his book, *Born Again*, soared in sales. (Colson never took any revenue from any of his books or from the $1 million Templeton Prize he received in 1993. Every penny in both instances went to Prison Fellowship.)

Colson spoke to countless gatherings and organizations, including chambers of commerce, prayer breakfasts, gatherings of legislators, and churches. In every speech, Colson made a pitch for volunteers to go into prison with the ministry. Up until Colson founded Prison Fellowship, most ministry in prisons was conducted by faithful souls from local churches or in yard events, such as former football great Bill Glass's Crusade or one-day evangelistic events featuring Maud Booth, the daughter of the founder of the Salvation Army, William Booth.

Those events were effective at giving the message of hope. What Prison Fellowship added to the yard events was their volunteers were there to continue to disciple those new converts on how to live a Christian life, even while in a dark place like prison.

Bringing Hope to the Hopeless

Colson and the Prison Fellowship volunteers brought a message of hope to the inmates. They told the inmates that they were children of God, made in His image, and that no matter what they had done, He loved them so much that He sent His son to die so that their sins would be forgiven; that if they accepted Jesus, were remorseful for the harm they had done, and lived according to His teachings, they could have eternal life with Him forever.

This message of hope was in stark contrast to what prisoners are often told by corrections officers. "You got nothin' comin" is barked at them incessantly. Often, when being dropped off at the bus station after being released, officers tell them, "See you back in a few months." Prison Fellowship's message on the other hand, tells them they have hope and a future if they would amend their ways. Not all prisoners respond to this, but many thousand have turned their lives around, and they are living proof that the sceptics who say nothing works are mistaken.

Some Corrections Officials Welcome Volunteers

As we noted earlier, some prison officials resisted Prison Fellowship bringing programs in their prisons. This happened in both federal and state prisons. However, other officials were glad to welcome Prison Fellowship programs. At the same time, Board of Prison Director Norm Carlson was encouraging his "quite revolution" to increase interaction between federal prisons and the community, some state officials were doing the same.

One outstanding example of such leadership is Jeanne Woodford, the warden of San Quentin State Prison in California. Woodford believed that inmates can turn their lives around if given opportunities, even though some don't take advantage of the programs. A *New York Times* profile of Woodford, "The Good Jailer,"[6] described the yard at San Quention, "The prison was bustling with purposeful activity. In the education building, inmates studied for their high-school equivalency examinations and college degrees. In factories, they learned to operate computer-controlled lathes, printing presses and milling machines. Two men pruned a Monterey Cypress tree in the chapel."

Woodford developed and implemented programs for prisoners sch as, "The Success Dorm," the first reentry program in a California prison. The *Times* article continued, "With little money, Woodford created programs at San Quentin by relying almost entirely on nonprofit agencies and about 3,000 volunteers a month—a number unsurpassed in any other U.S. prison. Volunteers conduct a gospel choir, lead group-therapy sessions, coach sports, instruct classes in art and comparative literature, and teach 'positive parenting' courses."

" 'The Success Dorm,' includes up to 200 inmates who attend three self-help groups a week and work on a community project inside the prison. The men chronicle their progress in journals and talk about it in discussion groups. It's a rigorous schedule that begins with a 4:30 a.m. wake-up call and continues until, on many nights, lights out at 10 p.m. A quarter of the prison's general population is in some kind of program—more if you include sports—but she wants all, excluding those on death row, to participate."[7]

Good wardens welcome volunteers because they know that if inmates are involved in productive programs that interest them, they are much less likely to get in trouble. Prison Fellowship's volunteers found the environment in San

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[6] David Sheff, "The Good Jailer," *New York Times* (March 14, 2004), https://www.nytimes.com/2004/03/14/magazine/the-good-jailer.html.

[7] Id.; and such an exclusion of death row inmates is no longer apropos, Anita Chabria, "Gavin Newsom's huge achievement: Closing death row. But does it play in 2024?" *Los Angeles Times* (April 24, 2024), https://www.latimes.com/politics/newsletter/2024-04-04/the-last-days-of-californias-death-row-and-what-it-means-for-newsom-politics.

Quentin Prison under Warden Woodford quite welcoming and their programs flourished. Woodford and Justice Fellowship's Director, Pat Nolan, served together on Governor Arnold Schwarzenegger's Rehabilitation Strike Team. (Justice Fellowship will be discussed in greater detail below.) Following her stint at San Quentin, Woodford was named Director of the California Department of Corrections and Rehabilitation.

Colson Visits a Troubled Prison

Colson was asked by a group of Christian inmates at Walla Walla prison in Washington State to bring his message to them. He agreed and arranged to visit them while he was in Washington to recruit volunteers at a showing of the movie, *Born Again*. However, when the Prison Fellowship team contacted the prison to make final arrangements for the visit, they were told that Colson would not be allowed inside the prison because his life would be in danger, and they could not guarantee his safety.

Colson's visit couldn't have come at a worse time. A guard at the Walla Walla prison had died when he was stabbed when trying to break up a fight in the "Big Yard." The warden immediately imposed a total lockdown of the prison. He went further for the inmates who lived in the same housing unit, whether or not they took part in the fight. He forced all 230 men to be held outdoors in the yard. For over six weeks, they baked in the hot summer sun where temperatures frequently soared to over 100 degrees.

The inmates in the other units didn't escape punishment either. They were put on 24-hour lockdown in 10' x 5' cells designed to hold two men, but which were now packed on top of each other, four men in a cell—with inadequate ventilation. They were kept locked down in those conditions for over one hundred days.

Worse, the prisoners were allowed out of their cells for only a few moments, once each week for a "shower on the run." The inmates were forced to run down the corridor and back between two ranks of guards who beat them with their batons, and punched, kicked, spat upon, and maced. One prisoner slipped on the wet floor while running the gauntlet. An officer used his baton to repeatedly sodomize him. The inmate's injuries were so bad that he was rushed to a hospital. In the handwritten notes, a doctor dryly commented the prisoner had been "worked over rather thoroughly" and was bleeding from his rectum due to lacerations on the inside of the anus.

The only reason the world outside the prison learned of these harsh punishments and beatings was because an inmate secretly made an audio tape of the brutality and convinced a prison chaplain to smuggle it out to a radio station.

That blew the lid off the abuse. The public outcry was immediate. State officials demanded an investigation. The report confirmed the prisoners "were beaten with batons, punched, kicked, maced, and generally roughed up." The report made a finding the prison's Tactical Squad used "unreasonable force," and five officers were fired.

Despite the danger inside the prison, Colson felt he could not let the Christian inmates down. He said the inmates would feel he had abandoned them and didn't care what had been done to them. Colson told the prison officials he had to keep his promise. They relented.

One of the inmates asked Colson if he would tell the world what had been done to the inmates in Walla Walla. Colson asked him what he would do if he agreed to speak out on the conditions inside. The inmate quickly said he would start a Bible study group. Colson readily agreed. The inmate was true to his word and organized such a group.

The day following his visit, Colson spoke at the Washington State Legislative Prayer Breakfast. He told those in attendance he was appalled at what had happened in the prison. He called it "the most dangerous prison in the country." He told the assembled government officials, "I'm in favor of punishment, but not a punishment that makes a person worse."

He was asked if he would help state officials reform their broken prison system. He said he would. While such an effort was outside Colson's original vision of taking the message of hope into prisons, he thought the ministry should address the deficiencies and injustice that he observed while inside Walla Walla. He later remarked, if Prison Fellowship presented the Gospel to prisoners but did not also address the conditions in which they were held, inmates would question the sincerity of the ministry's claims of caring about them.

Colson's commitment to work with government officials added an entirely new dimension to the Prison Fellowship's work. And just as the Fellowship had to stretch to rework the discipleship seminars so they could be held inside federal prisons, and later to expand them into state prisons, his commitment to assist legislators and governors to improve prisons would have to be built from the ground up. Once again, Colson's incredible dedication and his team's organizing abilities helped Prison Fellowship adapt to changing circumstances.

Addressing Injustice in the System

Colson turned to Dan Van Ness to help him develop an advocacy program based on Biblical principles of justice. Van Ness was a young lawyer working for Cabrini Green Legal Aid helping defend the poor residents of the large public housing project in Chicago.

Van Ness attended a meeting where Colson spoke. He was impressed with Colson's honest assessment of the failures of the criminal justice system and his commitment to improving it. Colson recruited Van Ness on the spot.

Van Ness set to work helping several states establish task forces comprised of volunteer advocates who were experts on criminal law and prominent lawyers and lawmakers who were committed to improving the criminal justice. One of those task forces was in Washington State where Van Ness helped guide it as its volunteers followed through on Colson's commitment to work with state officials to improve the state's prisons.

As the task forces developed reform proposals, it was important that those proposals align with Biblical principles. Former business leader and author, Gordon Loux, who was then President of Prison Fellowship, asked Van Ness to study the scriptures and develop a Biblical vision of justice that would guide Prison Fellowship's reform proposals.

All those involved in the criminal justice system dissatisfied with it

As Van Ness conducted his research, he said he wondered, "Why is it that everyone involved in criminal cases is dissatisfied?" The prosecutors, victims, and those accused all think the justice system is flawed. He resolved that there was an important role for religious leaders and their churches in seeking to restructure the system so that all parties felt they were respected and a just result would be reached.

Following a period of research, Van Ness wrote a book, *Crime and Its Victims*, in 1986, to provide practical advice on how Biblical principles could be applied to make the justice system more just for all. The book quickly became the "go-to" reference for lawmakers, pastors, corrections leaders, and Prison Fellowship volunteers interested in trying to reform the criminal justice system.

In his book, Van Ness pointed out an important weak point in the current criminal justice system: It is largely focused on only two parties, the state and the accused, as exhibited by the way criminal cases are titled: People vs. John Doe. However, there is another real party in interest that is missing—the victim.

In *Crime and Its Victims*, Van Ness proposed this problem might be fixed by placing victims of crime and their families at the center of criminal proceedings, focusing on the harm caused by criminals by the crime(s) they commit, providing each party a voice in addressing that harm(s), and seeking potential options by which convicted criminals may begin to make amends by trying to do right for their victims and their families. From this perspective, we should think of crime as more than law breaking—it is also victim harming.

Van Ness and Prison Fellowship recruited volunteers to offer ideas and advocate for criminal justice reform at the federal level and in the states. Soon after *Crime and Its Victims* was published, the restorative justice movement, which embodies the concepts Van Ness advocated in his book, gained supporters across the country, including state legislators. With the concept of restorative justice, the task forces were able to put forward a coherent explanation of the reforms Prison Fellowship advocated.

In 1983, the Prison Fellowship Board decided the justice reform effort was so important that they should establish a separate affiliated corporation, Justice Fellowship to expand the work of the state task forces.

Justice Fellowship advocated for probation reform, restored voting rights for felons, revised sentences proportional to the harm caused by felons, and sentences for non-violent felons focused on community service programs so they may remain in their communities, retain their jobs, and be with their families. As Colson commented, putting non-violent offenders in prison with violent offenders doesn't make sense. "They are not dangerous when you put them in there, but they may be when they come out."

In recent years, the term "restorative justice" has been coopted by groups whose policies are not restorative at all. They oppose holding felons accountable for the harm done to their victims and to the families of their victims. In fact, some of these groups call for abolishing prisons altogether. While these groups do not speak for the restorative justice community, they have made it much more difficult to convince legislators and the public to support reasonable criminal justice reforms. Despite this new challenge, Prison Fellowship continues to meet success at both the state and federal levels in enacting proven restorative justice programs.

Protecting Prisoners' Access to Religious Programs

In 1996, Senator Harry Reid proposed excluding prisoners from the protections of the First Amendment. Senator Reid's proposal would have restricted access by prisoners to religious programs, including Prison Fellowship as well as ministries of all faiths. Colson and the Prison Fellowship Board called on Justice Fellowship to engage with Congress on this issue.

Justice Fellowship recruited respected leaders from both parties in both houses of Congress. One particularly deft move involved organizing a press conference in front of the Capitol during which Senators Teddy Kennedy and John Ashcroft, often political adversaries, joined hands and spoke eloquently of the importance of providing prisoners access to religious services.

Chuck Colson and Pat Nolan testify before the House Judiciary Committee in opposition to proposals to limit prisoners' access to religious programs. Published here by permission from Prison Fellowship.

Prison Fellowship organized its volunteers, donors, and churches to write their federal legislative representatives and ask them to oppose Senator Reid's proposal. The response was overwhelming. Justice Fellowship delivered piles of letters to every congressional office. Seeing that his proposal had no chance of passing, Senator Reid abandoned it.

The efforts by Prison Fellowship and Justice Fellowship brought a strong backlash from some prison officials. For instance, the Pennsylvania Commissioner of Corrections, Martin Horn, complained to Colson, "A prisoner alone in his cell can pray to God. That is all the religious freedom I have to provide him." Colson politely responded that for Christians worshipping together is important; noting that Jesus said, "Where two or more are gathered in my name, there I will also be."[8] Horn was not alone in venting his ire.

However, the effort to defeat the Reid amendment brought an unexpected boost to Prison Fellowship and Justice Fellowship. Legislators who previously knew little about Prison Fellowship's ministry to prisoners learned about the impact religious programs have in transforming the lives of prisoners. In addition, they became aware of the sensible reforms Justice Fellowship advocated to improve

[8] *Mathew* 18:20

the justice system. From that point on, dozens of respected leaders of both parties in Congress were supportive of the work of Prison Fellowship and became key sponsors for Justice Fellowship's proposed reforms.

Over the next decades, Justice Fellowship and Prison Fellowship succeeded in passing several important reforms, including the Religious Land Use And Institutionalized Persons Act which set religious liberty for prisoners firmly into federal law; the Second Chance Act,[9] which provided incentives to state prisons to concentrate on preparing inmates to be good neighbors when they are released; the Prison Rape Elimination Act; and the First Step Act, the most comprehensive reform of federal criminal law in over two decades.

Justice Fellowship was frequently asked to provide expert testimony before Congressional and state legislative committees, the U.S. Sentencing Commission, and other federal and state boards and commissions. Former California state legislator, Pat Nolan, who headed the Justice Fellowship team beginning in 1996, served as a commissioner on the seven-member National Prison Rape Elimination Commission, and was a member of the National Commission on Safety and Abuse in American Prisons, chaired by former Attorney General Nicholas Katzenbach.

Over the next several years, Justice Fellowship continued its efforts to protect prisoners' religious rights, organizing the filing of several amicus briefs before the U.S. Supreme Court and state appellate courts to combat continued attempts to circumscribe the First Amendment rights of prisoners.

The Genesis of the First Step Act

Occasionally, Prison Fellowship's ministry to individual prisoners and their families opened doors that led to improvements to the criminal justice system. One example occurred when Nolan received a call asking him to meet with members of a family whose father had just been sent to prison. Nolan didn't know the family, but he agreed to meet with them at Dulles Airport.

Nolan opened with a prayer and then the wife and children explained why they were quite distraught. They were Orthodox Jews and worried their father would not be able to keep kosher nor form a minyan in prison.[10]

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[9] Related, see "A [Presidential] Proclamation on Second Chance Month, 2024," https://www.whitehouse.gov/briefing-room/presidential-actions/2024/03/29/a-proclamation-on-second-chance-month-2024.

[10] In Hebrew, "kosher" means fit or proper. Kosher food is any food fit for consumption by Jewish people. The laws of kosher define which foods a person can and cannot eat, and also how they should produce and handle certain foods. The laws also state which combinations of foods people should avoid. A minyan is the quorum required for Jewish communal worship that consists of ten male adults in Orthodox Judaism.

Nolan explained, because of the good relationships Prison Fellowship had with members of Congress, the ministry was in a good position to enlist help from several federal legislators if their father ran into difficulties practicing his faith while imprisoned. Nolan also explained the complicated bureaucratic process for sending their father a box for Passover.[11]

Nolan didn't think about that meeting again until ten years later, in 2016, when he was watching a televised press conference being held at Trump Tower where Donald Trump announced that his son-in-law would be joining his presidential campaign. Nolan was stunned. The man standing next to Trump, the new member of the campaign team, was one of the sons he had met with at Dulles Airport—Jared Kushner.

In Kushner's book, *Breaking History: A White House Memoir*, published in 2022, he recounts that first meeting, "During my father's imprisonment in 2005, a friend suggested that we meet [Pat] Nolan. So, my mom and I flew to Washington, D.C., and met in a conference room at the airport. Nolan greeted us warmly and asked if he could begin our meeting with a prayer. As he prayed, he recounted a story from the Old Testament about Joseph, who was sold into slavery by his own brothers, but whom the Lord lifted out of bondage and placed at the Pharoah's right hand to help guide Egypt through a famine and save his family from starvation. What had been intended for Joseph's evil, the Lord had used for his good. Nolan's prayer filled me with hope when I needed it most.

"A decade later I was sitting at my desk just down the hall from the Oval Office, with Nolan on the other end of the [telephone] line. He asked me to make long-overdue reforms to the federal criminal justice system that failed to pass during the Obama administration."

From that meeting, Nolan and Kushner developed broad bi-partisan support for what became the First Step Act. At each meeting in the White House Kushner asked Nolan to open with a prayer. Nolan's humble act of ministering to the family of an Orthodox Jewish federal prison inmate a decade earlier, bore an immense bounty of fruit in the passage of the First Step Act which benefited

[11] Passover is an April religious occasion. "The festival of Passover has its roots in the Hebrew Scriptures: the ancient Israelites were commanded to avoid all leavened foods—hametz—for the eight days of this holiday. Members of the various groupings Orthodox Jews begin preparing their homes one month in advance, right after the holiday of Purim, a festival celebrated annually to commemorate the salvation of the Jewish people in ancient Persia from Haman's plot "to destroy, kill and annihilate all the Jews, young and old, infants and women, in a single day." Not only are Orthodox Jews forbidden to eat hametz, they must work to ensure they do not have even the minutest speck of it in their homes." Lynn Davidman, "An Orthodox Passover," *OUPBlog* (April 2, 2015), https://blog.oup.com/2015/04/orthodox-judaism-passover.

thousands of prisoners and their families all over the United States.[12]

Reaching the Children of Prisoners

As Prison Fellowship's work in prisons expanded, a new way to assist those impacted by crime arose in a way only God could bring about.

Mary Kay Beard was serving a 22-year sentence in an Alabama prison where she began participating in Prison Fellowship's programs. Beard was no ordinary prisoner. By the age of 27 she had established herself as one of the most notorious criminals in the country. She and her husband were wanted in four states for a string of bank robberies and were the target of a failed organized crime "hit" for double-crossing the mob on a diamond heist. She was on the FBI's "Ten Most Wanted" list and had earned the reputation as "the Bonnie Parker of Alabama."[13] It seemed likely that Beard's life would come to the same kind of violent end as that legendary bank robber.

Beard spent six Christmases in prison, while serving her sentence for burglary, grand larceny, and robbery. Each Christmas, local churches and charities would bring toiletries form women prisoners. She watched as those women gathered the soap, shampoo, and toothpaste, re-wrapped, and offered them as Christmas presents to their own children.

"Oh, that's the heart of a mama," she thought. "She might be a thief like me, or a drug addict, but she has the heart of a mama." She vowed she would do something for children who have a parent in prison when she was released. Shortly after her release, Beard came up with the idea of Angel

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[12] "President Trump signed into law bipartisan legislation today to reform the federal prison system. The First Step Act, which passed the U.S. Senate 87–12 and the House 358–36, will usher in significant changes to federal sentencing laws as well as improvements to programs that aim to reduce recidivism and provide support to people who are involved in the criminal justice system." CSC Justice Center Staff, "President Trump Signs First Step Act into Law, Reauthorizing Second Chance Act," Justice Center, The Council of State Governments (December 21, 2018), https://csgjusticecenter.org/2018/12/21/president-trump-signs-first-step-act-into-law-reauthorizing-second-chance-act.

[13] The comparison was overdrawn: During the 1930s, largely in the southern U.S., Bonnie Parker and Clyde Barrow were small store, funeral home, and bank robbers. and multiple murderers. They ranged freely until, after one of the most extensive manhunts the nation had seen up to that time, they were ambushed by peace officers and shot to death near Sailes, Bienville Parish, Louisiana, on May 23, 1934. They are believed to have murdered at least nine police officers and four civilians. For more, see, "Bonnie and Clyde," https://www.fbi.gov/history/famous-cases/bonnie-and-clyde.

Tree.[14] Collecting prisoners' gift wishes for their children, she placed them on little paper angels hung on a Christmas tree in a Birmingham shopping mall. Church volunteers would purchase and deliver the gifts to the children in the parents' name. The program was a smash success, and, in 1983, Prison Fellowship hired Beard as the director of Angel Tree.

This is an important part of Prison Fellowship's ministry because children of imprisoned parents are, on average, six times more likely to become imprisoned themselves. These children often feel abandoned, therefore knowing that their incarcerated parent cares about them and remembers them at Christmas helps strengthen the bonds between them. One Angel Tree recipient looked up at her mom after the volunteers had left and said, "I knew Daddy would remember." Those strengthened bonds benefit all of us, because having an intact family when released is one of the most important factors in helping prisoners make successful transitions from prison to home.

Angel Tree also began to help the children of prisoners apart from Christmas. Joe Avila, like Mary Kay Beard, was recruited to work for Prison Fellowship after he finished his prison sentence. As Prison Fellowship's director in California, Avila organized Angel Tree Camping in collaboration with camping organizations and local churches. The camping experience promoted healthy relationships among the children.[15]

Joe and William Anderson of Prison Fellowship also used their relationships and access to professional and college sports organizations to found Angel Tree Sports, which provides one-day sports camps across the country. The very first Angel Tree Sports Camp was held at Stanford University and was made possible by legendary coaches Bill Walsh and Jim Harbaugh. Since then, hundreds of sports camps have been held across the country. Since 2005, Angel Tree Sports has been helping kids.[16]

Prison Fellowship recently launched the First Chance Network, a group of nonprofit partners providing opportunities for Angel Tree children in

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[14] Prison Fellowship, Angel Tree, https://www.prisonfellowship.org/about/angel-tree. "Every child has a story. For 1.5 million American children, that story is filled with the abandonment, loneliness, and shame that come from having a mom or dad in prison. For many, it may also include following their parents down the same destructive road to incarceration. ¶ Prison Fellowship Angel Tree reaches out to the children of the incarcerated and their families with the love of Christ. It uniquely equips your church with the opportunity to restore and strengthen relationships between incarcerated parents and their families by helping to meet their physical, emotional, and spiritual needs." "Angel Tree Resources," https://www.prisonfellowship.org/resources/angel-tree. More than a quarter million children received Christmas gifts through Angel Tree in 2023. *Prison Fellowship Annual Report FY2023*, p. 11, https://www.prisonfellowship.org/wp-content/uploads/2023/10/PF_AR_FY2023_Final_Digital-Version_10192023_Small.pdf.

[15] *Angel Tree Camping*, https://www.prisonfellowship.org/about/angel-tree/angel-tree-camping.

[16] Hamil R. Harris, "*Angel Tree Sports Camp* Offers Fun, Training for Children with Incarcerated Parents," Washington Informer (May 29, 2024), https://www.washingtoninformer.com/prison-fellowship-sports-camp.

their communities. Five cities were chosen to connect prisoners' families to organizations that have the expertise in assisting families.[17]

A prison within a prison

Tom Pratt, who had been executive vice president at Herman Miller Furniture, left the corporate world to take the helm at Prison Fellowship as President. In 1992, at his suggestion, the Board agreed to establish an internal Research and Development Division with a portion of the $1 million Templeton Prize money that Colson donated to the ministry. It was headed by Karen Heetderks Strong, Ph.D.

One of the projects assigned to Strong and the Research and Development Division was to design a way to deliver Prison Fellowship programs in ways that would reduce recidivism. The high incidence of recidivism is a problem that has vexed lawmakers and corrections officials for decades. Reducing recidivism would mean fewer crimes, fewer victims, reduced need for prison beds, reduced cases clogging our courts, more families reunited, and more workers to ease the workforce crisis.

One problem that confronted the team immediately was the very limited amount of time Prison Fellowship volunteers were able to spend with prison inmates—at most a few hours per week. The remainder of the inmates' time was spent in the chaotic corridors of their cell block—an environment that challenged them every day. Temptations were all around. The skills that inmates learn to survive inside prison put to the test everything they were being taught in Prison Fellowship's classes.

The R&D team brainstormed how to create an atmosphere that would be conducive for inmates to live by the values they learn from the Prison Fellowship programs. They looked at Brazil's APAC prisons (Association of Protection and Assistance to Convicts) for aspects that Prison Fellowship might replicate in the United States.

The extraordinary APAC prisons were described by Fr. Francesco Occhetta, S.J., "In the dark world of prisons, an experience exists in Brazil that is like a ray of light: there, prisoners are not numbers, rather they are referred to by name; they have tasks to carry out; they are imprisoned in places without bars and without guards; they do not wear uniforms. In these 'alternative jails' run by prisoners—called recuperandi (recovering people)—there have been no

[17] In 2023, Walmart gave $1,250,000 to support Prison Fellowship's *First Chance Network*, which uplifts children with incarcerated parents. "The First Chance Network Receives Two-Year Grant to Build Holistic Support For Children With An Incarcerated Parent," https://www.prisonfellowship.org/2023/04/prison-fellowships-first-chance-network-receives-support-from-walmart-org-center-for-racial-equity.

riots or cases of corruption, while recidivism has been reduced from 85 percent to 15 percent. It does not seem possible, yet experience, data and management costs prove it to be true: the latter have decreased by one third if compared to those run by the State."[18]

Based on the success of Brazil's APAC prisons, the Prison Fellowship innovators concluded the ideal setting would be a dorm, separate from the general prison populations. In the Prison Fellowship dorm, those in the program would live by the moral principles of Christianity. There would be no drinking, drugs, swearing, or fighting. The inmates would treat the corrections officers with respect. Prison officers would reciprocate that respect. Prison Fellowship innovators hit upon a name for the program, The InnerChange Freedom Initiative.

The Prison Fellowship team of innovators worked closely with Don Willett, who was Texas Governor George W. Bush's Director of Research and Special Projects. (Judge Willett now sits on the U.S. Court of Appeals, Fifth Circuit.). Carol Vance served as chairman of the board, Texas Department of Criminal Justice. Vance and the Board together oversaw the Texas Prison System and they weighed in with strong support for the InnerChange Freedom Initiative. Willett submitted Prison Fellowship's proposal to Governor Bush, who enthusiastically approved it.

The InnerChange Freedom Initiative opened at the Jester Prison Complex near Sugarland, Texas, in 1997. The first Director of the Jester Initiative was Jack Cowley. He had been a warden in the Oklahoma prison system for 24 years. The program was voluntary, and the inmates participated in classes to prepare them to live healthy, productive, law-abiding lives when they returned home from prison. Special emphasis was placed on preparing the men to re-enter the workplace, become involved in community life, participate in a local church, and strengthen their family and social relationships.

Though the classes were based on Christian values, the InnerChange Freedom Initiative was open to prisoners of all faiths or no faith. Initiative participants lived together in the same prison housing unit where they were taught values and life skills for up to 18 months. Initiative participants were each matched with a mentor. Mentors worked with prisoners in the months prior to their graduation and ultimate release, and after they walked out the gate. Initiative graduates were guided by their mentors and volunteers from local churches for at least 12 months after release.

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[18] For more, see, Fr. Francesco Occhetta, SJ, "Restorative Justice in Brazil: The Educational Method of APAC Prisons," *La Civiltà Cattolica*, Reflecting the Mind of The Vatican since 1850 (December 13, 2018), https://www.laciviltacattolica.com/restorative-justice-in-brazil-the-educational-method-of-apac-prisons.

Research Affirms the InnerChange Freedom Initiative Success in Reducing Recidivism

The goal of the InnerChange Freedom Initiative was to assist prisoners seeking a lasting, positive change of lifestyle by introducing them to a new value system. A study of Texas Initiative graduates by the University of Pennsylvania found they were much less likely to recidivate than non-Initiative participants. For example, InnerChange Freedom Initiative graduates were two-and-a-half times less likely to be re-incarcerated within two years of release. Only 8 percent of Initiative graduates recidivated, compared with 20.3 percent of the matched comparison group of non-Initiative prisoners. The recidivism rate was just 4 percent among those graduates who remained in contact with their mentors after their release.

The Warden of the Jester prison complex, Fred Becker, commented, "It's up to us to determine what kind of shape they come back to the world in. If we can stop only 10 percent of those inmates from re-offending, it will mean thousands of citizens who never become victims of crime. InnerChange is a step in that direction."

Becker also noted, while many of the Texas correctional officers were leery of the InnerChange Freedom Initiative at first, it soon became the most desired assignment at the Jester Complex.

