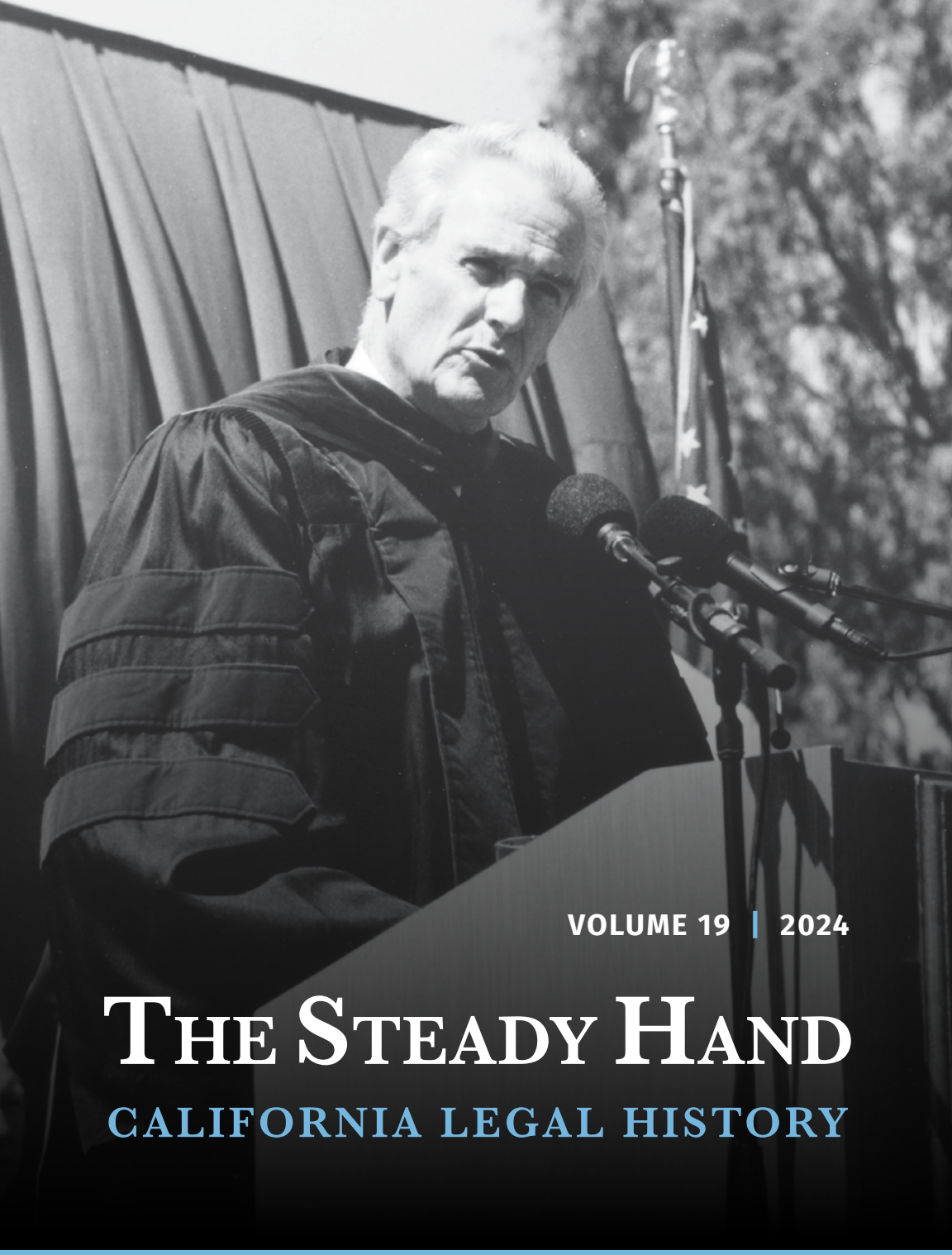

VOLUME 19 | 2024

THE STEADY HAND

CALIFORNIA LEGAL HISTORY

JOURNAL OF THE CALIFORNIA SUPREME COURT HISTORICAL SOCIETY

The historical underpinnings of a law, decision, or custom is critical to its proper application, whether in making an argument or in supporting a judicial ruling. In short, in the field of law, the past guides the future.

The Hon. Daniel M. Kolkey, president,
California Supreme Court Historical Society

Guide to the 2024 issue of *California Legal History*

California is a huge state, by population and by geography. It is governed by a complex mix of authorities comprised of city, county, regional, and state officials, elected and appointed. Government officials, as with citizens, must live by the rule of law, statutory and constitutional.

California Legal History is published by the California Supreme Court Historical Society to inspire, inform, and educate through its presentation of authoritative articles written by experienced legal and professional scholars, some with differing perspectives, on the origins, evolutions, and, in some cases, revolutions in the law and their various impacts on the people of the state.

In the 2024 issue of *California Legal History*, we remember former Chief Justice Malcolm Lucas and the late Associate Justice Keith Sparks of the Third Appellate District; celebrate seven trailblazing female appellate justices; recall Erle Stanley Gardner, the late best-selling author and creator of Perry Mason; and reflect on literature, music, old Hollywood, and Big Bands. Other articles in this issue, include: (1) McGeorge Professor J. Clark Kelso's informed perspectives, "Bringing Humanism to California's Prisons," based on 17 years and counting as Federal Receiver, California State Prison Medical Care; (2) Judge Marguerite Downing's story about Friends Outside, Los Angeles, assisting prisoners and former prisoners, and their children and families; (3) Former California Assembly Minority Leader Patrick Nolan and former Judge Lawrence Stirling's narrative on Prison Fellowship and its decades of inspiration and aid to federal and state prisoners and their children and families; (4) UC Berkeley Law Professor Charles McClain, Jr.'s account of the earliest cases involving Chinese immigrants heard by the California Supreme Court; (5) John Wierzbicki's recollection of the forgotten California Supreme Court decision on the extradition of American Indian Movement leader, Dennis Banks; and (6) the three winning student essays of the 2024 Selma Moidel Smith Student Writing Competition.

Cover photograph: Chief Justice Malcolm Lucas speaking during Pepperdine University's Commencement in 1991. He is credited with restoring smooth operations and collegiality to the state high court in the aftermath of the 1986 rejection of three members of the court by voters. For more on this matter, see, "Chief Justice Malcolm Lucas, How 'Collegiality' and a 'Steady Hand' Reset a Court in Crisis, An Oral History," by Laura McCreery, with an Introduction by Ryan Carter, page 277 in this issue of *California Legal History*. Permission granted to publish the photograph granted by Pepperdine University Special Collections and University Archives.

The California Supreme Court Historical Society was founded in 1989 as a non-profit public benefit corporation dedicated to recovering, preserving, and promoting California's legal and judicial history, with a particular emphasis on the state's highest court. The Society serves the interests of the bench and bar, the academic community, and the general public through its publications, educational programs and support of scholarly research. The Society assists with exhibitions, oral histories, court tours, and the acquisition and archiving of judicial materials. It publishes a semiannual magazine, *Review*, and an annual journal, *California Legal History*. A high point is the annual, Selma Moidel Smith Student Writing Competition in California Legal History. The Society is governed by board of directors chaired by Chief Justice Patricia Guerrero. The Society president is former Associate Justice Daniel M. Kolkey, Court of Appeal, Third Appellate District, State of California.

"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! 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 [Stanley Mosk] Library and Courts Building across from the State Capitol in downtown Sacramento. Nor was it for the other trailblazing female justices profiled here." Justice Shama Hakim Mesiwala's soaring story, "Ladies Justice, Celebrating Seven Trailblazing Female Firsts on the California Court of Appeal," begins at page 37 in this issue.

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Submissions of articles and book reviews are welcome on any aspect of California legal history, broadly construed. Please contact the editor-in-chief to propose potential submissions.

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Honoraria and commissions for articles, book reviews, or art are not available.

In recognition of the hybrid nature of legal history, manuscripts will be accepted in either of two legal styles, the *Harvard Bluebook* or the *California Style Manual* (CSM), or academic style (*Chicago Manual*). Citations of cases and law review articles must be in either Bluebook or CSM style. Manuscripts should be sent by email as MS Word files. Photographs and illustrations must be accompanied by appropriate captions containing relevant data, including permission to reprint and credit to sources.

Submissions and other editorial correspondence should be addressed to:

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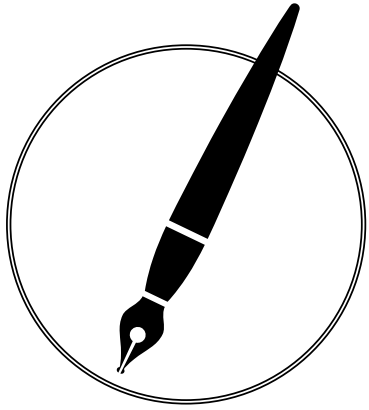

PRELIMINARIES

DANIEL M. KOLKEY

Foreword

Few, if any publications, other than this journal, *California Legal History*, and the Society's sister magazine, the *Review*, are dedicated to memorializing California's legal history. That very fact emphasizes the importance of this journal: A state that fails to record its past has no guide for its future.

Last year's journal offered articles that provided historical perspectives on the evolution of California's criminal justice policy over the past 50 years, including the campaign to adopt a victims' bill of rights in California's Constitution. It also included remembrances of leading figures in California law: Former California Supreme Court Justice John Arguelles; the State's leading legal scholar of California law, Bernard Witkin; and the recently departed Court of Appeal Presiding Justice Norman Epstein, who served in the state's judiciary for 48 years.

This year's journal builds upon these topics by offering a novel historical overview by Professor Clark Kelso on the evolution of the criminal justice system from the punishment for crimes in Grecian times (when the punishment for serious crimes was death, slavery, or banishment) to California's new proposed model regarding prisons.

It also offers the contentious context regarding the California Supreme Court's decision in *South Dakota v. Brown*—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, in that case, Dennis Banks, the founder of the American Indian Movement.

This issue also showcases the gradual change in California's judiciary, containing a first-of-its-kind article on "seven trailblazing female firsts" on the California Courts of Appeal.

Turn another page and the reader is transported to an entirely different subject of California legal history: the earliest cases involving Chinese immigrants in the California Supreme Court.

It also includes an abridged oral history of former Chief Justice Malcolm Lucas, who steadied the jurisprudence of the California Supreme Court following an unsettled period for our high court.

Accompanying these major stories are pieces regarding a California lawyer who was also a best-selling author, and the role of prison fellowships in promoting criminal justice reform, which was surprisingly led by two former California Assembly and Senate Republican leaders, one of whom became a judge.

The late Henry Kissinger perceptively observed that "injustice visualized is more visceral than injustice described," but that such *visualized* injustice can "privileg[e] emotional display over self-command, changing the kinds of people and arguments that are taken seriously …."[1] That is yet another reason why this journal, *describing* episodes of California's legal history, serves such an important purpose.

★ ★ ★

[1] Henry Kissinger, *Leadership: Six Studies in World Strategy* (Penguin Press 2022), p. 406.

GEORGE NICHOLSON

Introduction

From the Editor-in-Chief

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

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

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

[2] John Cooley, *Appellate Advocacy Manual, A Design and Decision-making Approach*, vol. 1, part 1, "Appellate Skills," A. "The Art and Science of Appellate Practice," chap. 1 (1989).

My Dear Paul:

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

Benjamin Cardozo seems to agree philosophically, "Method is much, technique is much, but inspiration is even more."[4]

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

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

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

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

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

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

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

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

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[5] Mark Twain, *The Wit and Wisdom of Mark Twain: A Book of Quotations* (Dover Thrift Editions, 1999), 36.

[6] *Mark Twain's Speeches*, *Paine's Edition,* "Introduction by Albert Bigelow Paine" (1923), http://www.twainquotes.com/UniformEds/UniformEdsCh29-v.html.

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

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

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

Ladies Justice

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

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

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

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

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

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

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

Criminal Justice Trilogy II

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

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

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

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

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

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

title, "Bringing Humanism to California's Prisons."[12] Although I knew most of it, I learned many of the following facts from him:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[15] "A Proclamation on Second Chance Month, 2024, March 29, 2024," https://www.whitehouse.gov/briefing-room/presidential-actions/2024/03/29/a-proclamation-on-second-chance-month-2024.

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

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

On Related Matters

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

> Reasonable people can and will disagree on some of our reform proposals, just as they may disagree on how society should balance certain interests. But what reasonable people should agree on is that failures of justice are a serious problem and one that society must not ignore. The lack of serious study of the problem is also an indictment against modern legal academia, which is so obsessed with getting criminals out of prison that it forgets how few crimes ever lead to punishment in the first place. As we conclude in the book:
>
> The tragic irony of the American justice system is that so little justice is done by it. Change begins with awareness, however, and this book has attempted to investigate the reasons why justice fails so frequently and suggest ways to make it succeed more often.

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

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

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

Recalling and Learning from History

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

Open Minds in the Classroom

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

bench in the 1970s.[29] It is a visual way to suggest times were changing. Soon they would change dramatically.[30]

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

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

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

Oral Histories

Chief Justice Malcolm Lucas

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

Remembering Justice Keith Sparks

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

"Justice Puglia's 'Passin'"

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

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

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

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

Justice Puglia delivered his final public speech before a San Joaquin County Bar Association luncheon, "Freedom is Not Free," on Law Day in 1998.[32] He concluded with:

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

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

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

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[32] Robert K. Puglia, "Freedom Is Not Free," 36 *McGeorge Law Review* 36 (2005): 751.

motorcycle to hear Big Bands.[33] We contacted key friends and colleagues. All of them helped us.

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

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

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

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

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

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

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

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

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

> "My favorite movie scene," she says, "is in 'To Kill a Mockingbird.' It is the scene where Atticus Finch has argued brilliantly and raised much more than a reasonable doubt, virtually proving the innocence of the accused, but the jury still returns a guilty verdict. Most of the spectators file noisily into the street, gossiping and celebrating. Upstairs, relegated to the balcony, another audience has watched the proceedings and remains seated. As Atticus Finch gathers his papers and walks slowly from the courtroom, they rise silently in unison. The Black minister, Reverend Sykes, taps Scout on the shoulder and says: 'Miss Jean Louise, stand up. Your father's passin'.' To me, this silent homage to a good and courageous man, who respects and believes in the rule of law—and is willing to defend it even at great personal cost—is the most moving moment in the whole film.
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> "Justice Puglia was just such a man. And he was not a fictional character. Most of us have risen to our feet many times to mark his passage because he was a judge. Court protocol required us to show respect for the robe and what it represented. But Justice Puglia was the kind of man who earned and could command our respect by virtue of his life and character. In a way, the robe was superfluous.
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> "We have had the great good fortune to know this extraordinary man. We can remember what he taught us. We need not be fearless to have courage. We can be tough and tender. We can do the right thing—and face the bad that cannot be avoided unflinchingly. We can laugh. And we must sing—even when people frown at us and advise us to keep our day jobs. We can care for the people around us. We can be generous. We can make our way, against the tide, without rancor or bitterness. And when we are tired and overburdened and feel we are not brave enough to go on, we will hear his voice in our ear. Hear him say in that quiet and steely tone: 'Yes, you can. You can.' And we will know that we are being true to his legacy. The legacy of one who loved liberty. We will know that we are standing up . . . because Justice Puglia is passin'."[35]

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

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

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

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

Here are the 2024 award-winning students:

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

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

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

Carlucci, Ashford, and Motley, Civil Rights Pathfinders

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

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

Some Final Thoughts

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

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

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

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[36] "America 250 Years in the Making," https://america250.org.

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

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ARTICLES

HON. SHAMA HAKIM MESIWALA*

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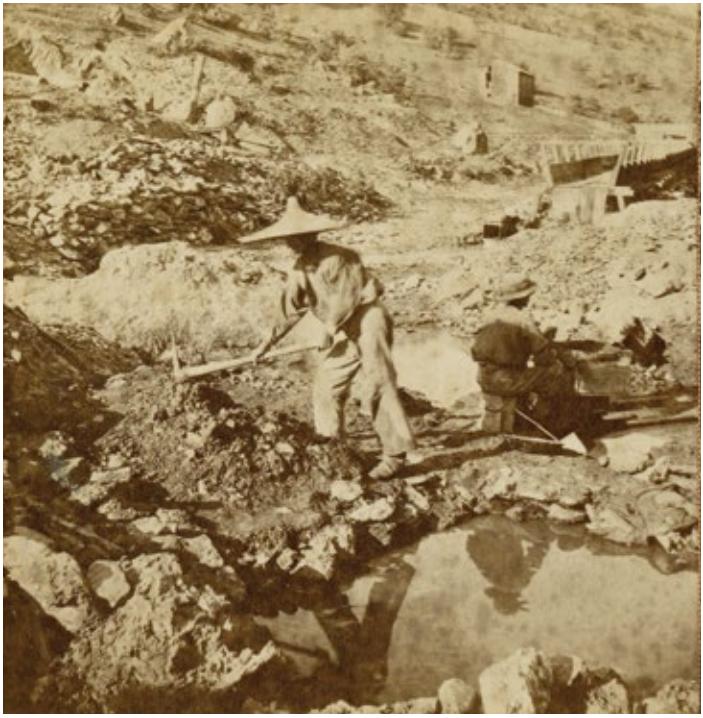
[42] *Moore v. Smaw and Fremont v. Fowler,* 17 Cal. 199 (1861). It was a highly controversial decision. The alternative view, supported by significant authority, was that the U.S. government retained title to precious metals.

[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.

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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.

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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).

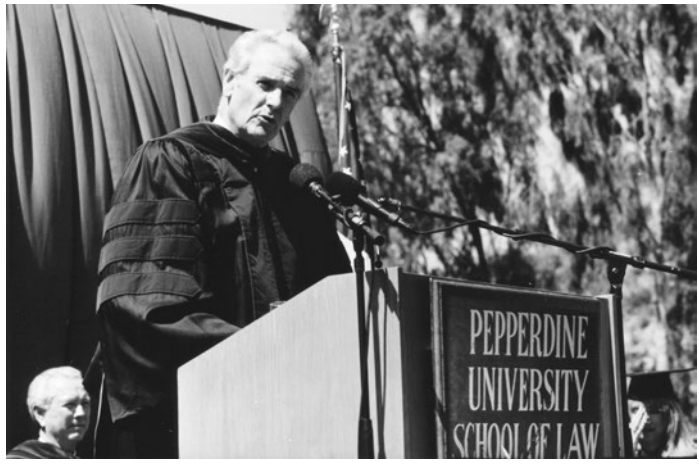
[118] https://www.pechanga-nsn.gov/index.php/history/the-great-oak (as of Jul. 6, 2024).

ORAL HISTORIES

AN ORAL HISTORY BY LAURA MCCREERY,*
WITH AN INTRODUCTION BY RYAN CARTER**

Chief Justice Malcolm Lucas

How "Collegiality" and a "Steady Hand" Reset a Court in Crisis



Malcolm Lucas speaks at the Pepperdine University Commencement in 1991. Credit: University Archives Photograph Collection [digital resource], Pepperdine University Special Collections and and University Archives. Permission granted to publish.

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* McCreery conceived of the California Supreme Court Oral History Project, initially, with but four justices in mind, who by 2005–2006 had retired from the bench: Chief Justice Malcolm Lucas, John Arguelles, Armand Arabian, and Edward Panelli. The idea, she noted, was to produce interviews with justices who served overlapping time periods with a goal of offering a richer historical account of the lives and careers of justices who were pivotal at a historic time for the court in the mid to late 1980s. Her work would go on to span her oral histories for nine justices. For more, see, https://www.worldcat.org/search?q=au%3ACalifornia+Supreme+Court+Oral+History+Project.&qt=hot_author and *California Leads in Oral Histories of State Supreme Court Justices*, Cal. Sup. Ct. Hist. Soc. Rev., Spring/Summer 2020, https://www.cschs.org/wp-content/uploads/2020/06/2020-CSCHS-Review-Spring-Oral-Histories.pdf; see *Oral Histories Explore Supreme Court in Changing Times*, https://www.cschs.org/wp-content/uploads/2014/08/2008-Newsletter-Fall-Oral-Histories-Explore-Supreme-Court.pdf.

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An Introduction

The year was 1984, and Federal District Court Judge Malcolm Lucas was in a good place. As a federal jurist, he enjoyed lifetime tenure, insulated from the changing political shifts of the era.

The mix of civil and criminal cases struck a satisfying balance. His knowledge of criminal procedure expanded.

And his already well-known collegiality and penchant for fixing the holes in the judiciary and for court administrative reform were shining brightly.

Then, after a robust thirteen years on the federal bench, came a call from his longtime friend, George Deukmejian.[1]

Deukmejian had just been elected governor, buoyed by voters' embrace of the tough-on-crime platform that fueled his campaign. He had his eye on the state's liberal highest court, which was packed with appointees of former Governor Edmund G. "Jerry" Brown[2] and his father Edmond G. "Pat" Brown.[3]

Deukmejian felt it had become too lenient. And with the Supreme Court's lone conservative associate justice, Frank Richardson[4] retiring, Deukmejian wanted Lucas, his old friend and law partner from Long Beach, to parachute in.

Suddenly, there was Lucas—whose already robust career had included

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[1] George Deukmejian was governor of California from 1983 to 1991. A friend to Lucas from their early legal career days in Long Beach, Deukmejian was elected on a tough-on-crime platform, with overhauling the judiciary a major part of it. The Governors' Gallery, https://governors.library.ca.gov/35-Deukmejian.html.

[2] Jerry Brown was twice the Democratic governor of California, from 1975 to 1983 and again from 2011 to 2019. He would appoint Chief Justice Rose Bird in 1977. The Governors' Gallery, https://governors.library.ca.gov/34-Jbrown.html.

[3] Pat Brown was Jerry Brown's father. The Democrat served as governor from 1959 to 1967.

[4] Frank Richardson was appointed to the California Supreme Court in 1974, by then Governor Ronald Reagan. He retired from the court on December 2, 1983. Upon leaving the court, he served as a distinguished visiting professor of law at Pepperdine University School of Law in the spring of 1984. President Ronald Reagan appointed Richardson as solicitor of the U.S. Department of the Interior, headed at the time by Secretary of the Interior William P. Clark, Richardson's former colleague on the California Supreme Court. Richardson left his Interior post in 1985 to become a Nixon Fellow at the Whittier Law School. For more on Richardson, go to https://www.cschs.org/history/california-supreme-court-justices/frank-k-richardson. Clark was previously appointed to the California Supreme Court by then Governor Reagan in 1973, and left the court when President Reagan named him to be undersecretary of state, U.S. Department of State, second only to Secretary of State Alexander Haig, in 1981; National Security Advisor in the White House in 1982; and Secretary of the Interior in 1983. In the next two years, Secretary Clark and Solicitor Richardson cleared a huge backlog of litigation the department had let drag on far too long. For more on Clark, see Paul Kengor, The Judge: William P. Clark, Ronald Reagan's Top Hand (2007).

removing unruly defendant Charles Manson[5] from his Los Angeles Superior Court courtroom and developing the nickname "Maximum Malcolm" by defense lawyers for his tough sentencing practices[6]—facing questions from his own children.

"My sister and I were sitting around a table at home, and he told us he'd been asked to go serve on the court. I said don't do it," Lucas's son Greg said,[7] reflecting on his father's "old-fashioned, Cicero kind of ethic."[8]

"Why would you give up this cushy gig?" Greg asked, reflecting on the turbulence that state court justices would face, from facing voters to picking up the pieces of a court that was under siege.

The answer was right out of a Roman statesman's playbook, with some Winston Churchill mixed in: "He said, 'When you're asked to serve, you have to step up,'" his son said.

This year marks forty years since Malcolm Lucas was sworn in to the California Supreme Court, a historical marker made all the more poignant by the fact that he helped establish the California Supreme Court Historical Society, which publishes this journal.[9]

When he took the job as an associate justice, he humbly embraced it as a "lone dissenter" on a court friendly to labor, to consumers and criminal defendants, and which was overturning death penalty convictions at a record pace.

But in Lucas, the seeds of what has been called a conservative "counterrevolution" had been planted on a court that for decades had swung left.

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[5] During a hearing in L.A. Superior Court, Manson, on trial for murder with three women codefendants, continued to physically turn his back to the bench as a show of displeasure. Lucas, who supervised the court's criminal division at the time, was presiding over law-and-motions matters in the high-publicity trial. As Manson's lawyer, Irving A. Kanarek, argued for a change of venue, Lucas chimed in: "You are to face the court, Mr. Manson, or you are going to be removed from this court." After a recess in which Kanarek talked to Manson, Manson continued turning his back to the bench. "He just kept spinning around, so I had him removed from the courtroom," Malcolm told McCreery. John Kendall, *Manson Turns His Back on Judge, Is Taken from Court*, L.A. Times, June 10, 1970. Lucas ultimately assigned the case to Judge Chuck Older. https://www.newspapers.com/article/the-los-angeles-times-hinman-manson-tu/30772061.

[6] Jeremy B. White and Christopher Cadelago, *Former California Chief Justice Malcolm Lucas dies at 89*, Sac. Bee, https://www.sacbee.com/news/politics-government/capitol-alert/article104792956.html.

[7] Telephone interview with Greg Lucas, Malcolm Lucas's son (Aug. 1, 2024).

[8] Greg Lucas is the California State Librarian, https://www.library.ca.gov/about/senior-staff/. Greg Lucas also paid tribute to his father during an honorary Court session following Malcolm Lucas's death: See video: *Supreme Court Oral Arguments, December 16, 2016: Remembering Hon. Malcolm Lucas,* at 48:14, https://www.youtube.com/watch?v=-mPagAxWN_I&t=22s.

[9] McCreery's oral history Q&A with Lucas is published here under a licensing agreement with the Regents of the University of California. https://www.lib.berkeley.edu/find/digital-collections. The longform oral history citation: *Malcolm M. Lucas: Chief Justice: Reforming the California Supreme Court and the California Court System in Extraordinary Times, and a Career in the State and Federal Judiciary, 1967–1996; with an Introduction by George Deukmejian*. Interviews conducted by Laura McCreery in 2007–2008, BANC MSS 2014/183, © The Regents of the University of California, The Bancroft Library, University of California, Berkeley.

Malcolm Lucas and his son Greg, circa early 1960s. Permission to publish from the Lucas Family.

Two years later, the seeds sprouted.

In 1986, voters in a judicial retention election removed Chief Justice Rose Bird,[10] along with two associate justices, Cruz Reynoso[11] and Joseph Grodin.[12]

It was the court's most seismic crisis in its 174 years, leaving it down three justices, including its chief, and a judiciary of which voters had grown wary.[13]

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[10] Chief Justice Rose Bird was the first woman appointed as a justice of the California Supreme Court and the first woman to serve as Chief Justice of California, and chair of the Judicial Council. Appointed by Governor Edmund G. (Jerry) Brown Jr., she led the court from 1977 to 1987. She died in 1999, after a battle with breast cancer, https://www.cschs.org/history/california-supreme-court-justices/rose-elizabeth-bird.

[11] Cruz Reynoso was the first Latino state Supreme Court justice in California history. On the court, he is perhaps most known for authoring a landmark opinion, *People v. Aguilar*, 35 Cal. 3d 785 (1984), where the court found non-English speaking people accused of a crime have the right to an interpreter during their entire court proceeding.

[12] Governor Jerry Brown tapped Joseph Grodin as an associate justice for the California Supreme Court in 1982. He had been sitting on the court of appeal, where he authored the decision in *Pugh v. See's Candies, Inc.*, 116 Cal. App. 3d 312 (1981), a landmark opinion affecting workers' rights. But his tenure on the Supreme Court would meet the same fate as Bird's in 1986. Faculty, UC Law San Francisco, *UC Law SF Celebrates Joseph R. Grodin's Legacy on 90th Birthday* (Aug. 28, 2020), https://uclawsf.edu/2020/08/28/joseph-grodin-legacy.

[13] Note that the three other justices on the court who were on the ballot did not face organized opposition, and retained their seats easily: Justices Stanley Mosk, Lucas, and Edward A. Panelli. Frank Clifford, *Voters Repudiate 3 of Court's Liberal Justices*, L.A. Times, Nov. 5, 1986, https://www.latimes.com/archives/la-xpm-1986-11-05-mn-15232-story.html.

When the dust settled, Deukmejian would again call on Lucas. This time it wasn't just to be the "loyal opposition."

This time, in a stunning moment, it was to lead the court.

On February 5, 1987, Deukmejian swore in Lucas as chief justice. And Lucas took the governor's oath of office for his second term.

By the time he retired in 1996, Lucas left behind what Deukmejian called "an extraordinary legacy that others will find hard to emulate."[14]

"Make that three legacies," said Clark Kelso, professor of law at the University of the Pacific, and an expert in the state's judicial administration.[15]

"The first legacy was that he restored a sense of collegiality and calm to the California Supreme Court," Kelso said. "It had gone through a rather difficult six to eight years."

Kelso said the death penalty rulings, coupled with rulings over state reapportionment, had for years chipped away at public confidence in the court. "It was restored in great part because of his leadership," Kelso said.

Second, the court suddenly went from one of the most liberal courts in the nation to solidly conservative, as a now Republican governor was able to appoint three new associate justices.[16]

"That began with Lucas," said Kelso, noting that it brought the court into the "mainstream" of the nation.[17,18]

And third, Lucas, already with a penchant for identifying gaps in court efficiency and administration, realized early on that the state's court system, from trial to appeals, needed revamped long-term planning and streamlining.

"He got the ball rolling," Kelso said.

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[14] McCreery, *supra* note 9, introduction by George Deukmejian.

[15] Ryan Carter interview with Clark Kelso, July 31, 2024. Kelso's *A Report on the California Appellate System*, 45 Hastings L.J. 433 (1994), https://repository.uclawsf.edu/hastings_law_journal/vol45/iss3/2, argued that California's Court of Appeal and Supreme Court "should set a model of leadership for the administration of justice" and must strive to meet the "broader goals of the entire judicial system."

[16] Incoming justices John A. Arguelles, Marcus Kaufman, and David Eagleson left after two, three, and four years, respectively.

[17] There has been considerable discussion on this, however. Former Chief Justice Cruz Reynoso said in a 2016 panel on judicial elections that after the 1986 retention election, the "whole tenor of the court changed," saying that its tilt to the right was a reason the court's reputation evaporated. *Thirty Years After a Hundred-Year Flood: Judicial Elections and the Administration of Justice*, Calif. Sup. Ct. Hist. Soc. (Oct. 2, 2016), https://www.youtube.com/watch?v=uMZcKJ0PvN0.

[18] Note, too, that despite her ouster and the intense criticism of her jurisprudence and approach as chief justice, Bird was also praised as a jurist for what many saw as voting her conscience. That gained accolades for advancing the law toward protection of the rights of workers, criminal defendants, the poor, and minorities. Maura Dolan, *Ex-Chief Justice Rose Bird Dies of Cancer at 63*, L.A. Times, Dec. 5, 1999, https://www.latimes.com/local/obituaries/archives/la-me-rose-bird-19991205-story.html.

The state's Judicial Council, with Lucas as presiding judge, became a platform for major reform, short-term and long-term. Lucas was credited for his push on administrative reforms within the high court but also in the court system generally.

He embraced the reforms of the Trial Court Delay Reduction Act, codifying the court system to speed up the processing and disposition of civil and criminal cases. Indeed, he is credited with conceiving, creating, and staffing a Commission on the Future of the California Courts, and accepting its final report in 1993.

The *Report of the Commission on the Future of the California Courts: Justice in the Balance 2020*[19] established goals for a Court operating in an increasingly diverse state, one where the court's own ability to reflect the state it serves had to improve, and one where its own budget and number of judges had to grow in alignment.

Kelso said once those planning goals were established, it paved the way for smoother and fairer operation of the courts in the twenty-first century.

"He took this very seriously," Kelso said.

When Lucas died in 2016, then Chief Justice Tani G. Cantil-Sakauye praised Lucas's ability to bring "stability, peace and leadership" to a Court in the midst of an upheaval.[20]

And even Reynoso, then nearly thirty years removed from the very retention election that ousted him and his colleagues and that elevated Lucas, said Lucas "was an honorable man who did a good job of running the court and making sure everybody was heard," he said. "I ended my tenure on the Supreme Court with great admiration for the work he had done."[21]

While today's California Supreme Court has tilted toward a moderately more liberal bent, "they have maintained that collegiality," Kelso said.

Flashback to Jerry Brown's pick of Rose Bird for chief justice. Lucas thought

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[19] Report of the Commission on the Future of the California Courts, Justice in the Balance 2020 (1993), https://www.courts.ca.gov/documents/2020.pdf.

[20] Maura Dolan, *Former Chief Justice Malcolm Lucas, Who Steered State's Top Court to the Right, Dies at 89*, L.A. Times, Sept. 29, 2016, https://www.latimes.com/local/obituaries/la-me-ln-malcolm-lucas-obit-20160929-snap-story.html.

[21] Jeremy B. White & Christopher Cadelago, *Former California Chief Justice Malcolm Lucas dies at 89*, Sac. Bee, https://www.sacbee.com/news/politics-government/capitol-alert/article104792956.html.

it instead should have been Associate Justice Stanley Mosk.[22,23] And indeed, by the time voters ousted Bird, Associate Justice Edward A. Panelli's name was in the mix as a possible replacement. But as headlines splashed across newspapers at the time in the walk up to the 1986 retention election—in which Lucas himself was also on the ballot—he was known as a kind of "Great Hope" among conservatives.[24]

Thankfully, Lucas left a rich path in which to explore his journey.

Exhibit A is Laura McCreery's sprawling 2007 oral history interview with Lucas,[25] excerpted below.

McCreery's queries, over eleven interviews from late 2007 into mid-2008, prompted Lucas—by now nearly twelve years into retirement—to share his path, sometimes candidly, sometimes kiddingly, sometimes with rich digressions along the way.

What we get is a story of how a Long Beach kid with a penchant for travel found his way from USC Law School to a modest private practice and ultimately to the state's highest court.

No doubt, not all will agree with his rightward jurisprudence, which aligned with the law-and-order governor who appointed him.

But there's a sense here that themes in Lucas's career transcend efforts to define Lucas solely by his death penalty or pro-business legal thinking.

There's the Rose Bird-era Malcolm Lucas, where his dissents on the death penalty defined his "loyal opposition" as much as they amplified his sharp contrast to the liberalized high court that he was appointed into as an associate justice. Those dissents would, of course, foreshadow the rightward shift that he would lead, not just on capital crimes but on cases involving business and industry.

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[22] Appointed by then Governor Pat Brown, Stanley Mosk served as an associate justice of the California Supreme Court from Sept. 1, 1964, until his death on June 19, 2001. It was the longest tenure in the court's history. He had previously served as an L.A. Superior Court judge and had also served as attorney general of the state of California. Mosk authored some of the most consequential liberal rulings on the court. And yet, he and Lucas often sided with each other on their opinions. This often came with capital punishment cases. By 1986, Mosk had sided with Lucas to uphold twelve of thirteen cases issued by the court. For a transcript of a tribute to Mosk, see *Stanley Mosk: In Memoriam*, Calif. Sup. Ct. Hist. Soc., https://www.cschs.org/history/california-supreme-court-justices/stanley-mosk; also see Dan Morain, *Malcolm Lucas: The Great Hope Among Court Conservatives*, L.A. Times, Oct. 13, 1986, https://www.latimes.com/archives/la-xpm-1986-10-13-mn-3048-story.html.

[23] The Los Angeles County Courthouse was renamed in 2002 in honor of Mosk, https://www.dailyjournal.com/articles/349964-happy-60th-birthday-to-stanley-mosk-courthouse.

[24] Morain, note 22, *supra*, laying out how Lucas emerged as likely the governor's pick for chief justice. It didn't hurt that he and Deukmejian were friends. But Morain also notes Lucas was the conservative reply to Bird. This was apparent in his actions on issues such as Medi-Cal abortions, his high volume of dissents (in one of every three cases), the anticompetitive aspects of rent control, and of course his dissents on death penalty cases.

[25] McCreery, *supra*, note 9.

Here, in Lucas's own words, we get a glimpse not just of his own space as an early associate justice in the shadow of Bird, but also of his perspective on Bird and a sense of simmering tensions brewing on the court in the lead-up to the retention vote.

But in addition, there's the post-Rose Bird Malcolm Lucas, tasked with the epic job of restoring some form of balance on a court that had been defined by its fractiousness, and in which the state's electorate had lost faith.

There's Malcolm Lucas, the reformer. The man had a penchant for administrative change, learning from his elders and contemporaries about the need to educate the public about the courts, to make the system more fair and more efficient.

McCreery's oral history also offers a taste of the stunning legal and political landscapes of the era in which Lucas navigated as a trial court judge all the way to chief justice. We find Lucas as an early lawyer, relatively ignorant of criminal law in his early days at his and his brother Campbell's Long Beach firm. But we also get a sense of his growth within the law as consequential and burgeoning U.S. Supreme Court and California Supreme Court doctrine paralleled his career. Major state and federal court rulings on privacy and the death penalty would very much set a stage for his own work as a justice.

The story unfolds in every answer of McCreery's sprawling interview with Lucas but is punctuated by that crisis moment in 1986.

With one epic judicial retention election in November of that year, California voters removed Bird, Grodin, and Reynoso—a resounding repudiation at the time of a court that many in the state said had swayed too far to the left.

Out of the crisis emerged Lucas, long known as cut from central casting—a USC law school grad, tall, with a full and wavy grey mane and chiseled chin, no-nonsense, but collegial. A futurist and reformer. A leader. A world traveler. Conservative—just the way Deukmejian wanted it when he nominated his distinguished former law partner to serve.

McCreery tackles it all, from the fate of the Bird court to the rise of the Lucas court. In the coming pages, edited for brevity, the richness of Lucas's experience emerges.

But to get there, the table must be set. One must know something about his roots and the early underpinnings of his career in the law.

McCreery helps us here, too, as we get to know a justice whose familial roots go back to the founding years of the nation.

In its original form, the robust Q&A span hundreds of pages, many of which are devoted to Lucas's early life. In the spirit of brevity, we've tried to condense that narrative of his early life here, in the hope of walking the reader up to the moment when the Supreme Court came calling.

There are also people to meet along the way, so we've tried to offer a robust sprinkling of footnotes as names of people, cases, and more enter the narrative.

Beginnings

When folks note that Lucas was a judge cut from central casting, metaphorically, it's right on. There was his physically towering height, his chiseled jawline, the neatly coiffed, wavy gray hair, and the baritone voice. Put on a judge's robe, and he gets the part.

But there was also his ancestry, which on some level hinted at a life in the judiciary. His great-great grandfather, Robert Lucas, was the twelfth governor of Ohio in 1832, after years of ascending in the state's Democratic machinery. Going even further back to the 1600s, the first Robert Lucas on the continent was a probate judge in the colonies.

So as McCreery noted: "There is judging in the blood," of Lucas's family line. Lucas's father, whom he described as a good and adventurous man, was a successful Nebraska cattle rancher.

William Jennings Bryan, the Democratic presidential candidate three times over, would stay at the Lucas ranch on his lecture tours and political campaigns, Lucas told McCreery, drawing a connection between Bryan's populist politics and Robert Lucas's own lament over the railroad monopolies of the era.

There was a rugged, adventurous, and pioneering spirit that ran through the family, from early morning cattle drives in Jackson Hole to Malcolm Lucas's aunt, Robert Lucas's sister, Geraldine, whose ashes were ultimately buried at the base of the Tetons after a life devoted to the land.

They were ancestors who "had astonishing lives," Lucas would tell McCreery. Robert ultimately sold his ranch, traveled to Australia, and went on a safari in Africa. His travels would lead to Europe, where he would meet the woman who would become Malcolm's mother, Georgina MacGregor Campbell.

They married in Scotland, ultimately finding their way back to the United States. Lucas was born in Berkeley on April 19, 1927, two years before the Great Depression.

After his father died suddenly in 1937, his mother would take her three boys—Malcolm, older brother Campbell, and younger brother Eric—to her

ancestral home in Scotland briefly. But with war brewing, they would settle back in Long Beach, California.

Lucas's widowed mother made a home in Long Beach with her boys. And despite the absence of a father, whose sudden death came from a heart attack, it was a happy childhood. Thanks to a mother who "devoted her life to her three boys," and some wealth brought by the sale of his father's ranch and grasslands, life was relatively insulated from the financial ravages of the Great Depression.

Here, we already see early contrasts with another of McCreery's subjects, former Justice John A. Arguelles,[26] a Lucas contemporary on the court. Arguelles's reflections on his own early life centered on Depression-era East Los Angeles, where his working-class origins offer insight into a Latino's life journey to the Supreme Court.

While they took very different paths, they converged with those of millions of their generation because of World War II. And they also found common ground in an exploration of the cities they grew up in and began their early careers—cities that were experiencing their own versions of pre- and postwar America.

Where Arguelles's career was grounded in 1950s working-class Montebello, California, after his late-war enlistment in the U.S. Navy, Lucas would find his own local turf as he found his way also to the Navy, where he enlisted at age seventeen. By then, he was somewhat acclimated to the sea, growing up in what was then the "sleepy," bucolic and white Long Beach.

It's here where at age sixteen, the war raging abroad, he was working for the summer at Douglas Aircraft, riveting together the aluminum of C-47s, joining the growing numbers of *Rosie the Riveters* at the plant as the war unfolded and the adult men were sent to fight.

Still, it was a happy early life: There was Woodrow Wilson High School, where playing on the golf team kept him out of trouble. There was the time he, his brother Campbell, and neighborhood friend Eddie, built a sailboat and sailed to Catalina.

"It was a nice little adventure," he tells McCreery, foreshadowing his own legal adventures to come.

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[26] For more on Arguelles, see *From the "People's Court" to the Supreme Court: Remembering the Legacy of John A. Arguelles*, Oral History by Laura McCreery and Introduction and Conclusion by Ryan Carter, 18 Calif. Legal Hist. (2023), https://www.cschs.org/wp-content/uploads/2023/12/Legal-Hist.-v.18-Oral-Hist.-Justice-Arguelles.pdf.

Road to the Law

Like Arguelles, a life in the law was not necessarily predestined for Lucas. But where Arguelles nearly found his way into a completely different profession and had few mentors, Lucas at least had hints early on about his career path.

McCreery prompted a telling quote from the judge about that path. Again, it was his mother's voice.

"You're never going to earn your living by hard labor," he remembered her saying. "You're going to earn your living with your mind."

"She didn't go so far as to say I'd be in law and all the rest of it," he tells McCreery. "That would be asking too much, or that would make me very suspicious, but she went on about: 'It's going to be intellectual pursuits that you follow,' which is something they could probably read from the atmosphere there and all the rest of it. It was unlikely that I would be a coal miner."

By 1947, when he was filling out his Navy discharge papers, even though specifics were thin, when asked about "plans for discharge," he wrote: "law school."

"So I must have had this in mind a long, long time ago," he said, reflecting on his young self. Indeed—the shy but studious Lucas would follow in his brother Campbell's footsteps. Campbell went to UCLA in pre-law and then to USC Law. Malcolm, thanks to the GI Bill that supported veterans, would earn his way into USC Law, a year behind his brother.

Lucas's education in itself, much like that of Arguelles, offers a glimpse into the early generations of the legal education landscape in their generation's Southern California.

By 1953, USC Law School—the first in California—was more than fifty years old. UCLA Law was still newly christened, having opened in temporary barracks behind the campus's Royce Hall in 1949.

There were only two women in this early academic cohort, which attracted among their entrants many military veterans such as Lucas.[27]

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[27] Times would change, of course. The school would ultimately go on to boast that its graduates included "arguably the most renowned American female lawyer from the 1920s through the 1940s, Mabel Walker Willebrandt, J.D. 1916, LLM 1917," who served as assistant U.S. attorney general during U.S. President Warren G. Harding's administration. Other distinguished alumnae from the school's early years, among others, include the first female Asian-American justice, Joyce Kennard, on the California Supreme Court, https://www.courts.ca.gov/5760.htm; and the first African American woman, Yvonne Brathwaite Burke, elected to Congress from California, who was also the first woman to serve on the Los Angeles County Board of Supervisors, https://cablackcaucus.org/hon-yvonne-brathwaite-burke. USC was the first top-tier law school to appoint a female dean, Dorothy W. Nelson, LLM 1956, who served from 1968 until 1980. She was appointed to the U.S. Court of Appeals for the Ninth Circuit. *History of Innovation in Legal Education*, USC Gould School of Law, https://gould.usc.edu/about/history.

Prompted by McCreery, Lucas reflected on "teachers fearsome to behold," such as corporate law professor John Paul Jones.

"You're seated there, and he's got a seating chart, and you know that you're going to have to recite if he calls on you. He'll run his finger up and down the seating chart, and then he'll say in this stentorian voice, "Smith. What's true about the case of x versus y?" which is one of the cases that we would study. "What's true about this case?"

Any sign of the judge Lucas would become is not easy to find in these early years. Good student? Yes. (And he worked on the side in the legal department at Southern California Edison, he tells McCreery.)

But destined for the pinnacle of the state judiciary? Political aspirations? Other than studying political science, any big precursors to "chief justice" were not on the radar screen quite yet. What was clear was a continued robust sense of adventure, and perhaps even a hint of a maverick spirit. There was the drive with a classmate to Mexico City at the end of his law school career. He would spend three months there, away from "noxious law school."

There was the year off after the bar exam to travel Europe. "We had purchased a Volkswagen when we got to Paris, so then we decided we will follow the sun, keeping going to the south to avoid the dreaded cold—not as easy as it sounds. We went through France and then Spain, and then at Christmastime we left the car in Barcelona, garaged it, and took a boat to Mallorca . . . ." Denmark, Sweden, Berlin would follow.

It was the summer of 1954, and the trek "made names come alive," Lucas told McCreery. But a professional life beckoned. Lucas and brother Campbell[28] had long envisioned starting a law firm back in Long Beach, and that they did when Malcolm returned from Europe. It would start them on a path to the courtroom, and to major lifelong connections.

It was the mid-1950s. A booming postwar America. A growing Long Beach, trying to become a big Southern California city. And Lucas, Pino & Lucas was making a name for itself mostly in commercial and business law.

What wasn't part of the firm's portfolio early on was criminal law and procedure, which would become foundational legal landscapes Lucas would face, and come to embrace, through much of his career.

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[28] Campbell Lucas carved out a distinguished judicial career in his own right. He served as an associate justice in the California Court of Appeal, Second Appellate District, Division 5 from Sept. 17, 1984, to May 2, 1988. He was then promoted to presiding justice of the same court, a position he held from May 2, 1988, to Jan. 6, 1991. Prior to these roles, he was a judge at the Los Angeles Superior Court from Nov. 13, 1970, to Sept. 17, 1984, having been appointed by then Governor Ronald Reagan. California Courts: Courts of Appeal, https://appellate.courts.ca.gov/district-courts/2dca/bio/campbell-m-lucas.

Malcolm Lucas, William Barr, and an unknown party. Pepperdine University Archives Individual Files. Special Collections and University Archives, University Libraries, Pepperdine University. Used with permission.

It wouldn't be long before all of that, including the course of Lucas's career journey, changed: enter George Deukmejian, the future governor of California.

Deukmejian was also rooted in Long Beach, a lawyer and ambitious. As Lucas described the time, lawyers ran in the same circles. They, including Lucas and Deukmejian, often gathered at Charlie Savitz restaurant in the city.

Deukmejian had just been elected to the California State Assembly in 1963 for a seat representing Long Beach. That same year, he went to the Lucases and asked to form a partnership, and did.

It was a good fit. "George was singularly prudent and almost miraculously honest," Lucas tells McCreery. "He makes Abe Lincoln look like kind of a neighborhood delinquent."

But the Lucas-Deukmejian association was just getting started.

Political power was shifting anew in California. The more left-leaning years of Governor Edmund G. "Pat" Brown would give way to Ronald Reagan,[29]

[29] Ronald Reagan was governor of California from 1967 to 1975. He served as president of the United States from 1981 to 1989. Governors' Gallery, https://governors.library.ca.gov/33-Reagan.html.

the famous actor turned politician, who with his now conservative credentials was elected to the state's highest office and Deukmejian was elected to the California State Senate, both in 1966.

As Reagan's policies steered the state rightward, he needed judges to do the same. Deukmejian, too, was rising in the state's now conservative power dynamics. He put Lucas's name forward as a judge in the L.A. Superior Court.

Reagan obliged.

Long Beach attorney Malcolm Lucas, the kid who made a sailboat that sailed to Catalina, and the world traveler who spent three months in Mexico City to get away from "noxious law school," was now a judge for the Los Angeles Superior Court.

A theme that cuts through Lucas's early judicial years is his evolving embrace of criminal law. That embrace started in Los Angeles, where he went from little exposure to criminal law and procedure as a lawyer to facing it every day as a judge.

"From the very first day in the Superior Court I realized how abysmally ignorant I was of criminal law," he tells McCreery. "I told you about telling Don Wright,[30] 'Don, you can't on a Monday send me down on Thursday to try, to start a murder trial. The only Miranda I know is Carmen.'" But he would grow.

"I began to like the criminal law," he tells McCreery. "I'd never had it. You start it off with the initial proceedings and the *voir dire* and all of that, and then there's this oftentimes dramatic tableau that is created before you. You're steering in a certain direction with your rulings, but you're watching what's happening, and some of these cases are just absolutely fascinating."

Shifting Constitutional Doctrine

It was also a time when big rulings in criminal procedure and civil rights were being handed down by the U.S. Supreme Court.

The court ruled in 1966 in *Miranda v. Arizona*[31] that police must inform criminal suspects of their constitutional rights before questioning them.

The decision would ripple all the way to the L.A. Superior Court, where

[30] Donald R. Wright was chief justice of the California Supreme Court from 1970 to 1977. He was appointed by then Governor Ronald Reagan. He was a Los Angeles Superior Court judge from 1961 to 1968 before Reagan appointed him to the California Court of Appeal, Second Appellate District. *See* https://www.courts.ca.gov/documents/WrightD.pdf. Ultimately, as chief justice of the state's high court, in 1972, he wrote the landmark majority opinion striking down California's death penalty, *People v. Anderson*, 6 Cal. 3d 628 (1972). After the penalty was reinstated in 1976 by an initiative, he wrote another opinion striking it down again, in *Rockwell v. Superior Court*, 18 Cal. 3d 420 (1976).

[31] 384 U.S. 436 (1966).

judges, including a young Lucas, were faced with presiding in the context of new doctrine.

There was *Gilbert v. California*[32] and *U.S. v. Wade*,[33] declaring the constitutional right to counsel during a police lineup.

"At the time I thought it was really quite an intrusion into state-court criminal proceedings," Lucas said, reflecting on *Miranda*. "I don't feel that way now. I think it's very beneficial that we have it. So, as I grew to understand it and use it, I endorsed it."

It's notable here that in this period—the late 1960s to early 1970s—there was major change in death penalty doctrine. In time, it would become consequential in the evolution of the death penalty in California and in how the Bird and Lucas Courts would rule on it.[34]

In the meantime, Lucas became head of the L.A. County Superior Court criminal division after working in it for three years. He was named to the post by then Presiding Judge Joe Wapner.[35]

By now, there were glimpses of the jurist Lucas would become. Wapner saw "that I could ensure that the progress of the court continued," Lucas tells McCreery.

At the time, there were mounting backlogs in cases. And there was little emphasis on settling them. It was a time before the Trial Court Delay Reduction Act of 1986, legislation that codified standards of timely disposition of civil and criminal actions. Lucas himself would later be a force in establishing the law as the state's chief justice.

But even at the Superior Court level, Lucas was pushing the court to be better. There was the streamlining of the Superior Court case calendar via the Special Committee on Judicial Reforms in 1971. There was the reclassification of possession of marijuana and dangerous drugs.

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[32] 388 U.S. 263 (1967).

[33] 388 U.S. 218 (1967).

[34] In 1972, the California Supreme Court's landmark decision in *People v. Anderson* (*see* note 30, *supra*) finding the death penalty is cruel or unusual punishment under the state's constitution, would shift the direction of death penalty doctrine for the next nearly twenty years. As a Superior Court judge at the time, Lucas would abide by *Anderson*. But in time, he would be on the leading edge of shifting it anew.

[35] Wapner was a key leader in Lucas's experience, who also recognized Lucas's leadership talent. Wapner himself is an interesting story. Many knew him as the pioneering, level-headed, but no-nonsense superstar judge on the television show "The People's Court." Born in Los Angeles, he too attended USC Law, rising from L.A. municipal courts to L.A. Superior Court, where he was elected presiding judge several times over. Adam Bernstein, *Joseph Wapner, Judge on "The People's Court," Dies at 97*, Wash. Post, Feb. 26, 2017, https://www.washingtonpost.com/entertainment/tv/joseph-wapner-judge-on-the-peoples-court-dies-at-97/2017/02/26/2664b1e0-fc58-11e6-8ebe-6e0dbe4f2bca_story.html.

Lucas found himself joining Wapner in lobbying the state Legislature for such reforms. He'd discovered his aptitude for improving the courts, and following Wapner's lead his interest in administration was reinforced.

"I think, although I had it myself, I think I had reinforced my feeling of institutional loyalty and a desire to improve the institution, not necessarily our own individual betterment," he told McCreery.

All the while, his efforts were being noticed. By 1971, the political winds had also shifted at the national level. Richard Nixon was three years into his presidency.

Lucas himself, a conservative judge emerging at a time when conservatives held the White House and the governor's mansion in Sacramento, had little outward interest in the federal bench until he was asked if he'd consider a seat.

"If I was happy with what I was doing, well, I'm just going to do that, do the best I can, and sometimes different things happen, sometimes they don't," he tells McCreery as she queries Lucas on his ascendency to the district court. "But I was never in an avenue of seeking advancement, which made me feel very comfortable, and I never thought about it. It seemed to me to be the best course."

Indeed, Lucas was rather enjoying the state courts and making a difference when it came to reforming them. But he did appreciate the formality of the federal bench.

And so, on July 8, 1971, he was appointed for a life term to the U.S. District Court and was formally inducted the following year.

But other winds were shifting.

Justice Donald Wright's majority opinion in *Anderson*[36] would alter the trajectory of cases for years to come, setting the stage for a major moment in Lucas's own jurisprudence and career.

In the case, the majority outlawed capital punishment, finding that it violated the California Constitution's "cruel and unusual punishment clause."

By then, the death penalty as a form of punishment was evolving, and by the time of Wright's opinion, becoming increasingly rare in the state.[37]

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[36] 6 Cal. 3d 628 (1972).

[37] Again, the evolution of the death penalty in this state is worth noting in the context of *People v. Anderson*. Beginning in 1967, as a result of various state and United States Supreme Court decisions, there were no executions in California for twenty-five years. On Aug. 27, 1937, the Legislature replaced hanging as the method of capital punishment with lethal gas. The law did not affect the execution method for those already sentenced. As a result, the last execution by hanging at Folsom Prison was conducted on Dec. 3, 1937. The last execution by hanging at San Quentin State Prison was held May 1, 1942; the defendant had been convicted of murder in 1936. A total of 215 inmates were hanged at San Quentin and 92 were hanged at Folsom. The gas chamber was installed at San Quentin in 1938. On Dec. 2, 1938, the first execution by lethal gas was conducted. From that date through 1967, 194 people—including four women—were executed by gas, all at San Quentin. *History of Capital Punishment in California*, California Dep't Corr. & Rehab., https://www.cdcr.ca.gov/capital-punishment/history.

In his opinion, Wright leaned heavily on an evolved standard of what constituted cruel punishment, while also finding that the framers of the state's constitution sought to "restrict their fellow Californians' zeal for devising novel and torturous punishments."[38,39]

"Well over a century has now passed since the day when vigilante justice and public hangings made executions an accepted practice of California life," Wright wrote. "We cannot today assume, as it was assumed in early opinions of this court, that capital punishment is not so cruel as to offend contemporary standards of decency."[40]

In his dissent in the case,[41] Associate Justice Marshall McComb[42] argued that the death penalty is constitutional, based on a long line of cases, and that it deters crimes that result in the deaths of innocent victims. He added that it is up to the Legislature or the electorate—not the courts—"to decide whether it is sound public policy to empower the imposing of the death penalty."

That dissent, while in the minority at the time, would resonate in the Lucas era, on a court where Lucas made a point of amplifying the people's will through the vote or through the legislative branch.

It wouldn't be long before McComb's reasoning would win the day, at least in the short term.

In November 1972, the California electorate passed Proposition 17,[43] which amended the state constitution, and in 1973, legislation was enacted making the death penalty mandatory in specified criminal cases.

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[38] *Anderson*, 6 Cal. 3d at 646.

[39] As noted by Edward J. Erler, professor of political science emeritus at Cal State San Bernardino, an underlying element of *Anderson* was the doctrine of independent state grounds, which "allows the California Court to make more liberal or expansive interpretations of provisions in the California Constitution which are similar to those in the U.S. Constitution." Edward J. Erler, *The Death Knell of the Bird Court*, Claremont Rev. Books, July 16, 2014.

[40] *Anderson*, 6 Cal. 3d at 645.

[41] *Id.* at 657.

[42] Marshall F. McComb served as an associate justice on the California Supreme Court from 1956 to 1977, https://appellate.courts.ca.gov/district-courts/2dca/bio/marshall-f-mccomb.