A Mother Reconciles with the Man Who Killed Her Daughter

An important aspect of the InnerChange Freedom Initiative was Victim Awareness classes. It pressed the inmates to accept responsibility for their crimes and apologize to their victims.

One of the inmates in the Initiative was a convicted murderer, Ron Flowers. He was serving a 35-year sentence for shooting schoolteacher, Dee Dee Washington. Flowers was involved in a drug deal gone bad, and thinking Washington was part of an ambush, he shot her as she sat in her date's car. Washington was simply an innocent bystander, but lost her life by the hand of Ron Flowers.

Washington's family was consumed with grief and anger. Her parents were both schoolteachers. They were heartsick that their daughter, their pride and joy, had been killed in a senseless shooting. Her father was emotionally unable return to work, and soon died of a heart attack. Her brother got involved in drugs and died from an overdose. That left her mother, Mrs. Arna Washington, all alone.

After serving 14 years in Texas prisons, always denying responsibility for Washington's death, Flowers volunteered to enter the InnerChange Freedom Initiative. Colson wrote, "During one of IFI's Victim Awareness sessions, Ron finally admitted that he did commit the murder, and he prayed that his victim's family would forgive him. He wrote a letter to Dee Dee's mother, Mrs. Arna Washington, expressing his repentance and deep remorse.

"For her part, Mrs. Washington had written angry letters every year to the parole board, urging them to deny Ron parole. But when Ron confessed, Mrs. Washington felt an overwhelming conviction that she should meet the man who had killed her daughter.

"Prison Fellowship staff carefully prepared Mrs. Washington and Flowers for the meeting. Mrs. Washington finally could ask the questions that virtually every victim wants to ask: 'Why did you do it?' 'How did it happen?' Flowers reassured her that her daughter was not involved in the drug deal. As Washington told her about the day that he killed her daughter, Mrs. Washington took his hands in hers and said, 'I forgive you.'

"I was in Houston for Ron's graduation from IFI," Colson added. "As Ron crossed the stage to receive his diploma, Mrs. Washington rose from her seat and walked over to embrace Ron, the man who had murdered her daughter. She then told all of us in the audience, 'This young man is my adopted son.'"

After Flowers' release, Mrs. Washington invited him to sit in her pew at church. Every Sunday, he sat by her side, and then went to her home for dinner together. And Mrs. Washington even stood by him when he was married. To the world, such a reconciliation is impossible, but Prison Fellowship knows, with God, all things are possible.

Other States Invite Prison Fellowship to Establish InnerChange Freedom Initiatives

As word of the InnerChange Freedom Initiative's success at reducing recidivism spread among governors, legislators, and corrections officials, several states approached Prison Fellowship with invitations to establish similar Initiatives. New Initiatives were established in Iowa, Kansas, and Minnesota, and the results in those states were just as impressive as in Texas.

The Minnesota Department of Corrections evaluated the impact of the InnerChange Freedom Initiative and found Initiative participants who completed the program and maintained contact with their mentors had appreciably lower rates than the comparison group of non-Initiative prisoners and those who dropped out the program.

For instance, of those who completed the program less than 14.5 percent were convicted of another crime, while for the comparison group it was 34.2 percent, and for those who dropped out of the IFI program, 35.7 percent had another conviction.

The Minnesota Department of Corrections concluded the reasons for the difference in recidivism rates could be:

> First, traditional or mainstream Christian doctrine promotes a pro-social, crime-free lifestyle, and existing research shows that religiosity is negatively associated with criminal offending.
>
> Second, since 2004, the InnerChange Freedom Initiative has attempted to address the criminogenic needs of participants by introducing programming that focuses on issues such as education, criminal thinking, and chemical dependency.
>
> Third, although the program does not specifically target high-risk offenders, it does not exclude them either, as having a sufficient length of stay in prison is the main eligibility criterion.
>
> Fourth, similar to a therapeutic community, offenders participating in InnerChange live in one housing unit that is separated from the general prison population.
>
> Fifth, InnerChange participants receive a 'continuum of care' insofar as the program lasts for at least months in the institution and then for the first 12 months following release when offenders are supported by a mentor and a faith community. Finally, by providing participants with mentors and connecting them with faith communities near their homes after their release from prison, InnerChange may expand the social support networks for offenders both during and after their confinement.

Americans United for Separation of Church and State Sues Prison Fellowship

In 1997, Iowa opened a new prison at Newton. The Iowa Department of Corrections was faced with overcrowding and a limited budget. As prisoners started arriving at the Newton Facility, treatment programs and classes were not yet fully staffed. The Department of Corrections reached out to Prison Fellowship and requested that it help fill out the programming at Newton with the InnerChange Freedom Initiative.

The state offered to fund the InnerChange Freedom Initiative for non-secular aspects of its programming, such as the cost of housing, food, correctional officers, medical, etc., just as they provided for inmates.

In 2003, Americans United for Separation of Church and State filed suit in federal court to shut down the program. The case was heard by Chief Judge Robert Pratt of the U.S. District Court of the Southern District of Iowa. Judge Pratt ordered Iowa to shut down the InnerChange Freedom Initiative and then took the unusual step of ordering Prison Fellowship to return all of the payments it had received under its contract with the state of Iowa. Judge Pratt imposed his order despite the state's payments had gone entirely for secular costs.

Judge Pratt opinion claimed that rehabilitative treatment was "a function traditionally reserved to the state." He offered no citation for this statement. His statement is not only without any legal support, but as cited earlier in this commentary, it is historically inaccurate. Religious groups have provided services to needy citizens, including prisoners, inside prisons, and former prisoners, outside prisons, from the earliest days of our nation.

The History of Religious Volunteers in Prisons

The history of Christians volunteering in American prisons goes back to the founding of the Republic. In 1787, a group of Quakers met in the home of Benjamin Franklin to address the need for reform of prisons. They formed the *Philadelphia Society for Alleviating the Miseries of Public Prisons*.

Their proposals led to the establishment of penitentiaries as alternatives to brutal and public corporal punishment for law breakers. They substituted imprisonment for corporal punishment and combined the idea of the prison with the workhouse, a reflection of the Quakers' belief that people can be reformed through reflection and remorse. These reforms began a world-wide movement for reform of prisons.

In addition to the Quakers, members of other Christian denominations send their members into prisons. For instance, Maud Ballington Booth, who was the daughter-in-law of William Booth who founded the Salvation Army, founded the Volunteers of America to take the Christian Gospel into prison.

The Catholic priest who founded the Knights of Columbus, made regular visits to the local jail to minister to the inmates. Jail and prison ministries are still key activities for the Knights.

Through several decades, prison agencies' names have changed—from penitentiaries, to reformatories, to corrections and rehabilitation. Yet, each of those titles, either implicitly or explicitly, includes transformation as an essential goal of imprisonment—an essential tenet of Christianity. In fact, Jesus specifically instructed his followers to visit those in prison, "I was in prison

and you visited me … whatever you did for one of the least of these brothers and sisters of mine, you did for me."[19]

Response to Judge Pratt's Ruling

U.S. Attorney General John Ashcroft wrote in defense of the InnerChange Freedom Initiative in Iowa, "This is the type of activity I sought to encourage when I sponsored the Charitable Choice Amendment in the Senate, which allows government agencies to contract with social service providers to tackle significant social problems—even if the provider is a religious organization. The IFI program follows the model of Charitable Choice: government funds are used only for non-sectarian purposes to fulfill a legitimate public need—reducing recidivism—while private donations pay for the religious portion of the program."

Attorney General Ashcroft recalled an historic moment in the White House, "I saw the impact of the IFI program firsthand. I will never forget the moment in the Roosevelt Room in the White House when three IFI graduates presented President [George W.] Bush with the results of the University of Pennsylvania study that documented the program's success in reducing inmate recidivism. These three men, once inmates in Texas prisons, were transformed and had become good neighbors. They enthusiastically embraced the duties of responsible fathers, employees, and citizens. Judge Pratt's ruling would deny other men and women the opportunity to transform their lives through similar partnerships between corrections officials and the faith community."

George Washington University law professors Ira C. Lupu and Robert W. Tuttle wrote about Judge Pratt' decision, "It is unfortunate that Chief Judge [Robert W.] Pratt grounded his opinion in part in the language of 'pervasive sectarianism.' The concept that some religious entities are 'pervasively sectarian,' and therefore are ineligible for state financial support, has fallen into disrepute. Four Supreme Court Justices repudiated this idea in their plurality opinion in *Mitchell v. Helms* (2000) [530 U.S. 793], asserting that the idea is stained with anti-Catholic animus, and we think that the concept is not likely to reappear in the Supreme Court's treatment of the Establishment Clause."[20]

Judge Pratt's order, if replicated beyond Iowa, would prevent similar, faith-based programs elsewhere, just as it did in Iowa where he precluded Iowa corrections officials from implementing a Prison Fellowship program even though it has proven to reduce recidivism and make communities safer. Judge

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[19] *Matthew* 25:36, 40.

[20] Ira C. Lupu and Robert W. Tuttle, "Americans United for Separation of Church and State v. Prison Fellowship Ministries (and others) v. Prison Fellowship Ministries (and others)," *Roundtable on Religion and Social Welfare Policy*, Nelson A. Rockefeller Institute of Government, Albany, New York (2006).

Pratt's order also pushes away the helping hands of the religious volunteers who make such a difference in the lives of the returning inmates. Most tragic of all, it denies prison inmates the opportunity to participate in excellent programs with proven success.

Judge Pratt's order went even further. He ordered recoupment, that is, he ordered Prison Fellowship to repay the money Iowa had paid it for the non-religious programming, even though Iowa found Prison Fellowship's performance was in every way satisfactory to prison and state officials. Here again, Judge Pratt's order was extraordinary. In Lupu and Tuttle's commentary arising from their participating in the *Roundtable on Religion and Social Welfare Policy*, Nelson A. Rockefeller Institute of Government, the authors asserted, "The most controversial aspect of Chief Judge Pratt's opinion is the order that [Prison Fellowship Ministries] repay an amount in excess of $1.5 million to the state of Iowa. In the absence of a contractual provision obligating a religious organization to make such a repayment if a program is held unlawful, no court (to our knowledge) has ever ordered a faith-based group to repay monies to the state or federal government after a finding that the payment was in violation of the Establishment Clause. Ordinarily, judges in such cases simply order the government to cease making unconstitutional payments in the future."

The impact of Judge Pratt's order on Prison Fellowship's budget would have been catastrophic. Prison Fellowship Ministries appealed. The U.S. Court of Appeals, Eighth Circuit, affirmed the trial court's order, except for recoupment. As to the latter, the Eighth Circuit concluded, "Given the totality of the circumstances, the district court abused its discretion in granting recoupment for services rendered before its order."[21]

Prison Fellowship Today

During Covid, the lockdowns forced Prison Fellowship to adapt to changing circumstances once again. With prisons closed to outsiders, the volunteers could not continue their in-prison programs. Rising to the need, Prison Fellowship developed Floodlight, a media platform that offered free inspirational and educational video content that corrections staff could download and share on prison television. Now that Covid is no longer a serious threat and access to prisons is largely restored, Prison Fellowship continues to produce Floodlight as a complementary, go-to resource, serving over 550,000 imprisoned viewers in forty-nine states.

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[21] *Americans United for Separation of Church and State v. Prison Fellowship Ministries* (2008) 509 F.3d 406, 428; for a more recent perspective on the freedom of religion, including the Establishment Clause, see, Ira C. Lupu and Robert W. Tuttle, "The Remains of the Establishment Clause," 74 *Hastings Law Journal* 1763 (2023); and for a related comment, Becket, Religious Freedom for All, https://www.becketlaw.org/case/americans-united-separation-church-state-v-prison-fellowship-ministries.

Prison Fellowship works to reverse the impact of parental imprisonment on their children through Angel Tree, because children of imprisoned parents are six times more likely to become imprisoned themselves. Angel Tree seeks to break this cycle of crime by strengthening the bonds between prisoners and their families, especially their children. Local churches provide Christmas gifts to the children in the name of their imprisoned parent. More than a quarter million children of prison inmates annually receive gifts "from" their imprisoned parent through the ingenuity of Prison Fellowship and the generosity of donors.

Since the closing of the InnerChange Freedom Initiative, Prison Fellowship developed the Prison Fellowship Academy, founded on the same principles. The Academies work to disestablish participants' criminal thinking and behaviors with renewed purpose and Biblically-based life principles. Graduates complete the year-long program as change agents and good citizens both inside and outside of prison.

After graduating from the Prison Fellowship Academy, the inmates participate in Prison Fellowship Pathways, which is based on the belief that people in prison can not only change but contribute and lead. Through peer support and encouragement, Pathways helps Academy graduates become leaders to create positive change within their prisons. This is what Chuck Colson originally envisioned when he started the Discipleship Seminars decades earlier.

This year, Prison Fellowship sponsored yard events featuring inspirational speakers and musicians. These Hope Events were held at 319 prisons where 38,100 inmates were introduced to the hope of the Gospel of Jesus Christ.

Angel Tree continues to connect children with their incarcerated parents. Last year, 253,132 children received gifts in their parents' name through Angel Tree, 4,917 Angel Tree kids attended summer camp, and another 1,559 Angel Tree kids participated in sports camps.

Prison Fellowship publishes *Inside Journal*, a quarterly newspaper printed and distributed by correctional facilities across the country.[22] Written specifically for imprisoned men and women, each issue explains the Gospel in a fresh way, offers encouragement and motivation, and shares practical advice for the daily struggles of prison life.

Prison Fellowship reaches out to wardens to help change prison culture. Prison Fellowship recognizes wardens determine the environment in each prison, so it developed the Warden Exchange to equip correctional leaders to create a safer, more restorative prison environment.[23]

And Prison Fellowship continues to mobilize Christians to advocate for federal and state justice reforms that advance proportional punishment, constructive corrections culture, and second chances. Prison Fellowship, as noted above, played an active role in reaching out to the Trump Administration and the bi-partisan coalition of Senators and Congressmembers that pressed for and achieved passage of the First Step Act.

Easter in Prison

Throughout his decades leading Prison Fellowship, Colson visited hundreds of prisons. Each time Colson went into prisons, he was met by a line of dignitaries waiting to greet him—wardens, state officials, church leaders, and many from the press. Colson perfunctorily greeted them, then rushed to the gym or chapel where the events were held. He would wade into bleachers or into the rows of chairs to hug the prisoners who had been eagerly awaiting his arrival. After all, it was the prison inmates he came to see. He wanted them to hear his message of hope. He told them that their lives were not over, that they had value because God loved them and so did the Prison Fellowship

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[22] *Inside Journal* is published each summer and winter, in men's editions, women's editions, and Spanish editions, https://www.prisonfellowship.org/resources/inside-journal-archives.

[23] "Throughout the seven- or nine-month programs, wardens convene with interdisciplinary thought leaders to exchange innovative ideas and practices for transformational leadership, the moral rehabilitation of prisoners, and community engagement. Program graduates emerge as part of a professional peer network reimagining prisons to create a prison culture that is safe, restorative, and prepares men and women in prison for the successful reentry into their communities." *Warden Exchange*, https://www.prisonfellowship.org/about/warden-exchange.

volunteers. Most of all, Colson wanted them to know that the Gospel could set them free.

"Chuck was never happier than when he took off his jacket and loosened his tie in a dingy prison chapel somewhere, facing rows of men in metal folding chairs who had big, thick Bibles in their hands. … He embraced as many as he could. He tried to learn their names and hear their stories. He tried to make a difference in there," explained Michael Cromartie who was Colson's first research assistant and aide after the creation of Prison Fellowship.

At the Bibb County Correctional Facility in Alabama one Sunday, the inmates enthusiastically greeted Colson. In fact, so many inmates wanted to attend that they could not fit into the newly constructed chapel.

Colson's remarks were preceded by an unforgettably jubilant worship service which was designed and led by fifty-nine men of Bibb's transformational ministry unit, run by Prison Fellowship field director, Deborah Daniels. Those fifty-nine men called themselves: "God's Gang for Change." They wrote their own mission statement, "We will console the weak in their weakness. We will give hope to the hopeless, faith to the faithless, and dreams to those who have no vision. We will provide leadership to the lost and Jesus to the unsaved."

Colson set aside every Easter to visit prisons. Easter weekend is when Christians have always gathered to celebrate Christ's triumph over impossible odds. In an editorial on patheos.com, Terry Mattingly described Colson's Easter sermons. "It wasn't the typical Bible text for an Easter sermon, but the preacher knew what this congregation needed to hear. Never forget what Jesus proclaimed in his first sermon: 'The Spirit of the Lord is on me, because he has anointed me to preach good news to the poor. He has sent me to proclaim freedom for the prisoners and recovery of sight for the blind, to release the oppressed.'"[24]

On Good Friday, 2011, Colson planned to return to Maxwell federal prison where he had served his sentence. In an ironic twist that harkened back to the opposition of some corrections officials to Prison Fellowship's programs, the warden at Maxwell cancelled the service a few days before it was to take place. The Prison Fellowship team quickly swung into action contacting the Senators and Congressmen with whom they worked to defeat Senator Reid's attempt to limit inmates' religious rights. The legislators went to work and quickly the word came down that the Good Friday service would go ahead as planned. Naturally, the warden chose not to take his place among the dignitaries greeting Colson on that Good Friday.

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[24] *Luke* 4:18

Despite the warden's interference, the return to Maxwell was deeply moving for Colson. As he walked the grounds where he was once imprisoned, he remembered the loneliness that prisoners experience. This Easter weekend, however, he was able to counter that hopelessness by presenting the life-changing message of hope, "In prison, you begin to feel that you're not worth anything, but that's not true. You guys are in a wonderful position, because you've been broken, and that's when you come face to face with Jesus Christ."

Chuck Colson, Founder of Prison Fellowship, enthusiastically greets prisoners. Published here by permission from Prison Fellowship.

Chuck Colson's Legacy

Sadly, that visit to Maxwell was Colson's last Easter visit to a prison. He passed away a little less than a year later, on April 21, 2012. He had fallen and hit his head. The doctors missed a large subdural hematoma. His unexpected death shocked the entire Prison Fellowship team. Words of condolence and respect poured in from religious and political leaders from around the world. His funeral at National Cathedral in Washington, D.C., was filled to capacity with dignitaries and well-wishers from across the country. However, the encomiums Colson would have valued the most were found in the messages of gratitude sent by prisoners who had been given hope by his ministry.

Colson often told those close to him that he didn't want any memorials in his honor. He said that the men and women whose lives were transformed by Prison Fellowship would be "living monuments" to his work. Those living monuments number in the tens of thousands. That is a remarkable and lasting legacy. Well done, thou good and faithful servant.

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HON. MARGUERITE D. DOWNING* AND NATALIE LACOURT**

Friends Outside in Los Angeles County:

Enhancing the Character of Justice

Friends Outside: Founding and Early Years (1954/55–1971)

Rosemary Goodenough was born into a politically active Quaker family in England where her grandfather served in the House of Commons. The family immigrated to the United States in 1945, settling on the San Francisco Peninsula.

Although the official date is unknown, Goodenough founded the organization that was to become Friends Outside in 1954 or 1955. No other known organizations, at least in California, were doing similar work. Goodenough wrote, "Friends Outside is a way of life. We spend a minimum of time in meetings and a maximum of time on the job." Perhaps quaint and

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* Judge Marguerite Downing is a Los Angeles Superior Court judge, handling dependency cases. During her 17 years on the bench, she served on various court committees, including the Special Events, Court Security, and Community Outreach committees. She currently cochairs the Remote Appearance Protocol Workgroup. She has chaired the Incarcerated Parents Working Group since its inception in 2009 and is a former chair of the American Bar Association Commission on Youth at Risk, and Chair-Elect of the National Conference of State Trial Judges. Judge Downing is a past chair of the Judicial Council of the California Association of Black Lawyers (CABL). For more than two decades, she has been the Hospitality Chair for both CABL and Black Women Lawyers Association of Los Angeles after having served as president of both organizations. The National Judicial College recently named Judge Downing as one of the 60 courageous judges nationwide in honor of its 60th anniversary in December 2023. In April 2024, she was inducted into CABL's Hall of Fame at their annual conference. Judge Downing is also a past president of California Women Lawyers (2004–2005), received their 2018 Joan Dempsey Klein Judge of the Year Award, and serves as their current Judicial Advisor South. Judge Downing has lectured in such far-flung places as Dubai, Beijing, Bangkok, Guam, Saipan, Huddersfield (U.K.), and Washington, DC. In her spare time, she reads, travels, and crafts.

** Natalie LaCourt graduated from University of Arizona Law School in 2022. After law school, she worked for the Los Angeles Superior Court as a clerk in the Juvenile Court division.

even naïve by today's standards, she believed the goals of the organization should be:

- To find the unmet needs of families separated both emotionally and factually from the community through the punishment of having a loved one in prison.
- To break the existing perpetuating pattern of crime in prisoners' families by enriching their lives with personal fulfillment, dignity and hope, recreation, and understanding.
- To recognize that the future of all children is equally important to the future of this country, and to know that as true friends, Friends Outside must get the cooperation of the parents in all plans to help their children.
- To share visibly, through love and friendship, those things we cannot give away, and to give invisibly, through our organization, those needed material things in such a manner as to never humiliate the receiver.
- To unite the wives of prisoners in clubs for strength and friendship, and to offer greater opportunities for their children's development.
- Finally, to turn those who have been helped into Friends Outside themselves, helping others as volunteers, serving the organization in all capacities—as Board Members, staff, and program directors.

Mrs. Joan Baez Sr. (mother of the folksinger Joan Baez) remembers Rosemary's arrival at her boarding house in Menlo Park. Goodenough was very persuasive and gifted at attracting others to her cause. "'Look,' she said one day to Baez, 'Somehow, I'm going to do something about it. Do you suppose, in your busy day with your three children and running this boarding house, you could fit in some hours to help me?'" "Oh, I'd love that!' Baez replied, 'Where do we start?'"

The idea was conceived in the Palo Alto Friends Meeting and financed initially with $25.00. According to Baez, "Rosemary knocked on the doors of the jail authorities to have volunteers visit jail inmates to find out their concerns about their families and get their permission to visit them. Volunteers met with the families to help them with their immediate problems such as obtaining welfare, food, and clothing." Goodenough's next step would be the formation of "Friendly Mothers Clubs."

In January 1957, Goodenough and her volunteers took the name "Santa Clara County Jail Auxiliary" but remained part of the American Friends Service Committee. The auxiliary changed its name to Santa Clara County Friends Outside in 1961 when the organization moved into its first office in San Jose.

Judges Paul I. Myers and Robert Peckham were amongst the members of the first board of directors. Another notable person was Clarence ("Clary") Heller, a descendant of Isaias W. Hellman, one of early California's leading financiers and Los Angeles' first banker. Heller established the Clarence Heller Foundation "to protect and improve the quality of life through support of programs in the environment, human health, education and the arts."

Early Friends Outside Services

Friends Outside is characterized as being ahead of its time. The public's attitude was often that the incarcerated "got what they deserved." The collateral damage caused by the criminal justice system to children and families would have been regarded by few beyond those who were directly affected by it. Services were few and lacked funding.

Academic research that might have validated the need for Friends Outside's services was scant or not readily available. Early services were driven by perceptions of unmet community needs and commonsense responses to those needs; e.g., "Families of prisoners do not have food. Let's open a food pantry," with perhaps an overtone of noblesse oblige. They included:

Friendly Mothers Clubs—A program by which women with incarcerated family members and their children could enrich their lives through social interaction and activities.

Youth Programs—Due to the stigma of being "prison-related," Goodenough thought it necessary to have youth programs for these children only. In 1967, she started a family camp.

Christmas Box Program—In 1958, the organization that was to become Friends Outside began sponsoring Christmas parties at the "jail farm." Sponsors were given a family's name and suggestions for the contents of a box for each family. Sheriff's deputies delivered the boxes.

Outsiders Club—Formed in 1960 by the formerly incarcerated and sponsored by Friends Outside, the club helped members "stay out of legal difficulty."

Visitors Centers—The first "visitors center" was opened at Soledad State Prison in 1969. Eventually expanding to all state prisons and still in existence, the centers offer respite for families and play areas for children who often travel to the prisons via long Greyhound bus rides. The centers also provide transportation from bus and train stations to prisons that are frequently located in remote areas. A change of clothing when prison staff deems a family member not suitably dressed (without which the family would not be allowed to make their visit) is the most popular and remembered service.

Prison Representatives—As of 1971, no non-Department of Corrections employee had been allowed to work full-time inside a state prison. Rosemary persuaded the director of the California Department of Corrections (CDC), Raymond Procunier, to allow the experiment at Soledad State Prison. Friends Outside eventually had (and still has) contracts with the CDC [now the California Department of Corrections and Rehabilitation (CRCR)] to maintain staff inside all state prisons. Their job includes helping the incarcerated and their families maintain contact when mutually desired and making plans for release.

The Development of Friends Outside Chapters

Goodenough's vision was to have a chapter in every county in California. Her approach was straightforward. She would ask a judge or someone else in the county to bring together a group of prominent women to attend a meeting, during which Goodenough talked about the work while zeroing in on the woman she found most suitable to start a chapter. Proclaiming a woman to be "Mrs. Friends Outside," Goodenough departed the meeting, often with a surprised woman left to develop the chapter with little assistance.

Each chapter was named for the county in which it was located and operated under the aegis of the flagship chapter, often within communities that were unaware, indifferent, and resistant to their work. In 1971, the board of directors of Santa Clara County Friends Outside felt it necessary to assume legal responsibility for their chapter only and began requiring other chapters to separately incorporate as 501(c)(3) nonprofit organizations. When state grants were obtained in 1972 to manage the prisons' visitors centers and place staff in prisons, a state office of Friends Outside was established in San Jose (later in Stockton) to manage the state grants and serve as a hub for Friends Outside operations across California.

The chapters were powered mostly by volunteers who were motivated by their desire to help, their religious or spiritual beliefs, concerns about the injustices in the criminal justice system and, in some cases, personal experiences with the criminal justice system. It was not unusual for persons who had worked for the criminal justice system to become volunteers, including Jiro "Jerry" Enomoto, who retired as Director of the CDC (the first Asian-American Director of the Department) and became the board president of the state office.

In her newsletter in 1971, Rosemary wrote: "Friends Outside has 14 chapters, some firmly attached, some hanging by their eyelashes." Chapters continued to form after Rosemary's death in 1973, eventually peaking at 30. Over the ensuing years the chapters slowly began to close for various reasons,

including financial hardships and failure to keep abreast of the changing times. After years of prominence, the chapter in Santa Clara County became financially insolvent and eventually merged with Catholic Charities San Francisco. Today, two chapters remain—"Friends Outside in Los Angeles County" and "Friends Outside in Stockton County," which serve their local communities, operate the visitors centers, and maintain staff inside the state prisons. Both entities can legally use the Friends Outside name, mission, and logo and occasionally partner to deliver services beyond the respective counties in which they are headquartered.

Friends Outside in Los Angeles County (1972–1982)

Core Beliefs

- That incarceration can be devastating to the families of inmates, especially to the children, and that the needs of families should be addressed whenever possible;
- That incarceration can be an intergenerational pattern that can be broken through appropriate services;
- That the reentry population is more likely to become productive members of society if they are able to maintain family and community ties, and receive effective services;
- That society as a whole benefits by our services through increased public safety, cost savings, and better outcomes for children and families.

Goals and Objectives

- Provide and improve links between families and incarcerated loved ones, when mutually desired, such as through increased contacts and improved quality of communication, resulting in increased reunification.
- Provide and link children and families, prisoners, and former prisoners with needed resources including services that reduce financial hardship, stress, and social isolation, resulting in increased self-sufficiency and well-being.
- Ameliorate the unintended effects of familial crime and incarceration upon children by supporting positive relationships within families and improving the ability of families to provide emotional and material support to their children.
- Support responsible and humane treatment of children and families of prisoners and their incarcerated loved ones by increasing public awareness of the unintended consequences of incarceration and the availability of and access to alternatives to incarceration.

Martha Jane Dowds, Founder

Martha Jane Dowds was born in 1918 in Arkansas and spent her first eight years on a cotton plantation in Louisiana. Her friends were the black children whose parents lived on the plantation and worked for her father.

At the age of eight, Martha Jane's family moved to Southern California just as the Depression hit. While the family wealth was lost, the focus on education survived. Martha Jane graduated from the University of California, Los Angeles, as a progressive person who saw the potential in people, transcending the racism into which she was born in the Deep South. In 1954, a year before the vaccine, Martha Jane contracted polio and was at death's door for several weeks.

Martha Jane met Norman, her husband-to-be, at a University of Southern California/UCLA mixer. Mr. Dowds graduated first in his pre-law and USC Law School classes, became a partner in Schulteis, Laybourne, and Dowds, and eventually was appointed to the California Superior Court in 1968 by then Governor Ronald Reagan.