[43] A "yes" vote for the measure effectively prohibited "the death penalty from being deemed unconstitutional under any provision of the California Constitution." It was a direct refutation of Wright's opinion in *People v. Anderson* that "every statutory law of California relating to the death penalty that was rendered ineffective by the decision of the California Supreme Court would be reinstated (subject to amendment or repeal) insofar as their validity under the United States Constitution is concerned." The analysis of the measure did stop short of saying such provisions were unconstitutional under the U.S. Constitution: "Their validity under the United States Constitution, however, is a separate issue." The analysis goes on, noting that Proposition 17 would "make effective" the death penalty statues "to the extent permitted under the U.S. Constitution." UC Hastings College of Law, *Voter Information Guide for 1972, General Election*, UC Hastings Scholarship Repository, http://repository.uchastings.edu/ca_ballot_props/774.

But the force of the U.S. Supreme Court's opinion in *Furman v. Georgia*,[44] declaring capital punishment unconstitutional, would become the backbone of reversals[45] throughout the Bird court for years to come.[46]

The legal and constitutional tug of war over capital punishment would remain, setting the stage not just for Bird's tenure, but for the shift that Lucas led.

In the meantime, he was busy in federal court.

Defense lawyers gave him the nickname "Maximum Malcolm" for his tough sentencing protocol.

It was his time on the federal bench, from 1971 to 1984, that Lucas told McCreery was the best experience in his judicial career. "There was always a sense of, in a sense, adventure," he said, adding that the mix of civil and criminal law on the federal bench was unmatched.

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[44] Furman v. Ga., 408 U.S. 238 (1972).

[45] At issue in *Furman* was whether carrying out the death penalty constituted cruel and unusual punishment under the Eighth and Fourteenth Amendments. In a sprawling opinion, only Justices William Brennan and Thurgood Marshall believed the death penalty to be unconstitutional in all instances.

[46] The case law in this period was very much evolving. A quick timeline for context:

- February 17, 1972: *People v. Anderson*, the California Supreme Court invalidated the death penalty law as a violation of the California Constitution's prohibition against "cruel or unusual punishment."
- June 29, 1972: *Furman v. Ga.*, the U.S. Supreme Court ruled the imposition of the death penalty in these cases constituted cruel and unusual punishment and violated the Constitution.
- November 1972: Proposition 17 passes, reinstating death penalty statutes, and that capital punishment is not "cruel or unusual punishment."
- 1973: The California legislature passes another death penalty statute. In an attempt to satisfy the requirements of *Furman*, the new statute left no discretion to juries.
- July 2, 1976: *Gregg v. Ga.*, 428 U.S. 153. In a 7-to-2 decision, the U.S. Supreme Court held that a punishment of death did not violate the Eighth and Fourteenth Amendments under all circumstances. In extreme criminal cases, such as when a defendant has been convicted of deliberately killing another, the careful and judicious use of the death penalty may be appropriate if carefully employed. The court did invalidate the use of mandatory death sentences, which disallowed the consideration of mitigating circumstances.
- 1976: *Rockwell v. Superior Ct.*, 18 Cal. 3d 420, strikes down California's mandatory death penalty statute, citing *Gregg*'s rationale.
- 1977: Legislature passes new death penalty over veto of then Governor Jerry Brown. State Legislature overrides Governor Jerry Brown's veto and reinstates the death penalty, allowing for capital punishment in first-degree murders with any of twelve special circumstances.
- 1978: California voters pass the Briggs Initiative, which creates California's current death penalty statute, adding sixteen more special circumstances, for a total of twenty-eight death-eligible crimes, https://deathpenaltyinfo.org/state-and-federal-info/state-by-state/california.

The Bird Court: The California Supreme Court in 1986 in the Chief Justice's chambers. Left to right: Associate Justice Stanley Mosk, Associate Justice Malcolm M. Lucas, Associate Justice Cruz Reynoso, Chief Justice Rose Elizabeth Bird, Associate Justice Joseph R. Grodin, Associate Justice Edward A. Panelli (standing), and Associate Justice Allen E. Broussard (seated). Published courtesy of the Supreme Court of California.

He was appointed justice pro tem on the U.S. Court of Appeal, giving him early appellate experience. He developed early views on the importance of oral argument. "It's important that it be done, if for nothing more than the appearance of justice," he tells McCreery. "And it does aid justice, so it should be continued."

He was contrasting what he'd seen at the state level with the federal judiciary and was not a fan of the "seniority system" of chief justices at the federal level. And he was continuing to develop his own courtroom approach and administrative chops.

A year in, he was already critical of certain court processes and norms and their impact on the court calendar and the efficiency of the system.

Lucas was in a good position. Lifetime appointment. He enjoyed the job. Thirteen years on the federal bench, and he was fascinated by it. But the political winds in California were changing anew.

An old and very good friend had reached the pinnacle of the state's elected office. Governor George Deukmejian took office in 1983[47] on a tough-on-crime platform, critical of outgoing Governor Jerry Brown's policies. In particular, he panned Brown's pick of Rose Bird as chief justice in 1977. The state's judiciary was way too lenient, he believed.

"Attorneys general don't appoint judges, but governors do," he told the *New York Times* in 2012. "And we were very troubled in those days by a lot of the appointments Jerry Brown had made."

Indeed, fueled by the doctrine of "reversible error," the Bird Court had overturned nearly every death penalty sentence that came before it.[48,49]

For Deukmejian, who put Lucas's name in Reagan's hat for the federal bench, it was time to turn the court's ideological tide—and quickly.

It was 1983. Lucas's phone rang. It was the governor calling. Even after a robust career on the state and federal benches, the journey was just getting going.

From here, the stage was set for Lucas's transition from federal bench to the state's high court in 1984. And it's here where we pick up with McCreery's interview, part of the California Supreme Court Oral History Project.

We present an abridged version here, amplifying key Lucas themes—from the Bird era to the retention election, to his leadership and collegiality, and to the cases.

Associate Justice Lucas: In the Shadow of Rose Bird

McCreery:

Mr. Chief Justice, you had been a federal judge for thirteen years by the time 1984 rolled around; I wonder, what was the first event that led to your eventually being seated on the California Supreme Court? How did it all begin, as you recollect it?

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47 Deukmejian defeated Los Angeles Mayor Tom Bradley by about 90,000 votes out of nearly 8 million cast. Katie Hafner, *George Deukmejian, 2-Term California Governor in the '80s, Dies at 89*, N.Y. Times, May 8, 2018, https://www.nytimes.com/2018/05/08/obituaries/george-deukmejian-dead-california-governor.html.

48 During her time as chief justice, Bird voted to vacate on more than five dozen death sentences. An example of a case that was overturned by the Bird court was that of Theodore Frank, who was convicted of kidnapping, raping and murdering a two-year-old girl, in *People v. Frank*, 38 Cal. 3d 711 (1985). His death sentence was overturned when the court ruled that evidence used in his trial was seized as a result of an overbroad search warrant. But Bird went further in her concurrence and dissent. The girl's grandmother, cochair of Crime Victims for Court Reform, blamed the court and specifically, Rose Bird. *See* Patrick K. Brown's *The Rise and Fall of Rose Bird: A Career Killed by the Death Penalty* (2014), https://www.cschs.org/wp-content/uploads/2014/03/CSCHS_2007-Brown.pdf.

49 See also Chief Justice Bird's dissent in *People v. Jackson*, 28 Cal. 3d 264, 278 (1980). In part: "Today, this court sends to his death an impoverished, illiterate and possibly retarded 19-year-old black youth by affirming a judgment that this court would not hesitate to reverse if any other offense were involved. I respectfully submit that it is unconscionable to affirm . . . . The majority dismiss counsel's failings as nonprejudicial. I cannot agree. Counsel's ineptness in preparing for and handling the guilt and penalty phases of this trial was so egregious as to amount to a denial of due process. A young man's life will be taken by the state as a direct result of these errors."

Lucas:

What monstrous misfortune caused me to leave a safe lifetime haven on the U.S. District Court to go to the California Supreme Court, a little more hurly-burly than the federal court?

The direct answer is, I got a telephone call from Governor Deukmejian, telling me, of course, which I had already known, that Frank Richardson,[50] a member of the California Supreme Court, was retiring, and would I be willing to have my name considered, along with others, to fill that position? I said, "I really don't know, George. I'll have to take a day or two and think about this, and I'll call you back." He said that was fine.

I spoke with friends in the judiciary who were knowledgeable about this. I spoke, I remember, with Otto Kaus,[51] and I expressed to him that the amount of writing that goes on there is considerable. I said, "Do you find it oppressive, Otto?"

He said not oppressive because, he explained to me, "Each justice has a staff of four law clerks," I believe it was. It may have been either three or four, because I know we added one when I was chief. "Then we have central staffs. We have a criminal central staff." I added a civil central staff when I became chief.

But he said, "You're primarily an editor. You assign these cases to each one of the individual staff attorneys, discuss it with the staff attorney, describe how the case in your view, so far at least, should turn out, and then they will return with a rough draft, perhaps of the opinion."

This isn't the case in all opinions, but most of them, particularly the more mundane ones. "So," he said, "you don't have to sit down with a yellow pad and start from square zero on the great, great, great majority of the cases. They're done."

I felt I could be a loyal opposition and that it would be a worthy task, and when I took the position, I had no thoughts of becoming chief justice. We had a chief justice, Rose Elizabeth Bird, and I accepted that.

So I told Deukmejian that, yes, I'm perfectly willing to be considered.

McCreery:

May I ask, at the time that Governor Deukmejian called and informed

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[50] *See* note 4, *supra*.

[51] Otto Kaus was appointed as an associate justice of the California Supreme Court, a position he held from July 21, 1981, to 1985. Judicial Branch of California, California Courts of Appeal, https://appellate.courts.ca.gov/district-courts/2dca/bio/otto-m-kaus.

you of Justice Richardson's retirement and asked to consider you for this, had there been any talk between you and the governor before that time about this possibility? Had you had any reason to even think about the California court system again?

Lucas:

Not really. I'd done thirteen, I must say, happy years in the federal bench, where you're pretty well your own boss.

You get individual calendars put in a routine manner into a wheel, as they call it. Your name is pulled up and that's your case. You work on your cases, and you help other people in other jurisdictions, but you're pretty well your own boss, and the Ninth Circuit is really a very lengthy distance from you, and not at all menacing.

Let's see. I think I tried about 5,000 cases in the federal bench, and 132 of those were appealed, and something like 28 of them were reversed. This is over a thirteen-year period and 5,000 cases, which is one of the lowest reversal rates in the whole circuit. I was enjoying myself and doing well, and getting interesting cases.

You get the mix of criminal and civil, and then you get the appellate work when you do go on the Ninth Circuit to sit, so no, a less longwinded answer would be that, no, we hadn't talked about it before this.

McCreery:

Just in your own mind, did you foresee any change at all for yourself from your federal position?

Lucas:

No. I mean, I was quite happy there. Perhaps I should have been more ambitious and been casting my summary of qualifications out over the city from a helicopter, but I saw no need to do that, and I am not one to promote myself, as I explained about coming on the superior court.

McCreery:

Did you find that in terms of actual legal questions, was there much crossover between the two systems—the federal system and the state system?

Lucas:

Sometimes, sure. Sometimes you'd look to get the reasoning as to what the Supreme Court would have done on that particular issue. You weren't bound

to accept it, of course, but if it had wisdom and persuasive impact, then you might well adopt it, or at least its reasoning.

McCreery:

The record shows that you were confirmed by the Commission on Judicial Appointments on April 6, 1984, and that, as you indicated earlier, was Chief Justice Bird, Court of Appeal Justice Lester Roth, and the attorney general at that time, John Van de Kamp, and that you took the oath the same day.

You were just shy of your fifty-seventh birthday, I noticed by that date. Then, I gather, there was a formal investiture ceremony about a month later down here in Los Angeles, presided over by Governor Deukmejian. That's just a list of those who spoke and participated on that occasion.

Lucas:

Yes. [Looking at list] I think this was conducted by the Supreme Court after I had been sworn in. I'm not sure what you would call it, welcoming remarks and introduction. Yes, I remember this. It all seems so long ago, twenty-four years ago.

McCreery:

It is quite a while ago. Do you remember how you felt upon embarking on this new phase of your life?

Lucas:

I was picked up the first day, I went up there, by another member of the state police who were assigned to the court. I noticed that he had a raincoat in the back seat. It was a very nice, perhaps unusual San Francisco day. I said, "Do you think we're going to need the raincoat?"

He said, "At some time during every day you need a raincoat. It's either so cold or so foggy, or maybe raining. The weather up here," he was from someplace else, "is not all that great."

That's kind of the, "Oh, really?" You'd been to San Francisco and you know it's in an area where the weather can be changeable.

McCreery:

But you were looking at it through new eyes all of a sudden.

Lucas:

Yes. I was looking at it like, this weather may be changeable on *me*. In June you would see tourists standing on the corner in shorts—who'd come from the

East where it was very hot—and just shivering. Then maybe you'd happen to see them the next day, and they'd be wearing, oh, a San Francisco coat that they'd bought, and San Francisco pants, the cheapest and warmest thing. So it was fickle, the weather. But it's a beautiful place, so I adapted to it. It was mostly work. You'd get up in the morning, and where do you go? You go right to work.

McCreery:

Just to set the stage for what the situation was when you joined the court, let's back up. While you were on the federal court, of course, Chief Justice Don Wright[52] decided to retire in 1977. I wonder if you can talk about how you first learned and reacted to Governor Jerry Brown's choice to replace him.

Lucas:

I suppose somebody called me, and/or I read it in the newspaper. I wasn't following it personally.

The more I learned about it, the more of a mistake I thought it was. Jerry Brown had appointed—when Frank Richardson was on, he was appointed by Reagan, and Mosk was appointed by Pat Brown, Sr.—everyone else on the court.

What I was told and what I've read is that she [Chief Justice Rose Bird] was a member of the public defender's office in Santa Clara County[53] and had been there for eight years, and she had volunteered to drive Jerry Brown around, I guess in his 1956 Plymouth or whatever he was probably driving in, when he was down in San Mateo.[54]

McCreery:

This is when he was running for governor?

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[52] *See* note 30, *supra*.

[53] While she had never been a judge, what Brown did like was Bird's reputation as an innovator as he sought a successor to Wright. Earning her law degree from Boalt Hall at UC Berkeley in 1965, she became the first woman in the Santa Clara County Public Defender's Office. She had also clerked at the Nevada Supreme Court. By the time she was in the Brown administration, she had her critics who knew her as a tough bargainer. While she was serving in the public defender's office in Santa Clara, she prepared a brief that persuaded the U.S. Supreme Court to refuse to hear a case that had been appealed by the attorney general of California. The case, *People vs. Krivda*, involving a search of a garbage can, developed the concept of independent state grounds. While at the public defender's office, she founded the public defender's appellate branch. Robert P. Studer, *Rose Bird Immersed in Controversy*, San Diego Union-Tribune, Mar. 1, 1977, https://www.sandiegouniontribune.com/news/local-history/story/2020-03-01/rose-bird-immersed-in-controversy; *but see California v. Greenwood*, 486 U.S. 35, 38, 43 (1988).

[54] Bird was known as one of Brown's most trusted advisors. She was the first woman to serve on the California Supreme Court and only the second woman in the nation to lead a state court, following Susie M. Sharp, chief justice of North Carolina. In 1975, before her elevation to the court, Brown appointed her Secretary of Agriculture, an agency of state government that employed 18,000 persons in 11 departments. It was known as a demanding job. She became one of two women to be named to a cabinet-level rank in the Brown administration, the first in California history. Studer, *Rose Bird Immersed in Controversy*, note 53, *supra*.

Lucas:

When he was running for governor. So he got to observe her . . . . So she, again apparently, and understandably I suppose, became a bête noire with the agricultural interests in California.

McCreery:

I was asking how you first learned that she was to be chief justice.

Lucas:

Yes, that's how I learned. A state senator, I never met this guy, H.L. Richardson,[55,56] apparently a very right-wing senator with little or no money for a campaign, began campaigning against her selection for this position.

When she appeared before the Commission on Judicial Appointments, she received the vote of Mathew Tobriner [as acting chief justice].

Parker Woods voted against her, saying, "On the grounds of experience." She'd had absolutely no judicial experience.

Finally, after much agonizing, Evelle Younger, who was the attorney general at that time, voted for her.[57]

I was told later by someone who talked to Evelle Younger that he said, "I'm going to be running for governor, and I don't want to lose the women's vote."

I hope that's not true, but at any rate it was kind of a tempestuous route to the position of chief justice for her.

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[55] H.L. "Bill" Richardson arrived in the California State Senate with the freshman class of 1966, part of the Reagan landslide that year, according to a tribute by Rep. Tom McClintock, R-Modesto. Richardson founded the Law and Order Campaign Committee, which became the driving force behind the early attempts to recall Bird, Reynoso, and Grodin. *Senator H.L. Richardson, RIP*, Feb. 11, 2020. Speech from the House floor, https://mcclintock.house.gov/newsroom/speeches/senator-hl-richardson-rip.

[56] Richardson was a pioneer in the use of direct mail lists to raise money for political causes and in particular for conservative causes. He also established one of the earliest, if not the first computer mailing company in the nation. Brown, *The Rise and Fall of Rose Bird*, *supra* note 48.

[57] Editor's Note: Once Bird's gubernatorial nomination to the high court was announced, Herbert Ellingwood, special assistant attorney general, California Department of Justice, called George Nicholson who was then executive director of the California District Attorneys Association (CDAA). He asked whether the association would oppose Bird's nomination. He said Attorney General Evelle Younger was a "no" vote if CDAA opposed Bird, but a "yes" vote if the association failed to oppose. Nicholson said he would call the president of CDAA, District Attorney Byron Morton, Riverside County. Morton said to go ahead, oppose, and call to reserve a testimonial slot before the California Commission on Judicial Appointments. Before doing so, Nicholson reflected for a short while and called Morton back to suggest CDAA's board of directors should be polled. Morton agreed. Nicholson polled the board by telephone and, by majority vote, 11–5, the board directed Nicholson to reserve the slot to oppose. District Attorney John Van de Kamp, Los Angeles County, immediately called Nicholson demanding an emergency full board meeting in Sacramento. The next day or so, the board met in Sacramento and evenly split by a vote of those in attendance, 6–6. CDAA thus took no position on the nomination. Late in the day before the confirmation hearing on Rose Bird's nomination as chief justice was to be heard by the Commission, Ellingwood again called Nicholson and asked, "Will CDAA be at tomorrow's hearing? If not, the attorney general will be a 'no' vote." Nicholson reiterated, "CDAA will not be there." Younger voted to confirm.

But at any rate, that's what I learned.

McCreery:

Just thinking for a moment about Governor Jerry Brown. He was said at that time to consider some other candidates for the position.

I don't know how many total, but the ones I read about were two other women, Dorothy Nelson,[58] who was then dean of USC Law School, and Shirley Hufstedler[59] of the Ninth Circuit. So that would seem to indicate he was in great hopes of having a woman seated in that position.

I just wonder, up to that point, what you might have thought about what he was generally doing, judicially speaking. He was clearly trying to make some changes in the face of the judiciary in the whole state, shall we say.

Lucas:

He wanted to poke his finger in the eye of the judiciary, is what it amounted to. That's my own view.

When you consider Dorothy Nelson and Shirley Hufstedler and Rose Elizabeth Bird in the same mouthful—Dorothy Nelson, dean of USC Law School, and even now a member of the Ninth Circuit Court of Appeal, and Shirley Hufstedler, who had been on our state Court of Appeal, and then went to the Ninth Circuit Court of Appeal, distinguished lawyer and all the rest.

If he'd wanted a woman, he would have gotten great huzzahs for either Dorothy or Shirley, because they were very able, and as has been proven by the test of actual experience, very able people. But he didn't.

Many people thought that he had difficulties with the judiciary. I don't know whether the thought that we had too much power because we weren't elected, yet we could declare unconstitutional a lot of the things that he did.

But no, he did no favor, either, to her when he appointed her to the Supreme Court.[60]

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[58] Nelson, a graduate with multiple degrees from UCLA and USC law schools, would carve out her own distinguished career on the U.S. Court of Appeals for the Ninth Circuit, after being nominated by President Jimmy Carter. News release: *Ninth Circuit Judge Dorothy Nelson Receives Lifetime Achievement Award*, Sept. 22, 2022, United States Courts for the Ninth Circuit, https://cdn.ca9.uscourts.gov/datastore/ce9/2022/Nelson-Award-July-2022.pdf.

[59] A graduate of Stanford Law School, Hufstedler was appointed associate justice of the California Court of Appeal, and then, just two years later, President Lyndon B. Johnson appointed her to the U.S. Court of Appeals for the Ninth Circuit. Eleven years later, President Jimmy Carter appointed her United States Secretary of Education.

[60] Friends said Bird ultimately acknowledged that she wished Brown had made her an associate justice instead of chief. See Dolan, note 20, *supra*.

McCreery:

I'd like you to say a few words about Stanley Mosk[61] and perhaps reflect on this idea voiced by so many that he, quote, "should have been chief justice."

Lucas:

Oh, absolutely he should have been chief justice. I expected him to be—from my outside position.

Here was a man of great standing and great recognition, and long-term experience on the court, and an innovative person who came up with good administrative ideas, and was just a standout person that should have been appointed and was never considered.

Maybe if Pat [Brown] had been governor**,** Pat might have considered him, but Jerry would not.

There was some word that spread around, "No, he's not going to have Stanley Mosk." He looked around until he found Rose, passing over Shirley Hufstedler and Dorothy Nelson.

It would have been a nice, tranquil court, well operated, with no interruptions.

Now, [Mosk] expected it [the promotion to chief]. He expected it, and he should have received it.

A Q&A Pause: The *People v. Tanner* Episode

Speaking of Stanley Mosk, Lucas shared with McCreery that "there was no love lost" between Mosk and Bird, not just after Brown passed over him to appoint Bird as chief justice, but also after allegations arose that the Bird court delayed the release of a decision in a case, *People v. Tanner*, to avoid public scrutiny.

From Lucas's perspective, the *People v. Tanner*[62] episode created "self-inflicted" wounds on the court and set a tone for what was to come under Bird.

We offer a summarized version here, with the hope of laying down some context as Lucas answers McCreery's queries about Bird.

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[61] Mosk was not an ally of Bird's. While his views were liberal, his dissents on death penalty matters set him apart. See his articulation in *In re Anderson*, 69 Cal. 2d 613 (1968). That said, he spoke highly of her upon her death, noting that Bird worked hard at the court, and her legal rulings were solidly researched and thorough, scholars said. "They were first rate. Even if you disagreed with the result, you would have to concede they were well-prepared and well-reasoned from her point of view." Maura Dolan, *Ex-Chief Justice Rose Bird Dies of Cancer at 63*, L.A. Times, Dec. 5, 1999, https://www.latimes.com/local/obituaries/archives/la-me-rose-bird-19991205-story.html.

[62] In *People v. Tanner*, 23 Cal. 3d 16 (1978) (*Tanner I*), the "Use a gun, go to prison" law, by a 4–3 vote, was found to intrude upon judicial discretion and voided. *Tanner I* was superseded when rehearing was granted, 23 Cal. 3d 55 (1978). Following reargument, the court reversed itself, by a 4–3 vote, and upheld the law in *People v. Tanner*, 24 Cal. 3d 514 (1979) (*Tanner II*).

Rewind to 1975, before Bird or Lucas were on the court. With the electorate's ire over crime building, Governor Jerry Brown signed a tough-on-crime bill, authored by Senator George Deukmejian, the "Use a Gun, Go to Prison" bill, stating: "By signing this bill, I want to send a clear message to every person in this state that using a gun in the commission of a serious crime means a stiff prison sentence. Whatever the circumstances, however eloquent the lawyer, judges will no longer have discretion to grant probation even to first offenders."

Two years later, Brown appointed Bird as chief justice, and her first retention election would come up the next year, November 1978.

In February of that year, the court heard arguments in *Tanner*, an early test of the "Use a Gun Go to Prison" law Brown had signed back in 1975.

The trial court found that Tanner—who had no prior criminal record and who had used an unloaded handgun in the commission of a robbery of a store clerk for $40—was not a suitable candidate for prison, striking the gun allegation in order to sentence Tanner to probation.

On appeal, the California Supreme Court initially agreed 4 to 3, in essence striking down the 1975 law requiring a prison term for use of a gun in a crime. But it would not release its decision until after election day.[63]

The *Los Angeles Times* reported on election day that the Bird court had delayed releasing the politically sensitive criminal case until after the election, in which voters were asked whether they wanted to retain four of the seven justices, including Bird.

The underlying allegation in the article was that the decision was withheld because it might impact voting.[64]

Bird denied the charge and asked the Commission on Judicial Performance to investigate. The public probe proved a public relations disaster for the Bird court. There were televised hearings, where members of the court were questioned on their handling of cases, questioned over the timing of the release of decisions, and whether members leaked information to outside sources.

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[63] Attorney General Deukmejian, as noted, wrote the "Use a gun, go to prison" law and stewarded it to passage while he was a state senator. By then, attorney general Deukmejian filed a petition for rehearing. The California District Attorneys Association arranged for the drafting and submission of a bipartisan petition for rehearing on the attorney general's side on behalf of more than one hundred state senators and assemblymen. Deukmejian argued *Tanner II* personally while the Supreme Court was sitting in Sacramento. Justice Mosk was the high court justice who made the difference when, without explanation, he reversed his *Tanner I* vote, and *Tanner II* was born. Adding to the consternation about the Court, *Tanner II* was filed late on the eve of the Christmas break in 1979. The very late filing insured the controversial case would continue as an immense distraction for the high court.

[64] Despite the adverse press, Bird kept her job, but just barely. She was confirmed with the lowest affirmative vote ever given a justice on the court, 52 percent to 48 percent. Wallace Turner, *Televised Hearings Are Planned in Inquiry on California's Justices*, N.Y. Times, Apr. 26, 1979, https://www.nytimes.com/1979/04/26/archives/televised-hearings-are-planned-in-inquiry-on-californias-justices.html.

When his turn came to testify before the commission, Justice Mosk sought to quash the subpoena. He successfully sought judicial intervention and won a decision by a reconstituted California Supreme Court concluding that Justice Mosk could not be compelled to testify in public commission proceedings.[65] Ultimately, he testified before closed commission proceedings.

The investigation failed to produce charges against any justice, but exposed the acrimony, pettiness, and divisions that wracked the court under Bird.

Conservatives used the court's initial ruling as evidence there was a liberal majority on the court that was soft on crime and that its ringleader was Rose Bird. Indeed, funds began to pour in from conservative interests in the effort to oppose her reconfirmation. Eight years later, in November 1986, she and Justices Joseph Grodin and Cruz Reynoso were removed from the bench by voters.

For Lucas, who was on the federal bench at the time but who came to learn about it through Mosk,[66] it was a moment that exemplified the acrimony on the court under Bird.

"It caused me a great concern also, but Rose—this is what Stanley tells me, and other members of the court told me—Rose immediately, without having a meeting of the court, without talking to the members of the court, because this would—to determine whether individual members of the court were holding this opinion would require investigating every member of the court," he tells McCreery. "Without any discussion, without asking them for their thoughts and their suggestions, or 'Should we do this?' or 'It's just stupid, it's untrue, and why glorify it?'" She asked for a hearing on this question. Stanley was furious about that, too, as were many other members of the court. Can you remember that hearing?

Back to the Q&A: "Self-Inflicted Wounds"

McCreery:

The whole aspect of going public with the inner workings of the court was quite unusual, it seems to me.

Lucas:

Exactly. It certainly was.

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[65] Mosk v. Superior Court, 25 Cal. 3d 474 (1979).

[66] Bird and Mosk were on the same side in the court's initial vote in favor of Tanner, and which struck down the law. But after the investigation had begun, Mosk joined the three who had initially opposed the decision, thus upholding the law. Turner, note 64, *supra*.

McCreery:

Then also that, as exhibits presented they released calendar memos and draft opinions, things that normally are never seen outside the court itself.

Lucas:

Exactly. Yes. This, of course, created additional problems. These were self-inflicted wounds, as I say.

She could have made a different administrative or executive decision, and only after consulting with the whole court, who were going to be as much impacted as she, maybe more.

So, this type of thing is not easily forgotten—is *not* forgotten. The collegiality as a result was—of the court, and the rapport I'm told, I wasn't on the court at that time, was very bad.

McCreery:

Any time you're trying to accomplish something, there's more than one way to get there.

Lucas:

Sure.

McCreery:

Of course, we know only in hindsight that there was no need to bring any charges against any of the justices, but the route to reaching that result was astounding in its effects, really.

Lucas:

Yes, yes. Just the lack of judgment to have immediately, just like that, ordered such a hearing, again without consulting the court—even doing it, and then doing it without consulting the court is just incredible.

McCreery:

You're not the first to use the word paranoia in conjunction with Chief Justice Bird. Do you have any knowledge of anything that might have caused her to be that way? I mean, had she any reason to fear?

Lucas:

Here are various things that have been suggested that might have application.

Number one, she came on as a completely inexperienced person.

McCreery:

The first time, she won by a clearly narrow margin.

Lucas:

But anyway, shortly after she came on, Richardson started this campaign, his own personal campaign, and gathered aboard people, and that, from kind of the first day, she was apprehensive about the election process.[67]

Then, of course, when she'd gone before the Commission on Judicial Appointments she hadn't received a unanimous vote, which is not a good way to start.

She had one, a very distinguished, experienced, Parker Woods, a member of the court of appeal who said, "I wouldn't vote for you. You have insufficient experience, and you shouldn't be chief justice."

From then on it was kind of a, "Well, she'll learn," or "That doesn't count. We're only determining whether she has the smarts to be able to do it," and all the rest.

I'm not saying that a governor doesn't have the right to appoint somebody that hadn't had any judicial experience. But she [Chief Justice Bird] was more or less under constant attack.[68]

McCreery:

In talking to her about the matter of death cases, were you able to discern, was she considering the individual situations of each one, or was there a more blanket approach to the whole matter? Did she indicate to you personally in any way?

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[67] Indeed. Bird was essentially under relentless attack from the beginning. As noted earlier, she would later confide that it would have been better if Brown had made her associate justice, just over two years after she'd become a cabinet secretary. But it should also be noted that there weren't many opportunities for women to gain experience in the law at this time. Many private firms refused to hire women. And she was among few women with legal prominence in Sacramento at the time. *See* Dolan, *Ex-Chief Justice Rose Bird Dies of Cancer*, note 61, *supra*. She set a different tone, and it rubbed many the wrong way. Even as women's participation in the legal profession increased substantially by the end of the twentieth century, during the 1950s and 1960s male college graduates were ten times more likely to enroll in law school than female college graduates. Elizabeth D. Katz, Kyle Rozema, & Sarath Sanga, *Women in U.S. Law Schools, 1948–2021*, 15 J. Legal Analysis, 48–78 (2023), https://doi.org/10.1093/jla/laad005.

[68] Given her lack of experience, even Cardinal Roger M. Mahony, then a bishop and chair of Brown's farm relations panel, penned a letter to Associate Justice Mathew Tobriner, which questioned Bird's "emotional stability" and criticized her as "vindictive." Robert C. Vanderet, *A Glimpse into the Private Life of the Late Chief Justice Rose Bird*, Calif. Sup. Ct. Hist. Soc. Rev., Fall/Winter 2022, https://www.cschs.org/wp-content/uploads/2022/12/2022-CSCHS-Review-Fall-Chief-Justice-Rose-Bird.pdf.

Lucas:

Here's the way that it happened with the death penalty cases, much to the relief of many members of the court.

These death penalty cases would come up, with huge, bulging records, come up to us for the first time. They didn't go to the court of appeal. They would have issues on appeal, dozens of issues on appeal.

Rose's way when she would write up her cases, not always, and others on the bench—I never did that, because I was dissenting—they would find what they believed to be one error, and they would say, "We have found this to be a reversible error," whatever it was, "and therefore we need not consider any of the other alleged errors, and we'll simply reverse it for retrial."

So that made the case pretty easy, when you only talked about one of the issues, generally. Sometimes they'd touch the others, as they should have, to assist whatever new trial judge hears this, but most of the time the cases were reduced in complexity by that concept.

Again, I thought that was not doing the duty of what a court should do.

If they're sending them back for retrial and there are clearly issues that are going to come up again, not issues of the way the trial court ruled necessarily, but just issues of law, they should have touched on that.

"The guidance of the trial court, we conclude that—," and then they go on from there.

But that was an acceptable way of disposing of death penalty cases, and the overall workload of the court was reduced substantially as a result of that. And it never made for habeas.

When we started on—I guess they called it the Lucas court—when we started affirming more cases, every affirmance generates first a state habeas and then a federal habeas.

The state habeases come to us and are almost the equivalent of another death penalty case and have to be heard by the trial judge, who takes evidence, and then it comes back up to us.

All of that was avoided by Rose, because they never really had a case—two cases, I think, were affirmed by her court. Robert Alton Harris[69] was one and

[69] Robert Alton Harris was executed on Apr. 21, 1992, in the gas chamber at San Quentin State Prison—the first execution in California in twenty-five years. For more, please see *Executed Inmate Summary—Robert Alton Harris*, Calif. Dep't Corr. & Rehab., https://www.cdcr.ca.gov/capital-punishment/inmates-executed-1978-to-present/robert-alton-harris.

[Lloyd Earl Jackson[70]].

McCreery:

When you say that there was a practice then, shall we call it, of focusing on a single error, which was only a part of the whole picture, can you give me an idea of what that sort of error might be?

Lucas:

It would be something that would garner a majority of the votes. You could always start with Rose, you know you were going to get her vote.

If you were the majority opinion writer and that's the way you were going, you would get that vote. You only needed two more, and then it was all over with.

McCreery:

I'm wondering, because I'm partly just trying to sort out the status of things at that time, because the death penalty had been suspended in the early seventies, then the statute rewritten for California and reinstated.

Lucas:

It had been declared unconstitutional in *People v. Anderson*.[71]

McCreery:

Right, yes. But then the new statute presumably had things that needed to be worked out in it that would have to come up in the form of cases. Was that work more or less done by the time you arrived, do you know? Were there still bugs in the legislation itself that were—

Lucas:

No, there were still some. The *Carlos* decision,[72] the court had held that in a

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[70] In 1979, Earl Lloyd Jackson was convicted of bludgeoning two elderly Long Beach women to death. He was nineteen at the time. The death sentence put into motion a series of appeals that in 2008 culminated in the U.S. Court of Appeals for the Ninth Circuit throwing out special circumstance and death penalty rulings. Note that when the California Supreme Court heard the appeal and affirmed, Bird and Mosk dissented. Jackson was retried in 2010, with the special circumstance charge reinstated. Jurors delivered a verdict of death. He remains on death row. Victoria Kim**,** *Jurors Order Killer Sentenced to Death in 1977 Murders*, L.A. Times, April 2, 2010, https://www.latimes.com/archives/la-xpm-2010-apr-02-la-me-death-penalty2-2010apr02-story.html.

[71] *See* notes 36 and 37, *supra*.

[72] Carlos v. Superior Court, 28 Cal. 3d 282 (1983). The court was faced with the question of whether a defendant can be charged or convicted of murder with the special circumstance of felony murder under the state's 1978 death penalty initiative if he did not intend to kill or to aid in the commission of a killing. The court, with Bird in the majority, said no.

felony murder there must be proof of intent before you can convict of murder, despite the fact that the man went into the bank with a gun and fired it, and hit somebody, which is enough for a felony.

But nevertheless, you'd have to prove, not on those facts, but you'd have to prove intent, and these cases were not tried with a question to the jury, "In committing this felony, did the defendant act with intent to commit the felony?" It just wasn't done. It wasn't necessary. And yet a case called *Carlos*—I think that was before I came on the court—was adopted by the court, and thirty-nine cases were swept away with that.

So when I came on and examined it, and my staff, we said, "This is ridiculous. It just can't hold water." So, the next *Carlos*-type case came back, and we reversed the *Carlos* opinion.

Lucas:

We were talking about something to the effect about death appeals and their impact on the court. Is that what we were talking about?

McCreery:

That's right, yes. Yes, you wanted to retrieve the article by Justice Richardson.

Lucas:

Yes. This is actually an article by myself, which quotes Justice Richardson,[73] under the category, "What can be done?" that is, about death penalty cases. A variety of suggestions have been made over the years.

First of all, send them to the court of appeal for reviewing there first, as the Constitution guarantees, an automatic right of review before the California Supreme Court.

[reads] "Critics and scholars both suggest that a constant stream of reverse judgments in these cases carries in its wake great social and economic costs, including a loss of public confidence in the ability or objectivity of the state's highest court, increased frustration by the growing number of death penalty proponents, prolonged uncertainty as to the fate of death-row inmates, and an alarming, ever-increasing drain upon judicial resources at both the trial and appellate levels."

Then I say, "At one end of the scale as to the death penalty is the abolitionist."

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[73] *See* note 72, *supra*.

And then, "Close to the other end of the scale another view has been expressed by my predecessor, retired Justice Frank Richardson. He expressed some discomfort with the record of his colleagues in these cases."

In his 1983 dissent in *People v. Easley*,[74] he observed that "Although California has had a valid constitutional death penalty since 1977, and approximately 145 judgments of death have been filed with us since then, we have thus far decided fewer than twenty such appeals. Of those decided, we have reversed the penalty in sixteen cases and have affirmed the judgment of death in only two." Those two cases being Harris and Jackson. "The judgments in those two cases are presently subject to pending habeas corpus proceedings, either in this court or in the federal court. As reflected in the majority's ruling in the present case," that's *Easley*, "it is apparent that the majority is willing to reverse a judgment of death for the slightest procedural defect or omission."

This is how Frank felt about it in 1983, and he put it in writing.

He continued in his dissent in *Easley*, "A personal aversion toward the death penalty is both understandable and widely shared, but the sovereign people have placed the law on the books. It is our responsibility to enforce it in the absence of reversible error.

"I am fully sensitive to the awesome implications of our resolution of the issues in a death penalty case and the great care with which we must examine these issues. Nevertheless, our role is to review the claims of procedural error with an eye toward identifying and resolving only those which reasonably can be said to have affected the verdict adversely."

He finishes with this phrase: "We should not transform the slightest procedural irregularity into reversible error merely because the death penalty is invoked." So that's the other side of the coin.

McCreery:

That very much gets at the question of what sorts of things were causing these reversals?

Lucas:

Yes. This was the year before I went on the court, 1983, and that's how he felt.

He'd been on the court for thirty years, and he felt strongly enough about it to set it forth in a published opinion. Whether he's right or not I suppose is just subject to your own opinion.

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[74] *People v. Easley*, 671 P.2d 813 (Cal. 1983).

But reversing sixty-two cases out of sixty-two gives you very little wiggle room to say, "Oh, no, these were all reversible errors. All sixty-two cases had reversible errors in them."

McCreery:

I think I read that when you arrived and began dealing with these matters yourself—I'm talking about the very early months on the court—you voted with your colleagues to reverse some death cases.[75]

Lucas:

Under the compulsion of the previous precedent that they had created. I hadn't sat on the cases, but they had precedent along this line, and it seemed folly to start dissenting about precedent that I hadn't sat on before, so initially I agreed.

McCreery:

Is it correct that you came to some point and decided you weren't going to do that anymore? I thought I saw some reference to your announcing a change of some sort. What do you recall about that?

Lucas:

Yes, that's right. I thought about it and determined that it was not my duty in form of *stare decisis* to automatically, Pavlovianly follow these cases, thirty-nine of which were corrected by *People v. Carlos*. Some of the cases were just patently wrong, so you had to reverse them.

McCreery:

Do you recall what prompted you to arrive at that change at the time you did? Was there a particular thing?

Lucas:

It perhaps could have been the magnitude of the problem. Each case that they reversed wasn't necessarily a *stare decisis* for large areas, because not all of the issues that were raised would be decided and reversed.

But still, with so many cases that had been reversed, you just had to sit down and consider whether this was so significant that you couldn't follow the precedent of the previous cases.

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[75] In his early months on the court, Lucas voted with the rest of the court to reverse half a dozen death penalty cases. In each case, he wrote, he was casting his vote reluctantly and was merely following the common judicial practice of adhering to precedent. *See* Morain, *Malcolm Lucas*, note 22, *supra*.

Most of the time the new cases that came to us, it was a question of harmless error, and most of the cases that they decided had been based on harmless error, harmless error being something that, "Surely you jest. This can't be that important that you would reverse the whole case."

McCreery:

That is the test, is it not? Would the outcome be different were it not for the error?

Lucas:

Exactly. Yes.

McCreery:

I wonder how your own experience as a trial judge informed your view of these death cases, your knowledge of the trial process?

Lucas:

I think it was very helpful, because you've done the *voir dire*—if you're a federal judge, you've even done the *voir dire*; many complaints about the *voir dire* and the use of the *voir dire*.

Most of the concerns were just the question of, "Was there a fair trial?" I emphasize again, not a perfect trial but a fair trial.

McCreery:

Thinking about your early years on the court as associate justice, when you were first becoming fully involved with all this, I wonder, how did you and your colleagues think about the penalty itself in a death case, and the fact that the penalty is so severe compared to other kinds of criminal penalties?

Lucas:

Yes, which is every justification for a very careful examination of the whole process. But then again, the Constitution doesn't say in death penalty cases, there shall be a perfect trial.

It just says the death penalty is constitutional.[76] You remember all the hoops we jumped through until it's been clearly established that it is constitutional.

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[76] Death Penalty, Cal. Const. Art. I § 27 (*Deering's California Codes* are current through the 2024 Regular Session Ch. 210), https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5JBS-0VX1-DXC8-202G-00000-00&context=1519360.

When you take your oath you say, "I pledge to support the Constitution of the State of California and the Constitution of the United States against all enemies, foreign and domestic," et cetera.

It's constitutional, so you say, "Let's be very careful about this." Harmless error becomes a lot narrower, but the harmless error, you look at it and you say, "If they had not transcribed the sidebar where the judge said, 'Let's take twenty minutes for a recess.' That's not even harmless error, but it's not reported. What else was said?"

McCreery:

I wonder, how did your own views of the matter change, if at all, once you were in the inner sanctum working on these matters?

Lucas:

I've often said I don't care if tomorrow the death penalty was taken off the books. If the people of the State of California, for example, said, "We no longer want to have death penalty in our California Constitution or laws," that would be fine with me.

It probably costs more to put through a death penalty—you shouldn't look at the first thing of cost, but I will speak about that first.

It probably costs more to try the death penalty case than to house the defendant for the rest of his life, because it takes years and years and years, and the productive time of many lawyers and many judges, and it's not really being enforced is what it amounts to.

Those who are opposing the death penalty are winning, is what it amounts to, if there is a war between those who are opposing and those who are supporting it.

But I never allowed myself to get into an ideological mindset, which I think Rose Bird got herself into, and I just say "sixty-two" to prove my case, and many other things she told me.

I never allowed myself to get—this is the law, and it's been tested, and the United States Constitution spoke of death as a punishment when they put together the Constitution.

I think it was for treason or for whatever, but the United States Constitution talked about it more than 200 years ago. Far be it from me to say, "I don't like the death penalty because it seems cruel and unusual and inhumane, et cetera."

If you're a judge, you have to enforce the law. That doesn't mean you get on the side of the prosecutor, but you have to say, if it's a fairly done trial without any reversible error—what are you going to say? "I don't like that anyway, because I don't like the death penalty, and I'll find some reason to reverse it"?

You shouldn't be a judge if you're impelled by thoughts like that.

McCreery:

A moment ago, you mentioned that Chief Justice Bird told you many other things about her views on this matter. What do you recall?

Lucas:

Oh, mostly things about the importance of reversible error, that if there was just the slightest question about it, well then she was going to reverse.[77]

That's obvious, as I say. Sixty-two times. That was her ideological mindset, there's no question about it, because she would be the only one voting to reverse on some of these cases.

We were talking about her being paranoid, and I think unfortunately it's an apt phrase, and I say that knowing full well what I'm saying. She was defeated in November of 1986.

McCreery:

The very same election.

Lucas:

Yes, in the same election.

So, it was a bad chapter in the life of the court. That's why I had the temerity to say, when I was appointed, that there's been some difficult times in the recent past, but that I hoped to be able to cure the wounds of the court and have us look forward and return to being the great court that we are.

McCreery:

While we're still talking of the period when she was chief, I wonder if I could ask you to just speak a little bit about how she operated in that capacity, before the election itself and everything changed. In other words, the rest of

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[77] Bird: "You don't execute somebody unless you're sure that the trial's been fair and that they have been tried under constitutional law. I think the people of the state of California have a right to be sure that when a person goes to his death here, he will go under constitutional law after a fair and impartial trial." Erler, *The Death Knell of the Bird Court*, note 39, *supra*.

you justices, when and how would you typically interact with her in the course of a week?

Lucas:

Speaking for myself, and also for Stanley Mosk, and probably all the rest of them, we never interacted except on Wednesday morning at 9:15, when we had our weekly conference to determine which cases we were going to grant and all the rest. I sat immediately to her right, because I was the most junior member, so I know pretty well what she was doing and how she was doing it.

McCreery:

I wonder, before Justice Panelli[78] arrived and you were the new member, and in some cases I presume the sole voice on certain matters, which of your colleagues could you talk to?

Lucas:

Really, not too many. Now and then Stanley. But you could go down and talk to Reynoso. He'd always be jovial and pleasant, but his mind was with the majority. After a while you determined, maybe incorrectly, that it was a useless exercise.

Certainly it was useless with Rose, because she wanted to have somebody write down every word she said. But it was not time-effective to do that with the others. They just wouldn't budge on these things. "No, this is all harmless error," or whatever I was down there talking to them about. It was mostly working with your staff, and as I told Panelli, "Press on regardless, as the English say."

McCreery:

This is an interesting matter about just the fact that now that you're on an appellate court rather than a trial court, you need other justices with you in order to prevail if you're in the majority, and you need to have some avenue for finding common ground, or perhaps you're at least seeking such avenues.

Lucas:

Not if it's 6 to 1. If it's 6 to 1, then, "Why should we waste our time talking to this outrageous semiconservative guy who doesn't agree with us Pavlovianly? It doesn't matter what he does. We'll do what we want to do."

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[78] Justice Panelli served on the California Supreme Court from 1985 to 1994. For a comprehensive Oral History by McCreery, see: *Oral History: Justice Edward A. Panelli*, 17 Calif. Legal Hist. (2022), https://www.cschs.org/wp-content/uploads/2022/09/Legal-Hist.-v.-17-Oral-Hist.-Justice-Panelli-.pdf.

McCreery:

So the atmosphere really was such that your attempts to either avoid a dissent, or avoid a very strong dissent, were not really welcome?

Lucas:

Were not accepted, at any rate.

McCreery:

You did dissent rather often in those early years, and now you've just explained that you evolved a method of doing that, perhaps drafting something stronger as a starting point?

Lucas:

Then sometimes I had the satisfaction years later of seeing, "Here's Lucas's dissent, now in new clothes, and it's a majority opinion," not with them but with a different court. It wasn't unexpected, but it was one of those, life's little pleasures.

"At last I won that one." It wasn't "I won it." It's the law is—I think it should have been, and as I espoused it. "The law has prevailed," is what I would say. It wasn't, "I won." You don't win or lose.

McCreery:

May I ask how Chief Justice Bird used her power to assign opinions?

Lucas:

Thank you. You've put me back on track. She never told us how she did it, at least she never told me.

I gather that she did it in a more or less rotational way. I'm sure that some people came in and said from time to time, "I'd like to have that case," and maybe they got it, and maybe they didn't. Then she had to make some judgment. Any good administrator would have to make such judgment. I'm going to give her credit for at least thinking about this. If one judge was in the condition that he had a number of cases under submission with no opinions flowing, why give him another one to go into this black hole?

McCreery:

I can certainly guess, but who else on the court was she close to, as you personally observed it?

Lucas:

Of course, Tobriner.[79] I wasn't on then, but she was very close to Tobriner. He was her mentor. Of course, he left. Other than that, I think she was playing things pretty close to her vest.

McCreery:

Address, if you would, the collegiality of this court.

Lucas:

Maybe this is a backdoor way of saying—when I became chief, having seen what I had seen, I sent out a memo, "You know where my chambers are, and I'll have a completely open door for each and every one of you. Come down any time you want. I'll be glad to see you, and it won't interrupt anything that's important. We'll discuss these things, anything that's bothering you. My door will be open. It will not be locked and closed. The door to my chambers will be open out into the corridor," which it was.

Little symbolic things.

McCreery:

Did they take you up on it?

Lucas:

Yes, yes. Of course, it was different personnel at that time, in part.

McCreery:

Right, right. But I wonder, even for those who had been there beforehand, such as—

Lucas:

Oh, Stanley would stroll by just to shoot the breeze. He didn't need any help from me.

Then I had some retreats where the whole court and the law clerks went—one was at a yacht club that had a room. Then another one was out in Marin.

We'd just take a day, and we'd have a calendar. I'd ask them, "Put down stuff you want to talk about. Let's have an agenda."

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[79] Tobriner served as associate justice from July 1962 to January 1982. In a memorial event in 1983, Bird said "it is the quality of justice tempered with humanity. It is the ability to see the human being behind the rule of law" that made him a great judge. *In Memoriam: The Honorable Matthew O. Tobriner*, Calif. Sup. Ct. Hist. Soc., https://www.cschs.org/wp-content/uploads/2014/07/CSCHS-Tobriner-Memorial.pdf.

That was an opportunity to vent a little bit if somehow you thought things weren't going right, or you weren't being treated right.

McCreery:

But you're drawing quite a contrast between those efforts and what you experienced when you first came on as an associate.

Lucas:

Oh, yes.

McCreery:

How do you characterize the atmosphere, just generally? You would go to work in the morning.

Lucas:

Of course, you knew what it was, that there was little communication, and in the chief's room there was a vastly suspicious person sitting in there.[80]

This is what you thought. How else could I come to that conclusion? "I'm going to write down everything you say, and then I'm going to come and shred everything in the court, all the memory of the court" This is somebody that's—I don't think this all happened as a result of being disturbed about not being returned to office, and it just happened in the last couple of months of her administration. I must say you got used to it. You didn't expect anything more.

There were still activities with your staff. You'd go out to lunch with your staff occasionally, but that was on just an individual basis.

So you didn't hope for anything better, actually, and after a while you resolved, that's okay. You respond in your own way to something like that, hopefully not belligerent or excessive, but your dissents will say how you feel.

McCreery:

Quite a set of circumstances. I'd like to talk just a little more about your colleagues when you first came on. You talked about Justice Mosk a few times. He was such a senior member, and I wonder, did he—

Lucas:

But he was from Los Angeles, and he sat in the—not while I was there, but

[80] Critics said Bird provoked the distance and the suspicion. Described as insecure and defensive, she was said to have changed the locks on her chambers door and isolated herself with a few aides. Associate justices had to make appointments to meet with her, and she kept an aide beside her during those chats. Dolan, note 18, *supra.*

he sat in the Los Angeles Superior Court. We knew a lot of people in common, and we'd run into each other at various functions. There was immediately a much more cordial atmosphere with him, and he was a pleasant enough guy. He liked a good joke and would tell a good joke.

McCreery:

Did he have some special place there, just by being so senior, recognizing that you're all equals?

Lucas:

He spoke first. I'm sitting here, at least the junior is here, and then Stanley is there. He's senior. So, when you start off the discussion on the case, "Let's go to the first case, *X v. Y*. What do you think, Stanley? Should we grant, should we deny? Depublish?" Whatever it was. You'd just say, "What are your thoughts, Stanley?" Then he would start out, and then sometimes this was important, because sometimes it would set the tone for the discussion.

McCreery:

I wonder, when you very first came on and were the junior member, did you have any hesitation to oppose Justice Mosk?

Lucas:

Oh, when you do it in writing, you know—actually it's, what did the mafia say?—it's business, it's only business, and you'd accept it. Sometimes there was pretty florid stuff in there. My staff would come in, "We've got to have this removed."

I'd tell them that, "It's business, it's only business. If they want to publish that and have people see how reactive they are, that's to their detriment. We'll never be ungentlemanly in terms of whatever dissent—strong and forceful, but not strident and ungentlemanly." So this was their own prerogative, what they wanted to write down.

As my sainted mother used to say, "Paper refuses nothing." They could write whatever they want down there, and history will determine its validity.

McCreery:

Then let me ask you about a couple of the other justices, again when you first arrived. Justice Kaus we talked about. You knew him from L.A. Superior. What sort of force was he on the Supreme Court?

Lucas:

Oh, he was well respected, and he had a good, clipped sense of humor, which he would use from time to time. I think he was supportive of the court. We used to go occasionally to a lot of Vietnamese restaurants around the court, I don't know why, but very good food, and we'd go and have some Vietnamese food.

He was somebody you could talk to straight out and there wasn't a problem. Sometimes his dissents joined my dissents, not perhaps as often as I would like, but—

McCreery:

Would you say a few words about Justice Broussard?[81]

Lucas:

Allen was at first—let's see, how can I say it?—well, like to Panelli when he said, "You're going to wear out the carpet there." It was not really said in a jesting way. It was said with a little sharp edge to it.

This is Panelli telling me this, a little sharp edge to it. Allen had that as a personality, just a little sharp. He was a good enough person. I got along well with him, but sometimes he could be, oh, a little lacking in generosity in excusing what somebody else said, not me or Panelli, just anyone else.

But basically, he worked hard. I know there had been many times that at 8:30 in the evening—his chambers were right across the hall from me. The whole place is empty. I'm working, and I come steaming out to go to the library or something, and here comes Allen and he says, "What are you doing here?"

McCreery:

You touched on Justice Reynoso a few minutes ago.

Lucas:

Cruz lived in Sacramento and had, as he called it, a farm I guess, with chickens and a horse and cow.

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[81] Allen E. Broussard served as an associate justice from 1981 to 1991. He grew up in Louisiana, and later attended Law School at UC Berkeley. As he ascended to the court, he worked with the NAACP, Bay Area African American political leaders, and served on the Oakland Municipal Court, the Alameda County Superior Court where, for a time, he was presiding judge, and ultimately the California Supreme Court. He succeeded Wiley Manuel, the first African American Justice on the high court. Broussard's work on the high court included work with the Advisory Committee on Race and Gender in the California Courts. For a transcript of an oral history with Broussard, *see A California Supreme Court Justice Looks at Law and Society, 1964–1996: Oral History Transcript* (1997), https://archive.org/details/looksatlawsoci00brourich/page/6/mode/2up.

It sounded pretty idyllic. He used to come in on Tuesday morning. There was a—it wasn't a bus, it was like an airport transport that you could pick up in Sacramento.

It would eventually drop you off at the airport in San Francisco or points in between. He showed it to me once. It had a nice light and an individual seat you could lean back in.

He used to pick that up by probably 6:30 in the morning on Tuesday, then he would come in. I guess he stayed at a hotel or something like that. I don't think he had an apartment or a house, and then Thursday night he would go back. That was often his—but that doesn't mean he isn't working at home, and he's got all these marvelous devices where you can communicate. But I just remember that about him.

McCreery:

Would you say a few words about Justice Grodin, please?

Lucas:

Joe was very academic.[82] He was a professor and very academic. Panelli used to say, "He's a very long-speaking man, very long." Rose used to say—this as you're going around the table at 9:15 in the morning or thereafter—come to Joe. "Now, Joe." This would start [gesturing with hand]. That's not a good sign.

"Now in this case . . . ." Then Rose would finally say, "What is your vote, Joe?" right in the middle of everything. [Laughter] I mean, that was Rose and you could expect that. "What is your vote, Joe?"

He'd say, "Okay," because he wanted to develop whatever thought he had, but sometimes he would go on for minutes at a time, and time is limited. You've got maybe a hundred cases or whatever, and you've got people who all want to express themselves. But he's learned and articulate, and the professor.

I sense that—and I don't blame him in the least, I would have felt the same way—that the retention election hurt him a great deal. He didn't consider himself—this is my own psychoanalysis—he didn't consider himself in the same category as Rose or for that matter Cruz Reynoso.

He wasn't particularly, at least overtly, political, whereas Rose was very political or ideological.

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[82] For an example of Grodin's scholarly work, see Joseph R. Grodin, *Developing a Consensus of Constraint: A Judge's Perspective on Judicial Retention Elections*, 61 S. Cal. L. Rev. 1969 (1988), http://repository.uchastings.edu/faculty_scholarship/222.

I think he was very distressed at the thought that he could even be, that the voters would even consider rejecting him, because of the good work that he's done all his life, and the opinions he'd written.

The unfortunate thing was, it was a package deal. The advertising apparently wasn't just, "Throw Rose Bird out." It was, "Throw Bird et cetera out." Throw all three of them out. In fact, there was some thought in the beginning that maybe they would include Stanley.

McCreery:

You were certainly glad to have him still, Justice Mosk, at that point. I wonder, in your own mind was there a distinction between Justice Mosk and the others who were the targets in that election? You've described his willingness to sign the [death penalty affirmances].

Lucas:

He did not endorse them for reelection.

McCreery:

He did not?

Lucas:

Yes. This is my recollection. He did not endorse them for reelection[83]. He wanted to stay completely neutral, or completely away from it, because there was always a chance that somebody would have some write-ins, I suppose, or whether it was the campaign or not would vote no for his retention. So I think he just said, I'm washing my hands of the whole affair. He didn't ever use those words, but he was not active one way or the other.

McCreery:

Governor Deukmejian was running for reelection in that same November 1986 vote, and he took the step of making public his own wish that Chief Justice Bird not be retained. I wonder how you viewed that?