After an earlier failed effort by an unknown individual to start a chapter in Pomona, Federal Judge William P. Gray became interested in the organization because of his daughter Robin Frazier's involvement with Friends Outside in Contra Costa County. Following what was by then the established process, in 1971 Gray asked Mary Dean Armstrong, wife of then attorney (and later associate justice of the California Supreme Court) Orville Armstrong to host a meeting in her San Marino home. Included at the meeting were Martha Jane Dowds, along with members of the San Marino Community Church. Near the end of the meeting, Goodenough proclaimed Dowds "Mrs. Friends Outside." Their three children off to college, Dowds and her husband were empty nesters. She started the chapter in 1972 in a bedroom of her San Marino home. Because of its controversial work and the size of the county, Goodenough told Dowds that it would "take 10 years for the chapter to establish itself." Dowds's approach was to "win people over slowly, one person at a time." Never hesitating to "drop names" to get what she wanted, Dowds started many conversations with "I am Martha Jane Dowds, and my husband is Superior Court Judge Norman Dowds."

Establishing Friends Outside in Los Angeles County

Finding a "real" office for Friends Outside had its challenges. Dowds was frequently told the work was "not for ladies." Churches were not interested, and prospective landlords expressed concern about the clientele. As recorded by the organization's first secretary Margaret Sherman, unsuccessful efforts

included "an abandoned bicycle shop, between a liquor store and a bookie joint, and next to an X-rated Movie motel." Eventually, the chapter moved to the First Congregational Church in Pasadena in 1974, where it enjoyed no-cost space for several years, made possible by church member (and Mrs. Dowds's influential uncle) John Wilfong. The organization remained in the church for 40 years, until 2015.

Dowds and volunteers kept the chapter going through 1977, when a grant from The Episcopal Church enabled the hiring of George Ferrick as the chapter's first paid executive director with a salary of $12,000. Volunteer qualifications were minimal—nonjudgmental, available time, willing hands. Training was on-the-job. Most were women, often wives whose husbands supported the family on a single income. In an interview conducted in 2024, Ferrick commented on what he thought was extraordinary about Friends Outside—the "charismatic dedication" of those who were involved. The chapter's tag line was "Building Bridges instead of Walls," which had evolved from an earlier version, "Men Build Too Many Walls and Not Enough Bridges." The mantra included: (1) Friends Outside is nonpartisan and universal and engagement should be from persons of all political persuasions; (2) never engage in a client's legal matters; (3) never ask a client the reason for incarceration; (4) ask the Wives Club members to do something, such as bring food to a meeting, so the interaction is more equal.

Services

The chapter's development mirrored the services begun by Goodenough, including the newly christened "Friendly Wives Club" that met at Dowds's home, a little secret she just never got around to telling her affluent neighbors. In 1978, Dowds, along with then-jail visitor Joyce Ride, received permission from Sheriff Peter Pitchess to establish a jail visitation program for county jail inmates at Sybil Brand Institute for Women, marking the beginning of an important relationship between the two entities that has endured throughout the decades. Following Goodenough's lead, the volunteers talked to the women about their needs, especially as they pertained to their children. Written records, if any, of services provided were recorded simply, "I did it."

Funding/Community Support

No-cost office space and volunteer staffing kept costs to a minimum. In 1978, the annual operating budget was about $30,000 and came from local organizations and memberships (monthly donations of $18.00) of persons who were principally recruited by Dowds and Ride through speaking engagements and their church communities (Episcopalian and Presbyterian, respectively).

The chapter received its first foundation grant from the Pasadena Foundation (now the Pasadena Community Foundation) in 1974, with which it purchased two IBM Selectric typewriters. Foundation grants over the years funded the purchase of additional office equipment.

The Chapter Is Incorporated as a 501(c)(3) Nonprofit Organization (1983–1989)

Although she did not want to "deal with a Board of Directors," pressure from the state Friends Outside office forced Dowds to incorporate the chapter as a 501(c)(3) nonprofit organization in February 1983, and recruit a board of directors, the first of which had 21 members. About this time Dowds also created an advisory board of prominent individuals who were willing to lend their credibility to the organization while providing professional guidance in their areas of expertise.

While attending Valley College, my wife Harolyn enrolled in Professor Vivian's Sociology class through which she visited incarcerated women at Sybil Brand Institute for Women, assigned Friends Outside in Los Angeles County to visit and support the women who received no other visits and assist them with conducting (allowable) activities, such as contacting social workers about their children, obtaining needed services inside jail, and helping them plan for reentry back into the community.

In reading from the journal, she created as a part of the class assignment, I found a passage about a young lady who had severe mental problems and, on several occasions, had attempted suicide. Being the trooper that she was, Harolyn continued to help this unfortunate soul whose very famous father had introduced her to drugs as a youth. After her first suicide attempt, her father suggested to the deputies that they move a little more slowly to assist her. She eventually succeeded in hanging herself with her shoelaces in her jail cell. This very sad event did not deter Harolyn from continuing with her service of more than three years, through which she also had many rewarding experiences while learning about the realities of the criminal justice system.

Melvyn Douglas Sacks, Criminal Defense Attorney

Services

Existing services to the families continued with assistance in planning prison visits, including discounted vouchers for the Greyhound Bus that proved very popular. (The chapter's records show that 365 such vouchers were issued in March 1983 alone). "Friendly Wives Clubs," now called "Family Support Groups" continued to meet, providing safe places where (mostly) wives and mothers of prisoners gathered for emotional support and shared tips for coping with the criminal justice system, visiting incarcerated family members, and reunifying after release. The jail visitation project expanded when Michael D. Vivian, Ph.D., a sociology professor at Valley College, was so moved by the murder conviction of a close friend (Dora Ashford) who was involved in a domestic violence situation that he created a class through which students made weekly visits to Los Angeles County jails and juvenile detention facilities under the sponsorship and guidance of Friends Outside in Los Angeles County. Chapter records state that volunteers made "over 4,000 visits" to the facilities in 1984.

Funding/Community Support

The annual operating budget in 1982 was about $22,000 but grew to about $100,000 upon receipt of the organization's first government grant. Other funds were still mostly generated by gifts from individuals and community groups that were solicited via outreach to churches, speaking engagements, and newsletters. Now board president Ride coordinated annual events to fundraise, recognize volunteers, and educate the community about the importance of the organization's work by featuring prominent speakers such as Los Angeles County Sheriff Sherman Block and local judges.

"Free will offerings" were solicited in 1985 to participate in "An Evening in Space," during which supporters viewed slides taken by Ride's daughter, Sally, who became the first woman astronaut aboard the Space Shuttle Challenger. Sally, who in 1988 became a member of the board of directors of Apple, Inc., also made it possible for the organization to obtain its first computer in 1988.

The Chapter Adjusts to a More Professionalized Field (1990–2010)

Handed keys to the office when hired by Ride, Mary Weaver became the executive director in 1990. Her time performing community service had been instructive. Having never given thought to the criminal justice system, she was surprised and moved by the sincerity of most of the released prisoners who arrived at the office for help, often saying, "I need to get a job," or "I want to find my family." Weaver was deeply touched by family members who shared their struggles to maintain ties with their incarcerated loved ones—amongst them the exploitive, high cost of collect-only calls, not knowing how to find where loved ones were incarcerated or the rules of visiting them, the embarrassment of receiving mail stamped, "FROM STATE PRISON," and not knowing what to tell children about the absent parent. Indeed, there were many burdens on families, most of whom had lost their wage earners to incarceration and were struggling to pay bills even as they attempted to keep their families together through expensive collect telephone calls and Greyhound bus trips for prison visits.

Transitions in the Field Lead to More Effective Services

The decade was marked by transitions in the field, some of which were internal to the organization; others external. Internally, the chapter served persons from across the county from a 225-square-foot office. Its small staff was overwhelmed by the size and geography of the county and the number of persons who called, wrote letters, and traveled to the Pasadena office for help. The three-line telephone rang all day long. As the only known organization in the county that served families of the incarcerated and the only organization (apart from chaplaincy services) that served county jail inmates, Weaver recognized the need to expand the organization's capacity. She requested and received a grant from the California Community Foundation to open satellite offices in South Los Angeles (Watts) and Long Beach, the communities in which the majority of the chapter's clientele lived.

Externally, the field was becoming professionalized. Funders were beginning to demand evidence of program efficacy. They became less interested in organizations that assisted multitudes of people to address their immediate needs and more interested in organizations that addressed clients' underlying needs and assisted them in attaining longer-term goals with demonstrable outcomes. In response to these programming trends and funding necessities, the chapter began to make needed changes, informed by research and data. Studies by the California Department of Corrections (and Rehabilitation) reported the percentage of state prisoners who had substance use disorders (about 60%) and mental health challenges (about 25%). In 1997,

the Centers for Disease Control released the Adverse Children Experiences (ACES) study that listed eight factors, including parental incarceration, which have a "tremendous impact on future violence victimization and perpetration." Challenges for its clients were often caused or exacerbated by trauma, racism, limited education, and multigenerational poverty and incarceration: complex challenges that required assistance by trained personnel.

Staffing

While volunteers were still welcome, Weaver began to hire people with academic and life experience credentials. In 1992, she hired a student, Martin Sosa, from Dr. Vivian's sociology class. A certified drug and alcohol counselor, Sosa was hired to serve parolees at the parole office in Pasadena and the incarcerated at Men's Central Jail. She also hired Sam Spicer Jr., who had lived experience with the criminal justice system, to serve the community of Watts in a building erected after the 1965 uprising.

Services to the Incarcerated/Formerly Incarcerated

In 2010, Friends Outside LA contracted with the Superior Court in Los Angeles to provide PATA (placement and transportation assistance), a program through which Sosa received referrals from judges to assess, place, and coordinate transportation of the incarcerated in Los Angeles County jails to substance abuse programs in lieu of all or a portion of their jail sentences. At a cost to the courts of $300 per person, Sosa assisted approximately 100 individuals annually, including those with dual diagnosis (substance abuse and mental health), to access free beds in treatment facilities where they were assisted to overcome the underlying problems that had led or contributed to their incarceration. In 1998, the U.S. Department of Labor's Workforce Investment Act established "one-stop" employment centers across the country, at which time Weaver began co-locating Friends Outside LA's specialized services inside the centers. Spicer's observation that most reentry job seekers were eager to obtain employment but were not "job ready" resulted in the creation of the organization's copyrighted "Parole to Payroll" program, an evidence-informed, reentry job readiness curriculum, one of the few in the country at the time.

Services to Children and Families

In 2007, Friends Outside LA began an afterschool program for children with incarcerated parents. Informed by the ACES study and using an evidence-based curriculum, the program focus was on socialization and trauma and was one of very few in the country that provided services to address these children's unique needs. In 2008, the chapter received a $25,000 donation from Patricia

Slesinger. Because of her experience interacting with the help in her Beverly Hills mansion, Mrs. Slesinger became concerned about the fate of children in the foster care system. With her donation, Friends Outside LA created the Incarcerated Parents Project (IPP), through which staff monitors visits between incarcerated mothers and their children with the goals of maintaining their bonds and reducing adoptions due to parental incarceration. (An equivalent program for incarcerated fathers is scheduled to begin in February 2025).

At about this time, Weaver became concerned about the breadth of needs the chapter was endeavoring to handle. Homeboy Industries was a long-established program serving youth involved in gangs, and programs such as Girls in Gangs were beginning to be offered inside juvenile halls and camps. In 2008, she made the difficult decision to narrow the chapter's focus to children and families of incarcerated and formerly incarcerated adults and to terminate the chapter's programs that were operating inside juvenile halls and camps.

Funding/Community Support

The Annual Budget in the mid-1990s was about $210,000. While funding from the California Community Foundation made it possible to extend services to additional communities, Weaver began to realize that government grants were often of longer duration, in larger amounts, and more likely to be funded again. New grants she sought and received from the County of Los Angeles (e.g., Inmate Welfare Fund, County Supervisors) and the cities of Los Angeles and Long Beach began to fund most services while foundation grants and individual donations paid for costs the government grants did not cover fully, such as administrative costs. A grant from the Children's Institute, Inc. increased organizational capacity to develop the reentry fatherhood program. The afterschool program continued through grants from the Los Angeles County Department of Probation and the Patron Saints Foundation. Administered by the Department of Children and Family Services, IPP continued through a grant from the Interagency Council on Child Abuse and Neglect (ICAN). A two-year grant from the Junior League of Pasadena expanded the volunteer base to include an additional 10 women who, along with the Pasadena Junior Chamber of Commerce, enabled the organization to hold its first fundraiser in decades at the Rose Bowl. The death in 2007 of a long-time volunteer, Thomas Fleming Rhodes, whose father Kenneth was a prominent attorney in Pasadena, resulted in a bequest with which the chapter established an endowment at the Pasadena Community Foundation.

Despite the unprecedented growth of the criminal justice system, including the number of persons incarcerated and number of correctional facilities built

during two decades, Friends Outside LA's specialized services were still among the few that were available. While there was little competition to do the work, there were also limited dollars. And the immense needs of a growing service population, their children, their families, and the costs to address them, still caused little public concern.

The Chapter Expands as Public Attitudes Begin to Change and the Reentry Field Explodes (2011–Present)

Services/Funding

Organizational growth was bolstered in the next decade when Friends Outside LA received two million-dollar plus federal grants in 2011 (U.S. Department of Health and Human Services, DHHS) and 2012 (U.S. Department of Labor, DOL), resulting in a threefold increase in its an annual budget ($850,000 to $2,500,000) and staffing (from 10 to 30) in about 10 years. The grants were substantial enough for the organization to do something that had never been possible—to build out programs with the staff that was needed instead of "making do" by having existing staff divide their time between multiple programs. The $2.5M DHHS grant would be the first of three five-year federal grants (as of 2024) to provide reentry fatherhood services through the Dads Back! Academy. Ann Adalist-Estrin, Director of the National Resource Center on Children and Families of the Incarcerated and one of President Obama's "Champions of Change" for children of incarcerated parents, wrote the only known reentry parenting curriculum in the country. The $1.1M DOL grant was the first of three federal grants (as of 2024) to provide reentry employment services, giving credibility to the program and enabling the organization to seek additional funding to support and expand it. A generous three-year capacity-building grant in 2023 from the James P. Irvine Foundation is supporting the development of the organization's data management and data analysis systems, among other needed infrastructure development activities.

New Key Partnerships

A growth factor was the organization's partnership with the South Bay Workforce Investment Board (SBWIB), through which Friends Outside LA has provided reentry employment services at the Inglewood One-Stop Center since 2011. To date, the partnership has resulted in a total of four grants from the U.S. Department of Labor and five grants from the California Workforce Investment Board. Friends Outside LA is the official reentry employment partner with the SBWIB and two additional one-stop centers, as required by the U.S. Department of Labor. Friends Outside Los Angeles' partnership with the League of Women

Voters resulted in an increase in voting by the incarcerated in LA county jails during the 2016 election. A partnership with Los Angeles County Child Support Services resulted in the ability of Friends Outside LA staff to assist the incarcerated with their current child support obligations and arrearages. The development of a video that will soon be shown inside county jails will inform the incarcerated how they can get assistance with child support, including to request that their child support payments be "frozen" during incarceration since the vast majority has no source of income. Other partnerships include with myriad service providers (e.g., Shields for Families, A New Way of Life, AMAAD, Legal Aid Foundation of Los Angeles), vocational training partners (e.g., Dootson Truck Driving School, Loyola-Marymount College, Tarzana Treatment Center, CAPS Academy), and community colleges (e.g., Los Angeles Trade-Technical College, College of the Canyons) through which clients receive wraparound services to address their additional needs. The staff has partnered for years with the Incarcerated Parent's Work Group (IPWG) which meets monthly at the Edmund D. Edelman Children's Court and is led by Judge Marguerite Downing, with a goal of identifying the barriers to reunification for incarcerated parents and developing strategies to eliminate these roadblocks.

Staffing Professional and Ethnic Diversity

In 2024,

- 58% of staff has lived experience with the criminal justice system;
- The majority of staff grew up in or near the communities they now serve;
- *Race/Ethnicity*: 53% Latino, 42% Black, 5% Caucasian; and
- *Gender Identity*: 48% female; 52% male.

Working in Partnership with the Criminal Justice System

A number of prominent individuals from the criminal justice system have been involved with the chapter as working board members or members of the Advisory Board. Board members have included Superior Court Judge Terry Smerling, Deputy District Attorney Ronni MacLaren, and Deputy Public Defender Jon Takasugi (who both later became Superior Court judges), Bruce Hoffman, the first Alternate Public Defender of Los Angeles County, along with numerous additional deputy district attorneys and deputy public defenders. Advisory board members have included Frank Zolin, Executive Officer, Los Angeles County Superior Court, The Hon. John Van de Kamp, California Attorney General, Judge Terry Hatter, Jr., United States District Court; and Judges William P. Hogoboom, Barbara Johnson, Billy Mills, and Everett Ricks, all of the Los Angeles Superior Court.

Judge Smerling encouraged the chapter to begin the PATA program and said of his involvement,

> My relationship with Friends Outside goes back over 30 years. Early on I became a member of the Board because I saw Friends (Outside) was one of the few Southern California organizations that endeavored to mitigate the hardships of incarceration. In addition to providing its well-known services to the families of prisoners, Friends Outside was a pioneer in providing an invaluable service to the criminal courts: arranging placements in drug treatment programs, transporting prisoners to such programs and monitoring defendants' progress in those programs. I have long advocated drug treatment for criminal defendants, the majority of whom have underlying substance abuse and mental health problems that engender criminality; but drug treatment is only an abstraction without the infrastructure provided by organizations like Friends Outside. Friends was one of the first, if not the first, entity to provide treatment supervision.

Board member and deputy district attorney Leslie Kenyon's introduction of Friends Outside LA to Patricia Slesinger resulted in seed money for what was to become the incarcerated parents program. A number of the members became financial supporters of the organization.

Friends Outside LA has also worked closely with the correctional system since 1978, during which it has been funded by the Los Angeles County Sheriff's Department and had programs inside Los Angeles County jails operated by that department. The organization has been funded by and had offices inside four parole offices operated by the California Department of Corrections and Rehabilitation. Funding for decades by the Los Angeles County Probation Department supported the afterschool program and enabled the organization to work inside Central Juvenile Hall and Camps Scott and Scudder.

In all cases, the programs would not have existed were it not for the support and assistance of the correctional agencies that provided resources including grant funds, staff time, and no-cost offices, telephones, and internet access. The involvement of individuals from the criminal justice system has been key to the chapter's development and well-being, providing credibility and professional expertise, and opening doors to public and private entities to which the chapter might not have gained access so readily or at all. The diversity of their representation on the board of directors and the advisory board has enriched discussions about how Friends Outside LA can best serve its clients. In spite of opposing opinions on topics such as punishment protocols, including about the death penalty, the underlying belief has always been that the organization's

work transcends politics and that the common good can best be attained when persons with opposing viewpoints work together toward common goals.

Research/Publications/Hosted Seminars

Projects include:

- "Examining the Needs of Adult Family and Close Ties of Incarcerated Persons in Los Angeles County," funded by the UCLA Center for Community Partnerships;
- "Released Aging Prisoners Project," funded by the California Wellness Foundation, in partnership with Independence at Home, a division of SCAN Health Plan;
- "Registrants & Employment," funded by California Workforce Development Board;
- "Reentry Fathers," funded by First 5 LA; and
- "Children of Incarcerated Parents—Trauma, Stress, and Protections," funded by the County of Los Angeles, Board of Supervisors.

Publications include *Black Los Angeles* and *American Dreams and Racial Realities.*

Distinctions & Awards

The organization and its staff have been the recipients of numerous awards and commendations from all levels of government and private entities. Most notably, at the federal level they have included "Fatherhood Hero," White House, Office of Public Engagement; Speaker of the House Nancy Pelosi; Congressman Adam Schiff; Federal Probation. State awards received include those from the Director of the California Department of Corrections, James P. Rowland, and State Senator Ted Lieu. Local honors include those from the County Board of Supervisors; Los Angeles County Sheriff's Department; Los Angeles County Quality and Productivity Commission; Los Angeles City Council; City of Pasadena; JC Penney; and National Association of Social Workers. The PATA program was designated a promising practice by the Vera Institute of Justice and the organization's reentry employment curriculum ("Parole to Payroll") was named a best practice by Westat, a national leader in research, data collection and analysis, technical assistance, and evaluation.

Return on Investment/Impact

Friends Outside Los Angeles serves an average of 800 unduplicated persons annually from offices in South Los Angeles, South Bay, and San Gabriel Valley, including onsite at a community college, three correctional facilities, three one-stop centers and two community buildings.

Success with clients can be measured in numerous ways, including whether grant goals were met, what outside evaluators say about the program's impact, and how clients' lives were individually impacted by the services they received. Below is a sampling from completed grants:

PROGRAM TYPE/FUNDER	CONTRACTED GOAL	PLANNED	ACTUAL
Reentry Employment			
U.S. Department of Labor (2014)	Enrollment Job Placement Recidivism	404 243 <22%	446 248 10%
U.S. Department of Labor (2018)	Enrollment Job Placement Training Credential	170 114 124	170 164 129
State of California (2019)	Enrollment Job Placement	135 81	135 82
County of Los Angeles (2020–2023) *146 placements were at an average wage of $20/hour (approximately 25% greater than the minimum wage at the time). 96 of the placements (66%) were in high-growth sectors	Enrollment Completed Training Job Placement	315 217 189	298 253 146*
City of Los Angeles (2022)	Enrollment Job Placement	99 56	101 57
Reentry Fatherhood (2020)			
U.S. Department of Health & Human Services	Enrollment Completed Program	150 113	155 125
Incarcerated Parents Program for Mothers and Children (2020)			
Interagency Council on Child Abuse and Neglect	Mothers Served	30/month	30/month

Outside Program Evaluations

After-school program

Children who completed the after-school program made the following improvements, (1) 88% improved in three or more academic areas; (2) More than 50% improve in four academic areas; (3) 85% improved in at least one emotional or behavioral area; (4) 50% improved in social skills, inappropriate behavior skills, and emotional skills.

—Carrie Petrucci, Ph.D., EMT Associates

"Parole to Payroll" reentry job readiness workshops

Friends Outside in Los Angeles County's job readiness workshops were a key component in the success of the program through which 94% of participants did not return to prison or jail within 18 months of completing the program.

—Westat

Success Stories and Failures

Pam, a social worker, contacted Friends Outside LA to ask whether we could communicate with a father who was in state prison. The mother of the child wanted his input in making a decision about taking their child off life support. In collaboration with Friends Outside's staff in state prison, case manager Sam Spicer Jr. was able to arrange for the father to talk to the mother of the child from a telephone in the office of prison staff. Months later, Pam sent a letter thanking the organization for making it possible for both parents to make this heart-wrenching decision together.

Yesenia, a 40-year-old Latina had been in and out of county jail due to substance abuse-related convictions such as possession and theft. Her ex-husband was raising their three children. She was living in a recovery program where she had spent one year and was ready to seek employment. Through Friends Outside LA's county-funded SECTOR program, Yesenia was assisted to enroll in vocational training to become a drug and alcohol counselor, during which she completed all aspects of the SECTOR program. Upon completion, staff assisted her placement in a job at an inpatient substance abuse treatment program, where she remains today, three years later, receiving pay raises and promotions. She has a strong relationship with her ex-husband and her children, whom she sees often.

Ronald, a 54-year-old African American man, served 34 years in prison. He came to Friends Outside LA in 2023 looking for employment and housing. A registered sex offender, his reentry is more fraught than most due to the additional stigma against him and the rules with which he must comply. Rufus was very active in Project imPACT, a program funded by the City of Los Angeles Mayor's Office and housed at Los Angeles Trade-Technical College. Staff assisted him in getting a job at a major stadium in Los Angeles County area as a parking lot attendant. His supervisor was so impressed by his work ethic and performance that he was promoted after four months to supervisor. More than one year later, Ronald is still on the job, an important marker that suggests he is unlikely to recidivate. Ronald has been living in transitional

housing and is saving money to reach his goal of getting his own apartment.

Caleb is a 27-year-old African American male with two sons. He enrolled in the Dads Back! Academy, Friends Outside LA's federally funded reentry fatherhood program, in October 2023. When he enrolled in the program, Caleb had an open criminal case, no visitation rights, and was sleeping in his car. A positive in his life was his supportive girlfriend. The case manager helped Caleb receive subsidized housing through program partner Shields for Families and the job specialist helped him secure employment as a manager at a large warehouse. Thus, Caleb could demonstrate that he was stable enough to get unsupervised visits with his sons. Next, the case manager connected him with a legal nonprofit organization that helped him win his criminal case. Caleb and his girlfriend recently visited the office, "not because we need anything but to say thank you." They especially credited the program's coparenting and healthy relationship workshops for helping them to stabilize the relationships within their blended family. They also shared their plans to marry in September!

Not all participants attain the success they had planned. When this happens, the primary reason is because they leave the program before completion, which can happen because they were not ready for the program, reincarceration, or lack of interest, among others. A few departures have been tragic—accidents, overdoses, homicides. And some programs fell short of their intentions and did not provide the needed services, length of services, or most appropriate staff to address the needs of some individuals.

What Friends Outside LA has not done well is to integrate the plight of the victims of crime into its programming. One successful approach was bringing together members of the family support group with members of the ex-offender support group. In some cases, the family members had also been the victims of crime. Families shared why they resented the family members who went to prison, including caregivers (many of them senior citizens) who sacrificed their wants and desires in their senior years to raise their children's children and keep them out of the foster care system. Ex-prisoners shared what they thought led to the commission of their crimes, what they experienced in prison, and the struggles of reentry. Both sides found the gatherings to be enlightening as they had opportunities to better understand one another.

Costs of Services

Although the direct costs associated with incarceration are huge, the collateral costs of incarceration, which include weakened family ties, financial

devastation, and children who can be at risk for social failure, are even greater. In 2024, the cost to incarcerate one individual in a California state prison for one year was $132,860 (*Legislative Analyst's Office*). The average cost for Friends Outside LA to provide services for one year to one individual (child, family member, incarcerated, formerly incarcerated) is $3,800 (*Internal Tax Department Form #990, 2022).*

Note about Indirect (Operating) Costs

Copies of Friends Outside LA's most recent annual 990 filing to the Internal Revenue Service and the annual single audit are available on its website, https://www.friendsoutsidela.org.

The organization has approximately six months of operating funds in prudent reserves and an endowment is held at the Pasadena Community Foundation as part of its plan to build funds through which operating costs can be secured into the future.

Friends Outside LA's annual income is composed largely of government grants in addition to foundation grants and private donations. Limits placed on government grants for indirect costs (costs that cannot be attached directly to a program, such as for bookkeeping, or expenses to maintain the administrative headquarters) can rarely exceed 10% of the grant. Moreover, a number of line-item costs cannot be included in the calculation (e.g., subcontractor costs). In some cases, the government funding agency keeps a percentage of the 10% funds, which reduces the amount available to the nonprofit organization for indirect costs to as little as 4%. Moreover, in spite of increasing demands upon nonprofits for accountability, the 10% indirect cost limit remains in place for most government grants. And while it is possible to seek a higher federally approved rate from the federal government instead of using the allowable 10% "de minimis" rate, the higher rate is only applicable during years when the nonprofit has a federal grant and is a lifelong arrangement. In other words, if a nonprofit receives the federally approved rate, they are precluded for the life of the nonprofit from ever using the de minimis rate. So, if the nonprofit fails to receive a federal grant one year, it cannot bill for the 10% de minimis rate either.

Into The Future (2025 and Beyond)

Reflections of Mary Weaver, Executive Director

In reflecting on the organization's 52+ years, of which I have been involved for 37 years, I think about whether we have remained true to our mission—is our reputation on solid ground, what has "changed but remained the same," opportunities and concerns for the future, and what is planned for the next 50

years, or at least the next five?

Fidelity to our mission is, I believe, unquestionable. The number of years we have not only survived but grown in spite of the economy, vicissitudes of public opinion, and an evolving criminal justice system indicate a kind of stability and suggests that we are able to adapt to our environment. Our staff and programs have become more sophisticated, focused, and results-oriented. Services that are rooted in evidence-based methodologies and best practices are now provided to clients for an average of six months to one year, enabling us to better track their outcomes. I hope some things remain the same, such as clients saying, "I love the way I was treated at Friends Outside." After decades of being one of the few organizations doing this work, many more have become involved as more funding has become available. And that is a good thing, too. The work has always been more than we could handle alone, not to mention that different clients respond to different service methodologies. As I think about Friends Outside chapters that are no more, I remember that many of them went under because they did not stay abreast of the times. If we are to continue to remain relevant into the future, it is clear that we must remain ethical, competitive, in touch with the needs of the clients and the communities we serve, effective, and careful with our funds, while taking care not to change what is unique and valued by those we serve.