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[83] Mindful that this publication has an audience well acquainted with the process of judicial elections, it still seemed important, for the record, to recount the judicial appointment and election process in California: Appeals court and state Supreme Court justices in California are selected through a governor's appointment and confirmed by the Commission on Judicial Appointments and confirmed again by the voters in the next general election. Supreme Court and Appellate Court justices also come before the voters at the end of their twelve-year terms. Superior Court or local judges can either be appointed or directly elected to the bench by voters. *Fact Sheet, California Judicial Branch*, Jud. Council Calif. (Aug. 2022), https://www.courts.ca.gov/documents/California_Judicial_Branch.pdf.

Lucas:

He never talked to me. We never talked about the—he would know better than to call me and to ask about something that involved—and I would know better than to talk to him, of course. So I don't know really what he was doing then. He did that, expressed his own view? I guess he's entitled to do that as a citizen. "I'm not going to vote for Rose Bird. Take it or leave it." Was that it, or what?

McCreery:

I think he expressed his intention not to vote for her himself. I'm not saying that very well, to vote against her I should say. It just seemed a bit unusual for a sitting governor, and I just wondered your thoughts about that.

Lucas:

I know that he had expressed great concern about her as chief justice for the reasons that I've been telling you about. But it was not just the death penalty. I think there were business groups who felt she was anti-business. You can kind of go down the line. They weren't fronting any of this challenge to her, but well, you can imagine the agribusiness. We talked about that. They probably were irked by her, and would have been just as pleased if she wasn't around, although I don't know how well organized the opposition was to her, do you?

McCreery:

There were a number of groups formed. You mentioned Senator H.L. Richardson, but there were some other groups that were formed and, I think, tried actively to place things in the media and to make it an issue that voters were aware of.

Lucas:

I don't remember, but do you remember what the final vote was? Obviously, she did not get 50 percent, but how much less than 50 percent? Do you happen to remember?

McCreery:

I can look it up. If you want to keep talking, I'll try to see if I can spot that.

Lucas:

Okay. I would have to guess that she got fewer votes, say, than Reynoso and Grodin, for example. I mean, the three of them got less than 50 percent.

McCreery:

I don't know if this is quite the thing I'm seeking. This is by county; let me just see.

This is the statement of the vote for 1986. It was each justice that was up for retention. There were six of you. This suggests—again, it's county by county, but looking at the totals as a percentage, 66 percent voted no on the matter of Chief Justice Bird, 34 percent voted yes.

Lucas:

How would that compare to Grodin and Reynoso, as a matter of curiosity?

McCreery:

Yes. For Justice Reynoso, rounding off to the nearest percent, 40 percent voted yes, to her 34 percent; 60 percent voted no. And Justice Grodin, 43 percent voted yes, and 56 or 57 percent voted no.

Lucas:

Could you look at mine while you're there?

McCreery:

You're at 79.5 percent yes. We'll round off to 80 percent, and 20 percent no. So that's quite a difference there.

Lucas:

That's not bad.

McCreery:

Then for Justice Mosk, since we were speaking of him, he got 74 percent yes vote, 26 percent. So it is very interesting, isn't it?

Lucas:

That's a very substantial difference for Stanley and, say, Rose.

McCreery:

Yes. So again, it's hard in a way to reconstruct the effects of the different groups that were formed, those who were overtly trying to unseat the justices. It's hard to deconstruct the effects of Governor Deukmejian's voice on this, because it was such an unusual situation in so many ways, wasn't it?

Lucas:

It certainly was. I remember reading about or being told about certain law firms gave a significant amount of money to Rose, and they were scheduled to appear before us in two or three months, before the election, and they did appear. Yet they'd given—one law firm gave $50,000 as I recall. They do this in Texas and it doesn't seem to bother them, but it bothered me.

McCreery:

Then there's this whole larger question, in a way, of having voters retain judges periodically. I think we touched on this before.

Lucas:

It's so much different than Texas, say. Texas, you're a Republican judge or you're a Democrat judge. You may have Bill Jones, who has a one-man office in Austin, Texas, run against you, and so it's Justice Smith versus Bill Jones, whereas we have—nobody can run against you. It's not Democrat or a Republican, it's nonpartisan, as it should be.

Nobody can run against you. It's just you're running against your own self, your own record. So there are many protections built in, and that's why I think since 1934 it's never been used except for this one election.

McCreery:

In general, how well do you find that works for California?

Lucas:

I think it works fine. That doesn't sound like high praise when you say, we have this mechanism but we never used it. There must be somebody, some rascal that should have been thrown out. But at any rate, we've never used it except in this one election, so it's been saved, I guess, for what the public thought were perhaps extreme examples of the use.

It was thought after '86, well, this will be happening with some regularity. Now here twenty-two years have gone by, and I don't know whether it's been even thought about in that time. It may have been, but nobody has been denied office that I know of.[84]

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[84] The discussion and debate have continued. The 2016 California State Bar Program examined the California Constitution's system for electing justices and judges, and how the elections can influence the administration of justice. Then UC Irvine School of Law Dean Erwin Chemerinsky and former California Supreme Court Justices Joseph Grodin and Cruz Reynoso offered their thoughts on the matter of retention and term limits for judges. See the California Supreme Court Historical Society's *Thirty Years After a Hundred-Year Flood,* note 17, *supra.*

McCreery:

May I ask if you recall how Chief Justice Bird viewed state constitutionalism, in principle?

Lucas:

She was very much in favor of it. She was not perhaps as—because it was at that time a somewhat controversial concept, particularly when the phrases were identical. I don't think she publicly expressed herself on that. I shouldn't say that; she might have given a dozen speeches on it. But she was not as vocal about it as, say, Stanley, or for that matter Joe Grodin.

But I think she thought that any red-blooded member of a supreme court of last resort, other than the U.S. Supreme Court, would welcome an opportunity to not have them mess with our work type of thing.

I was much less militant in that, thinking that the work of the U.S. Supreme Court was worth considering before we went into the field, if there was a possibility to wait a brief period of time.

As I say, there were certainly substantial ideological differences at that time between the California Supreme Court and the U.S. Supreme Court, as we know.

McCreery:

Did you have any particular knowledge of Chief Justice Bird's relationship or interactions with the U.S. Supreme Court? Was there any back and forth?

Lucas:

None that I know of. I mean, this might have been a private thing, but I knew some—I knew Bill Rehnquist, for example. I was on the federal bench after all. I met these people a lot.

McCreery:

Yes, I wanted to ask which members you might have known as well.

Lucas:

I went on a ten-day—Bill Rehnquist called me and said, "Malcolm, we're going to have the first ever Franco-American exchange. Members of the United States Supreme Court, led by Sandra Day O'Connor, are going to Paris to meet with the leadership of the French judiciary. You're chief justice. Would you like to go as a chief justice representing all of the other chief justices?" If I told you this before, stop me. I think I said to Bill, "*Mais oui*, Bill."

So, I got to know—Scalia was along. Steve Breyer, although he was on the court of appeal, was along. Ruth Bader Ginsburg was along, although she was also on the court of appeal, and, of course, Sandra and a couple of others. You spend ten days with them and you get to know them relatively well, in comparison to never having met them. But it was interesting to hear them and read their decisions later.

Supreme Court Justice Sandra Day O'Connor laughs at a quip by Justice Malcolm M. Lucas, right. Justice Thomas Reavley is at left. The panel was "grilling" Pepperdine Law School students in the university's 11th annual moot court competition on Feb. 2, 1985. Credit: Los Angeles Times Photographic Collection, UCLA Library Special Collections, Photographer: Bob Chamberlin.

McCreery:

How did Mr. Rehnquist make out as chief, in your view?

Lucas:

I thought he was a very good chief, actually. He allowed the court to proceed. I wasn't on the inside and I don't really know, but I did not see him as an overbearing, necessarily institutional-minded court chief who chided the members if they dared to dissent.

"We want to have uniform majority opinions." I didn't view him as that. He was a rather nice man, actually.

McCreery:

You mentioned getting to know Justice O'Connor. She certainly had an interesting career as the first woman on that court, a long and distinguished career.

Lucas:

Yes, she has, and she'd had some practical experience as a legislator; that was the interesting thing. Of course, she was on the Court of Appeal in Arizona as well, but she'd been several years in the Arizona legislature, a senator I think, which I think is helpful. I never had that experience, but it's helpful in terms of understanding how the sausage is made [Laughter], as it were.

McCreery:

As it were. But her experience on that court, of course, was quite different from California's first woman justice.

Lucas:

Yes, night and day I would say.

McCreery:

Can you contrast your style in presiding over the court with the earlier style of Chief Justice Bird at oral argument?

Lucas:

The presiding is pretty well the same.

You have sitting on your right the most senior member of the court, and on your left the next most senior.

It's all done by seniority. You call the case and away we go. Sometimes she would interrupt more than I thought was appropriate, and sometimes she was a little more caustic than I thought was appropriate, but we had so much time for oral argument, and then it was all done.

McCreery:

In her time, which other justices would tend to participate more actively?

Lucas:

Joe Grodin would have a variety of questions. It depended. I think some

of the judges had more interest, basically, in civil law than criminal law. But if it was a criminal case that needed examining, then they would have their questions. Then we'd immediately afterwards have a conference of the court as to how we should proceed on the case.

With the ninety-day rule we'd have a tentative opinion, but sometimes—oh, I can remember Otto. He would come to our post-argument conference and say, "I had a religious experience out there," because he heard one counsel say something that made him start thinking, "and so I don't know how I'm going to vote on this. I'll have to do more research," or maybe, "I've changed my mind."

So, oral argument was helpful. It is not dispositive. It's not a question of who has the most silver tongue, because facts are facts and it's very hard to change those facts. Facts are the most important part about the case. You get to state the facts in the way you want to. [Laughter] It's like the polls that come when they poll the public. "Isn't it true that so-and-so is a real idiot? You agree with that, don't you?"

McCreery:

"Yes or no?"

Lucas:

Yes, "Yes or no."

McCreery:

Can you address the quality of the advocacy that you saw on this court, compared to what you'd known in other settings?

Lucas:

Generally, it was good.

In important civil cases the best appellate argument would be given, because there would be money on both sides, and they would hire somebody who was an experienced and exceptional appellate advocate.

You would sometimes notice with criminal cases, well, here's a young assistant U.S. attorney who probably has maybe only argued a couple of cases, if any.

Not the death penalty cases, because those were handled by a death penalty section or unit in the attorney general's office, and they were, of course, very experienced. That's all they did.

Then you would notice also on the other side that the representation of the defendant, even in a death penalty case, would be enthusiastic but spotty sometimes, because they hadn't really had the experience.

It takes, not a lifetime, but to really have a feel for these cases it's important to be steeped in them. We had an organization called CAP, Criminal Appeals Project, where we attempted to have educative processes available to them, but sometimes we had to look at the case independently to make sure there hadn't been any inadequate representation.

McCreery:

How would one go about doing that, if necessary?

Lucas:

If there was a hint of it, such as, "My lawyer took cocaine" or "My lawyer slept," and this, that, and the other, you might before you hear the case ask for some additional briefing on this subject, so that both sides would be alerted, and you will hear, not additional evidence necessarily (because that would happen under habeas), but enough at least to concentrate on it and the law on it. Sleeping in trial, you might get an affidavit under those circumstances from the assistant D.A. who tried it. "I never saw the defense counsel asleep at any time." Cocaine, they couldn't have any comment on, I'm sure. I don't know how the defendant would know that, but I remember one case where that was the assertion.

McCreery:

How common was it to have things like this arise, questions about the advocacy itself?

Lucas:

Only in habeas. In habeas, this is a ripe field. "Can't you think of anything that you disliked or found different or unique about your lawyer during the trial?" "Well, yes. I wanted him to have my mother come up to the stand and testify what a good person I was in my youth, and he said, 'No, that's not important.'" If that's what happened there may be a problem, because when you're given the death penalty, it's nice to know this guy wasn't an animal from the moment he was born but learned that through hard knocks and all the rest. Then the habeas begins. An investigator is appointed by the defense counsel, and then the matter is heard either in the state court or in the federal court, and thus death penalty cases go on and on and on. There really is no end to them, it seems.

McCreery:

We were speaking about oral argument, and you were saying that before this new approach to the ninety-day rule there would sometimes be a very long time elapsed before a decision was forthcoming. You said particularly in some chambers, and I wonder, in the time of Chief Justice Bird when you were a fairly new member, what was the view of pulling your weight of the total workload?

Lucas:

When I was chief it was very important. I ended up cumulatively writing more opinions than anyone else on the court, just because I thought it was my duty, and we were to get these cases out, hopefully very carefully analyzed and all the rest.

Some of the members of the Bird court somehow were—what's the expression?—walking to different drummers, meaning that a case would be assigned to them and it would just go into a black hole.

Even Rose, after a while, she'd be starting the Wednesday conference and she'd say, "Now, Justice X, the case of *X v. Y*. I assigned that case to you," whenever it was, "a year or a year and a half ago. We haven't gotten an opinion on it. How are you doing on this case?"

"I'm working on it. I've got such a big load of other things."

Under those circumstances I would have privately told the person, "I'm not putting you on the wheel for any other new cases. You've got this case and some others that are behind, and I can't burden you with additional ones. So, I'm putting you on notice. Don't worry about it, but I'm putting you on notice that you're not going to get any new cases until you bring your old cases up."

That would generally be curative enough, because I didn't do that very often, and when I did it I went down to the person's chambers and sat and told them that, "This is not good. You could ultimately become subject to some criticism as a result if this became widely known. I don't want this to happen, but I'm taking you off the wheel, and please, tell me every week how you're doing on this particular case." Just some kind of a [notice that] the alarm's going to ring sooner or later.

McCreery:

Of course, the productivity of every member has ultimately some effect on all the other members over time.

Lucas:

Yes, sure. It's not much fun getting an opinion a year and a half later and saying, "What was that case all about again?" That's the beauty of the ninety-day rule. When the cases came up you, of course, remember them exactly, because you'd considered them fully and completely ninety days before.

McCreery:

But I take it these matters would come up in conference at some times, before that change, when there was still a possibility of a long wait?

Lucas:

Yes. I tried not to do it in conference. "Stand up, go to the corner, you're way behind in this particular case." This person is an equal member, and a constitutionally established member of the court, so I didn't—shame was not public shame, public in the sense that the whole court hears it.

The members of the court knew because we got reports on the cases. All you had to do was take a look and you could see that, uh-oh, things are piling up in the corner here.

But I didn't—there was no excoriating. That's not the way to get cooperation. It's the way I explained it to you. I would go down, and I would have just kind of a heart-to-heart talk, and that was generally effective enough, particularly when combined with the cessation of the assignment of additional cases.

McCreery:

But your predecessor took a somewhat different approach, it sounds like, to dealing with these individual situations?

Lucas:

I don't know what she was doing individually, of course, but I know at times she would, at the start of the Wednesday conference, say what I described.

McCreery:

Thinking a little bit more about overall workload and backlogs in cases where those existed, we touched last time on the backlog going to the death penalty appeals. I just wonder, as the first few years went on, aside from the issue of the penalty itself, but just as a purely administrative matter of how do you deal with this volume, what did you think should happen to ameliorate the backlog and perhaps even make some changes in how that whole process was handled?

Lucas:

It was difficult because, of course, the California Constitution says that a trial court verdict of death in a death penalty case shall go—"Do not pass go. Go directly to the California Supreme Court."

We considered—I believe the court is now considering—the possibility of sending the death penalty cases through the court of appeal. We considered that thoroughly. We had a—perhaps ungrounded—concern that there would be simply a duplicative process. "The court of appeal did this. Now we have to do it all over again, because of the importance of the case," and the significance, obviously vital significance, of the verdict.

The biggest problem we had was getting counsel to take these cases. The compensation—I remember once we raised it, it doesn't seem like much then, but this is years ago, from $75 to $95 an hour, in the hopes that with a cumulative number of hours that people would be more interested.

Slipping into when I was chief, we also had a requirement that the appellate process include, concurrently, a state habeas or at least a review. "Is there anything that I should be advancing from the standpoint of a habeas, like was the guy using cocaine, or sleeping, or whatever?" That made it even more difficult, because there was some assurance then that there was going to be an extended representation.

Probably about 20 percent of the court's time overall was taken up by death penalty cases. There's no way that I could quantify it, but that's my own belief.

McCreery:

As time went on, what was your own view of having an automatic appeal to the Supreme Court? Did you think that was the way to continue, or did you favor a change to that, if one should be possible?

Lucas:

The only other thing that would be possible would be if you had the Court of Appeal. We thought long and hard about that. I took an informal poll of the court of appeal members, and some of them were very reluctant to take these cases. "My God, we hear you've got 10,000-page transcripts."

It may be a good idea. It may be. I've thought about it often when the death penalty question comes up. The problem is you'd have to make substantial changes.

It's not really possible to say, "Let's experiment with it," and send them something. You've got to have the Legislature make substantial changes, constitutional changes, and then it's too late.

But when you take it—here was the daunting part of the death penalty cases. They're never complete. Once they leave your chambers, leave the chambers of the California Supreme Court, all signed, sealed, and delivered on the appeal, as I've said before, you've got the state habeas, and that goes up and back and forth.

With a death penalty case there will be a minimum of three times that the case will have gone to the U.S. Supreme Court before the judgment can be affirmed, and you can imagine how long that takes.

Then, of course, we had the Ninth Circuit, and they would take these cases and were not all that concerned about it. "We'll hear this when we get around to it, but it's not important." Enormous delays. Most of the delays are inherent in the review process of the Ninth Circuit.

Of course, the U.S. Supreme Court, in a number of opinions, reduced the opportunities for game playing.

Final Thoughts on the Bird Era

McCreery:

Chief Justice Lucas, I wanted to give you a chance to reflect a bit more on your experience serving on the Rose Bird court before we go on and spend more time talking about the period when you were chief justice. Given all that we talked about last time, how do you evaluate that whole experience?

Lucas:

It was punctuated by the 1986 election, but it seemed to me that there was a crisis in public confidence in this judicial system, which in my view had been drifting to the left of the law for some time.

The same things that the public were made aware of—sixty-two death penalty opinions, reversing every one.

After a while it's difficult to tell the public that you believe that everyone is being completely ideology-free and completely objective about cases, particularly death penalty cases. I think, of course, that was the primary reason that the opposition to her was created.

There were business groups, I think, which were disgruntled with some of the tort rulings expanding plaintiffs' rights to sue in tort**,** and there was certainly a strong resentment, apparently, to the approach that in death penalty cases we don't worry about fair trials, we must approach perfect trials, which was fraught with problems when you had that state of mind, particularly when the court

system had given two defense counsel for the trial of the cases, and millions of dollars were expended on investigators, psychiatrists, and all the rest.

I think the public felt there was a crisis in civil justice, too, to some degree, that the Bird court was adrift here as well, that they had disregarded some statutes, and disregarded established common-law principles, although I don't think that was the primary reason why the retention election of 1986 occurred.

The Lucas Court: The California Supreme Court in 1987 at the Chief Justice's conference table. Left to right: Associate Justice Edward A. Panelli, Associate Justice Stanley Mosk, Associate Justice David N. Eagleson, Chief Justice Malcolm M. Lucas, Associate Justice John A. Arguelles, Associate Justice Allen E. Broussard, Associate Justice Marcus M. Kaufman. Published courtesy of the Supreme Court of California.

Becoming "Chief Justice Lucas": 1986 Retention Election and Beyond

McCreery:

Have you any additional thoughts on the '86 election itself? We'll talk more about the aftermath when you were chief, but anything else that you'd like to add about that?

Lucas:

As I think I've said before, the retention-election process was created in 1934, and up until 1986 there had never been either a Supreme Court justice or a Court of Appeal justice removed from office—not removed from office but denied reappointment.

So at least my own personal expectations were that—without knowing all of the forces that were allied and how much activity was going on, if any—well, this is a big flap and it's intrusive, but I don't think anything is going to happen.

I think I told you that I had met and talked to a political advisor, Stu Spencer,[85] about this particular election. It was probably six months before the election. I said, "There's an awful lot of confusion going on about this." I asked him, "There's no possibility that she's going to lose her office, is there?"

He had turned out to be—I looked him up after that—a quite experienced political consultant. He said, forcefully, "She's toast," unquote. I said, "What do you mean?" He said, "At the present time we have 25,000 names who have called in and have volunteered to speak against her."

"Speak? What do you mean?" "Go to their Rotary Clubs, their service clubs, their schools, that they want to speak against her." He said, "I've never had that experience in any of the campaigns that I've run. There is a groundswell of opposition to her that I've never detected before. It's very fierce and growing fiercer."

So that's when I began to think, well, isn't that something? If he's right, that will certainly cause some disruption in the court, never thinking that Joe Grodin or Cruz Reynoso would be swept away by the waves. The election came and we know the results.

McCreery:

What chance did you have to talk to Governor Deukmejian about these events before the election, if any?

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[85] Spencer was a political consultant who served as deputy chairman for political organization in the reelection campaign of President Gerald R. Ford. He was also a longtime adviser to Ronald Reagan. He is known to be one of the first professional campaign consultants in American politics. *See* https://geraldrfordfoundation.org/centennial/oralhistory/stu-spencer and https://ballotpedia.org/Stuart_Spencer.

Lucas:

None. No, once I came on the bench my duty was to the court and to the law, and so I thought it reasonable and expected of me not to discuss anything that might have to do with the activities in the court. I'm sure I saw him from time to time, but there was never any discussion about the operation of the court, or personnel, or anything else.

McCreery:

How early did he approach you with even the idea of being chief justice?

Lucas:

That's a good question. He, of course, could have appointed anybody in the world, I suppose, with the qualifications. But he always had great confidence in me.

After all, we were law partners for thirteen years, and he'd expressed great confidence in me, and I suppose showed it by appointing me as associate justice. When he did call about it, it was, "You're probably expecting this call," something like this. He said, "You've been on the court three and a half years. You're experienced. You're the only candidate that I'm thinking about. What about it?" I've forgotten what I said—something like, "In for a penny, in for a pound," or whatever.

McCreery:

What indications might you have had of his intention before that—any whatsoever?

Lucas:

No. As I say, even after I spoke to Stu Spencer, I thought it was not going to happen, so I'm not going to spend a lot of time mulling this over. I don't think it's going to happen. It's just a relatively few disgruntled people that are unhappy with the court, or at least unhappy with her, and she made it through the [1978 election].

Chief Justice Malcolm Lucas and Gov. George Deukmejian in Deukmejian's office after swearing-in, 1987. (Courtesy of the Lucas Family.)

McCreery:

When Governor Deukmejian did call you with this prospect, how did you respond at first? You said, "In for a penny, in for a pound," but what else went through your mind, do you remember?

Lucas:

I don't know. I wish that I'd said, "Boy, I'm tired of writing dissents. This'll be a real change," [Laughter] but I didn't. Look. I was already up there. I was living up there.

I was now entrenched in the processes and had seen many things that if I had been in command I would have changed—we've already talked about many of them—and so it just felt like a natural step.

I don't know. I might have said to him, "Look, George. I can't be any worse than Rose, so go ahead." [Laughter] I didn't say that either.

McCreery:

You mentioned a moment ago that he said you were the only one he was considering.

Lucas:

I believe that's right, yes.

McCreery:

Here we are in February 1987. You've been sworn in and assumed office as chief justice of the State of California. You had a very unusual situation on your hands. You were short by several justices. What do you recall about your first steps? What seemed most urgent to you to attend to?

Lucas:

I'm not sure whether this was *the* first step, because some disturbing things had been brought to my attention before this—that is, that Rose Bird had destroyed all files of the Supreme Court, all the memory of the Supreme Court.

But, I would remember that soon afterwards, I think I called in Stanley and Allen [Broussard] at the same time, and let's see, who was the fourth, and Justice Panelli, okay.

I called them all in, just a very informal meeting in my chambers, and said, "Look. Every day we get petitions seeking review, and there's going to be a big pile of them before we really get three more people on here," and all the rest.

"What do you think are the possibilities that the four of us," because we had a majority, we had a quorum, "that the four of us can pass on most of these cases? If there's a split among us then, of course, it'll have to go over until we have a full complement of people."

They said, in essence, "The great majority of the cases we can handle. The denials are often unanimous, and so we could certainly handle all of the denials where we determine that this is an appropriate denial, and we will keep in mind that this shorthandedness would become the vote on some other cases."

So, we did. Every Wednesday morning it would just be the four of us, drinking coffee and eating—I've forgotten what I served them up. Rose generally had trail grout, which is pretty good, and I'm not sure if she had muffins, or if I was responsible for all that high-caloric stuff.

McCreery:

The court had a huge spotlight on it after that election. Pretty much everybody was aware of what had happened and how unusual it was. What steps could you take to get things back on track, as it were? How did you think about and act upon the perception of the public and the media and all that piece of it?

Lucas:

I gave an interview and/or a press conference. I didn't give many of those, but I can remember they were asking me about this very same thing, and I said, "You know that Otto Kaus used to say, 'We don't really think about elections and that type of thing,' but it's pretty hard to do, because it's like saying, 'I don't see that alligator in the bathtub.'"

I said, "As far as I'm concerned, we're going to change that alligator in the bathtub into alligator shoes, and I'm going to do the best I can—," the words I used were, "to heal the wounds of the court. We've been through some disruptive, difficult times, and we're going to have some tranquility here, get the court back on an even keel, and just put out good opinions that the public will agree with and support, and they will support the court."

I think I said something to the effect, "I believe that there is a groundswell of support by the people of California for this court as an institution, and we'll try to honor the support that the public does give us." It all seemed to work out, happily.

McCreery:

So, you were out there stumping on your own, as it were?

Lucas:

You had invitations to speak. The annual state bar address, for example, in September, you've got the entire bar organization before you. I started giving speeches shortly after, maybe a month or two after I came aboard. I wanted to have at least sixty days under my belt before I started spouting. These speeches then, at least in part, are disseminated by newspapers or trade journals or whatever.

I think that was effective. I think other members of the court, particularly the new members, were asked, "What do you think? How are you doing?" and all the rest, and they would come up with, hopefully, affirmative answers and a rationale for it.

But we weren't squabbling. It wasn't disruptive. I've told you I had an open-door policy, where any justice that wanted to come in at any time could, not exactly guaranteed to give you smooth sailing when you're reading an opinion or a proposed opinion, but it was worth it to have them come in. I've told you about the retreats we had.

Then we used to have just dinners, the seven of us only. So, all these things were helpful and, of course, then the staff would know about these things, particularly because they were at the retreats. Then if the reporters, which they certainly would attempt to do, if the reporters would talk to the staff, "How are things going?" "He seems okay. In fact, we had a retreat where we—," et cetera.

McCreery:

The communication sounds much improved, just in general.

Lucas:

Oh yes, yes.

McCreery:

In all directions, perhaps.

Lucas:

Yes.

McCreery:

I wonder in the early period when you were just getting reconstituted, what sort of guidance or aid did you have from Governor Deukmejian himself?

Lucas:

On what?

McCreery:

Just on kind of what needed to be done, and what resources might be available to you. Was there anything there?

Lucas:

There was nothing like that, and this would be entirely foreign to him, "How many more law clerks do you need for central civil?" He doesn't get involved in that.

McCreery:

Forgive me. I wasn't thinking so much on that level of detail, but I just wondered if he was able to assist you in any way with the liaison with the public, and the whole aspect of the perception of the court, shall we say?

Lucas:

No. I think he would have felt that that would have been intrusive, and maybe it would be felt by the population to be not within his bailiwick, because he apparently was an important force in motivating people to vote against Bird.

So, if he then says the day after she goes, "Now we have a wonderful court doing this," in my view it would ring hollow. He didn't do anything like that that I'm aware of and, of course, I didn't either. The best thing he did was to make, in due course of time, three appointments that made the court whole.

McCreery:

Before making these three appointments, did Governor Deukmejian consult you at all about any of the prospects?

Lucas:

Either he or somebody else on his behalf would ask me, "These are candidates that we're considering," and mostly, "Do you know anything negative about them? Would you oppose them coming on the court?" I had no veto, that's for sure.

But with these three I said, "No, they're all fine." They, of course, had their own vetting processes, and George knew [David] Eagleson[86] very well, another Long Beach person, and John Arguelles knew him well, because he was sitting in Long Beach. So, there wasn't that much curiosity about—with the exception of [Marcus] Kaufman,[87] perhaps—I wonder if he will run amok when he gets up there on the court?

These were solid people who'd had long judicial careers and some leadership roles in the court system, solid people, and reliable people.

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[86] David N. Eagleson would serve from March 1987 to 1991. Prior to his appointment to the Supreme Court, he served for three years as an associate justice of the Court of Appeal, Second Appellate District, Division Five from 1984 to 1987, and for fourteen years as a judge of the Los Angeles County Superior Court from 1970 to 1984, including a term as presiding judge in 1981–1982. *History: David N. Eagleson*, Calif. Sup. Ct. Hist. Soc., https://www.cschs.org/history/california-supreme-court-justices/david-n-eagleson.

[87] Marcus N. Kaufman served from March 1987 to January 1990. Before he was appointed associate justice, Kaufman served for seventeen years as an Associate Justice of the California Court of Appeal, Fourth Appellate District, Second Division.

They were all hardworking, and they knew what was expected of them. They had all talked to me before they were sworn in. "What's the work like?" and "Do you think I ought to do this, or would you advise me not to?"

I, of course, told them that, "It's a lot of heavy work, but you've been doing that all your life. You're working on the top shelf now. What you say goes, with the possibility of some gray cloud on the horizon called the U.S. Supreme Court, and it's all very important stuff and will go in the books. You can contribute to some good opinions going into the books." They were all well motivated. As I say, their work ethic had been long established, and so they were ready to go.

McCreery:

You've used the phrase work ethic several times. Had that particularly been a problem before?

Lucas:

When I described to you some of the chambers, under Chief Justice Bird, where cases would go to die, where the black hole, we used to call it—maybe it's not right to say there was no work ethic there. Maybe it was more proper to say there was so much disorganization that work couldn't be done.

I don't know what it was, but work ethic covers a whole lot, papers over a lot of things. One would be if somebody had a real work ethic and a feeling of personal responsibility, or what was expected of him or her, and what the other members of the court were doing, then one would expect that they would at least put out the average amount of output, and not end up holding up a lot of opinions. So that's what I mean by work ethic.

McCreery:

I can guess, but how did the votes change with this newly reconstituted court?

Lucas:

It was most notable, I guess, in death penalty cases, because we had a different view of harmless error.

Remember, Rose Bird had voted to reverse sixty-two cases out of sixty-two. There's always an error someplace, and it's never harmless. This was very frustrating to me, because some of these reversals were just—as I would say in the dissent—unbelievable.

So, there was then a majority for looking rationally and reasonably at death penalty cases, not rapidly and cursorily, but looking at them reasonably.

They all had tried cases, many cases, as I had, and they knew a harmless error from an error that required reversal. It was the experience, I think, that they had in the trial of cases that made the utilization of harmless error easier for them than it would for Rose, who had never tried a case, as a judge at any rate.

I guess it was easier for her to say, "That was error, therefore it's not harmless. We've got to reverse." So that was a big difference.

McCreery:

That's a good example of using the talents of a particular justice to apply to a certain problem.

Lucas:

Yes, exactly.

McCreery:

Do you have other examples of how you as chief could employ your staff of justices to look at some of the larger issues of the court?

Lucas:

The Richardson Committee, for example, had as advisory members Stanley Mosk and Ed Panelli.

Ed Panelli has vast experience in trial court, and of course, Stanley Mosk's experience is well known. I asked them to sit in and when the members of this committee were talking about various things, if they were making a mistake procedurally or factually and they needed some help, please chime in and give them suggestions. Or if you have your own ideas, project them. The court was well represented in this committee by Stanley and Ed Panelli, and I think we got a better rapport and better suggestions as a result of that.

McCreery:

Since we're on the subject of the conferences, how did you run those?

Lucas:

I ran them with a good deal more humor than Rose ran hers.

The period before it began was intentionally a relaxing experience. Maybe somebody would tell a joke if they'd heard one. It didn't happen all that often, but the talk was not about the law or the cases that were coming up. It might be about how did the Dodgers or the Giants do, or whatever.

We tried to keep it low key. Then after that it was more or less the same. We had a different complexion of people, of course, and there was no Rose Bird to say to Joe Grodin, "What is your point, Joe? What is your vote?" He'd say, "Okay, I'll tell you." This is after about five minutes of speaking.

McCreery:

That returns to this theme of collegiality that we've talked about on other days, and the extent to which you tried to foster that. Were there any bumps in that road?

Lucas:

No, not really. Stanley was always a good friend and cooperative. I think Broussard was a little discouraged by the election returns, because he at least ideologically had more in common with Joe Grodin and Cruz Reynoso than he had with me, at any rate. But he was an experienced judge, and he saw this coming. Let's see, he retired—?

McCreery:

1991.

Lucas:

I think it must have been uncomfortable for him to be outnumbered. He had never experienced that before. I've never thought about this, but I think I'd be uncomfortable. I *was* uncomfortable [when I first came on the court]. [Laughter] I could tell him, "Allen, you're going to wear my shoes for a while." I never did that. We wouldn't rub anything in. It wouldn't be gentlemanly or anything else, certainly wouldn't be collegial.

Administering the Court

McCreery:

Mr. Chief Justice, we agreed we would talk today about your task of administering the court system for California when you were chief justice. I wonder if you could start off by saying a bit about what you inherited from your predecessor.

Lucas:

The initial—shock is too strong a word, but the initial realization—it was obvious, of course, but the initial realization that I would have to be doing everything that I had been doing in terms of creating opinions as an associate

justice, plus all the administrative work for the court and the state—and that was very elastic.

You could do as little or as much as you wanted, and I found it to be quite demanding, but nevertheless quite interesting.

The condition of the court when I went there as chief justice—Chief Justice Bird had appointed Allen Broussard as acting chief justice, and indeed he sat in as presiding active chief justice on my confirmation hearing.

As I've said before, there were only the four of us, and we were muddling through, as the English would say, and that went on for quite some time, because it took, of course, time—months as a matter of fact—for the court to be fully staffed.

The staff itself was still—this is my word, and perhaps it's too strong a word—reeling from the elections.

It's obvious that the three judges who were not retained or not returned to office had full staffs that were working for them, and what are we going to do about these particular staff people?

McCreery:

What was the situation at that time with regard to the main part of it in San Francisco, and then these regional offices? Was the administrative office of the courts operating as one body? How was it structured in that regard?

Lucas:

It came to be operating in one body, and when we got the new building built, they had really quite splendid chambers, and hearing rooms, and all the rest of it. There was a time that the membership was scattered around, but Bill Vickrey[88] wanted to, where possible, where they were not needed in the field, have them in a central location, which he thought was a more efficient operation, and I agreed.

McCreery:

The scope of the office then, again, the AOC itself: keeping statistics and certainly performing useful functions like that, but to what extent was there a mission for the office, a support function to the council and indeed to the state? Did you have much sense of that?

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[88] Vickrey served as administrative director of the Judicial Council of California from 1991 to 2011, serving three state Supreme Court chief justices, from Lucas to Chief Justice Ronald M. George to Chief Justice Tani G. Cantil-Sakauye. Vickrey collaborated with them on historic reforms. Merrill Balassone, *In Memoriam: Longtime Judicial Council Administrative Director William C. Vickrey*, Calif. Cts. Newsroom (Feb. 7, 2023), https://newsroom.courts.ca.gov/news/memoriam-longtime-judicial-council-administrative-director-william-c-vickrey.

Lucas:

There is a mission statement that sets forth guiding principles, and California Rules of Court, Rule 1001, as a matter of fact, recites it. It worked well with the committees, in the executive and planning committees. There were a variety of committees, and the AOC worked as staff help for them.

All the advisory committee structures it worked with included the appellate committee, civil and small claims committee, criminal committee, court profiles committee, trial court budget commission, trial court presiding judges committee, court administrators committee, and the governing committee for the Center for Judicial Education and Research, and the administrative presiding justices committee. I was chairman of that committee.

One member of each one of the courts of appeal I appointed as administrative presiding justice, and they would meet with me in my chambers once a month to discuss whatever was of moment, and what we were planning.

The AOC also assisted the court technology committee, various task forces on a variety of things. Trial court delay reduction, for example, is one. They had plenty of work to do, and they did a good job.

McCreery:

It is a rather broad scope as it has developed in the meantime. But you're indicating it was a smaller scope when you took it over.

Lucas:

It was relatively—underline "relatively"—dormant when I came in. We eventually got Larry Sipes[89] from the National Center for State Courts to come in with us, and his wife also, who was excellent.

I, of course, had had some relationships with the national center as a member of the Conference of Chief Justices. But to give some background on perhaps why there wasn't this much activity—and again I seem to be violating my statement that I wouldn't publicly compare what Rose Bird had done and what we were trying to do.

But Rose Bird would not go to meetings of the Conference of Chief Justices. That is, she knew that twice a year the fifty chief justices would meet and consider a variety of important things for the system as a whole and would set policy, and all the rest.

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[89] See Larry L. Snipes, *Committed to Justice: The Rise of Judicial Administration in California*, Admin. Ofc. Calif. Cts. (2002), https://www.courts.ca.gov/documents/Committed_to_Justice_LSipes_Front_Matter.pdf.

I can remember the first time I went there, and they said, "Boy, are we glad to see you. Your predecessor refused to come. She said something about it was an old-boys' club." I thought, well, that can't be, but that's what it was.

Nor did she attend CJA meetings and that type of thing. She just was not—I don't know about her interest, but she was unwilling to do that.

That, of course, slows down anything you want to do, if you're not able to sit with them and project your ideas, your concepts, or help them project theirs. As I say, at the beginning everything was rather dormant, and you had to try the Heimlich maneuver on it and see if it worked.

McCreery:

I can understand. As you indicated before, a great many or perhaps all of your court records that might relate to these matters—

Lucas:

Had been destroyed.

McCreery:

—had been destroyed. So, you were set with a task of really starting over in some sense. Let's go back to the beginning of the Trial Court Delay Reduction Act,[90] if we may. Where did that idea first come from, that ultimately was enacted in 1986?

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[90] The act, introduced in the Legislature as Assembly Bill 3300, first added Article 5, Sections 68600 to 68612, to Chapter 2, Title 8 of the Government Code, stating that "Delay in the resolution of both civil and criminal litigation is not in the best interests of the state and public." *California's Trial Court Delay Reduction Act: A First Look*, 1 J.F.K. U. L. Rev. 87 (1988). Many years later, Beth Jay provides some perspective, "Malcolm M. Lucas, A Personal Remembrance," Cal. Sup. Ct. Hist. Soc. Newsl. (Fall/Winter 2016), at 8, https://www.cschs.org/wp-content/uploads/2015/01/2016-Newsletter-Fall-Winter-Malcolm-Lucas.pdf. It was in Lucas's nature fruitfully and diplomatically to challenge his colleagues. For example, he suggested, "One of the fundamental principles upheld by a responsive justice system is that the public court system must have adequate resources to perform its constitutional role. By resources, I do not mean only financial support. I include the authority to handle the affairs of the judicial system, to set a course for the future, and to meet needs in an environment where fiscal resources are unlikely to match increases in demand." It took some time and legislation, but one huge change arose from his observation. That birth of that change is reported in the Pacific Law Journal. "I am pleased that the editors of the *Pacific Law Journal* have agreed to publish the Judicial Council's report entitled, *Trial Court Unification: Proposed Constitutional Amendments and Commentary* as Amended and Adopted by the Judicial Council, in the annual legislative review issue of the *Journal*," J. Clark Kelso, *Introduction*, 25 Pac. L. J. 237 (1994), https://scholarlycommons.pacific.edu/cgi/viewcontent.cgi?article=1898&context=mlr; *Trial Court Unification: Proposed Constitutional Amendments and Commentary as Amended and Adopted by the Judicial Council*, *id*. at 239, https://scholarlycommons.pacific.edu/cgi/viewcontent.cgi?article=1899&context=mlr; and *Justices of the California Court of Appeal, Third Appellate District, Letter from the Justices of the California Court of Appeal, Third Appellate District, to the California Senate and Assembly Judiciary Committees Regarding Trial Court Unification (SCA3)*, *id*. at 299, https://scholarlycommons.pacific.edu/cgi/viewcontent.cgi?article=1900&context=mlr; also see two negative responses to an editorial supporting court consolidation in the Los Angeles Times by Judge Tully H. Seymour, Superior Court, Orange County, and Judge Donald E. Smallwood, Superior Court, Santa Ana, both at https://www.latimes.com/archives/la-xpm-1994-08-28-me-32093-story.html. "In 1998 California voters passed a constitutional amendment that provided for voluntary unification of the superior and municipal courts in each county into a single, countywide trial court system. By January 2001, all 58 California counties had voted to unify their municipal and superior court operations." *Fact Sheet, Trial Court Unification*, Administrative Office of the Courts (February 2005), https://www.courts.ca.gov/documents/tcunif.pdf.

Lucas:

I would say that it came from—I was thirteen years on the federal bench, and we had the Federal Judicial Center that had programs, and a number of the programs were case management.

They didn't quite call it trial court delay reduction, but it was case management, and it had most of the features of what they call trial court delay reduction: Have an early meeting with counsel; don't just have a case filed. Have a requirement that it be served on the other side, so there's a live person on the other side, and then have an early conference meeting with counsel.

At that time you ask how much time, and you tell them beforehand—this is still federal. "I'm going to be asking you what your estimate on this case is, and when you'll be ready for trial. This is something you shouldn't lightly say. You should think about it, because we're going to probably hold you to this." All counsel are optimistic. "We'll be ready in six months."

I said, "No, let's make it nine months. That means you'll have all the discovery complete. You don't come in and say, 'Oh, we have two or three depositions to complete, and we'd like a continuance,' because we won't give you a continuance. You should be careful in your initial stages with this."

So that was very much the nature of the federal courts. Some were more stringent on it than others. Each district perhaps had its own rules. But the Federal Judicial Center, under the judge whose building was blown up, Al Murrah, and his predecessors, had that as a very definite and important thing, and it worked.

McCreery:

So, you saw there a model that could be applied in California?

Lucas:

Yes.

McCreery:

We've talked quite a bit about L.A. County, the most populous and the biggest court system. Were there other counties around the state that stood out in terms of implementing the trial court delay reduction?

Lucas:

As you know we had nine central experimental counties, and they each had different rules that they created themselves, which is what we wanted them to do. "Which worked, which didn't?" Then we found—I think it was San

Francisco that said, "We want to volunteer, before you complete all this pilot-project stuff, we want to volunteer to go full time into this."

One of the districts in Los Angeles, the Pomona court, they said, "We want to implement trial court delay reduction now in our court district," not the whole L.A. County, but in Pomona. "Go for it."

You'd find that people were volunteering, courts were volunteering. They were volunteering. They were reading about all these things that were happening, and they were seeing this horde of people there that they couldn't manage, and said "Let's try anything." Pomona had a voluntary, very successful trial court delay reduction. It got down to "File your case. We're ready to hear it." This wasn't overnight. Maybe this took a year and a half, but I can't remember specifically whether there were any fallen angels, courts that just couldn't keep up, because we would then start sending retired judges there.

"I'm sending this judge down not to tell you how to do trial court delay reduction, but he's somebody that's knowledgeable about it, and he can also help you with your civil cases." They appreciated that, that they were getting some help, particularly where the judge would say, "Look, I know there's a few bumps in the road when you start this, but it's terrific when you really have it going. You'll dispose of half again of the cases that you're doing, the way you're doing it."

McCreery:

Trial-court delay reduction was quite a feat of your administration though, in California. I wonder, all these years later, how do you reflect on the success of this program?

Lucas:

It worked so well in the federal courts. It was a proven entity, a proven concept at least, so I knew that given determination and the will to make it work by the judge, and the ultimate cooperation of counsel, it had to work and it had to be better. We just couldn't have a system where cases would float in over the transom with a note attached, "This case is four years old. We're now ready to try it." So, I was quite satisfied with it.

I know since I left there have been requests by counsel, "This is too stringent. Let's give us this, and let's give us that." I wouldn't have done it. I think there has been some leeway given, which in my view detracts from the benefit of it, slightly.

McCreery:

In other words, asking for exceptions?

Lucas:

Yes.

McCreery:

Just thinking, then, overall about managing the state court system and all those complexities, the one we've just been discussing, the trial court delay, seemed to kind of set the stage for the Trial Court Realignment and Efficiency Act coming a few years later in 1991,[91] and of course those efforts to make the court system more efficient and to realign the courts have continued long after you left, and resulted in unification of the lower courts and so on. But what was the earliest work that you did in this area, and what was your thinking about it at that time?

Lucas:

The unification work was completed after I left the court, but the management of the courts was still before us.

Let's take L.A. County, for example. The municipal court judges were going home at noon. They've got these small claims cases and most of them settle. They were going home, and this was a God-given right. "I only work half a day. I generally get all these cases disposed of, or I'll put them over till the next day."

The superior court judges were working long hours. The municipal court judges for all intents and purposes had no lengthy law-and-motion matters to hear, because their cases at that time were $25,000 or less, and that was their jurisdiction. They could dispose of these cases easily—and I don't want to say easily, some of them I guess were hard—but there was a great disparity in the amount of work that was being done by the judges, the amount of work being turned out by them in the municipal court versus the superior.

I suggested that there be an agreement between the L.A. municipal and superior courts that the superior court would have the municipal courts as overflow courts, with their concurrence.

Then ultimately, of course, this matured into, "Let's just do away with the names, municipal, and everybody will be a superior court judge."

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[91] *See* Elizabeth G. Hill, *Trial Court Funding "Realignment*," Legis. Analyst's Ofc. (Feb. 1992), https://lao.ca.gov/1992/reports/trial_court_funding_realignment_393_0292.pdf.

McCreery:

This idea to do away with the names, as you put it, and just have them all judges of the superior court, where did that actually spring from as a solution?

Lucas:

Things like this. There was a court clerk in—bless her, where was she? She was the court clerk of the municipal court in a county, let's say. Sheila Gonzalez[92] was her name, a very well-motivated woman. She was the court clerk for the municipal court, and the superior court was having the darndest time getting a court clerk that knew that they were doing.

They'd come and they'd mess it up. They'd have to try to get another one. So, they came to Sheila and first they said, "Would you be interested in coming to us as our court clerk?" She said, "Only if the municipal court agrees. I'll go and I'll talk to them, and if they agree, then we'll do that." That's what they did. Eventually they were just operating the superior and the municipal court, with one court clerk, one jury panel, one jury room, and everything was centralized with Sheila and her operation.

McCreery:

Speaking of women, perhaps we'll turn to discussion of some of the various advisory committees that were set up in California during your tenure as chief, the first of these being the Advisory Committee on Gender Bias in the Courts. Perhaps you can just talk about that from the beginning, as you remember it.[93]

Lucas:

This was a committee that was set up by Rose just before she left the court. I'm not sure why she delayed that long, or maybe it was a new idea that had just come along, but she set it up—or maybe she didn't think I would set up such a committee. I don't know what she was thinking. But she set up the committee just as she left the court.

After she left, I expanded the membership of the committee, which I felt would make it more diversified and appointed a cochair. I left everyone on that she appointed, but I added some other members and appointed a cochair.

This committee has done a lot of good studies and has made recommendations to the judicial education system, so that we judges now

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[92] Gonzalez went from filing parking tickets as a clerk in Glendale Municipal Court in the mid-1970s to a highly persuasive and powerful administrator of the Ventura County courthouse. Mack Reed, *She's So Persuasive Judges Carry Her Bags*, L.A. Times, May 1, 1990, https://www.latimes.com/archives/la-xpm-1990-05-01-me-171-story.html.

[93] See again, Justice in the Balance 2020, note 19, *supra*.

have programs. It's mandated that a new judge have a one-week preliminary mandatory education, and then within six months have a two-week session at the [judges'] college, which is at Berkeley, as you know. It's my recollection that there is now a mandatory program presented on gender bias.

McCreery:

You were facing an enormous new role with many, many challenges. But I wonder, what was your thinking about the committee and that whole topic, shall we say?

Lucas:

My first and initial response, which was perhaps unseemly of me, was "Rose wanted to hand me a hot potato here. But it's not a bad idea."

I knew from going to the conference of chiefs that similar committees were being set up. It was an idea whose time had come, and within the last six months or a year a couple of other courts had set up these advisory committees and spoke of them as a good thing.

McCreery:

We can say it was an idea whose time had come, but we didn't so frequently see people at that stage making an attempt to really take a look at gender bias issues.

Lucas:

No, you're right.

McCreery:

Indeed, as I understand it, the committee's work revealed that yes, there was significant gender bias in the courts,[94] as there was just about everywhere else in society at that time. How did you proceed after the initial results were in, and what hand did you have in the committee's work as things went along?

Lucas:

Basically, not a supervising role, a reviewing role. They would make a study, they'd send me a report. If they wanted to do additional things that required assistance from the AOC, some kind of funding—minimal funding but some

[94] See *Gender and Justice: Implementing Gender Fairness in the Courts: Implementation Report*, Jud. Council Calif. Advisory Comm. on Access and Fairness Gender Fairness Subcomm. (July 1996), https://www.courts.ca.gov/documents/imp_rept.pdf.

kind of funding—then I would approve that. It was an idea that just, as we've said, whose time has come.

It resulted in a general recognition by the judges of the court, sometimes grudgingly, but ultimately a general recognition that this was important, indeed important enough that there will be a class and instruction in this to every new judge that comes on, so they're introduced to this concept the very first thing they do, or within the first six months of what they're doing. They go to the college and they receive this class, as well as, of course, a number of others.

McCreery:

This work did enjoy your full support, it sounds like?

Lucas:

Oh yes, sure.

McCreery:

Since you mentioned CJA, perhaps you could say a word or two about the California Judges Association.

Lucas:

I had, of course, friends who'd been the president of CJA. David Eagleson, for example, was president of CJA, and some others. Of course I was experienced with it, because I was on the superior court and a member of CJA and was quite familiar with what they do.

McCreery:

What do they do, mainly?

Lucas:

They maintain a political representative in the capital. This may not be his full-time job, representing the judges, but maybe half of his work involves representing the judges.

They follow the proposed bills—a couple of thousand bills will be introduced, some by people who haven't been there that long, because of term limits and all, and some of which would be very, very destructive to the court system. Sooner or later you will find them, but they find them—we had a similar unit, by the way, in the AOC. We had a guy who was in Sacramento, and I say a guy because he was a male and would go through all the bills. Some of the bills, if you didn't hop on them at once would really, really be destructive.

So, the CJA did a good job in their monitoring and support. "We have this particular bill which will—." Let's jump ahead. This didn't happen during my administration, "but which will merge the superior court and the municipal court."

That was a constitutional amendment as I remember, but at any rate it needed some peddling in the legislature and CJA kept [a list of legislators]. After everyone's name they would ask, "Please tell us if you have a particular special relationship with any member of the senate or of the assembly." "Oh yes, he's my brother. He's my next-door neighbor. I used to be in business with him." "Okay. Now, will you call him and tell him, 'We've got to have this bill. It's really important. I don't call you very often, but—." And so CJA would do that, and it was very helpful, because how many judges did we have at that time, 1,500? Something like that, perhaps.

McCreery:

The whole matter of advocacy for judges is a bit delicate. There aren't too many avenues for this to take place, really.

Lucas:

No. That's another thing that the CJA does, is to maintain the rules of ethics. They have a judge and a committee that are appointed and available for telephone calls, but they write the rules of ethics for the court system.

Therefore, they know when they can and when they cannot, and what they can and cannot approach a member of the legislature about. This is all vetted out beforehand, so you don't have somebody stumbling around irritating legislators. It's the last thing you want to do, and they get a lot of instruction before they start their approaches.

McCreery:

And how effective were they in Sacramento?

Lucas:

I think they were quite effective.

McCreery:

It is a task, isn't it, to bridge the gap between the judiciary and the public?

Lucas:

Oh, yes.

McCreery:

There's a lack of information flowing back and forth. I wonder, what do you think is most important for the public to know about our system that they may not have any way to know?

Lucas:

In the first place it's a confounding—not confounded, but confounding system. You say, "Let me tell you about the courts. There's the federal, and then there's the Ninth Circuit and the First Circuit and all the rest. The Ninth Circuit from the Rocky Mountains to the Pacific Trust Territories, from the Mexican borders to the Arctic Circle; that's federal law. Then there are district courts of appeal, that's still federal, and that covers a big area from almost San Diego up to San Luis Obispo, say. But that's federal also. Then we have the state courts, and there are fifty-two counties. Each county has a county seat, in this case Los Angeles, and that's where the head of the machinery of the court will be. But then, at least in Los Angeles, we have satellite courts, like Long Beach, Pomona, et cetera."

And then explain, "Each of those are court-wide operated without too much supervision from the central court."

"If you lose your case, what happens?" "Then there's the court of appeal, and there's the Second District Court of Appeal that's here in Los Angeles and covers so many counties."

"What do you do then?" "You petition for—not 'cert,' that's federal court. You petition for 'review.'"

"What does that mean?" "In the first place, it's not mandatory that they take [the case], so you're asking for a little help from the Supreme Court. It has to be a question of law that's important and significant."

Their heads are reeling. So often we would have boards put up, simplified boards. They would always ask about the death penalty cases. It amounted to trying to pass the buck. It was quite true, however.

I can remember explaining to one group about Robert Alton Harris,[95] who was the first person executed in California since 1966.[96] The case was tried in 1977 in the San Diego Superior Court. It came to us directly, of course—it

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[95] People v. Harris, 28 Cal. 3d 935 (1981).

[96] The gas chamber was installed at San Quentin State Prison in 1938. On December 2, 1938, the first execution by lethal gas was conducted. From that date through 1967, 194 people—including four women—were executed by gas, all at San Quentin.

doesn't go to the court of appeal, it comes to the Supreme Court directly—in 1980, and in 1982 we issued our verdict, our judgment. Then you would think, well, ladies and gentlemen, that's all there is, isn't it? The answer is no.

You begin with the state habeas. We changed that around, requiring that the state habeas went forward with the state appeal and with the same lawyer, to make it more efficient.

But basically, then you start with that state habeas, which goes up the ladder and can go to the United States Supreme Court, and then the federal habeas, which goes to the Ninth Circuit and is almost universally rejected, and then has to come back—or it has to go, excuse me, to the U.S. Supreme Court, which almost universally reverses the Ninth Circuit.

But are months going by? No, years. I think Robert Alton Harris was executed—I was chief justice—I think it was 1988.

McCreery:

1992.

NOTE: In McCreery's discussion with Lucas on administering the courts, Lucas went into a deeper look at the impact on the court from the execution of Robert Alton Harris. We discuss it here, given the weight of the moment in the court's history and its death penalty jurisprudence.

"Things Were Thundering Down": The Alton Harris Execution

Lucas:

That, by the way, was a rather traumatic experience.

Nobody on that court had had any experience with the execution of the death penalty, not that we were doing it, but we had a telephone call with the warden's office. But beforehand we were aware that there were going to be significant filings at the last minute, and so I had our court clerk in correspondence with the federal court to see what had been filed in the federal court.

They filed a federal habeas in the federal court, I think a day and a half before the execution. I told the clerk, "Go down and get a full copy of that at once and make copies of each one." I dictated a memo, "Dear members of the court, please read this as though it had been filed with us. I have every expectation we're going to see this tonight or tomorrow morning, and it'll be very beneficial if we can say we've read it, and it has merit or it doesn't."

It turned out to be a collection of newspaper clippings on this particular case. It was just a totally nonmeritorious filing. But sure enough in it came, about six o'clock on a Friday night, and so I got the court together at seven o'clock, and I said, "I believe you've all read this. I sent it out to you and requested that you read it. Do you see that we need to make any changes in our denials?"

"Absolutely not. This is just a spurious attempt to cause us to say, 'Gee, this is so thick we can't possibly do it. We'll have to put the whole execution over,'" which was in my view not an appropriate thing for a lawyer to do. But at any rate, so we had to sit up, we did sit up, and there were delays, and I think finally about five in the morning the warden called and said, "Do you have any other delays?"

It was going back and forth to the U.S. Supreme Court, and Bill Rehnquist was saying, finally, to the district judges here, who were continuously signing off on stays, "No further orders in this court for a stay or otherwise may be made in this matter without the prior approval of the United States Supreme Court." That's the only way they could stop the judges, because you could go to any particular judge. They went to a judge who was not too pleased with the death penalty, they went to his house. "Would you sign this?" "Yes, why not." Things were thundering down, and the attorney general's office had an open line to the U.S. Supreme Court building and were shipping these on right away. I can imagine that the Supreme Court was a little irked, too, at these things coming out at the last minute.

Finally, the very, very first time there's ever been such an order in a case like this, to my knowledge, "The district court judges in the Ninth Circuit shall not grant any stays or any other motions in this case without prior approval by the chief justice of the United States Supreme Court." Then finally the execution occurred.[97]

McCreery:

What else do you remember about the atmosphere back here in California that night as you were awaiting these events?

Lucas:

Very tense and very nervous.

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[97] *See also Executed Inmate Summary—Robert Alton Harris*, Calif. Dep't Corr. & Rehab., https://www.cdcr.ca.gov/capital-punishment/inmates-executed-1978-to-present/robert-alton-harris/.

McCreery:

You mentioned calling the group together, your colleagues, around seven or whatever time it was. Where were you after that?

Lucas:

I remained in my chambers. We would meet in the chambers, in the conference room, of the chief justice. There's a big table and you all sit around it, of course, in order of seniority, and that's where we met. Then we had this open line to the warden.