Our roots run deep and wide and we are firmly set for continued growth. With the needs of the clients still many and great, we could expand in as many directions as could be conceived and handled. Even though our origins began with serving children and families, our afterschool program and family support groups were placed on hiatus during the COVID-19 pandemic. Therefore, goal #1 in the near-term is to identify funding sources for those programs. Other five-year goals include the following:

1. research and develop programs for children and families that meet their current needs;
2. through our Irvine grant, continue to develop more efficient methods of tracking program data and outcomes to inform future programs;
3. partner with Friends Outside in Stockton to provide services that begin inside prison and transition to the community;
4. partner with Los Angeles County Child Support Services to arrange for fathers in the Dads Back! Academy to receive some kind of incentive toward their child support for program completion; and
5. in response to many, many comments from families ("I wish I would have known about Friends Outside at the outset of the criminal justice

process"), explore with the courts the possibility of providing family services on-site.

Our most ambitious but do-able goal is to obtain through a capital campaign a Friends Outside LA-owned building in which to house a family services center and administrative functions. The absence of an official "home" reduces the organization's presence. In my years at Friends Outside, we have never had our name on a building.

Call to Action

The criminal justice system is complex, operates at multiple levels, acts slowly, is flawed and is brilliant. The weight of the responsibilities borne by those who work within the system is heavy. Efforts to reduce or erase funding for policing agencies are concerning. How are communities safer when calls to 911 are put on hold and there are too few police to respond to life-threatening emergencies? Threats and retaliation against judges and juries make society less safe. Why would anyone desire jobs such as these under such circumstances?

Working toward a system that delivers greater safety to the public, protects the rights and safety of crime victims as well as people who work in the criminal justice system, delivers fair and reasonable sentencing along with opportunities for rehabilitation is a heavy task and one that requires communities to work together in the furtherance of the greater good. The "system" is an amalgamation of people, and it is only as good as the effort each of us is willing to make to do our part, to hold people accountable for doing their jobs appropriately "without fear or favor," while supporting them in carrying out their duties.

Rosemary Goodenough saw a community need and took it upon herself to address it. Leading by example, she engaged people to create an organization through which they came together from all walks of life and belief systems, found common ground, and helped others. It is difficult to imagine a higher purpose in life.

Acknowledgements

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through interviews with George Ferrick, Michael D. Vivian, PhD, Mel Sacks, JD, and Brenda Smith-Walker, JD, also helped to tell the story. Oral histories thought credible are included as appropriate. Gaps in the history or errors in the telling of our story are unintentional. Information to help us fill in the gaps is welcome. Contact us at 626.795.7607, ext. 105, 261 E. Colorado Blvd., Ste. 217, Pasadena, CA 91101, or info@friendsoutsidela.org.

Friends Outside in Los Angeles County acknowledges the work of untold volunteers and staff whose names are too numerous to mention here.

★ ★ ★

HON. THOMAS HOGAN*

Rogue Prosecutors:

Deconstructing the Progressive Prosecutor Movement in the United States, A Book Review

Like Athena springing full-grown from the forehead of Zeus, the progressive prosecutor movement seems to have arrived in the United States completely formed in 2015, then spread across American cities during the next decade. In their book, *Rogue Prosecutors: How Radical Soros Lawyers Are Destroying America's Communities*, published in 2023, Zack Smith and Charles Stimson provide insight and context into the origins and outcomes of this uniquely American experiment. There are a few surprises, many anecdotes, and some useful analysis in this intriguing but occasionally flawed treatise.[1]

The book has a logical structure. The first few sections address the philosophical underpinnings of the progressive prosecutor movement and identify the major donors who are funding the election of these prosecutors. Next, the authors dedicate a chapter each to eight of the best-known progressive prosecutors: George Gascon in Los Angeles, Kim Foxx in Chicago, Larry Krasner in Philadelphia, Kimberly Gardner in St. Louis, Rachael Rollins in Boston, Chesa Boudin in San Francisco, Marilyn Mosby in Baltimore, and Alvin Bragg in New York City. The authors conclude with their suggestions about how to deal with the influence of progressive prosecution tactics in the criminal justice system.

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Rogue Prosecutors has some distinctive strengths. Perhaps most importantly, the authors trace the philosophical origins of the progressive prosecutor movement. The book shows the arc of the idea of prosecutors beating their swords into plowshares—morphing from warriors protecting victims of crime and changing into social justice warriors in the great class struggle—as originating explicitly from Marxist thought. The philosophy is then adopted by the legal academy, where law professors with little-to-no experience as prosecutors and minimal exposure to violent crime championed the idea of prosecutors solving a multitude of social ills—from poverty to racism—simply by refusing to incarcerate criminals. After law schools spent decades proselytizing about the benefits of prosecutors refusing to prosecute, America was hit with social unrest triggered by high profile police killings of civilians, most notably Michael Brown in Ferguson and George Floyd in Minnesota. Fueled by these events, the movement was then converted into political action and the cohort of progressive American prosecutors was born. Smith and Stimson do a credible job describing how a Marxist concept which would have been mockingly dismissed by most Americans two decades ago gained political traction in a relatively short period.

The next critical strength of the book is in identifying the donors who are funding the election of progressive prosecutors, often overwhelming district attorney races with large infusions of cash. Nobody is shocked to see George Soros named as one of the major benefactors for progressive prosecutors. However, many readers will be surprised to find out that Facebook founders Mark Zuckerberg and Dustin Moskovitz, together with Moskovitz's wife Cari Tuna, have provided millions of dollars in funding to the campaigns for "prosecutorial reform" and progressive candidates. Patty Quillen, the wife of Netflix CEO Reed Hastings, also has used her substantial fortune to fund the progressive prosecutor movement. While none of these donors has any expertise in the complex field of criminal prosecutions, *Rogue Prosecutors* tracks the enormous sums they have contributed to this political campaign.

After describing the political evolution and funding of the progressive prosecutor movement, Smith and Stimson identify the organizations who coordinate the movement. The authors focus on Fair and Just Prosecution ("FJP") as the main non-profit systematically organizing progressive prosecutors. FJP acts as a central clearinghouse for the policies of progressive prosecutors and funds international trips (Scotland, Portugal, Kenya, etc.) for these prosecutors to travel abroad

and interact with each other. As described in *Rogue Prosecutors*, FJP acts as both the central brain of the progressive prosecutor movement and a permissive uncle, handing out rewards to compliant prosecutors. The authors describe how many of the non-governmental entities who coordinate the movement have interlocking leadership structures and receive funding from the same donors who fund the actual campaigns of progressive prosecutors, albeit through murkier funding processes.

With the background on the progressive prosecutor movement described, the book then delves into the eight "rogue prosecutors" chosen by the authors. Readers are exposed to the nitty-gritty details of specific cases overseen by these prosecutors, giving voice to the crime victims often ignored in the political tumult. Gascon's election is toasted in California jails by the inmates and he promptly allows a then 26-year-old defendant who sexually assaulted a 10-year-old girl to be sentenced as a juvenile, over the strong objections of the victim's family. Foxx tries to bury the prosecution of actor Jussie Smollett, who falsified a hate crime. As drug and gun prosecutions disappear, homicides spike under Krasner and Mosby. Gardiner fails to staff a murder prosecution, leading to the dismissal of the case and the anguish of the victim's friends and relatives, which might help explain why her office experiences over 100% staff turnover as prosecutors quit in disgust. While such anecdotes are interesting to illustrate specific points, the book is stronger in describing the common playbook of the progressive prosecutor movement and the pattern of problems for progressive prosecutors.

As described by Smith and Stimson, the playbook for progressive prosecutors is built around the idea that prosecutors simply should not prosecute criminals. Progressive prosecutors believe that they can lead the charge against what they see as systemic racism in the criminal justice system and mass incarceration by refusing to prosecute crimes. Nearly every prosecutor addressed in the book has issued a highly similar "Do Not Prosecute" memorandum, listing the crimes which they will not prosecute. The similarity in these lists leads to a natural conclusion that they are being either coordinated or copied; the scope of the crimes on the "de-prosecution" lists will probably surprise some readers, as they learn that crimes like drug dealing and robbery are not prosecuted everywhere in the United States.

In addition to the common playbook for progressive prosecutors, the authors also have identified common faults and problems for this modern cohort of chief prosecutors. Many of them lack experience as a

line felony prosecutor, the type of prosecutor who has spent years in the trenches actually trying serious criminal cases. Most of the progressive prosecutors lose experienced staff from their offices either by firing them *en masse* or by exhausted attrition, replacing seasoned veterans with inexperienced, defense-oriented supervisors and prosecutors. Some progressive prosecutors have ethical problems, ranging from campaign finance violations to actual criminal offenses. All of them share a bad relationship with their local police, creating an environment where public safety is endangered and victims are ignored. The authors point to the fact that it is not always malign intent that leads to problems for progressive prosecutors; sometimes, it is simple incompetence.

Smith and Stimson do not shy away from the debate about mass incarceration and systemic racism in the criminal justice system. Instead, they marshal statistics to examine and challenge these core tenets of the progressive prosecutor movement. *Rogue Prosecutors* makes two compelling points in this area. First, the people who are hurt most by progressive prosecution policies actually are minority crime victims, as more crimes are committed and those crimes are concentrated among underprivileged victims. Second, the authors argue that prior to the rise of the progressive prosecutor movement, modern prosecutors already had done an outstanding job in both reducing crime rates *and* incarceration rates over a 25-year period, creating a slew of effective diversion programs for non-violent offenders and reserving incarceration violent criminals and repeat offenders. Reviewing these facts, *Rogue Prosecutors* makes a strong argument that the progressive prosecutor movement is at best a solution in search of a problem, while at worst it is actually iatrogenic, literally killing the very people it supposedly is rescuing.

The book is not without its flaws. From a statistical standpoint, the authors do not grapple with the serious and conflicting empirical studies which have examined the impact of progressive prosecutors on crime. The ability to discuss and convert sometimes complex statistical studies in this area into understandable explanations for non-academic readers is a missing element. The authors also fall into the trap of attributing the rise in homicides during the Covid-19 pandemic to progressive prosecutors, when virtually every major city in America faced the same problem, regardless of prosecutorial policies.

Beyond the statistical issues, the authors also missed an opportunity to address some of the external political issues which gave rise to the electoral success of progressive prosecutors. It was not all a coordinated

conspiracy led by George Soros. The first representative of the modern wave of progressive prosecutors was Marilyn Mosby in Baltimore, who ran for election in 2014 and took office in 2015. Mosby was not funded by Soros or any of the other donors listed in the book, nor was she guided by an organization like Fair and Just Prosecution. Instead, she rode the chronically high violence in Baltimore to victory in a campaign based on pursuing a new style of racial justice, then leveraged the death of Freddie Gray in police custody to justify what became something that resembled a war on the war on crime (with the police and crime victims as collateral damage).

Many of the other "rogue prosecutors" benefitted from intensely local political forces. Kim Foxx in Chicago was elected as the Cook County State's Attorney after her predecessor, Anita Alverez, was caught up in the scandal surrounding the police shooting of Laquan McDonald, where Alvarez and then—Mayor Rahm Emanuel slow-walked the investigation and refused to release what later became a viral video of the shooting. Larry Krasner was elected in Philadelphia after the sitting district attorney, Seth Williams, ended up in a battle with the police union over disclosing officer misconduct and then became the target of a federal corruption prosecution. Ironically, the Philadelphia police union rented out billboards demanding the replacement of Williams and helped elect Krasner as the new district attorney. Kim Gardiner in St. Louis leveraged the death of Michael Brown in a neighboring jurisdiction to justify her election and policies. The book does a disservice to readers by not acknowledging the impact of local politics in driving the election of specific chief prosecutors. In addition, it was not only the political left driving the progressive prosecutor movement; libertarians on the right helped drive some of the arguments about reducing the footprint of the criminal justice system and the power of prosecutors, fueled by the desire to cut public expenditures and taxes.

The final problem for *Rogue Prosecutors* is its overall tone. From the beginning, the book comes across as a polemical screed. Larry Krasner is described as a "slick serpentine." The progressive prosecutor movement is characterized as "an abomination that is, quite frankly, a cancer on the body politic." The authors state that progressive prosecutors "bastardize and contort the role of the prosecutor into a macabre creature that is a prosecutor in name only." Those opposed to progressive prosecutors do not need to be convinced to believe in these opinions. Those who support progressive prosecutors will automatically dismiss the other

information in the book when reading such inflammatory language. And the great middle in America, who are just coming to grips with the scope and impact of the progressive prosecution movement, would be better convinced by the art of gentle persuasion and statistical verities. But the authors and their editor certainly knew that part of their mission was to create controversy, not necessarily converts.

Overall, *Rogue Prosecutors* is a worthwhile read. The level of granular detail about the origins of the progressive prosecution movement and the conduct of specific prosecutors will keep readers engaged. The authors also describe the political prosecution of then—Missouri Governor Roy Greitens by Kimberly Gardiner, a foreshadowing of the lawfare-style of prosecutions which broke out across America shortly after the time frame covered by the book. *Rogue Prosecutors* points out both the best and worst of the criminal justice system in the United States. State and local governments act as laboratories of democracy for criminal justice, trying out new and untested theories. If the progressive prosecutor movement resulted in fewer crimes, respectful treatment of victims, and less incarceration, the experiment would be viewed as a groundbreaking success. If the movement resulted in more crimes and the loss of victims' rights as the price of less incarceration for criminals, then the experiment must be viewed as a failure, to be abandoned post haste. Count Smith and Stimson in those arguing that it is time for America to move on from the failed experiment of progressive prosecution. But recognize it is classically American to try even radically different approaches to social issues, just as it is classically American for common sense eventually to prevail.

★ ★ ★

ALAN BROWNSTEIN*

Teaching Controversial Subjects

Among the several pedagogical debates surrounding teaching at public and private colleges today is the question of how instructors should teach controversial subjects. A continuum of alternative approaches exists, ranging from complete and unrestricted reliance on the expertise and discretion of the instructor to rigorous prohibitions against particular presentations that could be considered one-sided in their message. The former is strongly defended as essential to academic freedom. The latter is justified as a necessary bulwark against indoctrination.

I don't claim to have a definitive answer to the problem. But I have considerable experience dealing with it. I taught constitutional law at a public law school for almost 40 years. Needless to say, many of the issues discussed in my classes were controversial: the right to have an abortion, the meaning of the Free Exercise Clause and the Establishment Clause, affirmative action, free speech protection of hate speech, the rights of members of the LGBTQ community, the scope of national power and state's rights, and what constitutes

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the taking of property to mention just a few.

Over time, I developed a pedagogical approach attempting to present both sides of controversial issues to my students and allowing open discussion on these topics. I didn't start out teaching by adhering to this approach. I learned about teaching during my years in the classroom. And even after years of experience, I didn't always get it right. It isn't the easiest way to teach. However, I think it serves students better than the alternatives.

During the first class of the semester, I would tell my students something like this. We are going to discuss several issues in this class which are value based and which are passionately debated in our society. It is not my job to tell you what your values should be. You have to work those questions out for yourself.

In most cases, there are at least two, and often more than two, sides to the controversial issues we will be discussing in class. Sometimes, I will believe that one side of a debate has the better argument. Whether I explicitly tell you which side of a case I think is correct or not, you will probably be able to determine that from my class presentation. I don't claim to be able to completely conceal my values or opinions on constitutional doctrine. I'm just not that good an actor.

But my job is 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.

A problem may arise, however, if you don't think I am doing a fair job in presenting multiple sides of issues. If that happens, you have several choices. You can raise your hand and present to the class the argument you think I am not presenting fairly. I welcome such comments. If you are not comfortable with offering your argument to the class, come up to the podium to talk to me after class or come by my office to explain your position. I will present your argument to the class the next day on a no name basis.

I came to adhere to this pedagogical approach for several reasons. First, I think we do our students a disservice if we only teach them what we (and often they) already believe and never expose them to the contrary arguments they will hear and have to respond to when they leave the university. Critical thinking and the developing of persuasive responses to arguments we disagree with is hard work and requires practice. Learning to listen to the other side takes practice too.

Also, I found myself increasingly uncomfortable with the alternative

approach of presenting only one side of an argument. Many years ago, for example, I was the moderator of an event discussing hate speech on campus. One professor was criticized for teaching his students that history demonstrated that any civilization that tolerated homosexuality would inevitably decline. Some students argued that this was hate speech and should be prohibited. The professor being criticized argued that he believed his position to be accurate and that academic freedom principles protected his right to teach his class as he saw fit.

I was certainly dubious about the merits of this professor's argument. But I also took seriously his contention that academic freedom permitted him to teach his position to his students. After a pause, I asked him whether in addition to presenting his argument to his class, he also discussed with his students the opposing position and criticisms of his analysis.

Speaking figuratively, not literally, this professor almost fell off his chair when he heard my inquiry. It was unmistakably clear that he had never considered presenting both sides of this issue to his class. I found that failure to be difficult to accept.

I recognize that there are difficulties with this both sides approach. I can invite students to offer contrary positions in class, but for various reasons they may be unwilling to do so. I once asked a devoutly religious student who I knew to be pro-life why he did not speak in class when we discussed the right to have an abortion. He replied that the subject was too painful for him to talk about in class. Nothing I could do would change that.

More commonly, some students may worry that they will be harshly criticized by their peers if they challenge the conventional orthodoxy on an issue. I cannot protect students from substantive criticism of their positions. But I can try to make sure that any criticism directed at them is civil, not insulting, and substantive, not personal. If the need arises, I tell my class that when I call on a student in class, they are taking the floor in my place—whether I agree with them or not. I consider any personal insults directed at them to be personal insults directed at me. It has rarely been a problem.

The most difficult problem with an attempt to present both sides of controversial issues is determining whether the issue is one that is legitimately subject to debate. Not all issues are worthy of discussion and certainly may not be worthy of extended discussion. Slavery was not a positive experience for its victims. The Holocaust happened. I would not spend much time if any on the contention that state mandated racial segregation throughout society is fully

consistent with equal protection principles.

Determining when an issue is controversial in the sense that it deserves to have both sides addressed and evaluated will require the exercise of careful judgment in some cases. That's a problem and a cost. But no approach to teaching controversial issues will be judgment free and without cost. Some alternatives will simply be the best that we can do.

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HON. DANIEL M. KOLKEY*

The Critical Role and Benefits of the California Supreme Court Historical Society

History plays a critical role in the maintenance of a stable, functioning legal system.

More specifically, any society's legal system, if it is to remain stable and yet be responsive to contemporary society, must be founded on the wisdom of its ancestors, as modified and improved by the living, for the benefit of those yet to be born.

In a similar vein, Edmund Burke described society as "a partnership … between those who are living, those who are dead, and those who are to be born."[1]

And in his group of lectures in 1921 that were compiled in his influential book, *The Nature of the Judicial Process*, Benjamin Cardozo acknowledged history's important role in the judicial process thusly: "My analysis of the judicial process comes then to this, and little more: logic, and history, and custom, and utility, and the accepted standards of right conduct, are the forces which singly or in combination shape the progress of the law."[2]

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* Daniel M. Kolkey, a retired partner with Gibson Dunn & Crutcher and a former associate justice of the California Court of Appeal, Third Appellate District, is completing his final term as President of the California Supreme Court Historical Society. He instituted a number of the initiatives described in this article. Published by permission of the California Lawyers Association. The Association previously published the article in its magazine, *California Litigation*, in November, 2024.

[1] Edmund Burke, Reflections on the Revolution in France, in The Works of the Right Honorable Edmund Burke (1899) vol. 3, p. 359.

[2] Benjamin Cardozo, The Nature of the Judicial Process (Yale University Press 1921) p. 112.

That is why organizations like the California Supreme Court Historical Society, which is dedicated to recovering and preserving California's legal and judicial history—with a particular emphasis on California's highest court—play an important role in a functioning legal system.

And that is also why membership in the California Supreme Court Historical Society not only supports the preservation of California's legal history, but with its recently adopted initiatives, now offers immediate benefits to its members.

First, let's look at some of the new benefits of membership. Starting in 2022, the Society began to offer *multiple* educational programs each year that offer *MCLE credit free to members*. Just this year, the Society offered MCLE programs addressing free speech and the internet; the California Supreme Court's decision making; the legal evolution of restrictive covenants in California's history; and the evolution of the admission of evidence in rape trials.

In short, in consideration for the Society's dues checkoff of $25 at the time you pay your State Bar dues, you can view the Society's MCLE webinars for free. For those who want to further support the Society with a tax-deductible contribution *and* receive hard copies of its semiannual magazine, the *Review*, and its annual journal, *California Legal History*, the Society offers higher levels of membership that provide those additional benefits.

Second, by 2025, videos of those prior webinars that offer MCLE credit will be available on the Society's website at www.cschs.org. Members will be able to view these past webinars and receive MCLE credit for free, while non-members can go to the Society's website and pay a fee to receive the MCLE credit.

Third, the Society publishes an annual journal, *California Legal History*, and a semiannual magazine, *Review*, which publish articles analyzing legal developments in California history, like a description of the arguments and judicial decision-making in *Perez v. Sharp,*[3] in which the California Supreme Court overturned the century-old ban on interracial marriage—nearly two decades before the U.S. Supreme Court did so in *Loving v. Virginia*[4] in 1967.

But the journal and the *Review* also address contemporary events. In 2023, the *Review* published pro and con articles regarding the propriety of

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[3] (1948) 32 Cal.2d 711.

[4] (1967) 388 U.S. 1.

renaming the Hastings College of the Law as the UC College of the Law, San Francisco. And the 2023 issue of *California Legal History* published an article on the evolution of California's criminal justice system since *Brown v. Plata*,[5] which opinion in 2011 found that the level of overcrowding in California's prisons violated the Eighth Amendment's prohibition against cruel and unusual punishments. That same issue also published an article which provided a first-hand, historical account from one of the key participants (Justice George Nicholson) regarding how the advocates of crime victims' rights were able to enact the Victims' Bill of Rights in the California Constitution.[6] The article is a virtual "how-to" guide.

Fourth, to develop an interest in California legal history, the Society oversees an annual student writing competition for law and graduate students, offering prizes for the first-, second-, and third-place winners, whose papers can be published in our journal, and who can attend a virtual awards ceremony, which is traditionally presided over by the current Chief Justice of California.

Fifth, another one of the Society's principal functions is to fund the oral histories of California Supreme Court justices once they retire. In that connection, the Society's publications often include abridged versions of these oral histories. And from these oral histories, attorneys can learn quite a bit of insightful information regarding the inner workings of the courts, the jurisprudence of the justices, and the times that shaped our foremost jurists.

For instance, former Associate Justice Edward Panelli, who passed away on July 20, 2024 at the age of 92, recommended to attorneys to never waive oral argument, regardless of any solicitation seeking a waiver.[7] He also spoke of the importance of keeping your sentences short in your briefs since no busy jurist is going to take the time to figure out what the attorney is trying to say. He gave an example of receiving a brief with a sentence that ran a page and a half, observing that "[m]any times … if I don't know [what] they're saying, they didn't raise the issue properly, and then it's waived and we're going to deny it."[8]

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5 (2011) 563 U.S. 493.

6 Cal. Const., art. I, § 28.

7 McCreery, *Oral History of Edward A. Panelli, Associate Justice, California Supreme Court, 1985–1995* (2022) 17 Cal. Legal History 1, 503, which was abridged from *From the Bottom to the Top: An Immigrant Son's Rise to the California Supreme Court, Capping Twenty-Two Years of Judicial Service on California's Superior and Appeals Courts, 1972–1994*, an oral history conducted in 2005–2006 by Laura McCreery, Institute of Governmental Studies, University of California, Berkeley (2009), © The Regents of the University of California, The Bancroft Library, University of California, Berkeley.

8 *Ibid.*

And consider some of the observations of former California Supreme Court Justice John Arguelles—the second Latino to be appointed to our state high court. He acknowledged his consternation as a trial judge when the Bird Court reversed many death penalty convictions based on prejudicial error, explaining that "as a trial judge we had coped with the same arguments during posttrial motions and had concluded otherwise. . . . Reading a cold transcript many years later, four hundred miles away, is different than having been at the actual trial scene. … maybe I was wrong in one particular case, maybe, I don't think so, but perhaps I was. But were all of the other judges wrong too? All of us?"[9]

Attention, attorneys: Could Justice Arguelles's point be raised effectively in an appellate brief involving an issue regarding whether an error at trial should be considered prejudicial when the trial judge considered otherwise?

And consider these tidbits from the oral history of retired Associate Justice Ming Chin. He observed, "You can tell a lot just by reading the first paragraph of most anything. [U.S. Supreme Court] Justice [Anthony] Kennedy talked me into that. He puts a lot of time into the first paragraph of every one of his opinions, and you can tell when you pick it up whether you're interested in reading the rest of it."[10]

Justice Chin also told a story during his oral history about how future U.S. Supreme Court Chief Justice John Roberts prepared for his Supreme Court oral arguments while he was still a practicing lawyer: "Rumor is that he used to write every question, every possible question, on three-by-five cards. Then he would shuffle them, and then would answer them in whatever order they came up, because that's the way you're going to get questions at oral argument. I thought, well, attorneys ought to know this, that this is a good way to prepare for an argument because you're not going to get questions in the order you think they're going to come."[11]

Additionally, one can also learn about how review is granted in the California Supreme Court from these oral histories. Justice Chin explains that in considering whether to grant review, a justice must consider how

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[9] Carter and McCreery, *Remembering the Legacy of Justice John Arguelles: An Introduction and Oral History* (2023) 18 Cal. Legal History 1, 332, which was abridged from *Stepping up to the California Supreme Court: twenty-six years of judicial service at every level of the California court system, 1963–1989/John A. Arguelles*; with an introduction by Manuel A. Ramirez; interviews conducted by Laura McCreery in 2006, BANC MSS 2014/182, © The Regents of the University of California, The Bancroft Library, University of California, Berkeley.

[10] *Motion sustained: a half century of vigorous law practice and judicial innovation, from the Alameda County District Attorney's Office and private civil practice to the Superior Court, the Court of Appeal, and the California Supreme Court/Ming W. Chin*; with an introduction by Justice Carol A. Corrigan. Interviews conducted in 2019 by Laura McCreery, BANC MSS 2021/125, © The Regents of the University of California, The Bancroft Library, University of California, Berkeley, p. 85.

[11] *Id.*, p. 158.

the Court will come out on the issue if the petition is granted, whether the case is a good vehicle for deciding the issue, and whether the drafting of the petition for review affords the type of help the Court is going to need.[12]

But these oral histories literally come to life when the Society interviews the retired justice at a public program. On October 22, 2024, the Society held a public program in San Francisco (which offered MCLE credit), in which our recently retired Chief Justice, Tani Cantil-Sakauye, was interviewed about her career, her jurisprudence, and the Court by retired Associate Justice Kay Werdegar. This program revealed significant insights into how her early career shaped her innovations in the court system and on the Judicial Council, and other tidbits, such as the advice she received from former Chief Justice Ron George upon assuming her position as Chief Justice.

Finally, because there has never been a book on the significant influence of Bernard Witkin on the California courts, the Society is sponsoring a book on Bernard Witkin—the "Justinian" of California law, as the late appellate justice, Norman Epstein described him—based on archival materials, his speeches, interviews, and 17 oral histories about him from people who knew him. This book, to be authored by legal historian, John Wierzbicki, will be a "must read" for appellate lawyers and judges when it is completed in three years.

In conclusion, the California Supreme Court Historical Society not only preserves California's legal history and disseminates it, *and* offers MCLE programs at no cost to its members, but it also issues publications that can make you a better attorney—or even guide you toward a judicial career.

And just as importantly, a true appreciation of California's legal past helps preserve its future. If we lose our rudder, we will lose our way. Or as the late Henry Kissinger so presciently observed, "No society can remain great if it loses faith in itself or if it systematically impugns its self-perception."[13] A deep and balanced appreciation for a society's history can maintain that faith.

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[12] *Id.*, p. 214.

[13] Henry Kissinger, *Leadership: Six Studies in World Leadership* (Penguin Press, New York 2022) , p. 415.

ARTHUR GILBERT*

Literature and Music —Keys to Judging

My personal journey: We are more than our professions

California Judges College—*Circa* 1976

I am seated in a dimly lit room with the others in the audience viewing an image on a screen center stage. The person on the stage, a silhouette, standing to the side of the screen speaks into his hand-held microphone.

"Please describe what you see."

To myself, I answer this question and the others that follow.

"I see a room."

"Describe the room."

"The room is empty, no furniture, just four walls, a floor and a ceiling."

"Anything else?"

"No, … just wooden walls, a wooden floor, and … and the ceiling."

"The ceiling is …."

"Is … unremarkable."

"In what way?"