The execution was set for midnight, 12:01 to be exact. They do this so that there'll really be a whole day that they can fight off stays, because if the execution is at midnight and somebody comes in at 11:59 and grants a stay, then there's no time to go to the Supreme Court of the United States.

But it was very tense. We were ready for it, I must say. We had done a lot of work on this case; the staff and I were very glad in terms of the reputation of the court that we didn't have to say, as I said before, that "We received this big filing, and it's too late now for us to really read and consider it. Therefore, we'll have to grant a stay."

Having gotten it previously and reproduced it, and all having read it before it was even filed, then we were able to give it careful attention. We had hours to read it in, and it turned out, of course, not to be anything that you would need to give any significant study of. It was all about his case, but not relevant.

McCreery:

You and the other members, then, felt you were adequately prepared?

Lucas:

Yes. We felt that we had more than done our duty. This case, particularly because of its significance in terms of being the first case, we wanted to make sure that we did it absolutely correctly, and if we had to grant a stay we would. Fortunately, we didn't have to do that given the spurious nature of the final petition—it was a successive petition, and there's rules against successive habeas petitions, but we just could give a straight denial, not just on successive but on the merits, too, which is helpful.

McCreery:

As the first one in about twenty-five years, what did this represent?

Lucas:

It represented a very turbulent time in the jurisprudence of the death penalty.

Don Wright wrote the opinion *People v. Anderson*,[98] which declared California's death penalty to be cruel and unusual, and invalidated the death penalties at that time in California. Then the [U.S.] Supreme Court issued *Gregg v. Georgia*[99]; I think they were doing *Furman*,[100] and then the California legislature passed the Briggs Amendment, which reconstituted the law. I think it followed the *Gregg* case fairly accurately as to what was required.

The U.S. Supreme Court had held (if it was *Gregg* or *Furman*, I've forgotten which) that the Georgia procedures gave too much leeway to a jury. "Shall we execute or not?" "What do we think about ordering the execution?" "I don't know. We just flip a coin." So, the court required a graduated consideration of it, and then our death penalty did include that. We modified it since in some other cases, but basically that was it.

But it was the demonstration, I guess, that the death penalty litigation was not complete by any stretch of the imagination, but that the major building blocks of it were in place and were approved by the U.S. Supreme Court. They're the ones who make the final decision, of course. It made it easier, if you can call it easier to handle these terrible death penalty cases, to analyze them, because the law was still in flux. But most of the major things had been considered and determined.

McCreery:

What effect did that have on your thinking about the death penalty as a sentence?

Lucas:

I've always said that if there were no death penalty the court would be a heck of a lot better off, in terms of labor, and the intensity of the work, and the anxieties, and all of that. But the other side of the coin is, the people of the State of California, through their elected representatives or maybe through themselves, through initiatives, have said they want the death penalty, and they want it imposed.

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98 493 P.2d 880, 6 Cal. 3d 628 (Cal. 1972).

99 July 2, 1976: Gregg v. Ga., 428 US 153 (1976). In a 7-to-2 decision, the U.S. Supreme Court held that a punishment of death did not violate the Eighth and Fourteenth Amendments under all circumstances. In extreme criminal cases, such as when a defendant has been convicted of deliberately killing another, the careful and judicious use of the death penalty may be appropriate if carefully employed.

100 Furman v. Ga., 408 U.S. 238 (1972).

The United States Supreme Court has looked over all of the death penalty mechanism here in California, and has approved it in a sense, and so little good is gained from saying, "Well, gee, what if we didn't have it, we wouldn't have to work so hard." We have it, and constitutionally we are the only ones that have it in the court system.

I know that Ron George is interested, and I explored it for a while, too, in the concept of sending it to the intermediate courts of appeal, and when I first introduced the idea to them, we were met by, "I don't think we want to have those kind of cases. Boy, we've heard you get 10,000 pages of transcript." I said, "How about 40,000?"

McCreery:

Yes. These judges hadn't seen the likes of that, had they?

Lucas:

No, ever.

McCreery:

Yes, it's a study in contrast, those two sentences—life without the possibility of parole versus the death sentence.

Lucas:

Night and day. It's a question of finality of life. Without possibility of parole, he has his entire life to live, and through habeas and additional evidence of his innocence it can be presented at any time during his lifetime, assuming he meets the procedural rules of the U.S. Supreme Court and the California Supreme Court.

But Robert Alton Harris is not going to be able to file any more habeas. But then again, his case was confirmed by every court that considered it—the trial court, our court, the United States Supreme Court. I think even the Ninth Circuit affirmed, I'm not sure.

At any rate, it went up to the Supreme Court three times, and nobody said no. That's my recollection. Yet it took something like thirteen, fourteen years. So, is there such a thing as too much justice? Too many of those cases will make an old man out of you, I'll tell you that.

I told you about the one week in the first year I was chief, I told the court, "We're way behind in these death penalty cases, and they're entitled to as much priority as civil cases. I'm recommending that we take a week of our vacation in July and set down a solid bank of death penalty cases all week. I want to

hear if anybody has any objections to it. I think it's important, but there may be some adversity caused for one or more of you."

They were pretty good about it. They said, "No, you're right. We've got to do something about this." So that's not the most desirable thing in a judge's life, to sit for one week hearing nothing but death penalties, where the abominations that are committed man to man are just horrifying. But again, you took an oath to support and defend the Constitution of the United States and the Constitution of the State of California.

McCreery:

A moment ago, you touched also on the much larger and more ambitious access and fairness advisory committee that you formed in 1994, with all these subcommittees on race, ethnicity, gender, disability, sexual orientation—really a huge range of civil rights issues addressed. This was a major initiative under your watch.

Lucas:

A major undertaking, yes.

McCreery:

I even read that it was set out formally as the number one priority of the Judicial Council at one point in the mid-nineties, as they were developing into more of a strategic planning role and that sort of thing.

Lucas:

Yes. They were moving, slowly but surely, from the fact-gathering aspects to, as you say, the planning.

That was a great expansion of the AOC and their abilities. But as you say: [reads from page 239][101] "The landmark work of the advisory committee in the area of gender bias was accompanied by the work of another Judicial Council group, the Gender Fairness Subcommittee of the Access and Fairness Advisory Committee, charged with implementing the gender fairness proposals. Thanks to the work of this group, it was reported that by 1996 approximately one third of the sixty-eight original proposals submitted to the Judicial Council in 1990 had been substantially implemented. The Judicial Council's Advisory Committee on Racial and Ethnic Bias in the Courts approached its task directly by conducting public hearings. Between November 1991 and June 1992,

[101] Snipes, *Committed to Justice*, note 89, *supra*.

thirteen days of public hearings were conducted in twelve cities [throughout California].” This was no small task.

McCreery:

Just returning, then, to the Access and Fairness Committee on the whole, and the subcommittees, I was actually wondering in those areas, given that you were taking on a lot of complicated issues, how was that work received in the judiciary here in California, that tough look at civil rights?

Lucas:

Yes. Some few members of the judiciary, often crusty old timers—I guess I’m a crusty old timer now, but I wasn’t then—viewed it, as they told me off the record: “Let’s not fool around with this folderol. We’re here to try cases and to act as a judge, and all of this is social work.”

You’d have to tell them, “We’ve got a major problem here. Not we, not California, because California’s in the forefront of finding out about it, but the whole United States. If we want to have the respect and support of the population of California, we don’t have an army to enforce our orders. We need to have the public believe that we are honest and ethical and absolutely fair-minded, without bias or prejudice, and if you have a substantial element of the population that doesn’t believe this, we’re going to have major problems in the enforcement of our orders or the acceptance of our opinions.” And they finally came around, particularly as the evidence developed.

McCreery:

Thank you for talking a little bit about that, another area of innovation it seems to me. You touched a moment ago on the fiscal pressures of the early nineties, and as you say, Governor Pete Wilson and the Legislature and all the branches were facing a difficult time. How did that affect your branch in the early nineties?

Lucas:

It had a very negative impact. Interesting, and Larry [Sipes] lays this out well in the books. Proposition 13 was passed in 1978. Do you remember Proposition 13? If you bought your house before 1978 you’ve always loved that. If you bought it afterwards, you’d say this is very unfair. The guy living next door to me is paying a quarter of the taxes that I’m paying. But that was a catalyst for the concept of state funding of trial courts, because what happened was Proposition 13 said that in terms of increasing, the appraised value or assessed value of a house is limited, and therefore the revenues to the counties are limited.

It made it very difficult for the counties to come up with the money to support the courts, which of course at that time was the whole ballgame.

I think the state was paying the superior court judges. Maybe between 5 and 10 percent of the court system was supported by the state. All the rest, the court buildings and all the personnel, were covered by the counties. Of course, it goes without saying that this made for a very ragged and differentiated form of justice in various counties.

Some counties were wealthier than others. If you were a small and poor county someplace, hiring another deputy sheriff was a big thing, and if you couldn't afford it, you'd say "We can't afford it. We can't give you a marshal, because we can't afford to—you tell me what to do." I've read this, or maybe I had a hearing on it. "You tell me who I should fire so I can hire a deputy sheriff to come to your court. Which one of these officers, eight of them in my police department, do you want me to fire so I can—" et cetera.

A very tough, very difficult thing. So at least in theory, the state funding would ensure a more uniform and regular and continuous form of income for the courts.

McCreery:

But it sounds as if, by contrast, many of the legislators may not have taken such an interest in the judicial branch, or viewed it as important.

Lucas:

Yes. Initially, long ago, they viewed the Judicial Council as just another state agency, an arm of the Legislature.

That was another reason why the Judicial Council began planning. "We're going to plan, and we're going to set forth our plans in advance, and we're going to get some approval by some key legislators, and we're going to make sure these plans are rational and will help the courts."

McCreery:

Whose idea was that, to have that in the wings?

Lucas:

It was an idea that I had from conversations with the Conference of Chief Justices. This is an equal branch of government. What if they said, "No, we're not going to fund you at all"? Do we just shrivel up and go away, and say "We've done something to offend them, and now they're not going to fund us at all." They do have that pocketbook, and I guess that's the end of the court

system? The answer is no. We will bring a lawsuit that would require them to fund us.

McCreery:

We thought we might talk a little bit more, as we did last time, about your Commission on the Future of California Courts, the so-called Vision 2020, and the associated conference that you held. I know there are many reports and official documents that came out of this long planning process, but I wonder if I could ask you to reflect on what you were trying to do in this arena?

Lucas:

Okay. By way of background, the Judicial Council began to be a planning [body]. Of course, it was supposed to be a policy-setting organization as well in its initial stages. In its initial many years, it did no planning. But then it became a planning body, making annual plans.

McCreery:

What was your role in that change?

Lucas:

Well, I encouraged it. Part of this time, I was without an administrative officer of the courts, so the inquiries from the AOC were not weekly and were not necessarily daily, but were often hourly on things to do, so I was heavily involved in all of this.

McCreery:

What was your intent behind these efforts?

Lucas:

It was to give a complete overview of what was happening in the state at the time and then look ahead to what it might be in the year 2020. We had scenarios we would discuss.

It may come to this scenario in the judicial system, that because of a variety of things—lack of funding, massive expansion of alternative dispute resolution or whatever—that we're only trying criminal cases, and we're in gray buildings filled with prisoners clanking along in chains, and that's all we're doing. If that is a possible history, what can we do to avoid that?

What can we plan now to ensure that that never happens, and that these things we are talking about—although they're potentials in the future—that we

will meet them, and best them, and change things so that we have the preferred court in the 2020s?

In other words, that we will lead and not follow, that we will to the extent possible make our own future, and that future should be a beneficial and benign future for the judiciary, and one that gives the people of California a fair and balanced consideration of their problems and does it in an equitable period of time.

McCreery:

How big a change was that, to try to take charge of your own fate?

Lucas:

It was quite a big change, because up until then you had the old graybeards that said, "It's always been this way, it always will be. Things happen. We'll just see what—don't dig up trouble. Things will happen, but we've always taken care of them. Just let them happen and then we'll see what we can do." Totally reactive, that's the way the judiciary had been.

We were opening a continuing discourse on what can happen to the judicial system in California, requiring you to consider what can happen in California generally. It was very important to know how much of a population increase there will be in 2020. Will it be sixty million? Probably by 2050 we'll have sixty million, but whenever we have that, every population increase brings—as night follows day—with it an increase in civil and criminal litigation.

It's just—that's the way it works. You have to first find out, what are these projections, and then start planning for them. It opens a lot of doors to a lot of thoughtful stuff, and as I say, it's been a form of gazing into the future that would not ordinarily have been done.

McCreery:

And you wanted to look quite a way into the future, something like thirty years nearly, from the time you started, so that's really long-range planning, isn't it?

Lucas:

Oh, yes, sure. Yes it is.

McCreery:

Was there discussion of how far ahead to look, or do you remember setting that up?

Lucas:

Yes. Futurists told us thirty seems to be a pretty good year. You can be much more accurate than if you say a hundred years.

Who can tell what California's going to be like? Will it have 150 million people crammed in from the Sierra to the ocean, or will there have been some growth slowing by some measures? You can't tell; it's too far away.

But thirty years was something that was possible to project with current statistics and projections and all of that. Not necessarily guaranteed, but you know in advance that there's going to be maybe another fifteen million people that'll be coming to the courthouse and expecting the same service as you're providing to the thirty million that are in California now, and you'd better be ready for them. Does it mean new courthouses?

McCreery:

Let's talk just briefly, if we may, about some of the changes that grew out of this process. I was thinking of one example, and that's the specialty courts for families, for drug cases, domestic violence. What kind of innovation was that?

Lucas:

Significant innovations. The 2020 Commission did not necessarily say, "Here is your blueprint on a drug court. You do this and you do that and the other and you have restorative justice, as it were, to those people who come here, and all the rest.

It just opened the door to the consideration of new methods of doing old jobs, and then it was left to another separate group that would be established to look into this, but whose futures were not limited. "Look at the stars and see what you see. We're not going to get there, but maybe you'll get some good ideas if you can look ahead of you and see all the things that could happen. What would be the best way, assuming that those things happen, to handle them, and to have started handling them?" So, it was a very beneficial thing.

McCreery:

Ultimately, those changes were put into place. As you say, implementation came later.

Lucas:

Yes.

McCreery:

I was wondering about your thoughts on the appropriate role of ADR in the whole system.

Lucas:

It's never been intended to be a substitute for the public courts. The volume that the public courts do compared with the volume of alternative dispute resolution experts is minimal. They do quite a bit.

Every single case that JAMS[102] decides is, generally speaking, a significant case and may have time estimates for a jury trial from two weeks to two months. If you settle that case, there's going to be a shortened line in the courthouse for those who are not going to be involved in mediation or arbitration through an ADR provider. So, whatever they do is plus, is gravy, as it were.

We looked into that. How far can this expand by 2020? You make whatever estimates you can, and I'm sure that it will expand slowly, but will expand. But it's never going to be the solution. We're never going to come to the gray-walled courtroom with prisoners shuffling by in chains, and nothing else because it's all being done by ADR. That won't happen.

McCreery:

Is there any danger of going too much in that direction, in your view?

Lucas:

I suppose the primary danger would be, if indeed it is a danger, that if there was a significant amount of civil cases that were resolved by arbitration, where there is no record and there is no precedent established—it's precedent for the two parties, but it is not quotable precedent for anything else—if enough of that happened, maybe you put the court of appeal out of business, for one thing.

At the very least you would diminish the number of quotable, usable precedents in civil cases. But that's not going to happen. There are too many cases that are going through the courts, and the lawyers have enough to read just from the opinions—I think it's about 12 percent now that are published by the courts of appeal. That gives them plenty of work to do.

McCreery:

It certainly does. I was thinking about just a couple of other things that the futures commission looked at. One was more training, not only for judges

[102] Judicial Arbitration and Mediation Services.

themselves but for court staff. They also looked at improving the services of court interpreters and some reforms to the jury system itself. Without needing to go into great detail, I wonder if any of those stand out to you or are of particular interest to you?

Lucas:

The jury reforms. This was discussed by the 2020 Commission, but it had also been discussed by various court people including the AOC. It was very, very irritating to people who were called for jury duty to come down on Monday morning and sit, and then at five o'clock be told, "Come back tomorrow. We haven't had need for you."

You did have a week's service that was required. You could conceivably sit there for five days without being called—a very, very uneconomic situation, but convenient for the courts themselves. We had a whole bunch of people out there. Is it going to hurt them in their jobs? We don't know. Is it going to make them irritated and feel negative toward the entire judicial system? Maybe, but we don't care.

Now we've come around to what I think is a good, workable system. It's one day, period. Sometimes you don't even report on that one day, because you can call beforehand and you've been told what your jury panel's number is, and if you're not called for duty, that's it. Or if you are down there you have one day. Can you be called for a case? If you're on the jury you have to finish that case. Otherwise you go home, and that's your jury duty, all taken care of. They do call you more often as a result, however, I must say. [Laughter]

I got called recently, was sent a summons recently. I wrote back saying, "I'm over eighty years of age now. I do want to serve, and I consider it my duty and a privilege, but can you change the location from downtown Los Angeles," which is difficult to get to in the early morning hours, "change it to Beverly Hills Superior Court, which is close to where I live?" I haven't yet heard back from them, but I know other people who have made such arrangements.

It's such an important thing to have citizens [participate], and it's important grounds or area for support for the courts. There's nothing like a juror who has gone to the courthouse and has been selected, and has gone through a case, and has seen a judge and some lawyers present a well-planned piece of litigation. They have been gifted with the responsibility of finding either guilt or innocence or liability, and they come back and they know all about it, and they're real fans.

"Would you like to give up the juries?" "Oh no, these are good people. We talked about all these points. We resolved all of them." Many, many good advocates for the court system are created by a properly handled jury selection process and trial.

McCreery:

That's one of the really direct avenues for a participatory democracy.

Lucas:

Absolutely. This is your chance to be part of the governing mechanism.

McCreery:

So that was very much of interest to you, it sounds like.

Lucas:

Oh, yes, very much so.

McCreery:

I just wonder, thinking back on the whole futures commission, and then seeing things that have continued to happen, of course, since you left the court, what is it, twelve years ago now. I wonder how you mark the report card. How did it go? How did it turn out?

Lucas:

Did we get our million dollars' worth? First, it wasn't our million. I don't want to be crass about it, but did we get our money's worth out of it? Yes, we did, and we're still getting it.

It's the pebble in the pond, and the concentric waves moving out till they reach the shore. These ideas, written down and substantiated by learned people, are being studied by people who had no idea about this, [who] come out of law school or whatever, or think tanks. This will be and is a source document for many of them.

It is also being kept alive in the AOC, because it's part of the annual planning programs of the AOC. The ideas that seem appropriate—they can't put them all down to be done in one year, but the ideas that seem appropriate to concentrate on can be and are being selected from the 2020 Commission report and recommendations. We had a lot of excellent people in there. We were dedicated, too.

McCreery:

Standing behind all this as chief, this strikes me as a significant mark you made on the system, one that perhaps few are truly aware of.

Lucas:

I think that's probably true. It's not the same as if you are an architect and you design a building, and you and your engineer build the building, and there it is. My God, a year ago there was nothing in this space; now we have an eighty-story building. That is something that is clear, momentous, and intrudes upon your consciousness.

The 2020 report, although publicized, and public meetings and surveys and all the rest, is now more important in the minds of the Judicial Council and the AOC and those who seek it out, because it's listed every place you look under court reform, but it's not quite as obvious as some things might be to the general public. I can't say that it was meant necessarily for the general public. They would look at this, and some of these things would be not mysterious, but would be a little complicated for them.

McCreery:

Since you're talking about the members themselves, I wonder if I could ask a little bit about the changes in the membership over the years that you were chief. We talked earlier about, of course, the reconstituting of the court after the '86 election and the arrival of Justices Arguelles, Eagleson, and Kaufman, in alphabetical order and seniority, as it turned out. But in fairly quick succession those three also retired and were in turn replaced. Of course, Justice Broussard retired as well in due time. You really saw a great amount of turnover, didn't you?

Lucas:

Yes, and there's no question that that is disruptive. An annual report would say the first year of my administration, when there were just four of us and we were waiting to get the new members, "Why is the production so low?"

You told them, "We only had four people, and we had a lot waiting to be done." There were fifty-five cases or something. The next year we produced about the standard, 125, when we got up to snuff.

But it is disruptive, because each one of the new members that comes on has to be taken care of in terms of an allotment for furniture and changes to their chambers. Everyone is entitled to their own desk and chair and carpet

and all the rest of it. But that had to be done, and they had to select their staff. Maybe, hopefully, they'd take the staff of the departing justice; maybe not, and so it was disruptive. It was more or less a continuous rumble. Was it John Arguelles who went first?

McCreery:

Yes. Then Justice Kaufman.

Lucas:

Kaufman, and then Eagleson. He was on four years, I think, Eagleson. Then Broussard was after that.

McCreery:

Yes, he retired in 1991.

Lucas:

Yes.

McCreery:

Did they give you much notice of their intents to retire, or did you have—I'm only asking, did you have a chance to kind of think ahead and figure out how you were going to cope?

Lucas:

I at one time said in a Wednesday conference early on, "Let's hope we all remain here till death, but sometimes that doesn't happen. So, if you know that you're going to retire at a particular date (which you wouldn't know if you had a sudden illness or anything), give me about six months' notice. It will be quite confidential. You're the one to announce your retirement, but I'll at least be able to think about the staffing and all the rest of it." They were pretty good about that.

McCreery:

I don't know if you thought in these terms, but did the so-called center of the court, or the natural groupings in terms of approaches to opinions, did those shift noticeably?

Lucas:

If you talk in terms of ideology, which perhaps we shouldn't, it was certainly the center of attention when Rose Bird was chief justice. When

Arguelles, Eagleson, and Kaufman left and their replacements came on, there was probably a slight turn from center to the left, as opposed to a slight turn from center to the right, with those [earlier] three. But I don't think it made an appreciable difference.

McCreery:

No, and I don't suggest it. I was just simply wondering about how sometimes natural alliances form, just as with you and Justice Panelli when Chief Justice Bird was still there, a sort of likeminded person shall we say. So, I only wondered if there were observations that you made once these new members came.

Lucas:

You got so that you could pretty well tell what the votes were going to be.

McCreery:

I can imagine.

Other Legal Themes

McCreery:

We said that we might spend some time talking today about various legal themes that took shape while you were chief justice and perhaps touch on some specific cases, but also talk about the broad ideas behind them. I want to invite you to introduce any themes or cases that we haven't talked about ahead of time that you would like to.

One of the broad areas we thought we might speak of today was cases related to insurance. You had mentioned to me last time that one set of cases that stood out for you was *Moradi-Shalal v. Fireman's Fund Insurance Companies*[103] and the fact that that decision of 1988 reversed an earlier decision by the Bird court in *Royal Globe Insurance Company v. Superior Court*[104] in 1979. What do you remember about the lead-in to *Moradi-Shalal* and how it panned out?

Lucas:

Of course, I wasn't on the court in 1979 when the *Royal Globe* case came down, which, of course, ruled that third-party claimants could sue an insurance

[103] Moradi-Shalal v. Fireman's Fund Ins. Companies, 46 Cal. 3d 287 (1988).

[104] Royal Globe Ins. Co. v. Superior Court, 23 Cal. 3d 880 (1979). Writing for the majority, Lucas wrote: "We have concluded that the Royal Globe court incorrectly evaluated the legislative intent underlying the passage of section 790.03, subdivision (h), and that accordingly *Royal Globe* should be overruled."

carrier in a separate proceeding for violating the Unfair Claims Settlement Practice Act.

It had a difficult life. Not very many courts followed it, and there was much criticism of it. Lawsuits soared, by the way, third parties filing lawsuits against insurance companies.

McCreery:

Thank you. When you say not many courts were following *Royal Globe*, can you expand on that a bit more?

Lucas:

It pushed the limits of the extension of court liability, particularly against insurance companies.

This case seemed to be an interesting example of the overextension of tort rights, creating another cause of action in an insurance case against the insurance company by third parties rather than the insured.

So, it [*Moradi-Shalal*] was very heavily briefed, as I recall, a lot of amicus curae briefs. I wasn't sure when I started this whether we were going to reverse or simply do some acrobatics and still keep *Royal Globe* alive.

It turned out that approach wouldn't work, and besides that there was a current in the court and elsewhere saying that *Royal Globe* is a case whose time never came.

McCreery:

Yes. Can you put this issue, though, in context for me in terms of the whole range of insurance issues that the court might face? How big a deal was it to address this particular issue?

Lucas:

It was probably the first of just a few of the Bird court opinions that we felt were harmful to the citizenry—impractical, difficult, and hard to apply, and that perpetuated confusion.

When that came up for review we thought, we can speak on this now. It turned out that the court, with two exceptions, 5 to 2, wanted to correct what we believed were obvious errors in the *Royal Globe* case.[105]

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[105] Mosk and Broussard dissented. Mosk: "*Royal Globe* (1979–1988), may it Rest in Peace. During its life it served the people of California well, particularly the victims of unfair and deceptive practices." Moradi-Shalal v. Fireman's Fund Ins. Companies, 46 Cal. 3d 287, 313.

McCreery:

As you pointed out, this was the first of a handful of decisions of the Bird court that your court reversed. I gather most of them were in the criminal area, other than this? Indeed, we've talked already of the ones relating to the death penalty, for example.

Lucas:

Yes, we've covered that.

McCreery:

And some of the criminal procedure. But I'm simply noting my impression from reading that there weren't so many instances in the civil area of outright reversals.

Lucas:

I suppose *Moradi-Shalal* would certainly be a limitation on tort liability for wrongful termination of an employee.

McCreery:

I wonder what other insurance cases—before we go into employment law—what other insurance cases might stand out to you as key developments in the law, if any?

Lucas:

Let's see. There was *Bank of the West*,[106] which gave some basic contours for the interpretation of an insurance contract.

It used to be that if there was anything—I'm speaking very broadly now—if there was anything wrong and/or ambiguous in the insurance policy, then it was all the insurer's fault, and the insurance company will have to pay, or at least there'd be various intendments taken against them.[107]

Then *Bank of the West*—I haven't read it for a long time—basically said that it's the expectations of the consumer and whether he or she have expected coverage under these circumstances. Then consider that expectation in light of the language that was there, and that there would not be an automatic assumption that any errors or ambiguities would be decisively levied against

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[106] Bank of the West v. Superior Court, 2 Cal. 4th 1254 (1992).

[107] At issue in *Bank of the West* was whether an insurer was obligated to provide insurance to petitioner for petitioner's violation of an unfair competition statute arising out of its advertising activities.

the insurer.[108] That seemed to be a little fairer way to do it.

McCreery:

This matter of interpreting insurance policies, insurance contracts—how big was that in the overall insurance landscape? Was that a frequent issue that would come to the courts?

Lucas:

Yes. As soon as we started to have toxic dumps, toxic waste sites, then a lot of complications arose. "How long has this toxic dump site been in existence?" "Twenty years." "How many different policies have covered it during that time?" "Eighteen." So how do you allot, if there is to be an allocation, the damages when you have a situation like that? Each one of the insurance companies would claim that they were not liable. They did it for a year, but that was it.

There seemed to be waves of litigation, all having some relationship to each other. I guess that's natural enough.

McCreery:

I wonder, to what extent were you aware of an expectation that the court would respond in a certain way to these kinds of issues, the court as it was now configured?

Lucas:

That would generally be a matter of irritation to me if it was voiced to me directly. "You're expecting some Pavlovian response from us, simply because this is what you would like?"

What kind of a damnation would that be? "You get what we think is right. It may be wrong, that's possible, but you'll get a considered opinion from the whole court. Don't go to sleep. You'll read the case when it comes out, and then you'll know where the court is going."

To leave an impression that because we were more conservative than those who were swept from office—and that's probably true—that the law would automatically be analyzed, and the decisions would automatically be slanted one way or the other? So, no. You try to put on blinders and do the case as the law suggests.

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[108] Writing for the Court, Associate Justice Panelli wrote: "advertising injury" must have a causal connection with the insured's 'advertising activities' before there can be coverage." Bank of the West v. Superior Court, 2 Cal. 4th 1254, 1277.

McCreery:

Perhaps you handed out a few surprises now and then?

Lucas:

Yes, that's right.

McCreery:

Coming along later and reading about all this, there are all kinds of analysts and court watchers saying the Lucas court was friendly to insurance companies or not friendly enough. It seemed that none of them had all their expectations met, no matter what they were.

Lucas:

No, so maybe we did it right. I don't know. It's like a settlement. When both parties leave the settlement conference with tears in their eyes, having settled the case, you know you've made a good settlement. [Laughter]

McCreery:

But the whole area of insurance law is one that seems to me ever more complicated as the decades go by. Do you have general thoughts about how that landscape changed while you were on the court or even looking at it afterwards?

Lucas:

For example, with the toxic waste dumps and the, quote, "proliferation," of them and the huge expense to clean them up and the number of years that the various policies would cover made every one of them a very, very difficult, convoluted problem.