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* Arthur Gilbert has been a judge for almost a half century. He has been a pianist most of his life. He is presiding justice, Court of Appeal, Second Appellate District, Division Six, State of California. He was appointed to the court as an associate justice in December 1982. He was elevated to presiding justice in 1999. He began his legal career in the Los Angeles City Attorney's Office, as a deputy city attorney trying cases in the Criminal Division. He entered private practice a year later and practiced law for a decade. He was appointed to the Los Angeles Municipal Court in 1975. He was elevated to the Los Angeles Superior Court in 1980. In his private life, he is a writer and a musician. He regularly writes for *Los Angeles Daily Journal*, California's largest legal newspaper. He is a concert pianist and is the lead pianist with the Los Angeles Lawyers Philharmonic Orchestra and Big Band of Barristers.

"In what way is the ceiling unremarkable?"

"Yes."

"It is simply a flat floor, … a regular ceiling."

"You seemed a bit uncertain about the ceiling."

"Not really."

"You hesitated."

"I did?"

"You did."

"Mmm…maybe so."

"Why the hesitation?"

"Can't say."

"Let show the same room with people in the room."

"Sure. That might liven things up a bit."

The slide changed. I looked and felt the slap, the jolt, that accompanies a sudden insight. The people in the room had to duck because the floor, the walls, and the ceiling were slanted. One wall was longer than the opposite wall, showing the ceiling sloping at an angle.

That jolt, or was it the slap? Oh yes, it was both. They stayed with me ever since and have served as my guide in every case, every motion, every ruling I have made in my judicial role from then to now and I expect in the future. If I were to grade myself on how well I have followed this guide (I am a tough self-grader), I would give myself a B … maybe a B+. I will not hazard a guess as to the grades I receive from litigants and their counsel.

The slap-in-the-face insight I am sharing with you brings to mind Bugs Bunny and Porky Pig. Bugs Bunny is a wise-cracking, irreverent, fast-talking, fearless con-rabbit. Porky Pig, on the other hand, is a stuttering, shy, non-aggressive, sweet, gentle pig. Five-year-olds and professors of astrophysics have one thing in common. We, like they, do not question the anomalous characteristics of the personalities of Bugs or Porky. And, of course, there is nothing unusual about them talking. Things are not always what they seem, and sometimes they are.

And what does this have to do with literature and judging? For many years Professor (ret.) and appellate attorney Robert Gerstein and I taught a course at the California Judges College on standards of review vis-à-vis the hard case, the case for which there is no ready answer. These are cases where plugging

in a statute or citing a case is not likely to supply a satisfactory resolution. The legal philosopher Ronald Dworkin uses as an example the case many of us wrestled with in law school, *Riggs v. Palmer* (1889) 115 N.Y. 506.

Defendant poisons his grandfather because he suspects his grandfather is about to disinherit him. What follows is the probate proceeding. Grandson claims he is entitled to inherit under the will. Residual beneficiaries contest his claim. Please note in 1889 there were no statutes in New York that prohibited convicted murderers from profiting from their crimes. A literal interpretation of the statute, what some would call "following the law," results in the grandfather's estate going to his errant grandson.

I have presented this case to various groups of judges in different venues, and the responses have been wide and varied. One view is that we are charged with "following" the law, not deciding how we think the law ought to be. To rule in favor of the grandson is to usurp the role of the Legislature. Ruling in favor of the grandson will send a message to the Legislature to change the law if that body deems it appropriate.

In a two-to-one decision, the *Riggs* court ruled that under society's principles of fairness and equity, one should not profit from one's wrong. Under that rationale, the residual beneficiaries prevailed over the grandson. In *Riggs*, an argument that supports the majority position is that a literal interpretation of the statute leads to an absurd result. I think it's safe to assume, most rational people would agree. But the dissent questioned under what authority may a judge decide a case where there is no established legal authority.

In some cases, a literal application of the law is so absurd-that only one solution would be acceptable to most people. Or is that just my view in a hypothetical case involving the Vehicle Code? Let's say the code prohibits vehicles in the park. I'll go out on a limb and guess that most people would consider such a law eminently reasonable.

Cars driving in the park create a hazard for children, animals, and those who might throw a ball, of whatever sport, too high to a catcher caught off guard or blinded by the sun. There he goes running off the grass into an oncoming "vehicle." And gas driven cars make noise and contribute to pollution.

Motorized wheelchairs travel at around 3 to 5 miles per hour. Assume a disabled person is traveling in a motorized wheelchair at 3 miles an hour and receives a ticket from a traffic officer. Is the ticket warranted? I think it best not to write anymore about such a case. I could get such a case and would have to recuse myself.

What does the familiarity with, if not the study of literature, have to do with judging the *Riggs* case, or any case, where in some quarters there is apparently no ready answer? Some would argue nothing. But in some indefinable way I would counter, it gives judges a broader insight of ways to decide the hard case.

To go back a way, say around the 5th century BC, we might consider *The Oresteia*, the chilling trilogy by Aeschylus. I credit my dear friend and mentor, the late Professor Herb Morris, for directing my attention to *The Oresteia*. Herb's influence and spirit drives me to write this and other articles on literature and the arts.

Don't want to give away the plots, but the three plays, "Agamemnon," "The Libation Bearers," and "The Eumenides," are about murder, fury, punishment, and, to surely pique your interest, justice.

To attain that end, we require a trial. How else do we achieve justice? Knew that would get your attention. The three plays progress, if you will, from violence and revenge to justice. Judges who decide homicide cases involving gang revenge cases are regularly confronted with themes portrayed in *The Oresteia*. In the third play, "The Eumenides," the goddess Athena creates the idea of a trial over which she sits as the judge. The forward-thinking Greeks knew who would make a good judge.

Franz Kafka's *Penal Colony* and *The Trial* make us see the law from an exaggerated and distorted perspective of trial and punishment for defendants caught up in the legal system. These works illustrate how arcane is our system of justice and punishment from the perspective of the ordinary citizen who may become a defendant. Judges take note in approaches to sentencing, and Herman Melville's *Billy Budd* illustrates how a strict application of the law can lead to grave injustice, an understatement in Billy Budd's case. In addition to current writers, read Emily Dickenson, Tolstoy, Ralph Ellison, George Eliot (a woman), Dostoevsky, W.E.B. Du Bois. Add to this list hundreds more… in your spare time.

Shakespeare's *Measure for Measure* gives us insights about judging that applies from the play's inception to the present. The play opens with the Duke, who governs Vienna. He is speaking with his trusted adviser about the deplorable state affairs in the city. Immorality is rampant, and something must be done about it. But the Duke is a "softy." He loves his citizens and does not have the heart to enforce the laws prohibiting immoral conduct. The Duke is an all-purpose ruler. He is also a judge who is reluctant to enforce the law. To attain some insight into the principes of judging, he decides to temporarily turn the task over to someone who will take on the responsibility he has shirked. The

Duke decides to take a leave of absence and meld into society disguised as a monk. This will give him the opportunity to see how his replacement handles the job. What better way to gain insight when he returns to office?

But who to appoint? The Duke turns to his advisor, named… get ready, Aeschylus. No doubt Shakespeare read "The Eumenides." Does this remind you of the present day? One can imagine a Governor meeting with the appointments secretary to discuss the qualification of an applicant for a judicial appointment.

They decide on a seemingly upright citizen known for his integrity and rectitude, Angelo. Angelo, a strict law and order judge, turns out to be anything but an angel. Through the play's twists and turns, its subplots, and conclusion, we learn that absolute justice is impossible. But we learn that in a society where there is too much leniency or too much rigidity, there is no justice.

Would help to include in your extracurricular reading a few legal philosophers. Maybe H.L. Hart, Ronald Dworkin, Lon Fuller, my classmate George Fletcher, to name a few, in your spare time. The point is a familiarity in the humanities and philosophy helps judges see the room with people inside. In subtle ways, this background enhances their ability to interpret statutes, case law, and decision making.

Many judges write not only legal opinions and statements of decision, but fiction, biographies, columns, and poetry. There are too many to mention in the space of this article. But I asked one of them, prize winning poet and San Luis Obispo Superior Court Judge Craig van Rooyen, to what extent, if any, poetry influences his approach to judging.

Craig van Rooyen

"Poetry and judging are at the core of my identity and often make uncomfortable bedfellows. The older I get, the more I'm willing to risk affirming the reality of an interior life, the one we often suppress to appear sane to our fellow citizens. And since appearing sane is important to a judge, writing poetry for me is a great risk. Poems seek words for the unsayable, so, by definition, are always failures—but meaningful failures. Judges don't like to admit failure, so again, writing poetry is a great risk. Hence, I flinch whenever someone walks into my courtroom and mentions having read one of my poems.

"Even if poems are always failures, however, at their best they can give the reader (and *writer) an experience of fierce interiority that is life-affirming. We all need to*

be assured that joy and sorrow and despair and longing and the appreciation of beauty exist in other people too. This assurance slakes loneliness. So, writing or reading a poem is a way to know you are not alone in the world. As a judge, I put on a robe to create a separation between me and the litigants because the role requires that separation. Poems, on the other hand, are always tearing away at the separations of time and the body.

"Still, there are similarities between writing and judging. Both seek clarity, both love simplicity, and both use words to pursue understanding. Both involve conversations with the great minds of the past. The point of that conversation in judging is to approach what Plato called the Just City. We will never enter completely the Just City, just like Moses never entered the promised land, but taking part in the conversation that pushes us closer is an absorbing and meaningful way to live. The point of the conversation in poetry is to make peace with our mortality. Death, then, is the engine of poetry and the payoff is moments of transcendence. Of course, we will never completely make peace with our mortality, but having the conversation with other people who feel and think deeply is an absorbing and meaningful way to live.

"In the end, writing and judging both require great compassion, so I like to think each can inform the other in the same person. Compassion is, I believe, one of the basic laws of the universe. Although we do not have an equation for it, compassion is as real as gravity or entropy or the space-time continuum. To the extent that poetry and judging give expression to compassion they are giving expression to the same deep reality we can never completely grasp."

Familiarity with literature makes us better writers able to express the rationale for our decisions. Of course, our style is expository. The poet's style is often indirect, creative, and suggestive. As van Rooyen so eloquently states, poetry in all its forms in indefinable ways informs what we do. The absence of literature in our education is a loss, as it is in the loss of words and expressions from our lexicon. Van Rooyen's prize winning poem eloquently makes the point."

"Respair" by Craig van Rooyen

First published in the *Cincinnati Review*, issue 17.1, 2020.

Every six minutes another word is dropped from the lexicon.
Who says there's no use anymore for *woolfell*,
the skin of a sheep still attached to the fleece?
And when did we stop calling tomatoes *love apples*?

I need somewhere in the world for there still to be
A *fishwife* who understands the economy of flesh
grown taut under shimmer-skin laid out in open air.
Call me a sentimental fool, or better yet a *mooncalf*,
but I already miss the ten words that went extinct
in the last hour—before I learned their names
or tried to say something smart to make you love me.
Piepowder, *drysalter*, *slugabed*, forgotten
like the names of the enlisted in the army of Alexander the Great.
And where have they gone? Gathered on shrinking ice
with other victims of our inattention, floating out into a rising sea?
Like the last day my grandfather remembered my mother's name.
So don't mind me in the bathtub on my hands and knees
trying to keep my grandpa's mind, a polar bear,
and the word *poltroon* from spinning down the drain.
It's been left to me to save everything by remembering.
Before the cock crowed, Peter *thrice* denied Christ, and
twenty words marched off into the dark, never to be uttered again.
Fortunately, that night, we retained *dumbass* and *forgiven*,
two words it would be hard to live without these days.
And if I could, I'd turn myself inside out to resurrect
respair, that forgotten Emmaus Road word for
the return of hope after a long period of desolation.

A Diversion

After some reflection on the foregoing, let's shift to a story about an event that occurred on April 25, 2004. Peter Stump was the principal cellist for the Los Angeles Philharmonic. He was such a renowned artist that the Philharmonic loaned him a Stradivarius cello. Stradivarius did not limit his matchless talent to violins. The cello was insured for a mere $3.5 million. Mere? Guess you are aware there are not many around. The Stradivarius cello is priceless. There are only 60 in the world. You expect more? It was 320 years old in 2004. You can do the addition.

On the evening of April 25, Stump was performing in Santa Barbara with a chamber ensemble. He lives in the Silver Lake district of Los Angeles. Stump drove home after the concert. It's a long drive, approximately 95 miles. Maybe the traffic was light in the evening, but we can safely assume Stump arrived home after midnight. And as you shall soon deduce, Stump was extremely tired.

The cello, or in musician's argot, the "Strad" was in a case. And that case was "encased" in another case. Stump set the case against the wall of his front porch in Silver Lake. He opened the front door and sleepily made his way into the house. Oh yes, what about the "Strad"?

It stayed outside on the porch ensconced in two cases. Shall I continue?

Sometime in the middle of the night, while Stump was sleeping (a reasonable assumption), a young person was riding a bicycle in the neighborhood and saw the cello case on Stump's front porch. I will not hazard a guess why someone would be riding a bicycle at such an hour. Let's say, it is not in the record.

The curious lad, or shall we call him "thief," got off his bicycle, ran up to the front porch, grabbed the cello, and peddled off not so gentle into that good night. In his haste to leave the scene, he crashed into something, probably a trash can.

How do I, we, know this? No judge or lawyer should assume facts that are not in the record. I, we, know what happened because a neighbor's security camera caught the entire incident on video with sound. It's in the record. Bet you are dying to know what happened when Peter Stump woke up the next morning. Sorry, it's not in the record… but I, we, can imagine. The feelings in the pit of his stomach or in other parts of his anatomy were probably far more acute than suffering a reversal from the Supreme Court, federal or state.

Stump had to tell the Philharmonic Association of the loss. Hard to keep something like this under wraps. It was front page news in publications across the world. When I read about it, I winced. Can't help it. I felt like it was my fault. It's just me.

A few days later a lady was driving in the Silver Lake area and noticed a cello case in a dumpster. Apparently, she was not a news junkie. She didn't know about the missing cello until a week later. The cello was returned to the Philharmonic in a condition that was reparable, and presumably the lady, who doesn't read the newspaper, received a $50,000 reward.

This story crawled into my brain, settled there, and refused to leave. I found the story so compelling that I included it in the talks on opinion writing I have given over the past two decades.

You may ask, "What does this story have to do with law?" Maybe nothing, but for a moment, let the question linger. How does Stump "actualize," if you will, himself as a musician? He does so through his instrument, the cello. Musicians' instruments are the tools of their trade. How well they use them covers a wide range from phenomenal to not so good. And what are the tools of

the trade for lawyers and judges? Nothing so tangible as a physical instrument.

Our tools are simply words. It's for you, dear reader, to decide if my relating Stump's story held your interest. Please do not feel it necessary to let me know whether I succeeded or failed. Of course, every case involves a story. There may be disputes about parts of the story based on relevance or accuracy. The client relates the story to the lawyer. The lawyer may relate a version of the story to opposing counsel. And we expect accurate and relevant parts of the story to be related to the judge in pleadings, motions, and in trial.

The judge may be called upon to write an opinion, a judgment, a statement of decision, or a variety of other responses. But even a seemingly dull tax case may be told with clarity and concision in pleadings and motions. On second thought, maybe a tax case is a bad example. Explaining statutes makes the writing enterprise all the more challenging. The facts in a reinsurance case may not be as conducive to hold a reader's interest as those in the *Palsgraf* decision (*Palsgraf v. Long Island R. Co.* (1928) 248 N.Y. 339), but they can and should be told with clarity to enhance the reader's comprehension.

Peter Stump expresses himself with notes played and interpreted with his cello. Judges and lawyers' tools are words. How we use them makes all the difference. Musicians listen to music and the interpretation of other musicians which inform their own interpretation. So too does what we read. In an indefinable way, what we read can open our minds and inform our style and manner of thinking and writing. But unlike the poet who writes to understand, we write to be understood. I do not recommend James Joyce's *Finnegans Wake* or even *Ulysses* as a model. We may learn from fiction, but we must write with clarity after a careful analysis of the arguments which we must first view with skepticism.

What lawyers and judges read in statutes, cases, contracts, and briefs requires care with an open mind and a healthy degree of skepticism. Like the musician, who uses notes with care and inflexion to tell a story that resonates with the listener, we must do the same with our words.

What a perfect transition to music and the law. What may have been under wraps in the past is out in the open. There are many lawyers and judges who are musicians. And this takes me back to my personal journey.

I come from a family of musicians. In his early 20s, my father played piano professionally in Chicago. He hung out with the great trumpet player Bix Beiderbecke and Hoagy Carmichael, the composer of "Stardust." For younger readers, I hope I am not making an unwarranted assumption. If

you have never heard of "Stardust," check it out on YouTube. Dad played in a band that backed a vaudeville show that was followed by a movie on the Orpheum Circuit. He also played in a dance band on a boat that sailed around Lake Michigan.

My mother also came from a musical family. My grandfather was reputed to have been the principal flutist with the New York Symphony, which later became the New York Philharmonic. My mother and then my aunt taught me classical music, but I was interested in jazz.

I grew up listening to Art Tatum, Fats Waller, Duke Ellington, Benny Goodman, and Artie Shaw, to name a few. I later marveled at the genius of Charlie Parker, Dizzy Gillespie, Bud Powell, Bill Evans, Herbie Hancock, and dozens of other artists.

Later in life I became close friends with the great clarinetist Artie Shaw who had a friendly rivalry with clarinetist Benny Goodman. I am convinced Shaw was a certifiable genius. The profound lesson he taught me may be summed up in six words: "Good enough is not good enough." Advice to readers: To follow that rule 100 percent of the time will ensure you have a miserable life.

Shaw had a photographic memory. He knew the writings of the Greek and modern philosophers. He not only read the authors of contemporary literature of the mid to late 20th Century but knew many of them. Once he asked me what author I was reading at the time. I replied, *Swann's Way*, the first of Proust's seven novels under the rubric, *A la recherche du temps perdu*, or, if you prefer, *In Search of Lost Time*. Shaw replied, "Ah yes" and began quoting passages from this monumental work. To tackle this work is a marvelous journey for any intrepid reader. Warning for those not familiar with the work: it is written in a stream of consciousness style where sentences go on forever. Wonder if any legislators… never mind. Admission: I barely got through *Swann's Way.* It is challenging and enlightening, but not a model for writing a statement of decision. I am saving the other six novels for when I retire.

When I was around 12 or 13 years old, my Dad took me to hear Art Tatum at Sardi's in Hollywood, not far from where we lived at the time. I had every recording Tatum ever made. Dad urged me to go up to the piano to see the master at work. I nervously made my way among the tables of drinking and smoking patrons to get to the piano. I still see the annoyed look on the large blonde server (that's not what they called them then) with the tray of drinks above her head when I almost walked into her.

I reached the piano and watched Tatum's fingers playing at lightning speed over the keys, with endless improvised variations on the chord changes

of the tune he was playing. It was at that moment I knew I had better go to law school. I still played the piano and studied briefly with the legendary Sam Saxe when I was a senior in high school. The singing group The Four Preps was the rage with classmates of mine at Hollywood High School. The Four Preps made the hit parade with their song, "Twenty-six Miles Across the Sea, Santa Catalina is the Island for Me." The wonderful pianist Lincoln Mayorga, also a close friend, was their pianist. When Lincoln was out of town, I rehearsed The Four Preps for their appearance at the Hollywood Bowl.

My writing career as a columnist began when I was a high school student. I wrote a jazz column for a professionally done slick magazine called the Student Journal. I recall interviewing the legendary jazz great and exponent of the West Coast jazz style, trumpet player Shorty Rogers. At that time, he was playing a Flugelhorn, which I described as a trumpet with a thyroid condition. Being an overeager teenager, I asked Shorty a question. Of course, I do not remember the exact words, but it went something like this: "So Shorty, to what extent are your improvised lines influenced by Stravinsky's rhythmic patterns and polytonality." Shorty looked at me for a moment as though he were contemplating the magnitude of my question, and said, "Hey man, you got a match?"

When I was a freshman at UCLA, I stopped taking lessons. Sam Saxe was disappointed and predicted one day I would wind up in a lawyer's band. How prescient he was.

I played a few gigs in college but did not start playing seriously again until I was in my 40s. In the late 1960s, when I was practicing law, I attended a concert featuring the great sitarist Ravi Shankar and tabla virtuoso Alla Rakha. I was "turned on" (not to be misinterpreted)—how about "blown away"—by the intricate rhythms and micro-tonality of Indian music which could sound "off key" to audiences used to hearing the western tempered scale.

Ravi Shankar wanted to foster an appreciation of Indian music and culture. He opened a music school on the outskirts of Beverly Hills. I signed up to take tabla lessons with the master Alla Rakha. During the day I was a lawyer wearing monogrammed shirts and silk suits. At night I changed into my simple white smock and tried to be comfortable sitting cross-legged before my table drums as Alla Rakha put me and other students through the paces.

One evening after classes were over and most students had left, I stayed with one or two other students to get some extra pointers from Alla Rakha. But who should drop in but violin virtuoso Yehudi Menuhin. Alla Rakha insisted we play for Menuhin. Somehow, we pulled it off. I want to believe that

Menuhin meant it when he said we were wonderful. We had a lively discussion about the differences between western and Indian music. I also spent an hour or so speaking in a similar vein with Geroge Harrison after he joined us during a tabla session. I was taken by how down to earth and human were these two singular artists.

I kept my Indian music life and law separate and tried to keep it a secret from my partners, fellow lawyers, and judges in the local legal community. One evening, as I was trying to work my way through the complex rhythm of a raga, a television crew from PBS came to the school and filmed a half-hour show of Ravi's music school. There I was in the front row. Of course, someone from the bar association saw the show and at the next bar meeting I was "outed."

It now occurs to me that immersing myself in Indian music and the Indian culture was similar to my experience years later as a student at the Judges College, viewing an image of what I thought was an empty room. What a difference it made to my approach to thinking about music by this exposure to another culture's profoundly different music. These experiences open the mind, make it more receptive.

I kept up with my music when I first became a judge and studied harmony and theory with vibraphonist Charlie Shoemake and pianist Terry Trotter. I played an occasional gig, but everything changed when I met Gary Greene. Sam Saxe had a clear crystal ball. I am the pianist with the Big Band of Barristers, a swing band made up of lawyers and a judge now and then. This talented, amiable group of lawyers and I meet regularly at my house where we rehearse for our gigs. We play big band of arrangements, mostly of the past, and some more modern "hip" charts. Many of the musicians earned their livelihood in music before going to law school. There is a limit as to how long a musician can keep playing on the road when the pay is not regular, and the road ahead uncertain.

Gary Greene is a lawyer in Los Angeles. But he is also a violinist and conductor who, like me, grew up in a musical family. His late uncle, Ernst Katz, founded the Jr. Philharmonic Orchestra in 1937, the year I was born. It was there in the delivery room that I sensed music was going to be part of my life and that I would be playing in the Big Band of Barristers. That Gary had not been born yet is beside the point. The Jr. Philharmonic, under the baton Ernst Katz, thrived for decades. Gary succeeded his uncle as conductor of the Jr. Philharmonic and celebrated its 75th Anniversary with a concert at Walt Disney Concert Hall.

As a youngster, Gary joined the orchestra as its concertmaster. He worked closely with his uncle and learned every aspect of running an orchestra. This involves more than conducting the full orchestra, but rehearsing sections of the orchestra, for example, the string section, the brass section, and then putting it all together with the full orchestra.

When music is part of your life, no matter your profession, it stays with you in one form or another. You can still play the piano, guitar, drums, or whatever your instrument when not attending to your profession. Gary the lawyer was no different. But in his case, there is what to ordinary human beings would be an insuperable obstacle. His "instrument" is an orchestra.

In early 2009, Gary let the legal community know that he was forming an orchestra composed (pardon the expression) of musicians who were part of the legal community. This includes lawyers, judges, paralegals, other legal staff, and law students. The announcement read: "Wanted: Legal Musicians"; it was published throughout Los Angeles in bar association bulletins and legal newspapers.

In Gary's words, "more than 100 legal musicians responded to form the Los Angeles Lawyers Philharmonic." With Gary as conductor and 30 legal musicians, the orchestra made its debut on January 30th. The concert was a success and 10 more followed that year.

In their second year, they performed another 10 concerts, including their Walt Disney Concert Hall debut. The Mayor of Los Angeles and City Council proclaimed the LA Lawyers Phil "LA's only legal orchestra." Gary, who does not sleep, trust me, he doesn't. I receive emails from him in the middle of the night while I am sleeping. I read them the next day. I am sure it was in the middle of the night he came up with the idea to form a legal chorus. In 2011, he debuted his chorus Legal Voices at Disney Hall. What did they sing? Something easy for the first performance? How about Beethoven's 9th? It was a stunning performance. By 2012, the orchestra grew to 75 members and the chorus exceeded 100.

The musical fare ranged from Mozart to Duke Ellington. The orchestra was invited to return for its third performance at the Radio and Television News Association's Golden Mike Awards in 2012, but there was only room for 18 musicians. That gave Gary the idea to form a new and musical ensemble, a big band like the swing bands of the 30s and 40s, Glenn Miller, Benny Goodman, Count Basie, and Artie Shaw. Gary again reached out to his colleagues and got together 18 lawyers and judges with jazz and big band backgrounds including some who played with Stan Kenton and Les Brown among other great bands.

I was the piano player. If you think the title "judge" cuts you any slack in an orchestra, band, or combo, forget it. Everyone has to "cut" it. We had our debut concert at the Universal Hilton on January 21, 2012. The enthusiastic reaction of the audience we interpreted as a success. Thereafter we were booked for several other gigs. Within a month we were invited to participate in a nationwide competition of lawyer bands sponsored by the American Bar Association.

The competition was fierce. You know how competitive lawyers are. Out of several hundred bands, we made the finals, along with four other bands to compete in the final round of competition in Chicago. We traveled to Chicago and, because my hotel room did not have a piano, I practiced on the writing table. The competition took place the evening of August 4, 2012, at the prestigious Chicago Art Institute.

We performed in an elegant room where even the parquet floor was an art piece. The sound equipment was first rate including the grand piano I played on. Our three other competitors were a rock band, a singing group, and who remembers the personnel of the other group. Each of the finalists performed in other rooms in the art gallery. The 2,000 in attendance strolled from room to room where they compared and evaluated the five finalists.

I will not keep you in suspense any longer. The Big Band of Barristers won the contest by an overwhelming majority vote. The Big Band of Barristers became America's #1 Legal Band. Soon after, the band released its first CD, "The Chicago Album" featuring some of the classic music from the Golden Era of Big Bands. Numerous concerts followed and kept on coming. The Mayor of Los Angeles and the City Council proclaimed the LA lawyers as "LA's only legal orchestra." The vote was unanimous. How often does that happen? Proves the point that music brings people together, even politicians.

The orchestra and band played in a variety of venues, many for charities at venues like Disney Hall, jazz clubs, and outdoor summer concerts. The orchestra and band backed performers, including Dick Van Dyke, Pat Boone, Florence Henderson, Lanny Kazan, and Carol Channing. The MC for the band was our beloved June Lockhart.

But one of my most memorable experiences was playing a piece written by my dear friend, the past editor of this publication, the phenomenal Selma Moidel Smith, lawyer, editor, composer, to name just a few of her many skills. She composed over 100 compositions, and I had a solo on one of her tangos the Big Band of Barristers performed. Selma was in the audience. Numbers go on for infinity. That may be the number of times I rehearsed the piece. Selma gave me a high five. What a relief!

So, what is the relationship, if any, between playing music and judging? My colleague and good friend Justice Helen Bendix is a highly talented violist. Here is her eloquent view on the subject.

How Being a Musician Has Informed My Work as a Judge —Helen Bendix

"Making music and serving justice are related. Both thrive on beauty of expression. Both serve aesthetic and moral goals that are unique to our species.

"Being on an appellate panel of four is not dissimilar from playing in a string or piano quartet. Both require active listening for what is not explicit, or in musical parlance, 'the rests are as important as the notes.' Both start with a baseline of learning rules. In music, that is reading music and playing in tune, all in the context of changing rhythms and dynamics. For justices, the baseline is knowledge of ever-changing law and procedures to implement the law. The magic, however, happens in the expressive communication among musicians and justices that produces a convincing performance or opinion. A memorable performance or opinion rests on four players learning their respective parts, patiently listening to other members' interpretations, and being open to differing ideas and aesthetic values.

"The same is true in the trial court. A jury trial can be aesthetically beautiful and at the same time, further justice if the participants follow lessons one learns as a musician. Sometimes counsel has the solo, and sometimes only a minor part. At all times, however, counsel must listen attentively to opposing counsel; counsel must perceive what is not said (the rests) and the arguments themselves (the notes and rhythms). Like the sharing of a musical phrase among members of a quartet, counsel responds to the themes being developed during the trial. Counsel must also use all his or her senses to discern how the jury is responding to the performance and to be responsive to the cues counsel is receiving. The trial judge, like a conductor, is responsible for the tempo or tempi of the trial and enforcement of the rules. Absent the judge's active listening and control, the trial would be dissonant and out of step."

Other musicians in the orchestra have expressed similar views. Retired attorney Jerry Levine, who played drums for the band and, let's use a fancy word, "percussionist" for the orchestra was a music major. He thought it was the perfect major for law school. "It taught me to be analytical in reading music, and later, statutes and how to interact with others in interpreting music."

My involvement in the arts continues to make a difference in an ineffable way that enriches my view of life. And this in turn deepens my insight into how I decide cases. Empty rooms are not always what they seem to be.

★ ★ ★

GARY S. GREENE*

Lawyers and Judges in Harmony

By day, we are civil litigators, trial attorneys, deputy district attorneys, criminal defense attorneys, in-house counsel, sole practitioners, partners at large law firms, superior court judges, court of appeal justices, law professors, paralegals, law students and the like. But, by night, we comprise the Los Angeles Lawyers Philharmonic, and the concert stage is our *courtroom*.[1] Our members include conservatory graduates, professional musicians, and some hobbyists who are dusting off instruments they played in their youth. In addition to practicing law and adjudicating, we perform music—from the great classical works to popular Broadway musicals and more – in front of thousands of enthusiastic fans, often at the Walt Disney Concert Hall[2] and many other major venues throughout the Los Angeles area.

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* Gary S. Greene is an attorney for almost a half century, a violinist, and a conductor. He is founder and maestro of the Los Angeles Lawyers Philharmonic and Legal Voices, and the bandleader of his Big Band of Barristers. Earlier, he was concertmaster and conductor of the Jr. Philharmonic Orchestra, the acclaimed young people's symphony founded in 1937 by his late uncle, Maestro Ernst Katz. Greene has led the Los Angeles Lawyers Philharmonic and Legal Voices, and the Jr. Phil, in most major classical works and has conducted popular pieces for legendary performers, including Edward Asner, Jordan Bennett, Debby Boone, Pat Boone, Richard Chamberlain, Carol Channing, Kevin Early, Robert Goulet, Peter Graves, Florence Henderson, Carol Lawrence, June Lockhart, Brock Peters, Stefanie Powers, Debbie Reynolds, Mickey Rooney, Sha Na Na, Dick Van Dyke and Michael York. He was named the 2010 "Person of the Year" by the *Metropolitan News-Enterprise* for not only entertaining the legal community but also for having done much to unify it. He was recognized as, "A Man with a Briefcase and a Baton—the Only Lawyer from Whom Judges Take Direction." In 2012, Greene was presented with the prestigious Board of Governors Award from the Beverly Hills Bar Association. In 2024, the UCLA Alumni Association presented Greene with the 2024 UCLA Community Service Award for "his legacy of sharing his love of music to bring people together and engaging others in giving back." He earned his BA summa cum laude from UCLA, and he was awarded membership in Phi Beta Kappa. He earned his JD from Loyola Law School.

1 "Los Angeles Lawyers Philharmonic, https://lalawyersphil.org. The Los Angeles Lawyers Philharmonic (that encompasses the orchestra, chorus, and big band) is a 501(c)(3) nonprofit corporation. The City and County of Los Angeles proclaimed them to be "LA's Only Legal Orchestra and Chorus." Their repertoire includes major classical works, as well as Broadway and motion picture scores.

2 "Getty Museum Presents, Sculpting Harmony," https://gehry.getty.edu, with narration by architect and designer Frank Gehry and music by the Los Angeles Philharmonic.

Founding a Legal Orchestra

The idea of forming an orchestra composed of lawyers goes back to 2008 when I was introduced to a judge of the Los Angeles County Superior Court who kept his trumpet in chambers. I did not know that about Judge Brett Klein (now retired) when I appeared before him in previous years. But it was during our conversation at an event in the summer of 2008 that we began talking about music. Judge Klein went on to tell me that he knew other judges who are fine musicians such as Aviva Bobb (a violinist) and Helen Bendix (a violinist and violist). And I began thinking about other colleagues in the legal profession who are musicians. So, I immediately thought we could have the makings of a *legal* orchestra. As a musician, I was familiar with the Doctor's Symphony in Los Angeles.[3] So, I thought, "Why not an orchestra composed of lawyers and judges?"

An idea is one thing. Bringing an idea or dream into reality is another. The musicians would need a music library, a rehearsal venue, a concert venue, together with a staff to organize the venture through communication with the legal profession. In the beginning, I was the "staff." Fortunately, I had the background for such a duty. Shortly, I encouraged my daughter, Debra Marisa Greene (now Kaiser), to take on the huge task of executive director. For the past 15 years, she has been the staff, handling communications with the legal newspapers, law firms, bar associations, law schools, scheduling auditions; obtaining music and organizing the library; managing the musicians; producing and promoting concerts; selling tickets and more.

I was brought up in a musical family and played violin with my late uncle, Ernst Katz, and his orchestra. He was a concert pianist, composer, and conductor. He was about to launch his career in music during the 1930s when the world was suffering the dire effects of the Great Depression. People did not have jobs, money, or hope. He told me it became clear the timing was not right for him to begin a professional music career. So, he conceived another idea to use his talents and give young people in his community what they needed: Hope through music. With dedication and perseverance, on January 22, 1937, he formed his orchestra of young musicians. It became the Jr. Philharmonic

[3] "The Los Angeles Doctors Symphony Orchestra is one of the oldest community orchestras in the United States. Founded in 1953 by Dr. Reuben Strauss with 35 doctors, dentists, veterinarians, nurses, and allied health care professionals, it boasted 70 members at the time of its first concert at the Philharmonic Auditorium in downtown Los Angeles in 1954. The orchestra's mission is to offer high-quality, affordable concerts to the diverse communities of Southern California, to support important medical causes, and to provide musical growth and fellowship for its performing members. (LADRSymphony, https://www.youtube.com/@LADRSymphony?app=desktop and see, "OrchestraNovaLA," https://www.youtube.com/@LADRSymphony?app=desktop).

Orchestra of California.[4] He conducted it for 72 years with the motto, "Give Youth A Chance to Be Heard." He never received any remuneration. He mentored thousands of young people, including me. Under his baton were the makings of famous conductors such as Leonard Slatkin and Jorge Mester, and notable musicians, including Flea of the Red Hot Chili Peppers, and many others who became members of orchestras around the world. Other Jr. Phil alumni pursued careers in law, medicine, and other professional fields.

In 1967, I became concertmaster (first violinist) of the Jr. Philharmonic Orchestra and worked with my uncle for many, many years. So, decades later, when I felt the calling to form my *legal* orchestra, I was prepared. While pursuing my legal education. I learned that musical training teaches discipline and a methodology to achieve success and provides a sound foundation for becoming a lawyer.

During December of 2009, I sent announcements to bar associations and the legal newspapers looking for lawyers, judges, law students, and legal staff who were advanced musicians and would like to become members of an orchestra. Within days, I received many emails from interested legal professionals.

While I anticipated that many played instruments in high school, I was shocked to learn there were so many graduates from music conservatories such as Juilliard, New England Conservatory, Berklee College of Music, Cleveland Institute, San Francisco Conservatory, USC Thornton School of Music and UCLA Herb Alpert School of Music, among others.

Nearly 100 musicians auditioned, and I selected 30 from this initial group of legal professionals to form the Los Angeles Lawyers Philharmonic for its debut.

We owe a great deal to Roger and Jo-Ann Grace of the *Metropolitan News-Enterprise* for obtaining our initial rehearsal space and for the opportunity to make the Los Angeles Lawyers Philharmonic's musical debut at the *Met News* Person of the Year Dinner at the Jonathan Club in Los Angeles on January 30, 2009. We surprised the bench and bar with our performance. That evening, we received requests to play for the Los Angeles County Bar Association and the Los Angeles Law Library.

Tony Award winning and Emmy nominated actress, June Lockhart, is a good friend of mine and loved our legal musicians. She attended nearly all of our performances and most of our rehearsals for many years. In 2015, the LA Lawyers Phil created the June Lockhart Humanitarian Award (the "Junie") and made the initial presentation of the award to June Lockhart on June 13, 2015

[4] "Jr. Philharmonic Orchestra of California," http://jrphil.atspace.com.

at Walt Disney Concert Hall. Since then, recipients of the "Junie" included composer/song-writer Richard Sherman, actor Edward Asner, attorney/composer Selma Moidel Smith, actor Hal Linden and our executive director, Debra Marisa Greene Kaiser.

When I announced that I was forming an orchestra for members of the legal profession, one of the first individuals to contact me was Selma Moidel Smith.[5] She told me about her background as an attorney and a composer, and she expressed her enthusiasm for my new venture. She shared her music with me, and soon we performed it to capacity audiences at Walt Disney Concert Hall in Los Angeles. For her 95th birthday, we performed a concert in her honor. It was attended by many attorneys as well as members of the supreme court, court of appeal and superior court. She and I became good friends. She attended many of our concerts. On June 29, 2019, I presented Selma with the June Lockhart Humanitarian Award (the "Junie") at the Los Angeles Lawyers Philharmonic's 10th Anniversary at Disney Concert Hall. The orchestra performed one of her works, the "Beguine" from her composition, *Espressivo*.

It was my hope to bring the legal community together in harmony. I was fortunate to have a gift for music and a very special and gifted uncle, Ernst Katz.[6] Many years ago, I learned that music is not only a universal language that expands our communication skills, but it is also relaxing in stressful times and reinvigorating as we return to our day jobs.

A Chorus is Born

About two years after I formed the Los Angeles Lawyers Philharmonic, I received numerous complimentary emails from attorneys and judges impressed with the advent of a legal orchestra in Los Angeles. However, while many said they would like to be part of such a legal musical organization, they did not play an instrument; they were singers. So, in January of 2011, I sent word to bar associations and legal newspapers that I was forming a chorus for lawyers, judges, law students, and legal staff. I received responses from nearly 200

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[5] Smith was editor-in-chief of *California Legal History* for 13 years, from 2009 through 2022. She was admitted to the State Bar of California in 1943, number 18,051. Compare her Bar number with your Bar number. She is a lawyer, composer, and music educator, https://www.selmamoidelsmith.net. The year before Smith was admitted to the Bar, Annette Abbott Adams was appointed by Governor Culbert Olson to be presiding justice, Court of Appeal, Third Appellate District, the first woman to serve on the Court of Appeal, and the first woman to sit, albeit temporarily, on the California Supreme Court, https://thehill.com/100-women-who-have-helped-shape-america/517912-annette-adams.

[6] "He was like a musical Mother Teresa," said entertainer Pat Boone, who performed at several concerts. "He had that kind of passion and personality to completely sacrifice his other interests to enrich and nurture the lives of young people through music." (Elaine Woo, "Ernst Katz dies at 95; founder and conductor of Jr. Philharmonic Orchestra," *Los Angeles Times* (August 16, 2009), https://www.latimes.com/local/obituaries/la-me-ernst-katz16-2009aug16-story.html).

singers. Auditions were held at Southwestern Law School where a chorus of 100 was assembled to begin rehearsals on April 30, 2011. Officially named, "Legal Voices of the Los Angeles Lawyers Philharmonic," we had our chorus.

An ambitious goal for the chorus was to make its debut at Walt Disney Concert Hall, performing Beethoven's *9th Symphony*. Los Angeles Superior Court Judge Rolf M. Treu (now retired) not only joined the chorus but worked with its members on the proper German pronunciation of Friedrich Schiller's poem, "Ode an die Freude," for the final movement of Beethoven's *9th Symphony*. Rehearsals were focused and intense. On July 30, 2011, I was privileged to lead the orchestra and chorus in a triumphant performance of the final movement of Beethoven's epic symphony. We received a standing ovation from the capacity house. Since then, the chorus has performed major works annually at Disney Concert Hall with the Los Angeles Lawyers Philharmonic, including Carl Orff's *Carmina Burana*; Beethoven's *Choral Fanta*sy; Mozart, Brahms, Fauré, and Rutter *Requiems;* Bernstein's *Chichester Psalms*; and countless opera, Broadway, and motion picture scores.

In the fall of 2012, I appointed Jim Raycroft, then a 30-year member of the Los Angeles Master Chorale,[7] to serve as Legal Voices' third Choral Director. The chorus harmonizes with voices that are more commonly heard in courtrooms than on the concert stage.

Worldwide Recognition

The word was out. The Los Angeles Lawyers Philharmonic was not merely a group of amateurs; they were real musicians who could perform on the level of major professional orchestras. The Associated Press picked up on our unique orchestra and ran an article covered by newspapers around the world. The *New York Times* wrote its headline: "To Get to This Orchestra? Law Practice, Law Practice." [8]

Australia Supreme Court Justice George Palmer read about the Los Angeles Lawyers Philharmonic in Sydney, Australia. He is an accomplished composer, having his works performed by the London Symphony and other orchestras around the world. Justice Palmer sent the orchestra one of his compositions, *Ruritanian Dances,* and flew to Los Angeles for our orchestra's performance at Walt Disney Concert Hall. On July 30, 2011, Palmer was honored on stage by the then-Los Angeles County Superior Court Presiding Judge Lee Edmon.

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7 "Los Angeles Master Chorale," https://lamasterchorale.org.

8 "To Get to This Orchestra? Law Practice, Law Practice," *New York Times* (December 31, 2009), https://www.nytimes.com/2010/01/01/arts/music/01orchestra.html.

The then-sitting president of the Republic of Croatia, Ivo Josipović, an attorney and composer, also read about the Los Angeles Lawyers Philharmonic. He told me of his desire to have our orchestra perform one of his works. On July 21, 2012, we performed his, *Pater Perotinum Millennium Celebrat,* at Walt Disney Concert Hall. President Josipović wrote: "I was pleasantly surprised listening to the recordings of your orchestra of judges, lawyers, civil servants, and professional musicians. I must admit that Croatian law experts are not so good in music and have not yet established an orchestra similar to yours."

In 2012, a lawyer, Karen DeCrow, began her article in the New York State Bar Association's monthly magazine this way: "Los Angeles is home to the Lawyers' Philharmonic. Gary S. Greene maestro. Greene has brought surprising harmony out of his herd of jurist trumpeters, litigator cellists, law clerk vocalists, and brought us an evening of enjoyment,' wrote Mark Haefele in his review of a performance by the orchestra."[9]

A Big Band Is Formed

The LA Lawyers Phil was selected to perform at the annual Golden Mike Awards Ceremony hosted by the Radio & Television News Association (RTNA) of Southern California in 2011. The orchestra also performed there in 2012. But, in 2013, I was told there would not be enough space for the orchestra. They wanted a smaller group of about 18 musicians. Rather than reduce the size of the orchestra, I created an 18-piece big band like the popular bands of the 1930s and 40s. I did so by reaching out to legal professionals seeking jazz musicians to form Gary Greene, Esq. & His Big Band of Barristers.[10] The Big Band made its debut on January 19, 2013, at the Golden Mike Awards attended by several hundred news reporters, news anchors, and news directors, as well as television and radio station staff.

Our Musical Groups Are Philanthropic

During the 15 years of their existence, the musical groups have raised tens of thousands of dollars 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, The Salvation Army, Shriners Hospitals for Children, The Thalians, UCLA

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[9] Karen DeCrow, "Trials in Opera, The Portrayal of Lawyers and the Legal Profession," *NYSBA Journal*, 38 (October 2012), https://nysba.org/app/uploads/2020/04/October12_WEB.pdf.

[10] Former Presiding Justice Robert K. Puglia, Third Appellate District, grew up with the Big Bands in the 1940s. He was a lifetime fan of Big Band music and a world-class collector of recordings of that genre of music all his life. To appreciate him and his work as a jurist, see George Nicholson, "Introduction," 2024 issue, "Justice Puglia's passin,'" *supra*.

Center for Autism Research/Treatment and Ascencia (which raises funds for the homeless).

In 2023, the orchestra performed a Concert of Hope in which the musicians played violins recovered from the Holocaust to celebrate the triumph of the human spirit. The concert raised funds for both the Violins of Hope project[11] and the City of Hope, one of the nation's leading comprehensive cancer centers. Music always prevails!

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's 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, DC.

In 2017, two orchestras were awarded Gold Medals for their international broadcast performances by the New York International Radio Program Competition: the New York Philharmonic and the Los Angeles Lawyers Philharmonic. The Los Angeles Lawyers Philharmonic won the Gold Medal for its recording of Bernard Herrmann's score in the remake of Norman Corwin's iconic broadcast of, "We Hold These Truths," commemorating the 225th Anniversary of the Bill of Rights and the Constitution of the United States of America.

Lawyers and Doctors in Harmony

I was determined to bring two professions, law and medicine, together through music. So, I invited the Los Angeles Doctor's Symphony to join forces with the Los Angeles Lawyers Philharmonic to perform a joint concert and raise funds for legal and medical charitable organizations. On December 8, 2019, the two orchestras shared the stage at the Wilshire Ebell Theater. Maestro Greene, Esq., and Maestro Ivan Shulman, M.D., each conducted the combined orchestra for half the concert. When they played music, there was harmony among lawyers and doctors.

It was a very memorable evening. Bringing our two professions together in rehearsals and on the concert stage was a heartwarming experience for everyone involved. The audience roared its approval.

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[11] "'Violins of Hope' is a project of concerts based on a private collection of violins, violas and cellos, all collected since the end of World War 2. Many of the instruments belonged to Jews before and during the war. Many were donated by or bought from survivors; some arrived through family members and many simply carry Stars of David as decoration." Violins of Hope, https://www.violins-of-hope.com.

Music During the Pandemic

During the COVID pandemic, members of the LA Lawyers Phil and Legal Voices made two virtual recordings. The first was part of the Violins of Hope project. We played and sung a Holocaust remembrance piece titled, *Schlof Main Kind*. It has been viewed by thousands globally. The second was a gift for Music Mends Minds,[12] a music support group for those suffering from neurocognitive disorders such as Alzheimer's, dementia and Parkinson's Disease. The piece we recorded virtually was *The Music Mile.* It became the theme song for Music Mends Minds. It was written by Broadway composer Larry Hochman and Nick Stephens with lyrics by Megan Petersen.

On June 12, 2021, when in-person rehearsals were not possible due to the pandemic, Legal Voices Choral Director Jim Raycroft and I conducted a Choral Car Concert. Members of the chorus were singing a cappella through microphones from inside their vehicles parked in a lot in Los Angeles. This unique performance was recorded and can be seen on YouTube.[13]

The Lawyers Harmonize with Celebrities

Many celebrities have performed with the Los Angeles Lawyers Philharmonic including Paul Anka, Ed Asner, Pat Boone, Richard Chamberlain, Michele Greene, Bill Handel, Florence Henderson, Carol Lawrence, Hal Linden, June Lockhart, Alan Rachins, Dick Van Dyke, Betty White and Michael York. Composers Richard M. Sherman and Charles Fox have conducted the LA Lawyers Phil in their Oscar, Emmy, and Grammy winning compositions and became honorary members.

Officials and California Supreme Court Justices Participate

Chief Justice Tani Cantil-Sakauye was a guest conductor of the Los Angeles Lawyers Philharmonic on January 27, 2012. Former California Governor George Deukmejian, on January 27, 2012, and the then-Los Angeles Mayor Antonio Villaraigosa, on September 24, 2009, also conducted the orchestra. Many members of the California Supreme Court attended our performances, including former Chief Justice Ronald M. George, Justices Carol A. Corrigan, Martin J. Jenkins, Goodwin H. Liu, Ming W. Chin (now ret.), Carlos Moreno, (now ret.) and Kathryn M. Werdegar (now ret.).

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[12] Welcome To Music Mends Minds, https://www.musicmendsminds.org. "Music Mends Minds is a nonprofit that strives to foster worldwide communities among afflicted individuals and their families, friends, volunteers, and caregivers, all of whom can thrive on socialization and music-making."

[13] "Ave Maria" is one of the songs performed during Los Angeles Lawyers Phil's Choral Car Concert on June 12, 2021https://www.youtube.com/watch?v=81ACg3DyJBo.

We are all volunteers. To this day, every musician who has performed with the Los Angeles Lawyers Philharmonic, Legal Voices, and Gary Greene, Esq. & His Big Band of Barristers, do so because he or she loves music. The mission of the LA Lawyers Phil, Legal Voices, and my Big Band of Barristers is 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 our concerts.

If you are a musician and either a lawyer, judge, law student or legal staff person, audition for our orchestra, chorus, or big band. If you enjoy hearing marvelous music, attend our concerts. Help us bring the legal community together in harmony. It'll make the world a better place. Visit www.LALawyersPhil.org.

Maestro Greene leading the Los Angeles Lawyers Philharmonic during a performance at Walt Disney Concert Hall (circa 2010). Published with permission of the Los Angeles Lawyers Philharmonic; photo by Steven Eichner.

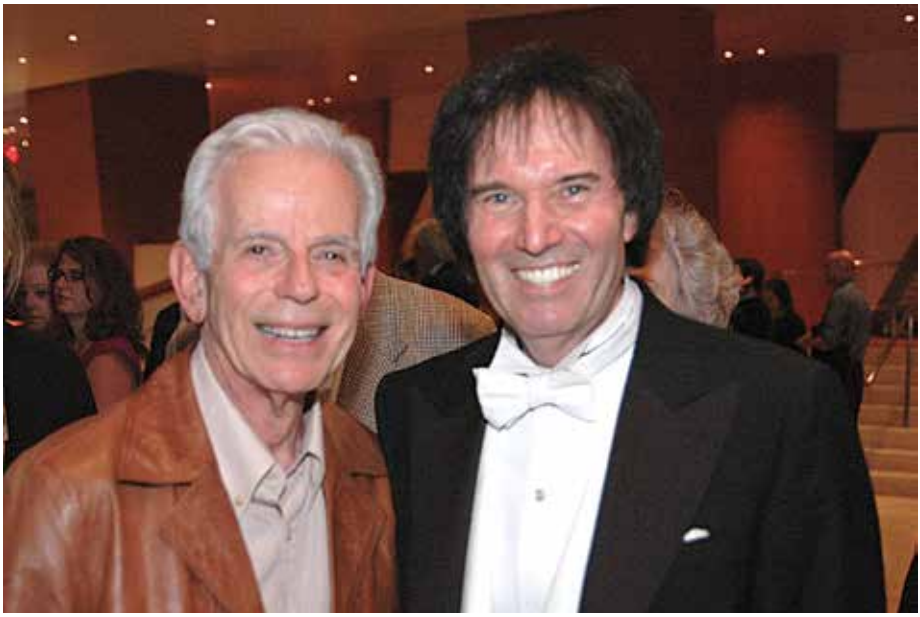
Former Governor George Deukmejian leading the LA Philharmonic on January 27, 2012. Published with permission of the Los Angeles Lawyers Philharmonic; photo by Michael Kohan.

Los Angeles Mayor Antonio Villaraigosa leading the orchestra on September 24, 2009. Published with permission of the Los Angeles Lawyers Philharmonic; photo by Michael Kohan.

Chief Justice Tani G. Cantil Sakauye conducts the Los Angeles Lawyers Philharmonic in concert at the Jonathan Club in Los Angeles to a standing room only audience on January 27, 2012. Published with permission of the Los Angeles Lawyers Philharmonic; photographer: Michael Kohan.

Robert Hirschman, Esq., bass; Justice Arthur Gilbert, piano; Barbara Gilbert, singer; Joseph Di Giulio, Esq., alto saxophone; July 30, 2011, LA Lawyers Philharmonic's 2nd Anniversary at Walt Disney Concert Hall. Published with permission of the Los Angeles Lawyers Philharmonic. Photographer: Michael Kohan

Presiding Justice Arthur Gilbert, Gary S. Greene, Esq., Chief Justice Tani G. Cantil Sakauye (ret.), Justice Ming Chin and LA Superior Court Presiding Judge Kevin Brazile at the Italian American Lawyers Association annual Supreme Court Night. December 7, 2017. Photographer: Michael Kohan



Justice Gilbert and Maestro Green, July 15, 2010, Walt Disney Concert Hall, Los Angeles. Published with permission of the Los Angeles Lawyers Philharmonic. Photographer: Michael Kohan

Maestro Gary S. Greene, Esq., violinist and Judge Aviva Bobb (ret.), Los Angeles Superior Court; Chief Justice Ronald George (ret.), then Presiding Judge of the LA County Superior Court; and now Appellate Justice Lee Edmon, violist, and then Los Angeles Superior Court Judge and now Appellate Justice Helen Bendix, December 7, 2010. Published with permission of the Los Angeles Lawyers Philharmonic; photographer: Michael Kohan.

Gary S. Greene, Esq., Justice Kathryn Werdegar (ret.), Selma Moidel Smith, Esq., December 1, 2015, Casa Italiana. Published with permission of the Los Angeles Lawyers Philharmonic; photographer, Michael Kohan.

Supreme Court Justice Carlos Moreno (ret.) and Maestro Greene, Esq. at the Italian American Lawyers Association annual Supreme Court Night, December 7, 2010. Published with permission of the Los Angeles Lawyers Philharmonic; photographer: Michael Kohan.

Maestro Greene and Selma Moidel Smith, June 29, 2019, Walt Disney Concert Hall, Los Angeles. Published with permission of the Los Angeles Lawyers Philharmonic, Photographer: Michael Kohan

The Los Angeles Lawyers Philharmonic and Legal Voices accepting applause during a performance at Walt Disney Concert Hall on July 30, 2011. Justice Arthur and Barbara Gilbert (lower left; she in off-red) and the combo are pictured next to the piano. Published with permission of the Los Angeles Lawyers Philharmonic; photo by Bob Young.

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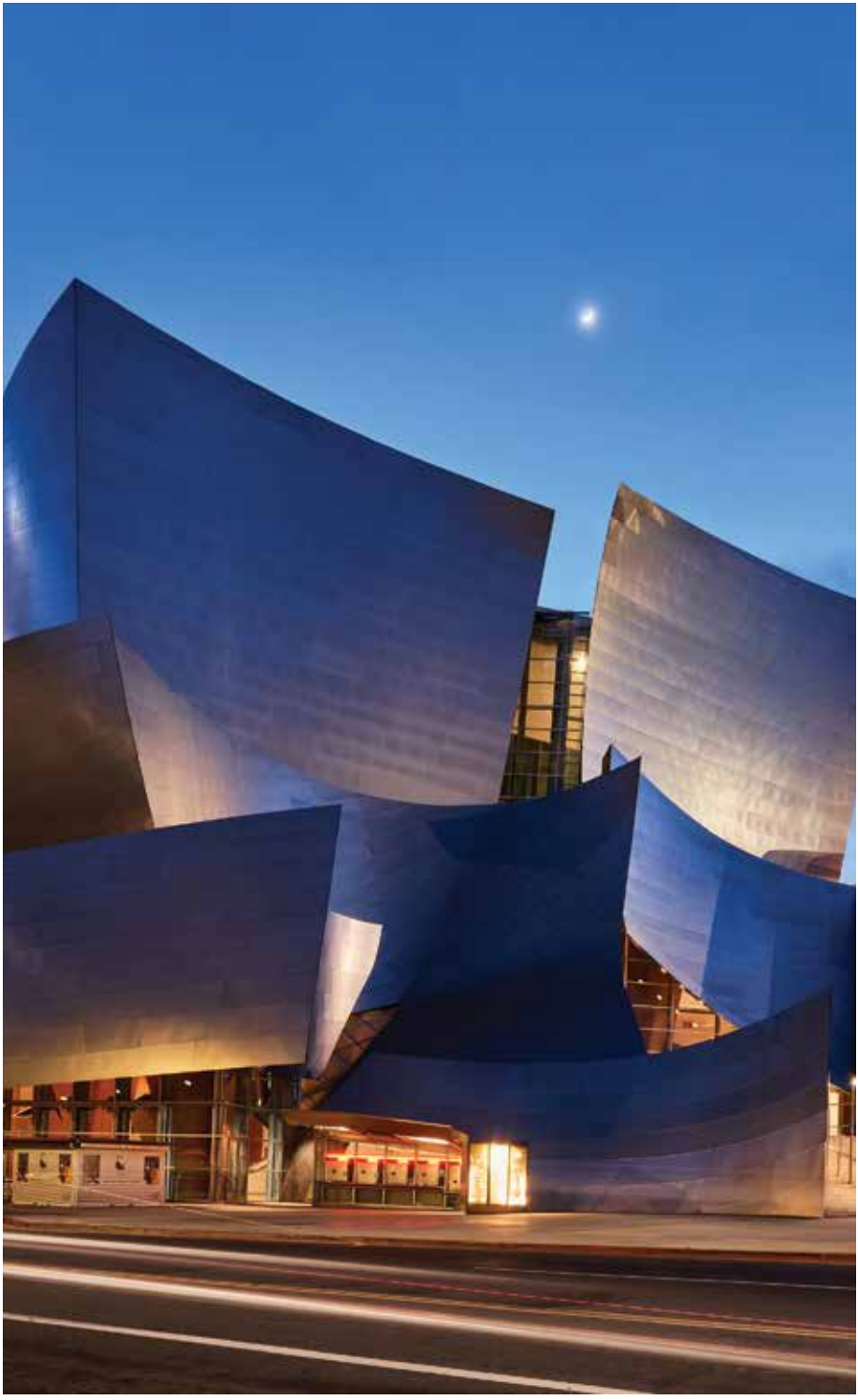

Building an Icon:

The Making of Walt Disney Concert Hall

Walt Disney Concert Hall captured the eyes and ears of the world from the moment it opened, radically reshaping the cultural landscape of Los Angeles. Lillian B. Disney, in honor of her late husband Walt Disney, donated $50 million to the Music Center for a new concert hall. The Disney family had a long-standing association with the Music Center, and the donation was a reflection of her husband's love of music, a love he had shared with the world in his collaboration with conductor Leopold Stokowski to combine classical music with animation in the 1940 film Fantasia.

It took 16 years from Lillian B. Disney's initial gift in 1987 to the time Walt Disney Concert Hall was ready for the public. When it finally opened in October 2003, it was recognized as an architectural masterpiece and acoustical marvel, forever changing the musical landscape of Los Angeles.

Architect Frank Gehry envisioned a place in which people would come together and feel comfortable doing so—an iconic destination with which people would identify and think of as their own. He wanted to create 'a living room for the city' where music would be accessible to great numbers of people.

The building of Walt Disney Concert Hall became ever more complicated, and the decision-making turned cumbersome and lengthy. A complex mesh of political, planning, management, and bidding problems led to a shutdown of the project in 1994. But in 1996, through press articles, key events, professional support, and a fund-raising campaign, Walt Disney Concert Hall began to show signs of life. When it at last opened in October 2003, this architectural masterpiece and acoustical marvel forever changed the musical landscape of Los Angeles.

JOHN S. CARAGOZIAN*

Erle Stanley Gardner:

*America's Best-Selling Author and a California Lawyer***

When Erle Stanley Gardner died in 1970, he was twentieth-century America's best-selling author, with over one hundred mystery novels published and over 300 million books sold worldwide.[1] Gardner's most famous character is criminal defense attorney Perry Mason, who was featured in eighty-two novels and also in movies, radio shows, and a long-running television series. Less known is that Gardner was a successful Ventura County, California trial lawyer with a strong record of representing minorities and the poor.

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* John S. Caragozian serves on the California Supreme Court Historical Society board of directors. He often speaks to judges' and lawyers' groups about California history. He also has written articles on constitutional, privacy, and governmental subjects in the *Northeastern University Law Review, Loyola of Los Angeles Law Review*, and *Los Angeles Lawyer.* He chairs the Bollens/Ries/Hoffenberg annual lecture at UCLA and formerly chaired the executive committee of the National Council of Farmer Cooperatives law, tax, and accounting committee. Until retiring in 2021, he was vice president and general counsel of Sunkist Growers, Inc. Prior to joining Sunkist, Mr. Caragozian was in private practice in Washington, D.C. and Los Angeles. He began his legal career as a trial attorney in the U.S. Department of Justice in Washington, D.C. While in private practice, Mr. Caragozian was an adjunct professor at Loyola Law School, where—with one of his law partners—he created and taught a California legal history course from 2006 through 2011. In addition, he cofounded the 2010 Loyola Law School symposium, "Rebooting California—Initiatives, Conventions, and Government Reform." Before becoming a lawyer, he worked on the staff of Los Angeles City Council Representative Edmund Edelman. Upon Mr. Edelman's election as County Supervisor, Mr. Caragozian moved to Mr. Edelman's supervisor staff. Caragozian received his B.A. from UCLA and J.D. from Harvard.

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[1] E.g., Krebs, *The Fiction Factory*, N. Y. Times (Mar. 12, 1970) p. 1, col. 1; Hughes, The Case of the Real Perry Mason (1978) p. 14; *Erle Stanley Gardner: American Author*, Britannica, at https://www.britannica.com/biography/Erle-Stanley-Gardner (as of Jul 7, 2024). See also *Erle Stanley Gardner, Author of Perry Mason Stories, Dies*, L. A. Times (Mar. 12, 1970) p. 1, col. 1 (referring to Gardner as "the world's best-selling author").

1. Early Years

Gardner was born in 1889 in Massachusetts. He and his family moved to Oroville, California, where he began high school and joined a boxing group. He was suspended and then expelled from Oroville High School after being accused of repeated pranks. In 1908, Gardner, without his family, moved to Palo Alto, California, where he resumed high school and worked in a law office, typing papers. He graduated from Palo Alto High School in 1909. Later that year, Gardner moved to Willows (north of Sacramento), California, where he worked as a typist for $20 per month and read law.[2]

Gardner then attended Valparaiso University law school in Indiana. While there, he supported himself financially, at least in part, by playing poker.[3] Gardner's law school time was brief: He left after one semester. Apparently, his departure related to his resumption of boxing, which the school barred. Gardner organized training and sparring with classmates and may have been accused of criminal conspiracy. Gardner himself told another version: "I was kicked out for slugging a professor." Separately, Gardner witnessed alleged minor criminal activity by classmates, but did not want to have to disclose their names to law enforcement. To avoid being arrested or questioned, Gardner left Indiana.[4]

Gardner next moved to Santa Ana, California and read law in the office of E. E. Keech, an expert water rights lawyer. Gardner, 21, was admitted to the State Bar in 1911 and moved to Merced, which, Gardner believed, was destined to grow. He "hung out his shingle" as a sole practitioner, but, as Gardner later acknowledged, he had no idea how to build a law practice.[5] Further, Gardner tired of the San Joaquin Valley's unrelenting summer heat during the days before air conditioning.[6]

2. Oxnard

A friend told Gardner about Oxnard, California, a Ventura County town with nearby beaches.[7] Oxnard had been incorporated for less than a decade and had a population of 2,600. The area was heavily agricultural, the main crop being sugar beets grown on the Oxnard plain. During these horse-and-

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2 See Hughes, *supra* note 1, p. 46.

3 See Senate, Erle Stanley Gardner's Ventura: Birthplace of Perry Mason (1996) p. 11.

4 See Hughes, *supra* note 1, at pp. 47–48; Krebs, *supra* note 1, at p. 82, col. 2.

5 See Hughes, *supra* note 1, at pp. 49–52.

6 See *id.*, at p. 50. Sorry, Merced.

7 See Hughes, *supra* note 1, at p. 50.

buggy years, the town was vice-ridden, with open gambling, prostitution, and violence. As Gardner recalled, "I fit right into Oxnard."[8]

Oxnard also provided opportunity for a young lawyer. It offered the prospect of growth with the discovery of oil, continued agriculture, and the development of an adjacent commercial harbor. And it had only two lawyers in the whole town. Gardner moved there in 1911. He affiliated with veteran corporate lawyer I. W. Stewart and took the office's smaller cases.[9] As Gardner wrote to his father, "I have built a law practice in which I am dealing with . . . clients of all classes—except the upper and middle class."[10] Gardner, in his own words, defended "vagrants, peeping Toms and chicken thieves as if they were great statesmen."[11]

Gardner's first high-profile case grew out of his ongoing representation of individuals and small businesses in Oxnard's "prosperous teeming" Chinatown.[12] One of Oxnard's open vices was Chinatown's illegal lottery. City officials had turned a blind eye to the lottery, provided that it stayed in Chinatown. However, the city became indebted, and a crack-down could generate needed revenue in the form of fines, apparently projected at $100 to $150 from each convicted lottery ticket seller.[13]

Gardner learned that arrest warrants had been issued for twenty Chinatown shopkeepers who sold lottery tickets. Unfortunately for Gardner and his clients, the lottery was plainly illegal under state and municipal law. Late the night before the warrants were to be served, Gardner concocted a solution. Working with Chinatown's leader, Gardner arranged for the twenty shopkeepers to switch locations with each other, such that, for instance, the butcher was at the laundry, the druggist was at the grocery store, and so forth. The Oxnard police failed to recognize the switches and arrested individuals not named on the corresponding warrants. The court therefore dismissed the cases.[14]

The police reacted with a new warrant against one individual lottery ticket seller whom they knew, Soo Hoo Yow. Gardner defended Soo at trial, and the jury hung. On re-trial, however, Soo was convicted of violating Oxnard's anti-lottery ordinance. Gardner successfully appealed the conviction on the

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8 *Id.*, at pp. 52–53; Senate, *supra* note 3, at p. 8.

9 See Hughes, *supra* note 1, at pp. 52–53.

10 Gardner, The Court of Last Resort (1952) p. 4.

11 *Case Closed* (Mar. 23, 1970), Time, at p. 85.

12 Hughes, *supra* note 1, at pp. 52–53.

13 See Senate, *supra* note 3, at p. 59; Hughes, *supra* note 1, at pp. 52–53.

14 See Senate, *supra* note 3, at p. 60.

ground that the ordinance differed from the state's anti-lottery provisions and was thus void.[15]

Gardner worried that (a) Oxnard would cure the defect in its municipal ordinance by amending it to conform to state law, (b) Oxnard police, seeking vengeance, would re-arrest Soo, and (c) Soo would be convicted under the amended ordinance and have the book thrown at him by being sentenced to jail.

To forestall a jail sentence, Gardner concocted another solution. Gardner hid Soo in his (Gardner's) car and drove to Ventura County's seat, the City of Ventura.[16] There, Gardner and Soo appeared in the county courthouse, and Gardner himself swore out a complaint against Soo for illegal lottery ticket sales in Oxnard. Soo immediately pled guilty, and a Ventura County judge fined Soo a nominal $15 without any jail time. When Gardner and Soo returned to Oxnard, the police—as Gardner had foreseen—arrested Soo, but Gardner had the charges dismissed on double-jeopardy grounds, Soo already having been convicted of and punished for the Oxnard offense.[17] With his handling of the lottery matters, Gardner earned long-lasting respect from Oxnard's Chinese community and was dubbed "Tai Chong Tzee" (or "the great counselor").[18]

In the early 1910s, Gardner began to make a more general name for himself as a trial lawyer in Oxnard, becoming "a local celebrity as a defender of the underdog."[19] He had special sympathy "for the penniless and the friendless" and for "those he considered unjustly accused."[20] In 1915, Gardner entered into a partnership with another young and leading Oxnard lawyer, Frank Orr. The two men had complementary skills, with Orr being a conservative, knowledgeable corporate lawyer and Gardner being a flamboyant litigator who "won all his trials."[21]

The Orr & Gardner practice grew, but, in 1917, Gardner became convinced that he could earn more as a salesman. He moved to Oakland to take a sales job with an automobile tire and accessories company. The company flourished during World War I's boom, and Gardner's territory was the entire western

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15 See *id*., at pp. 60–61. Cf. *Ex Parte Solomon* (1891), 91 Cal. 440 (voiding a San Francisco local ordinance that punished illegal lottery ticket possession with a fine of up to $1,000, when the California Penal Code provided for a fine of only up to $500).

16 Officially, the city's name is San Buenaventura. This article will comport with common usage and use the name Ventura.

17 Senate, *supra* note 3, at pp. 61–62. See also Hughes, *supra* note 1, at pp. 55–56.

18 See Hughes, *supra* note 1, at p. 62.

19 Krebs, *supra* note 1, at p. 82, col. 2.

20 *Id.*

21 See Hughes, *supra* note 1, at pp. 61–63; Krebs, *supra* note 1, at p. 82, col. 2.

U.S. After the war, however, the company's factory burned down, and the nation suffered from a post-war recession. The company failed.[22]

3. Ventura

In 1921, Gardner—broke after the automobile tire company's failure—moved back to Ventura County. To his surprise, Gardner received a letter that he had $200 (almost $3,600 today) in an account at Ventura's First National Bank. Gardner withdrew half of this balance to rent a house. When Gardner returned to the bank to make another withdrawal, the balance was still $200. Gardner eventually learned that an anonymous Chinese man—perhaps in gratitude for Gardner's Chinatown work during the previous decade—had opened the account in Gardner's name and arranged to make further deposits to keep the balance from falling below $200.[23]

Gardner resumed practicing law with Orr, this time in the City of Ventura. Through the 1920s, the Orr & Gardner firm grew and became Sheridan, Orr, Drapeau & Gardner. The new partners were Louis Drapeau, a former newspaper reporter and later a California District Court of Appeal Justice; and Robert Sheridan, formerly with the Ventura County District Attorney's office.[24] Gardner himself represented a mix of individuals and businesses in trials and appeals[25] and earned $20,000 annually (approximately $350,000 today).[26] The firm moved into downtown Ventura's First National Bank building, which was built in 1926. The building boasted four floors and the county's first elevator.[27]

In courtrooms, Gardner never aimed for "the dapper slick-lawyer look." Instead. as one of Gardner's former law partners recalled, Gardner related to jurors by dressing "as ordinary as themselves."[28] Gardner did distinguish himself with his around-the-clock trial preparation. Also, Gardner was especially skilled at cross-examination, often discrediting adverse witnesses by leading them into telling obvious lies or by confusing them.[29]

Gardner's courtroom tactics were creative and unconventional. In a 1926 trial, he represented a defendant in a civil slander suit. The plaintiff claimed

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[22] Hughes, *supra* note 1, at pp. 64–65.

[23] See *id.*, at pp. 62, 65.

[24] *Id.*, at p. 66.

[25] See, e.g., *Crane v. Reardon* (1933), 217 Cal. 531 (Gardner unsuccessfully represented an appellant in civil litigation involving technical deed and gift issues.).

[26] Hughes, *supra* note 1, at pp. 64–65.

[27] See *id.*, at p. 90; Senate, *supra* note 3, at p. 17.

[28] See Krebs, *supra* note 1, at p. 82, cols. 2–3.

[29] See *id.*

that the defendant had falsely accused her (the plaintiff) of being unfaithful to her husband and that these accusations had damaged her nervous system. The plaintiff prayed for a then-astronomical $250,000. Just as Gardner was about to cross-examine plaintiff, an earthquake rocked the courthouse, and everyone—counsel, jurors, and spectators—jumped, ran, or ducked. Everyone, that is, except the plaintiff, who remained composed and then answered Gardner's questions with equanimity. Gardner quickly incorporated the plaintiff's reaction (or lack of reaction) into his closing: Gardner argued that plaintiff could hardly claim damage to her nervous system when, during the earthquake, she exhibited "such wonderful calmness and poise." The jury deliberated for eleven minutes before delivering a defense verdict.[30]

In a criminal trial, Ventura County District Attorney Don Bowker waived his opening statement. Defense counsel Gardner then delivered his own opening, consisting mostly of what Bowker "would have said," and Gardner even mimicked Bowker's voice and manner. Bowker's composure suffered from Gardner's unconventional tactic, and the jury acquitted Gardner's client.[31]

Throughout his years of practice, Gardner continued to represent poor and minority clients. For example, one day he happened to be in a courtroom during a murder prosecution of Joseph Sandoval. Gardner was "much moved with sympathy for [Sandoval's] unfortunate plight" and believed that Sandoval had not received "full benefit of … rights and privileges." Gardner successfully moved to be an amicus, though he was unsuccessful in persuading the California Supreme Court to overturn the death sentence.[32]

4. Professional Writer

While practicing law full-time, Gardner also began writing fiction. At first, he wrote short stories and submitted them under various pennames to "pulp" magazines (named for the cheap, rough newsprint on which they were printed). Initially, all his stories were rejected, but Gardner persisted, sometimes writing and re-writing late into the night, even during jury trials. His typing was so long and frenzied that sometimes his fingers were rubbed raw and bled.[33]

In 1921, Gardner sold his first story to a pulp and received $10. He continued simultaneously to practice law and write fiction and soon was frequently

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30 See Senate, *supra* note 3, at p. 29.

31 See *id.*, at pp. 29–30. Some people have speculated whether Bowker was a model for fictional District Attorney Hamilton Burger, Perry Mason's opposing counsel in Gardner's novels and the television series. See *id.*, at p. 29.

32 *People v. Sandoval* (1927), 200 Cal. 730, 732–33, 736–37.

33 See Hughes, *supra* note 1, at pp. 58–59; Krebs, *supra* note 1, at p. 82, col. 3. See also L.A. Times, *supra* note 1, at p. 20, col. 2 (". . . Gardner threw himself into the production of pulp magazine fiction, writing at night after long days of legal duty.").

contributing to various pulps. By the early '30s Gardner was writing—actually, by then, dictating—more (perhaps 200,000 words per month) and practicing less (two days per week).[34] His volume of published words was important to Gardner, because pulps often paid authors by the word, a common rate being three cents per word. Gardner joked that, when one of his characters fired a gun, "three 'bangs,' such as 'Bang, bang, bang!,' meant nine cents to the author, whereas one 'bang' was worth only three cents . . . ."[35]

In addition to short stories, Gardner also wrote a full-length novel, but several publishers rejected it. Finally, publisher William Morrow & Co.'s president suggested that Gardner plan on a series of books with the same main character, thus freeing Gardner from having to invent new main characters for every book and allowing series readers to become familiar with the characters.[36] In response, Gardner developed main character Perry Mason, a tough, resourceful, and winning criminal defense lawyer in Los Angeles, along with Mason's secretary Della Reese and private investigator Paul Drake, all of whom were to appear in Gardner's series of Perry Mason novels. (Years later, Gardner acknowledged that Perry Mason was based in part on real-life criminal defense lawyer Earl Rogers whose brilliance, creativity, showmanship, and success captivated Los Angeles and San Francisco courtrooms and newspapers from 1899 until 1916.[37])

In 1933, Gardner ended his legal practice and became a full-time writer, though he hired away three of the Sheridan, Orr firm's secretaries to do his typing and other office work.[38] That year saw William Morrow & Co. publish Gardner's first book, a Perry Mason novel titled *The Case of the Velvet Claws*. The *Los Angeles Times* and *Time* magazine hailed it as among the best books of the year.[39]

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[34] See Britannica, *supra* note 1. The 200,000 words per month is incredible. If the figure is accurate, then Gardner—while still practicing law, albeit part-time—was writing over 25 pages per day (each double-spaced page averaging 250 words) every day of the month. Well, maybe. Or maybe not. A lower, perhaps more realistic, estimate was 224,000 words per year. Krebs, *supra* note 1, at p. 82, col. 3.

[35] Hughes, *supra* note 1, at p. 89.

[36] See Krebs, *supra* note 1, at p. 82, col. 3.

[37] See Hughes, *supra* note 1, at p. 15. Biographies of Earl Rogers include Cohn & Chisholm, Take the Witness! (1934); St. Johns, Final Verdict (1962); and Trope, Once Upon a Time in Los Angeles: The Trials of Earl Rogers (2001). For a brief overview of Rogers, see Caragozian, *California's First Celebrity Lawyer*, L.A. Daily Journal (Jul. 3, 2024) p. 4, col. 1, re-posted at https://www.cschs.org/wp-content/uploads/2024/07/History-Resources-Caragozian-Californias-First-Celebrity-Lawyer-7-3-2024.pdf (as of Jul. 10, 2024).

[38] Early in his full-time writing career, Gardner's finances were precarious, as his expenses, especially secretarial payroll, were high. Later, Gardner's income increased, but his overhead increased, too. See Hughes, *supra* note 1, at pp. 150, 162. Apparently, by the early 1940s, his overall finances improved, and Gardner eventually became wealthy. See, e.g., Starr, Hiding in Plain Sight: The Secret Life of Raymond Burr (2008) p. 146. Cf. Huges, *supra* note 1, at p. 162.

[39] See Hughes, *supra* note 1, at pp. 107, 119. Today, first editions of The Case of the Velvet Claws sell for $2,500 and up. See, e.g., https://www.abebooks.com/servlet/SearchResults?an=gardner&bi=h&bx=off&cm_sp=SearchF-_-Advs-_-Result&ds=30&fe=on&pn=morrow&prc=USD&recentlyadded=all&rgn=ww&rollup=on&sortby=17&tn=velvet%20claws&xdesc=off&xpod=off&yrh=1933&yrl=1933 (as of Aug. 16, 2024).

Each year, Gardner's output typically included at least two Perry Mason novels under his own name. Also, each year, Gardner usually wrote at least one other book, sometimes under a pen name and sometimes under his own name. These other books included two series: Twenty-nine "Cool & Lamb" novels featuring private investigator partners Bertha Cool and Donald Lamb, written under pen name A. A. Fair; and nine "Doug Selby" novels featuring a crusading rural District Attorney and written under Gardner's own name. Gardner wrote other novels as well and, beginning in 1948, nonfiction travel and true crime books (described in parts 5 and 7 below).[40]

In addition, Gardner continued to write stories for magazines, and he eventually graduated from pulps to "slicks" (magazines catering to middle- and upper-class readers and printed on higher quality paper). In 1934, *The Saturday Evening Post*, then among America's most popular and prestigious magazines, paid Gardner $15,000 (almost $340,000 today) for a story and, in 1941, published three more Gardner stories. *Cosmopolitan*, then a general circulation magazine within the Hearst media empire, also published Gardner stories.[41]

As Gardner continued to write Perry Mason novels, they continued to grow in popularity. Beginning in 1937 and ending in 1962, the *Saturday Evening Post* serialized sixteen Perry Mason novels plus two other Gardner mystery novels.[42]

In February 1934, Gardner moved to San Francisco, but that same year moved back to southern California—Hollywood, to be exact—because Hollywood studio Warner Bros. began producing Perry Mason movies.[43] The following year, Gardner bought a house in Hollywood. Eventually, six Perry Mason movies were produced between 1934 and 1937, but Gardner grew unhappy with them and ended the series.[44]

While Gardner had stopped practicing law, his years of practice provided material for his fiction writing. For example, in one of Gardner's appellate cases, *Magby v. New York Life Insurance Co.*, Gardner represented a widow whose late husband had died in 1927 after inhaling carbon monoxide fumes from his car inside a closed garage. The widow claimed double indemnity under

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[40] See Hughes, *supra* note 1, at p. 158. For a list of Gardner's books, sorted by series and including publication dates, see Senate, *supra* note 3, at pp. 71–76.

[41] See Hughes, *supra* note 1, at pp. 125, 135, 327. For a year-by-year list of all of Gardner's published writings, including pulp and slick stories, articles, novelettes, and novels, see *id.*, at pp. 312–41.

[42] E.g., Gardner, *The Case of the Lame Canary* (May 29, Jun. 5, Jun. 12, Jun 19, Jun. 26, Jul. 3, Jul. 10, & Jul. 17, 1937) Saturday Evening Post (serializing the novel of the same title published in 1937). See Hughes, *supra* note 1, at pp. 325, 328–30, 333–34, 335–38.

[43] Hughes, *supra* note 1, at pp. 143–45.

[44] See Senate, *supra* note 3, at p. 77. Warner Bros. produced one additional movie loosely based on one of Gardner's Perry Mason novels, but the movie did not include a character named Perry Mason. See *id.*, at p. 79. For a list of all seven Warner Bros. movies, including principal cast members and other information, see *id.*, at pp. 77–79.

three life insurance policies issued to the husband. The policies provided for double indemnity for death that was (1) "effected solely through . . . accidental cause," and (2) not from suicide. At trial, the widow had presented enough—or, perhaps, barely enough—evidence for the jury to find that the husband had not died by suicide, and the jury decided in favor of the widow. On appeal, the insurer argued that the jury instructions failed to distinguish between "accidental death" and "death resulting from accidental cause or means." The District Court of Appeal concluded that the jury instructions were clear on this point and affirmed the jury verdict in Gardner's client's favor.[45]

In his 1941 Cool & Lam novel *Double or Quits*, Gardner featured the same issue in the plot, "accidental death" versus "death by accidental means." Gardner explained this technical but important distinction to the novel's readers in a straight-forward way. Gardner wrote that dying of carbon monoxide poisoning while working on a car in a closed garage may be "accidental," but would not be double-indemnity-triggering "death by accidental means" if none of the "means"—namely the decedent's actions in closing the garage door, turning on the car's engine, and working on the car—were accidental. Indeed, all of these "means" would seem to be intentional. On the other hand, if, say, wind had closed the garage door, then "accidental means" could be established.[46] More broadly, Gardner drew on his own varied "personal experiences" as a practicing trial lawyer in Oxnard and Ventura to write about Perry Mason's "canny courtroom performances."[47]

Gardner's sustained output derived from his speed; according to one report, Gardner wrote a complete novel, from start to finish, in three and a half days.[48] On average during the 1930s, Gardner typically wrote four novels per year, plus magazine stories. His writing method was to dictate and then edit the typed pages. He enjoyed being referred to as a "faction factory" or "the Henry Ford of detective novelists," and never claimed high literary style.[49] Indeed, Garner noted that he was "writing for a mass market," so, unsurprisingly, his Perry Mason books were sometimes called as "pulp-novel[s]."[50] Conversely, the novels' strengths included factual and legal accuracy. Law school deans praised the realism of Gardner's courtroom scenes and the soundness of the protagonists' legal maneuvers.[51] In addition, Gardner was masterful in his

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45 *Magby v. New York Life Insurance Co.* (1934), 136 Cal.App. 772, 773, 774–75.

46 See Senate, *supra* note 3, at pp. 44–45; Gardner [writing as A.A. Fair], Double or Quits (1941), pp. 43, 94, 123.

47 See Time, *supra* note 11.

48 L. A. Times, *supra* note 1, at p. 20, col. 1.

49 Krebs, *supra* note 1, at p. 82, col. 1.

50 Hughes, *supra* note 1, at p. 165. See also Starr, *supra* note 38, at p. 81.

51 Krebs, *supra* note 1, at p. 82, cols. 1, 5.

"neat, complex plots based on careful research."[52]

Each of the Perry Mason novels' titles began with the words "The Case of the . . . ," and each of the nine Doug Selby novels' titles began with the words, "The D. A. . . ."[53] Altogether, Gardner wrote 132 mystery novels, including several that were published posthumously. Moreover, regardless of their literary strengths or weaknesses, Gardner's books were enormously popular. Over one hundred of his books sold at least 1 million copies, and, in total, they sometimes sold up to 20,000 copies per day. The books were translated into over 30 languages.[54]

Beginning in the 1940s, small, inexpensive paperback books became popular, especially with wartime G.I.s and factory workers who liked their portability. Paperbacks were also inexpensive—typically selling for twenty-five cents—and were widely available, including at drug stores, newsstands, and bus and train stations. Mystery fiction was the most common paperback genre and, by 1944, eight of the ten best-selling Pocket Books (which was the paperback division of publisher Simon & Schuster) were re-printed Perry Mason titles. As a Pocket Books executive stated, "Gardner led the boom in paperbacks," and eventually over 100 million Gardner paperbacks were sold.[55]

Gardner's popularity as a fiction author led to high-profile journalism assignments. In 1943, for instance, the Hearst-published *New York Journal-American* paid Gardner an "exorbitant" fee plus expenses (including two secretaries) to travel to the Bahamas to cover a sensational murder trial. In 1952, *Look* magazine paid Gardner "a perfectly fabulous lump sum" to cover the Queens, New York trial of bank robber and prison escapee Willie Sutton. Owing to security concerns, cameras were prohibited in the Queens courthouse, but Gardner was able to have a camera smuggled into the courtroom, apparently by a newspaper reporter, who then photographed Gardner shaking hands with Sutton. The photo appeared in *Look*.[56]

Among the writing honors bestowed on Gardner, probably the highest was in 1962. The Mystery Writers of America conferred on Gardner its prestigious

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52 Time, *supra* note 11.

53 Senate, *supra* note 3, at pp. 71–74. During his lifetime, Gardner wrote 82 Perry Mason novels, and four more were published posthumously with Gardner listed as the author. See *id*., at pp. 71–73.

54 Time, *supra* note 11. See Senate, *supra* note 3, at pp. 71–75. All of Gardner's novels were first published in hardback by William Morrow & Co., which had published then-little-known author Gardner's debut novel, The Case of the Velvet Claws. Gardner remained loyal to William Morrow & Co. throughout his career.

55 Hughes, *supra* note 1, at pp. 222–24.

56 See *id.*, at pp. 234–40; Gardner, *The Case of Willie Sutton* (May 6, 1952) Look. Gardner later rued the photo and how it came to be taken, but said that, given the fee that Look magazine paid him, Look "quite naturally expected something fabulous in return." Hughes, *supra* note 1, at p. 240.

"Grand Master" award in recognition of an author's "body of work that is both significant and of consistent high quality."[57]

5. Temecula, California and Baja California

Gardner's personal interests included hunting, camping, and boating in the American West. While Gardner was a "crack shot" with a rifle or pistol, he hunted exclusively with a bow and arrow for the last twenty-plus years of his life. Gardner relished the outdoors, but hardly roughed it when he camped. He and his companions drove to camping spots with such comforts of civilization as "a small refrigerator truck, air-conditioned camper vehicles, [and] a cook," plus two secretarial staff "in case he felt the urge to write."[58]

In 1937, Gardner camped near Temecula, California, then an unincorporated Riverside County crossroads with, at most, 250 residents and a single telephone at the general store/post office.[59] He first bought Temecula-area rural property as a part-time camping spot, but gradually constructed a hodge-podge of twenty-seven buildings—a dozen garages, ten guest cottages, sleeping quarters for his secretaries, and a combination personal office/library. The property grew into a 3,000-acre ranch and Gardner eventually employed six secretaries plus ranch personnel there. He named it "Rancho del Paisano," and it became Gardner's permanent home for the rest of his life.[60]

When Gardner first moved to Rancho del Paisano, communications with the outside world were slow and cumbersome. Publishers, editors, or agents who wanted to contact Gardner had two choices: (i) traditional mail, or (ii) if timeliness were important, a telegram to the Western Union office at Lake Elsinore (which was closest to Rancho del Paisano, though some twenty miles distant), where a Western Union employee then read the message over the telephone to an employee at the Temecula general store/post office, with the latter employee, in turn, writing the message on paper and having the paper delivered to Rancho del Paisano. This Rube Goldberg journey then had to be reversed for Gardner to communicate back to the outside world. Finally, in 1951, Rancho del Paisano got a telephone.[61]

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[57] https://edgarawards.com/category-list-the-grand-master/ (as of Jul. 7, 2024); https://www.shelf-awareness.com/issue.html?issue=3873 (as of Jul. 7, 2024).

[58] Krebs, *supra* note 1, at p. 82, cols. 5, 6. Over the years, Gardner wrote five nonfiction books about his western U.S. travels: Neighborhood Frontiers (1954), The Desert Is Yours (1963), The World of Water: Exploring the Sacramento Delta (1964), Gypsy Days on the Delta: Carefree Adventure Cruising the Inland Waterways of the Sacramento Delta (1967), and Drifting Down the Delta: The Joys of Houseboating on the Inland Waterways of the Sacramento Delta (1969).

[59] Hughes, *supra* note 1, at p. 173.

[60] See Hughes, *supra* note 1, at pp. 171–77; Krebs, *supra* note 1, at p. 82, col. 4; https://www.pechanga-nsn.gov/index.php/history/the-great-oak (as of Jul 6, 2024).

[61] Hughes, *supra* note 1, at p. 177.

In 1947, Gardner began camping in Mexico's Baja California, which had few paved roads south of Tijuana. During these many trips, Gardner explored remote interior areas of Baja on land and by helicopter. On one of the trips, he (re)discovered caves with prehistoric paintings and returned with two-larger scale expeditions, the first with a UCLA archaeology professor and the second with a scholar from Mexico City's Museo Nacional de Antropología (National Museum of Anthropology).[62]

In 1964, however, Gardner was threatened with arrest in Baja California. That year, he had flown by private plane to La Paz, at Baja's southern tip, having been invited to view cave paintings and fossil beds. When he arrived, Gardner learned that an arrest warrant was issued against him, based on charges that he had stolen ancient artifacts and used bulldozers to destroy archaeological sites. Apparently, the charges were false, but Gardner was caught in an internal Baja California political dispute. The charges were eventually dropped, and, in 1968, Mexico's national government honored Gardner in Mexico City.[63]

Altogether, Gardner wrote six nonfiction books based on his Baja California travels, plus two more books about other parts of Mexico.[64]

6. Radio and Television

Between 1943 and 1955, Perry Mason was featured on a nationally broadcast CBS radio drama, running to more than 3,200 fifteen-minute episodes. Gardner wrote some of the radio scripts.[65] However, he lacked complete creative control over the radio programs and was unhappy with many of the scripts and other details. Also, the pace was heavy: 250 scripts per year.[66]

With the rise of television in the mid-1950s, radio dramas declined in popularity. A Perry Mason television series was a natural next step. Gardner, having been frustrated with his lack of control over the Perry Mason movies and radio dramas, resolved to have greater control over Perry Mason on television. Accordingly, he formed his own production company, "Paisano Productions." Gardner was the majority owner, but his secretaries also had ownership interests. In addition, Paisano Productions had its own executives.[67]

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62 *Id.*, at pp. 270–72. The UCLA professor, Clement W. Meighan, wrote a book about the caves and paintings, Indian Art and History; The Testimony of Prehispanic Rock Paintings In Baja California (1969).

63 Hughes, *supra* note 1, at pp. 273–76, 292.

64 Gardner's Baja travel books are The Land of Shorter Shadows (1948), Hunting the Desert Whale (1960), Hovering Over Baja (1961), The Hidden Heart of Baja (1962), Off the Beaten Track in Baja (1967), and Mexico's Magic Square (1968). Gardner's other nonfiction books that, in whole or in part, are about mainland Mexico are Neighborhood Frontiers (1954) and The Host with the Big Hat (1970).

65 See Starr, *supra* note 38, at p. 83.

66 See Hughes, *supra* note 1, at p. 232.

67 See *id.*, at pp. 241–43. See also Krebs, *supra* note 1, at p. 82, col. 5. The Los Angeles law firm O'Melveny & Myers set up Paisano Productions' structure. See Hughes, *supra* note 1, at p. 243.

Paisano Productions conducted auditions for all aspects of the proposed one-hour, weekly television show, including the network (CBS was chosen), actors, advertisers, and independent producers. Gardner personally chose veteran theater, radio, and movie actor Raymond Burr for the title role of Perry Mason.[68] According to one version of lore, Gardner saw Burr on the set after an audition and announced, "That's Perry Mason"; in another version, Gardner told Burr, "In twenty minutes, you captured Perry Mason better than I did in twenty years."[69]

Gardner did not write the show's scripts; he was a narrative writer and had learned from the Perry Mason radio show that he lacked skill to write dramatic scripts. Still, Garner sometimes contributed to, always reviewed. and had final approval rights over every episode's script.[70] The resulting Perry Mason television show debuted on CBS in September 1957 and lasted for nine seasons, until 1966. Like the novels, the television show was set in Los Angeles, and it followed a formula, with Perry Mason successfully representing his clients in every episode. For its first five seasons, the show was broadcast on Saturday nights and then switched to Thursday nights. In the series' final episode in May 1966, Gardner himself played a judge.[71] After 1966, the Perry Mason series went into syndication. It was also dubbed into sixteen languages for foreign distribution.[72]

The series was regularly ranked among the most popular TV shows during its nine seasons. Burr's Perry Mason portrayal won Burr 1959 and 1961 Emmy awards for "Best Lead Actor in a Dramatic Series," and Burr became television's highest paid actor and a pop-culture hero. Perry Mason co-star Barbara Hale won a "Best Supporting Actress" Emmy in 1959.[73]

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[68] See Hughes, *supra* note 1, at pp. 242–45. A biography of Burr is Starr, *supra* note 38.

[69] Hughes, *supra* note 1, at p. 245; Starr, *supra* note 38, at p. 86.

[70] See Hughes, *supra* note 1, at pp. 246, 249. Parts of some of the early Perry Mason television scripts borrowed from the 50 or so then-published Perry Mason books. With the series continuing for season after season and totaling 275 episodes, the demand for new scripts outpaced the material in the existing Perry Mason books, so screenwriters created fresh plots, dialogue, dramatic effects, and the like. See, e.g., Krebs, *supra* note 1, at p. 82, col. 5. See also Starr, *supra* note 38, at pp. 90, 146. The television scripts continued the Perry Mason novels' attention to legal accuracy; besides Gardner himself, one of the screenwriters had practiced law, and an editor had a law degree. See Starr, *supra* note 38, at p. 90.

[71] https://www.imdb.com/title/tt0673265/fullcredits/?ref_=tt_ql_1 (as of Jul. 7, 2024).

[72] See Krebs, *supra* note 1, at p. 82, col. 5; Hughes, *supra* note 1, at pp. 232, 241, 243–51; Starr, *supra* note 38. at p. 146. A listing of the entire series' cast and crew is at https://www.imdb.com/title/tt0050051/fullcredits/?ref_=tt_ql_1 (as of Jul. 15, 2024). In 1973, after Gardner's 1970 death, CBS broadcast a new Perry Mason series, with Raymond Burr again in the title role, but it was cancelled mid-season. See https://www.imdb.com/title/tt0069615/ (as of Jul. 11, 2024). Twenty-six Perry Mason television movies, also with Burr, followed between 1985 and 1993. See https://www.imdb.com/name/nm0000994/?ref_=fn_al_nm_1 (as of Jul. 14, 2024). After Burr's 1993 death, HBO produced two seasons of another Perry Mason television series beginning, in 2020 and ending in 2023. See https://www.imdb.com/title/tt2077823/ (as of Jul. 11, 2024).

[73] Starr, *supra* note 38, at pp. 116, 135. Burr was nominated for another Emmy in 1960, but did not win. https://www.emmys.com/bios/raymond-burr (as of Jul. 14, 2024). Similarly, Hale was nominated for another Emmy in 1961, but did not win. https://www.imdb.com/name/nm0354853/awards/?ref_=nm_ql_2 (as of Jul. 15, 2024).

For countless audience members, television's Perry Mason was the only lawyer they knew.[74] Moreover, the television series inspired young viewers across the country to become lawyers, among them future United States Supreme Court Justice Sonia Sotomayor and Harvard Law School Professor Charles Ogletree.[75] Burr was a special inspiration: "Many lawyers can trace their early interest in the law to the popular television series and to the beloved performance of Raymond Burr . . . ."[76]

The Perry Mason television series also sparked support from Burr to the University of the Pacific's McGeorge School of Law in Sacramento. In 1960, Gardner was scheduled to deliver McGeorge's commencement address, but became ill and could not appear. Burr stepped in and spoke, and McGeorge awarded Burr an honorary degree. Burr and McGeorge's Dean, Gordon Schaber, became friends, and, afterward, Burr appeared at McGeorge fundraisers and donated Perry Mason television scripts, Perry Mason books autographed by Gardner, and other material.[77] The friendship between Burr and Schaber endured for decades, even after Schaber's 1991 retirement as McGeorge's Dean. In November 1992, Burr—despite having secretly begun "exhaustive radiation treatments" for spinal and kidney cancer and suffering from "severe pain"—was a keynote speaker at Schaber's sixty-fifth birthday gala.[78] Today, Burr's Perry Mason scripts are still displayed at McGeorge.[79]

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[74] See, e.g., Morales, *Alumni Spotlight: Transactional Attorney and Adjunct Professor Sylvia Fung Chin '77* (Mar. 25, 2021) Fordham Law News, at https://news.law.fordham.edu/blog/2021/03/25/alumni-spotlight-transactional-attorney-and-adjunct-professor-sylvia-fung-chin-77/ (as of Jul. 27, 2024).

[75] See Neil, *Sotomayor: I wanted to be a cop, but learned from 'Perry Mason' that I could be a lawyer* (Jan 14, 2013) ABA Journal, at https://www.abajournal.com/news/article/sotomayor_i_wanted_to_be_a_cop_but_learned_from_perry_mason_that_i_could_be (as of Jul. 27, 2024); https://www.kvpr.org/local-news/2023-08-08/he-wanted-to-be-like-perry-mason-charles-ogletree-merced-native-son-and-harvard-law-professor-dies-at-70 (as of Jul. 27, 2024). See also Museum of Broadcast Communications, Encyclopedia of Television (1997), at https://interviews.televisionacademy.com/shows/perry-mason (as of Jul. 27, 2024).

[76] Rogers, *Perry Mason and the Present Moment* (Nov. 30, 2022) Florida Bar News, at https://www.floridabar.org/the-florida-bar-news/perry-mason-and-the-present-moment/ (as of Jul. 27, 2024).

[77] See https://www.pacific.edu/pacific-newsroom/perry-mason-actor-raymond-burr-had-deep-connections-mcgeorge (as of Jul. 5, 2024); *McGeorge Commencement* (1960) 1 McGeorge College of Law News Bulletin p. 1. See also *The Back Story: McGeorge School of Law* (Feb. 13, 2023) Comstock's Magazine, at https://www.comstocksmag.com/article/back-story-mcgeorge-school-law (as of Jul. 5, 2024). Schaber was a legendary and revered figure. During his 34 years as Dean, he transformed McGeorge from an unaccredited night school into a well-regarded and accredited school within the University of the Pacific. E.g., *Gordon Schaber; Dean of Law School*, L.A. Times (Nov. 8. 1997), at https://www.latimes.com/archives/la-xpm-1997-nov-08-mn-51544-story.html (as of Jul. 23, 2024). Then-U.S. Supreme Court Justice Anthony Kennedy was among the many who memorialized Schaber after his 1997 death. Kennedy, *Gordon D. Schaber, In Memoriam: November 22, 1997* (1998) 29 McGeorge L. Rev. (issue 2) *x-xii.* See generally *Tribute to Gordon D. Schaber* (1998) 29 McGeorge Law Rev. (issue 2) *vii-xxii.*

[78] See Starr, *supra* note 38, at pp. 204–06. (Other speakers at Schaber's birthday included Justice Kennedy, former U.S. President Ronald Reagan, former California Governor Edmund G. (Pat) Brown, and former U.S. Attorney General Edwin Meese. https://www.youtube.com/watch?v=ox5eil-dfAw&ab_channel=JimDavidson (as of Jul, 26, 2024).) Burr was hospitalized for surgery in February 1993 and died in September 1993, less than a year after feting Schaber. See Starr, *supra* note 38, at pp. 206, 211.

[79] See email from McGeorge Associate Dean of Library Services James Wirrell to the author, May 10, 2024.

7. The Court of Last Resort

Gardner semi-returned to lawyering in 1946. That year, he had been featured in a *Saturday Evening Post* article, "The Case of Erle Stanley Gardner," which, in part, portrayed Gardner as a champion of the underdog.[80] After reading the article, a Los Angeles criminal defense lawyer sent Gardner a plea to help San Quentin prisoner William Lindley, a convicted murderer who faced execution in less than two weeks.[81]

Despite publication and radio script deadlines, Gardner read Lindley's entire trial transcript and constructed a timeline from it, proving that Lindley could not have been at the crime scene when witnesses placed him there. By the time Gardner completed his timeline. it was, in Gardner's words, "almost a matter of hours" before Lindley's scheduled execution, so Gardner wrote letters to each California Supreme Court justice, the governor, and other officials with his (Gardner's) timeline conclusions. As a result, Lindley's execution was stayed and then commuted, and Lindley finally was determined to be innocent and released.[82]

The Lindley case generated national publicity, and, in 1948, Gardner and *Argosy* magazine owner and long-time Gardner friend Harry Steeger formed The Court of Last Resort (CLR).[83] Its mission was "preventing the conviction of innocent men and the escape of guilty men," with an emphasis on correcting wrongful convictions.[84] Gardner wrote articles about CLR's efforts, and *Argosy* published the articles and provided additional publicity; both Gardner and *Argosy* provided financial support.[85] The CLR had a Board of Investigators, which was a group of "nationally known" and "publicly spirited" experts—such as a private investigator, handwriting expert, polygraph (or "lie detector") expert, and even a former prison warden—who investigated possible wrongful convictions.[86] During CLR's decade of existence, Gardner devoted eighty percent of his time to it.[87]

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[80] Johnson, *The Case of Erle Stanley Gardner* (Oct. 12, 1946) Saturday Evening Post. See also Hughes, *supra* note 1, at p. 255.

[81] Gardner, *supra* note 10, at pp. 8–9; Gardner, *Need for New Concepts in the Administration of Criminal Justice* (1959) 50 J. of Crim. L. and Criminology 20, 24.

[82] See Gardner, *supra* note 10, at p. 8; Hughes, *supra* note 1, at pp. 255–56. The underlying murder was never solved. Gardner, *supra* note 10, at p. 12.

[83] Beginning in 1925, Argosy (a pulp in the 1920s and '30s) had published some four dozen Gardner novelettes and short stories. See generally Hughes, *supra* note 1, at pp. 313–24.

[84] See, e.g., Feuerstein, *Visiting Perry Mason: A Trip to the Temecula Valley Museum's Erle Stanley Gardner Exhibit* (Apr. 2017) 67 Riverside Lawyer, at pp. 12, 14 & fn. 21.

[85] See Hughes, *supra* note 1, at pp. 258–61; Gardner, *supra* note 10, at p. 9.

[86] See Gardner, *supra* note 10, at pp. 18–19; Hughes, *supra* note 1, at pp. 259–61. The CLR also had an auxiliary group of former FBI agents. Hughes, *supra* note 1, at p. 260.

[87] Hughes, *supra* note 1, at p. 261.

The CLR's first case centered on Clarence Boggie, who had been sentenced to life in prison for a 1933 murder in the state of Washington. Boggie's case was brought to Gardner's attention by a part-time volunteer chaplain at the prison. A threshold problem was that an appeal—even if collateral—required a trial transcript. In those days, however, a defendant in Washington had to pay for his or her own transcript; and Boggie, as a prisoner, lacked the $750 for the transcript. Improbably, another prisoner had outside money and paid for the transcript. Eventually, the CLR found substantial exculpatory evidence, including testimony that the police had suborned perjury by pressuring a witness to falsely identify Boggie. Publicity in *Argosy* and the *Seattle Times* led to Boggie being released after more than a decade in prison.[88]

Next, the CLR assisted Bill Keys, a prospector and rancher whose property adjoined Joshua Tree National Monument (now, National Park), California. In 1943, Keys shot and killed another landowner, but claimed self-defense. Keys was convicted of manslaughter, which Gardner believed was a "compromise verdict," and was imprisoned. After Keys' wife contacted the CLR, one of its forensic experts reviewed the bloodstain evidence and concluded that the evidence was consistent with self-defense. For procedural reasons, the CLR approached the California Adult Authority (which functions as a parole board) and secured Keys' release after five years of imprisonment.[89]

The CLR undertook numerous additional cases, with a focus on scientific analysis, especially the polygraph.[90] The CLR's primary leverage was publicity: Gardner wanted to "arouse public opinion and marshal it into a force that would get action."[91]

In 1952, Gardner assembled the CLR's first years' cases, along with the earlier Lindley case, into a book, *The Court of Last Resort*, which he dedicated to Steeger.[92] It won the Mystery Writers of America's 1953 Edgar award for best fact crime book. The CLR was also the subject of a television series, "The Court of Last Resort," which was produced by Gardner's Paisano Productions. The series lasted for one season, 1957–1958.[93]

Unfortunately, *Argosy*'s readers began to lose interest in the CLR, and the magazine found it difficult to justify providing the CLR with space and

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88 See generally Gardner, *supra* note 10, at pp. 22–71.

89 See generally *id.*, at pp. 79–96.

90 Downey, *The "Court of Last Resort"* (Apr. 25, 2019) [Univ. of Texas] Ransom Center Magazine, at https://sites.utexas.edu/ransomcentermagazine/2019/04/25/the-court-of-last-resort/ (as of Jul. 8, 2024).

91 Gardner, *supra* note 10, at p. 99.

92 See generally Gardner, supra note 10.

93 See Hughes, *supra* note 1, at pp. 258–61. See also *Court of Last Resort*, Variety (Oct. 9, 1957) p. 28, col. 2.

support. Further, the CLR was deluged with thousands of requests from prisoners across the country claiming to have been wrongfully convicted, and funds were needed just for preliminary assessments of which requests had any legitimacy. More fundamentally, the CLR was pulled in different directions: Generating reader interest versus improving the administration of justice.[94]

The CLR also had to navigate the anti-communist hysteria of the 1950s. For example, the CLR avoided cases that had a racial element, even though Gardner, as a young lawyer in Oxnard, had represented persons of Chinese and Mexican ancestry who were being unfairly victimized. Gardner, on behalf of the CLR, rejected a particular request for help, writing, "The man is a Negro in the 'Deep South,' and we have found that in many of these cases persons with communistic backgrounds try to stir up trouble simply in an attempt to destroy our form of government [and] to inflame racial prejudices."[95] In sum, Gardner refused to have the CLR "engage with potentially contentious cases."[96]

California's infamous Caryl Chessman case precipitated the CLR's demise. Chessman had been convicted in 1948 of seventeen counts of aggravated kidnapping, rape, and robbery. He was on death row in San Quentin, as aggravated kidnapping was then a capital crime. Chessman had repeatedly managed to delay his execution, and, by 1960, he had come to symbolize a national debate over capital punishment, including the specific question of whether the death penalty was proper for non-homicide crimes.[97] Gardner barred the CLR from involvement in the Chessman controversy, even though (a) he opposed capital punishment, and (b) Chessman had raised significant procedural errors, especially a delayed, botched, and unreliable trial transcript.[98] Gardner wrote that sympathy for Chessman was "instigated by the far, far left." Gardner also hesitated to criticize the police in connection with Chessman. With rising internal conflict and ebbing public interest, Gardner dissolved the CLR in 1960.[99]

The CLR, while flawed and lasting barely a decade, assisted wrongfully convicted prisoners. More broadly, it focused public attention on the importance of procedural safeguards for those accused or crimes and on the

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[94] See Hughes, *supra* note 1, at pp. 262–64.

[95] Downey, *supra* note 90.

[96] *Id.*

[97] See, e.g., *People v. Chessman* (1951), 38 Cal.2d 166, 183, 185–87, 190–93. See also Enright, *California's Aggravated Kidnapping Statute—A Need for Revision* (1967) 4 San Diego L.Rev. 285, 294–96.

[98] See, e.g., *People v. Chessman* (1959), 52 Cal. 2d 472, 475–89.

[99] See Hughes, *supra* note 1, at pp. 264–66. Chessman was executed in May 1960.

importance of scientific evidence.[100] The American Bar Association appointed a committee on criminal justice to work with the CLR, and the CLR became a template for others to create formal innocence initiatives that are active to this day.[101]

8. Family and Personal Life

When Gardner began working at Stewart's Oxnard law office in 1911, he met one of the office's secretaries, Natalie Talbert. The two were married in 1912, and their only child, daughter Grace, was born in 1913.[102]

In 1935, Gardner bought a house in Hollywood, and his wife Natalie bought a house in Oakland. The couple never divorced, but never lived together after 1935.[103] Erle Gardner financially supported Natalie Gardner with a monthly allowance of $225, shortly increased to $250 (nowadays, almost $5,800 or approximately $70,000 per year), plus her car insurance, medical expenses, and other items.[104] On paper, the marriage lasted for fifty-six years, until Natalie Gardner died in February 1968.[105] Six months later, in August 1968, Gardner married his long-time secretary and companion, Jean Walter Bethell.[106] She lived to be 100, dying in 2002.[107] Gardner's daughter Grace died at age 91 in 2004.[108]

One of Gardner's long-term friends was fellow mystery writer Raymond Chandler. Chandler's main character was private detective Philip Marlowe, and Chandler's first and most famous novel was *The Big Sleep* published in 1939.[109] Both Gardner and Chandler were about the same age, had successful careers prior to being published, and were pulp writers who became famous novelists. The friendship began in 1934, when both men were living in

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[100] See, e.g., Gardner, *supra* note 81, at pp. 21, 24–26.

[101] See Hughes, *supra* note 1, at p. 266–67; https://innocenceproject.org/our-work/ (as of Jul. 27, 2014). See generally https://www.aallnet.org/srsis/resources-publications/assistance-for-prisoners/list-innocence-projects/ (as of Jul. 27, 2024) (a state-by-state listing of current innocence projects, centers, clinics, and other entities). One difference between the CLR and its modern counterparts is the type of scientific evidence used to prove innocence: For instance, the CLR often used the polygraph, while modern efforts often rely on DNA. See, e.g., Downey, *supra* note 90 (Gardner had faith in the "divinatory powers attributed the polygraph" and was the polygraph's "patron saint.").

[102] See Hughes, *supra* note 1, at pp. 58–59.

[103] *Id.*, at p. 145.

[104] See *id.*, at p. 146.

[105] *Id.*, at p. 292.

[106] *Id.*, at p. 293.

[107] *E.g.*, https://www.wikitree.com/wiki/Walter-9392 (as of Jul. 9, 2024).

[108] https://www.findagrave.com/memorial/40520585/natalie-grace-naso (as of Jul. 13, 2024).

[109] In 1946, Warner Bros. released the classic noir movie "The Big Sleep," which was based on Chandler's novel. See https://catalog.afi.com/Catalog/moviedetails/24697 (as of Jul. 14. 2024).

Hollywood. Later, each left Hollywood and lived elsewhere in southern California, but they continued to correspond and visit each other until 1954, when Chandler's physical and mental health declined.[110]

9. Epilogue

In 1970, Gardner died of cancer at age 80 at Rancho del Paisano. His ashes were scattered over Baja California.[111] Gardner's papers—including draft and corrected manuscripts and business and personal correspondence—and art collection were donated to the University of Texas at Austin.[112] The Temecula Valley Museum also has a collection of Gardner's books, photographs, and other material.[113]

The Sheridan, Orr law firm, where Gardner was a partner for a dozen years, had various name iterations after Gardner's 1933 departure; the firm closed in 2020.[114] Downtown Ventura's First National Bank Building at 21 South California Street, where the Sheridan, Orr firm was located and where Gardner wrote his first Perry Mason novel, still stands, albeit with renovations since Gardner's time. The City of Ventura has designated the building and Gardner's office in it as historical landmarks.[115] A block from the First National Bank Building, the Ventura County Courthouse at 501Poli Street, where Gardner tried cases, also still stands. Originally constructed in 1912, it was closed in 1969 for restoration and seismic retrofitting and reopened in 1974

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[110] See Hughes, *supra* note 1, at pp. 203–12. While Chandler wrote and sold far fewer books (seven full-length novels) than Gardner, Chandler's literary qualities are more highly praised than Gardner's. E.g., Powell, California Classics (1971) pp. 371–72 ("[W]hat Chandler sought to do, and did, to a degree that Gardner never did" was to reach an "intensity of artistic performance [that] becomes literature."). Chandler's writing has been criticized for sexism, racism, and homophobia, though some of these characteristics might have reflected the bad-old-days era in which Chandler wrote. See, e.g., Sante, *Rising Crime*, N.Y. Times (Feb. 18, 2007) at https://www.nytimes.com/2007/02/18/books/review/Sante.t.html (as of Jul. 19, 2024); Arnold, *Under Lockdown with Raymond Chandler* (Apr. 17, 2021) L. A. Review of Books, at https://lareviewofbooks.org/article/under-lockdown-with-raymond-chandler/ (as of Jul. 19, 2024). Biographies of Chandler include MacShane, The Life of Raymond Chandler (1976), and Hiney, Raymond Chandler: A Biography (1999).

[111] Hughes, *supra* note 1, at pp. 304–05.

[112] *Id.*, at pp. 282–83, 304; https://norman.hrc.utexas.edu/fasearch/findingAid.cfm?eadid=01420 (as of Jul 6, 2024); https://norman.hrc.utexas.edu/fasearch/findingAid.cfm?eadid=01252 (as of Jul. 6, 2024).

[113] See https://www.temeculavalleymuseum.org/collections (as of Jul. 27, 2024).

[114] Cf. Long, *A Farewell to Benton Orr Duvall & Buckingham* (Nov. 2020) Citations [magazine of the Ventura County Bar Association], at p. 12.

[115] See https://www.cityofventura.ca.gov/DocumentCenter/View/7730/CITY-HISTORIC-LANDMARKS?bidId=, nos. 36, 86 (as of Jul. 6, 2024). Nowadays, the building is sometimes referred to as the "Gardner Building" or "Erle Stanley Gardner Building." See, e.g., Martinez, *Brooks Institute's Closure Called a Loss to the Region's Creative Scene*, Ventura County Star (Aug. 24, 2016), at https://www.vcstar.com/story/news/local/communities/ventura/2016/08/24/brooks-institutes-closure-called-a-loss-to-the-regions-creative-scene/89332836/ (as of Jul. 7, 2024); Chalkins, *Who's Guilty Party in This Mystery?* [sic], L.A. Times (Jul. 19, 2000), at https://www.latimes.com/archives/la-xpm-2000-jul-19-me-55442-story.html (as of Aug. 1, 2024).

as the City of Ventura's City Hall, which it remains.[116] It is on the National Register of Historic Places.[117] Gardner's Rancho del Paisano was sold and re-sold and now is absorbed into the Pechanga Tribe's reservation lands.[118]

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[116] https://www.cityofventura.ca.gov/1882/City-Hall (as of Jul. 14, 2024).

[117] *Id.*; https://www.nps.gov/subjects/nationalregister/database-research.htm#table (as of Jul. 27. 2024).

[118] https://www.pechanga-nsn.gov/index.php/history/the-great-oak (as of Jul. 6, 2024).