But we went through and made rules as we went along. "That'll cover some of the cases. We'll wait for the next one," not that it's entirely done. I haven't followed it under Justice George, but we went a long way in clarifying what is a difficult topic, a difficult subject.

McCreery:

We had mentioned perhaps talking a little bit as well about an insurance matter related to Proposition 103, passed by the voters in November of 1988, and that was insurance reform, requiring a 20 percent rollback in auto insurance policy rates, for example, and a matter that came up to you on the Court in the course of things. What do you recall about that whole matter?

Lucas:

It was an important case and highly publicized. We are speaking now of *Cal Farm Insurance Company v. Deukmejian.*[109] As I recall, I used my powers as chief justice to take original jurisdiction of the case and not have the public have to wait as it wends its way, ably and all the rest, through a court of appeal. This was an important enough measure that we should have a decision one way or the other.[110]

Can you remember, the courtroom was packed for oral argument? I think I granted approval for a telecast. We had been doing that in a few of the cases that came down where there was huge interest but not enough room. I wanted this opinion to be unanimous, if possible, because it's an important issue and the public should think that whatever we come up with, that's right. It was unanimous.

I assigned it to Broussard, and this, as I say, was a major objective as far as I was concerned. In my view it negated any possibilities that people would think that this had any political undertones to it.

McCreery:

We've talked a little bit before about these ballot measures that come up to you. I'm just noting with interest your feeling that it was worth expediting, shall we say, the court's work on this measure so that the people would have an answer.

Lucas:

I can't point to anything in writing about it, but I had the sense that our court, with three exceptions that I'll name, was willing to give great deference to the initiative measure.

After all, this was the people who elected our representatives in Sacramento now coming to us directly with this.

Now, oftentimes they were poorly worded and perhaps ambiguous and all the rest. But nevertheless, they represented a semi-pure democratic way of getting something resolved one way or the other in the courts. I think we

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[109] Calfarm Ins. Co. v. Deukmejian, 48 Cal. 3d 805

[110] At issue were provisions in the 1988 auto insurance law that stemmed from Proposition 103, requiring a rate reduction to 20 percent below 1987 rates, limiting interim first-year insurance rate relief to companies substantially threatened with insolvency, and requiring a mailing to notify insurance customers of the opportunity to join a nonprofit corporation to advocate their interests. The court held the insolvency standard on its face was unconstitutional and that the formation of the consumer advocacy corporation also violated the state's constitution. The opinion was unanimous.

generally were deferential to them, including wanting to have them resolved as speedily as possible.

I got the sense that probably Mosk, Broussard, and Kennard[111] were—they could take it or leave it, an initiative measure, not that they were openly belligerent against them; they weren't. But there was less of a feeling that the people have spoken and we should listen to them as soon as possible type of thing.

McCreery:

Let me return just briefly to "three strikes," or at least to related things. You touched early in our discussion just now on the prison population, and this, of course, was a period of time when many new prisons were being built in California and the population was growing. Then as three strikes went into effect evermore, I just wonder how you reflect on that whole picture, that whole change in California's citizenry? I was only wondering how you saw the entire landscape of the prison population change.

Lucas:

The option to place people in prison is what, exactly? Is it to be four years in an institution of higher learning? I don't know. I doubt it, for many of the prisoners are—it's very unfortunate, but they're raised in a gang atmosphere, and they have gang responses to questions and issues, which may include shooting or knifing or whatever else.

I don't see that there's too much of a chance to do much but give them the opportunity to choose for themselves to take a path to rehabilitation. It's really up to that particular individual. We must have something to offer them, of course. They can come out as a welder and make a good life being a welder, or they can come out being a much more savvy criminal and take their chances with society. Very difficult problems.

McCreery:

Speaking of three strikes, that reminds me of something that you mentioned briefly when we were talking about three strikes a few minutes ago, and that was the cameras in the courtroom. You were saying you allowed there to be remote televising of the proceedings because of the nature of that particular case. Talk a little bit about, in general, cameras in the courtroom and what you feel the appropriate role is and when it should be allowed.

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[111] Associate Justice Joyce L. Kennard was appointed by Governor George Deukmejian in April 1989. She served as chair of the California Judicial Council's Appellate Advisory Committee from 1996 to 2005. Before that, she had served as associate justice on the state Court of Appeal in Los Angeles (Division Five) and judge of the Los Angeles County Superior Court. https://www.courts.ca.gov/5760.htm.

Lucas:

Yes. If I had my druthers, and I was a despot—benevolent, of course, but a despot—I would never have a camera in the courtroom.

I'm talking about non-jury matters, of course, before us. It just causes a difference in the way counsel argue the case. "Do I have my sound bite ready, and when should I give it?" and the way that some members of the court—"Shall I ask my perfectly penetrating question now, or should I wait a little bit?" It detracts from the real process, in my view.

It is a learning experience, to some degree, for people to see it who have never been to a court. That I'm sure is a plus. But all in all, I would never have it.

McCreery:

You didn't want a circus in there.

Lucas:

No. Exactly. I daresay if you got the counsel together, someone would definitely vote against it. Some want to have it, a little free publicity, but a lot of them would not want to have it.

McCreery:

Did it work out OK in those few times you allowed it?

Lucas:

Yes, it worked out OK. Nobody turned and argued to the camera if that's what you mean. [Laughter]

McCreery:

We mentioned that we might talk briefly about one other area of the law that came up while you were on the court, and then where a different decision was reached after you left. We have touched on this in earlier meetings, but this is the matter of whether a girl who is a minor in California needs a parent's consent to have an abortion.

McCreery:

Yes, in *American Academy of Pediatrics v. Lungren*.[112]

[112] American Academy of Pediatrics v. Lungren, 16 Cal. 4th 307 (1997).

Lucas:

Stanley Mosk wrote that decision. I joined it, but it was 4 to 3.

McCreery:

Yes. Maybe you can just summarize what that was, and then what happened after you left.

Lucas:

The summary that I would give was from the opinion itself, Stanley's opinion itself, or maybe he told me this in a conference, but something to the extent, "It's absolutely outrageous that we would permit a fourteen-year-old girl to go and get an abortion without having to consult with the parents." And then here's his clinching line. "You have to have a parent's consent to get a tattoo if you're under sixteen, and here we don't consider this as important as getting a tattoo." He said, "It's just mystifying."

The other side of the coin is, you don't know what kind of a house she's coming from, and maybe she's being abused there. [113]

These are very delicate things. But as I recall, there was a mechanism where you could go—a little clumsy—but you could go before the court of appeal and get a ruling on whatever was bothering you. But at any rate, that sums it up, was the way Stanley put it a little roughly, perhaps.

McCreery:

Of course, in this case you and Justices Baxter and Arabian voted with him.[114]

Lucas:

Yes.

McCreery:

On the subject of new developing areas [of the law], I did want to just very quickly touch today upon last week's decision on gay marriage by the

[113] It was the other side of the coin when at a moment of significant turnover on the court in 1996, the justices—now with Lucas retired—agreed to reconsider their ruling upholding a state law that required minors to obtain parental consent for abortions. Lucas and Arabian had just left, this losing two of the four votes needed to uphold the 1987 law. The initial Lucas court's ruling was scheduled to become final not long after the decision, on April 4, 1996. But with the pending turnover, the court extended the deadline to reconsider. And it did, culminating in the reversal. See Maura Dolan, *State High Court to Revisit Ruling on Abortion Consent*, L.A. Times, May 23, 1996, https://www.latimes.com/archives/la-xpm-1996-05-23-mn-7428-story.html.

[114] In the reconsidered decision, Chief Justice Ronald George was joined in the majority by Associate Justices Kathryn Werdegar, Joyce Kennard, and newly joined Ming W. Chin and Janice Rogers Brown. Justices Mosk, Baxter, and Brown dissented.

California Supreme Court[115] as perhaps an area that was being newly shaped as time goes on, and just how you viewed that one coming down?

Lucas:

To me this is something on which the public had already spoken. The proposition inherent in this had 4,600,000 people approve it. There's also a Legislature that, if this was necessary, could do it, and for us to push our way to the front, to be the second state to proclaim this, I thought was just unnecessary, and it's not the duty of the court.

McCreery:

Yes, I did want to explore the court's duty vis-à-vis the Legislature's duty. That is a question, isn't it? Where should this matter be handled?

Lucas:

Yes, and particularly when there had been propositions on it. I gather we're having a subsequent initiative. I think the signatures are already obtained on it.[116]

McCreery:

I believe just recently they were completed.

Lucas:

Does it say more or less what was said in the prior initiative, except it will come after this decision and therefore nullify it?

McCreery:

I don't know the details.

Lucas:

I think it's relatively modest in its length. "A marriage is a union of a man and a woman," something like that.

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[115] McCreery's interview with Lucas came just a week after the court decided on May 15, 2008, in the landmark *In re Marriage Cases*, 43 Cal. 4th 757, that the right to marry, as embodied in Cal. Const. art. I, §§ 1 and 7, guaranteed same-sex couples the same substantive constitutional rights as opposite-sex couples, including the right to choose one's life partner.

[116] Proposition 8, seeking to add the phrase, "Only marriage between a man and a woman is valid or recognized in California," to the California Constitution, would ultimately make the subsequent November's ballot. And voters approved it. It made its way to the federal courts, where in 2009 a U.S. District Court held that Proposition 8 violated the U.S. Constitution's Fourteenth Amendment. Ultimately, a U.S. Ninth Circuit panel affirmed that Proposition 8 violated the U.S. Constitution. On June 26, 2013, the U.S. Supreme Court's majority opinion in *Hollingsworth v. Perry* held that proponents of California's Proposition 8 lacked standing to appeal the lower court ruling invalidating the measure as unconstitutional, restoring marriage equality for same-sex couples throughout California. *San Francisco's Legal Fight for Marriage Equality* (June 26, 2014), S.F. City Att'y Ofc., https://www.sfcityattorney.org/2014/06/26/san-franciscos-legal-fight-for-marriage-equality-2. A year later, the U.S. Supreme Court decisively resolved the matter in *Obergefell v. Hodges*, 576 U.S. 644 (2014), a 5–4 decision, with the majority opinion authored by Justice Anthony M. Kennedy.

I didn't write it and I don't know, but it's very brief, and that will be inserted, they hope, in the Constitution, and therefore in their opinion will void the decision that has just come down, that is not final yet, but will be final shortly, unless they stay it.

McCreery:

Thank you. It certainly is a major case with a lot of ramifications, and we all watched with great interest to see how it would go. As you say, it is not over yet.

McCreery:

I actually wonder if I could ask you about one other key case that I neglected to put on our list. I think we may have touched on it very, very briefly, but I came to realize we didn't talk about it that much. The court had a minor role in a much larger drama, and that was *Wilson v. Eu*[117] in 1992, the case on deciding the reapportionment plan for the 1990 census.

Lucas:

Wilson v. Eu.

McCreery:

Yes, and just to remind you, the Legislature had tried to come up with a reapportionment plan. Governor Wilson vetoed it, and so the court was asked to appoint a panel of special masters to do a new plan.

Lucas:

Neither the governor nor the Legislature could agree on a redistricting or reapportionment plan, and so there's only a third branch of government, and that's us. They said, "Will you please redistrict or reapportion?"

There was the handwringing and predictions of doom. "This far-right court will mangle all the districts, and we'll all be out on the street. The sky is falling."

Fortunately, unpersuaded that this was going to occur, we did what seemed a perfectly rational thing to do and a fortunate thing to do. We got the guy, I've forgotten his name, a very able guy, who did the reapportionment before. Do you happen to have his name?

McCreery:

The names that I have for the three special masters are George Brown of the Fifth District Court of Appeal, Rafael Galzaran of L.A. Superior, and Thomas Kongsgaard of Napa Superior?

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[117] Wilson v. Eu, 1 Cal. 4th 707 (1992).

Lucas:

Yes. We also had witnesses, expert witnesses on this law, who had done a prior reapportionment or redistricting. We had them come in and we spoke at great length. We gave them a significant amount of instruction, not on how they do their job, but on what to avoid.

We do not want to have umbilical cords straying all over the State of California, with one bulb in one part of the state that has many Republicans and/or many Democrats, connected with another place that has many Republicans or many Democrats, guaranteeing a sure seat, a sure district. It's not only foolish, but it's just got to be—you can't do that and have a rational government.

So, we gave them a series of directions, some of which they solicited from us. "We think it's improper to have," for example, "noncontiguous districts." Sometimes the result of having contiguous districts melded or changed is to no longer have a safe seat. I think that happened to maybe, let's say half a dozen, I don't know. Not very many, not a significant number of people, and it often happens in every reapportionment. But they had gerrymandered the state up so that everyone's got a safe seat.

Generally speaking, we would not really know who was in any one of the districts of the Assembly or the Senate. Some would be names that you would recognize, but generally it was just, "Let's do numbers on this," and we got great census and statistical figures, and matched it up, and then met with the experts again. It was a job well done.

McCreery:

Recognizing that you were not in the trenches with this, do you recall much about the discussion of how to think about so-called minority districts, and give special notice to certain areas for that reason?

Lucas:

I can't remember an emphasis on that. This would be the expertise of the professionals that we had.

Usually a minority district will have a cohesive allegiance to a particular political party, so that bloc of political party members more or less controls—are they red, white, or blue? I don't know, they're all Democrats. I don't know, they're all Republicans. So, you start with that.

I'm sure we would want to avoid, again, an umbilical cord bringing a group of blacks, African Americans from one part of the state in with another, so

there's a nice, solid African American district. It would be completely contrary to what a fair redistricting would have required.

McCreery:

Were you called upon to do any other peacemaking in this redistricting matter?

Lucas:

No. We talked to the whole Court, and they were very happy.

I told them, "We're putting on blinders here. You may have a friend who is a member of the Assembly, but because of some necessary readjustment he or she is going to be out in the street. It's called collateral damage, and there may be some collateral damage." There wasn't enough to be at all concerned about, but I warned them of this as a potential result.

No, it went nicely, and it was a good job. We had the satisfaction of doing a good job and one that helped the people of California.

McCreery:

There was a case asking whether the state privacy laws were violated by mandatory drug testing of college athletes, *Hill v. NCAA*, 1994.[118]

Lucas:

That was the *Hill* case. I think I wrote that, did I not?

McCreery:

You did.

Lucas:

It's a question of the right to privacy versus the protection of the public's right to know that whatever athletic events they were attending were not rigged and that all the participants were being given a fair shake.

They were not that intrusive. My God, the opposite side had these athletes out in Times Square doing what they had to do to create a sample. The loss of dignity was overwhelming.[119]

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[118] Hill v. National Collegiate Athletic Ass'n, 7 Cal. 4th 1 (1994).

[119] At issue in this landmark case was whether the NCAA's drug testing program violated student athletes' state constitutional rights to privacy. In his opinion for the majority, "a student athlete's already diminished expectation of privacy is outweighed by the NCAA's legitimate regulatory objectives in conducting testing for proscribed drugs."

Most of these people were glad to have something which assured them—it's like the steroids that we're into now, particularly Barry Bonds. It was the same type of thing, except there hadn't been a scandal. I think it came out well, and it's been followed.

McCreery:

And indeed, you did. You were quite effective at handling a number of the cases, setting aside those you couldn't work on. Of course, you did have the new people coming in after that very early time, and then you continued to have a lot of turnover in your colleagues.

Lucas:

We did have a lot of turnover.

McCreery:

As we were just saying last time. What did you say, something like, "Change was the norm"?

Lucas:

Yes, yes.

McCreery:

So, thinking maybe in the middle and later years when you'd had a chance to put through a number of your initiatives on administering the court system, and the Supreme Court itself was a bit more humming along than it had been, I wonder just how you viewed your role, or what was your focus, and how that might have changed?

Lucas:

I was glad to get help on the administrative side—help in the form, say, of Justice Eagleson.

He'd been two terms the presiding judge of the Los Angeles Superior Court, the largest trial court in the world, I'm told—at least he told me that. California's court system is larger than the federal system, so we're talking about lots of things whirling around, lots of bodies and lots of ideas being transmitted.

He was very helpful in the changes that we made internally in the processing of cases by the Supreme Court, and worked out many of the details, and was very helpful in going personally to other members of the court that might have some concern about this. "Let me explain my idea," he'd say, "and I want to hear yours."

But the idea of reinstating the ninety-day rule is fairly obvious. He didn't have to do much arguing about that. I stated it is fairly obvious. "Everyone else in the world is conforming to this except us. We're supposed to be leading and setting the example, and we're just violating it. We're saying three years later, 'We filed our opinion. Now we've submitted the case. Then and only then does the ninety-day rule start.'"

So basically, the ninety-day rule was never effective when I was on the court as an associate justice and before then. Nobody worried about living off their savings because they'd been slothful in coming out with an opinion. The rule was emasculated, eliminated indeed. It didn't take much discussion to reach agreement on that.

McCreery

Recognizing that you were a group of seven independent, strong-willed judges, I wonder what were the thorny patches in being a leader of such a group?

Lucas:

First, I told myself, don't get excited by dissents.

There were a couple of members of the court that liked to shape the dissent like a javelin and hope that it hits within an inch of your heart and no further away.

"This court has descended into the depth of," blah, blah, blah. It is possible and it occasionally happened when—Don Wright used to do this, too.

Go into the chambers, "Look, X. I think you've gone a little bit too far here. I've had some complaints from other members of the court. Why don't we take out this javelin-through-the-heart aspect of it. Put in anything else you want and, of course, your dissent will remain a dissent and will not be changed in any way by eliminating this criticism of the court as a whole, 'descent into the depths of hell, and we only have a few more minutes to live,' blah, blah, blah. We can take that out without really injuring the dissent."

Inevitably, one on one, the judge would say, "There's no pride of authorship in this, and you're right. It doesn't really belong here, and I'm happy to take it out." "Thank you. As always you're gracious, and it's a very helpful thing." So, you just don't get excited by anything.

My brother used to say—he was a great traveler, and after he took the bar he took a trip around the world with another friend of his from USC law school. His motto was, as far as travel, "Don't panic. Don't panic. If you miss an airplane, another one will come along. If this and that happens, don't

panic." It's not a bad admonition to give yourself. Is the world coming to an end? Don't panic.

McCreery:

You were aiming for a steady hand[120] at the helm?

Lucas:

Exactly, and someone that is fair, hopefully, and understanding of their problems.

McCreery:

But that does really illustrate the theme of some amount of harmony in this group, and collegiality and ability to work together. This to some extent was surely reflected in your decisions. Many of them enjoyed a strong majority as they came out. I got to wondering how highly you valued unanimity by the court?

Lucas:

I thought it was an important aspect of a successful judiciary, obviously not mandatory. The United States Supreme Court puts out separate and concurring and this and that, and when you're all done, you know, "Who won?"

McCreery:

Why is it important for the court to speak with one voice, or at least some unified voice?

Lucas:

I view the Supreme Court as a separate entity unto itself, not a group of individuals who happen to have dropped by. I have always thought and felt and occasionally expressed that reasonable accommodation should be made toward the ultimate goal of a unanimous opinion.

There's nothing worse, in my mind, for lawyers and for that matter the public, if a continuous stream of fractured opinions come out of the court, and one side saying, "What are these buffoons doing?" and the others say, "Ah, at last we've discovered the holy grail," and they're trying to find out what it's really all about. It's bad for the property owners, it's bad for the citizens, and bad for business. It should be something where you can with some clarity go to find out what your rights are.

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[120] Governor Jerry Brown interestingly noted upon Lucas's death that "Chief Justice Lucas led California's highest court with a steady hand and a probing mind." Bob Egelko, *Malcolm Lucas, Former California Chief Justice, Dies at 89*, S.F. Chronicle, Sept. 29, 2016, https://www.sfgate.com/news/article/Malcolm-Lucas-former-California-chief-justice-9406387.php.

Of course, it always changes. Things happen, and laws and initiatives and referenda are passed that require additional review, but basically I feel that a justice should dissent only on a very important point, only when it's necessary on an important point.

McCreery:

To look at the other side, what is the role of dissent in the process? When is it important? Did you think of it as serving a particular function, as the law is shaped, or how did you look at it?

Lucas:

The dissent? Keep in mind, I went on the court to replace Frank Richardson, who was retiring. He was a conservative and so was I. I was the only conservative on the court. So, did I think that dissents were important? I thought they were vital.

How can this court live without my views and my scolding on what they're doing? I wouldn't have taken the job if I couldn't have dissented.

Why would I want to come up there and drink coffee while they ran the court off a cliff, as it were, in my view? This is when Rose was chief justice, and you must gather that I had some, let's call them differences with her and her conduct of the court.

There are ways to minimize dissent. One thing would be by example. I tried to dissent as seldom as possible, and I would tell the new members coming on, "Look. It's up to you. We're constitutional officers, and we can do pretty well what we want, but I'll give you my philosophical view," and I'd talk to them about just what we're talking about. If you could live without the dissent, it's far better. If you can't, we've got printing machines that'll take care of it, and maybe you'll persuade the majority opinion? Who knows? I have no comparison on how many dissents we had compared to anyone else. That's the next thing that Jake Dear should do, maybe. [Laughter]

Final Thoughts: "Most Lasting Effects"

McCreery:

Maybe so. Just in a summary mode then, I'm wondering, what do you think are the most lasting effects of the Lucas court in any arena that was part of your job?

Lucas:

The election of 1986 was an earthquake for the court. Suddenly we're bereft, lost three members, and we'd been living under a shower of political propaganda in all the newspapers for almost a year.

There was not much in the way of collegiality, I must say, among the court as a whole, and I lay a lot of blame on Rose. I've talked about this before, so I won't talk about it anymore. But I tried to make the court as collegial as possible, to put us back in the mainstream.

For thirty years or more the court had been running the ship of the court up against the left bank, and it had a reputation for that.

The writers on the law, the professors on the law, delighted in this. This was something that fit their philosophies and their ideologies, and they were quite accepting of this and not desiring any type of a change. I felt it was not representative of a court that was open and going to give all sides of a question a fair shot. But I was hoping that I could get some quiet.

I remember a press conference, or maybe it was an interview, where I was asked, "Do you think this kind of an incident is going to ever happen again?" My response—I don't know where it came from, but my response was, "No. This is like a hundred-year flood, and I don't believe it's ever going to happen again to this court. We've had an unusual series of circumstances, but as far as I'm concerned, it's not going to happen again. The court will resume its principal occupation, and we hope to turn out good, well-reasoned opinions that will satisfy the people of this state." That's what I was trying to do.

In fact, I think I said to one reporter, who I had talked to before and who asked me a question, "What's going to be the latest bombshell that drops?" I said, "Look. It's going to be very quiet around here, productive, humming along, but very quiet. You might think about asking for an assignment overseas if you want excitement, but not here in this court, believe me." He laughed a little bit, and I hope it turned out that way.

Between the "Quiet" and the "Counterrevolution": An Epilogue

By 1995, Lucas was taking "a fresh look" at his future. In the immediate rear view, he was fresh off a difficult episode.

Lucas himself asked for an investigation[121] after the *San Francisco Chronicle* reported in late 1993 that he had spent fifty-three weekdays out of state in

[121] *Justice Lucas Seeks Ruling on Trips*, L.A. Times, Nov. 20, 1993, https://www.latimes.com/archives/la-xpm-1993-11-20-mn-58876-story.html.

1992 to attend an array of legal conferences and events. He was reimbursed for two of the trips from a subsidiary of a corporation that had cases before the court, though Lucas voted against the corporation's interests in two cases that came before the court after the trips.[122]

Ultimately, the California Commission on Judicial Performance found "no basis" for disciplining Lucas. But it stung.

As Greg Lucas noted, his father "was very, very cognizant of the appearance of impropriety. We can't just not do bad stuff," and adding that his father believed fervently that public servants "have to be above the fray."

In McCreery's Q&A with Lucas, he welcomed her queries on the matter—which came late in their interview, as he quipped, so he wouldn't "snap [her] head off."

"After this came out I was very, very irritated," he said of the *Chronicle* article. "So, I called in one of my law clerks, and I said to her, 'I want to have a request to the Commission on Judicial Performance for a complete review of this. Tell them that we're going to file this, and get whatever papers are appropriate and necessary. Get them all out, and all the bills and everything else, and ask them to investigate.'"

Indeed, as Lucas noted with McCreery, he was trying to advance the business of the court by engaging in the conferences, often with other judges.

"I was active in the Conference of Chief Justices. I headed up a couple of committees for the ABA, one a very important study of habeas corpus in the death penalty, where the committee went around holding public meetings, mostly in the South, to see what was happening there. It wasn't a pretty picture, either, and a variety of other things. I was keeping up my cases. That's the first responsibility, and I made sure that was done."

Ahead of him, he saw a life beyond the bench nearing. Two years prior, he'd remarried, to Fiorenza Courtright, a Beverly Hills socialite.

It was time. After twelve years on the court, nine as chief justice, it was time to let someone else in. More time for his wife. Time for more reading, and collecting books, a favorite pastime. Time for a knee replacement. Time for travel, still a sense of adventure long embedded in his blood.

"I'd pretty well worked my entire life," he told McCreery, reflecting on his young self, working at Douglas Aircraft, and at Southern California Edison's legal department during law school.

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[122] *State Chief Justice Lucas' Travels Did Not Violate Ethics, Panel Says*, L.A. Times, Jan. 29, 1994, https://www.latimes.com/archives/la-xpm-1994-01-29-mn-16622-story.html.

Lucas retired in May 1996. By then, the balance of power on the court was shifting back to something more centrist, and the power of Lucas himself appeared waning.

At one point, then USC law professor Erwin Chemrinsky mused out loud on the benefits of a change at the top of the court—a court that while not broken by the simmering resentments of the 1980s may, he said, have needed a chief justice with a higher profile.[123]

Still, as Lucas sat down with McCreery in 2007, an old friend was about to chime in on the legacy of his former law partner back in Long Beach. "Through his matchless efforts and strong faith in the judicial system, he provided the leadership which restored respect for the court," George Deukmejian wrote.[124]

Lucas simultaneously led a kind of quiet conservative "counterrevolution" on the court while also achieving a certain kind "humming along"—catalyzed by a knack for collegiality and administrative prowess—that he hoped separated his chapter from his predecessor's. His rulings were often underpinned by a fidelity to the idea that policy should be made by legislative act and the voters, not the courts.

He would raise the ire of members of the legislature after upholding a voter initiative limiting the terms of legislators and state officials and cutting the legislature's budget by 38 percent.[125] He referred to new curbs on an "entrenched, dynastic legislative bureaucracy." It irked lawmakers so much that they canceled the chief justice's annual address to the legislature. And it would lead to retaliation from a legislative committee that briefly sought to cut the court's budget by the same amount.

Lucas would lead the first conservative court in thirty years, backed by an unprecedented retention vote. He would tackle the loads of capital cases, turning Bird's doctrine of "reversible error" into "harmless error."

Major Bird-era rulings and doctrines that once swung against insurers, employers, and drug companies and for consumers, labor, and criminal defendants, would be overturned. As court watcher and legal journalist Robert Egelko noted, the Lucas-led "counterrevolution"[126] would lead to lasting

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123 "We may get a chief justice who is more involved, who uses the office much more as a platform," Chemerinsky told the L.A. Times in 1995, as speculation emerged, just after Lucas announced he'd be retiring that May, as to who might become chief justice. "Lucas wasn't a terribly visible figure. My guess is most people in the state couldn't tell you who the chief justice is." Maura Dolan, *State Chief Justice Lucas to Retire*, L.A. Times, Oct. 1, 1995.

124 Deukmejian wrote the introduction that preceded McCreery's longform Q&A.

125 Robert Egelko, *The Supreme Court: Right, Left and Center*, Daily Journal, Sept. 2, 2006, https://dailyjournal.com/articles/312072-the-state-supreme-court-right-left-and-center.

126 *Id.*

impacts on a range of legal issues, from tort liability to capital punishment.

And yet, he noted that few executions actually took place, and the rightward momentum that Lucas ushered in would eventually ebb, giving way to a more centrist court.[127]

Lucas died on September 28, 2016, thirty years after he became chief justice. He left a court, in his words, "humming along."

Eight years after his death, his actions to establish a more collegial tone echo in a Court that is simultaneously (1) the most diverse in the nation,[128] with different backgrounds and viewpoints; (2) obscure to the public (in contrast to the U.S. Supreme Court)[129]; (3) distinctively unpolarizing (again, unlike the U.S. Supreme Court); (4) among the most consequential of the state's branches of government; and (5) increasingly unanimous in its opinions.

In her foreword to the Loyola of Los Angeles Law Review to a symposium[130] on the California Supreme Court, former Chief Justice Tani G. Cantil-Sakauye offered insight into that unanimity. Reaching consensus, she said, is about the court's deliberative process. She pointed to several conversations among justices "at different stages of a case's progression."

"These conversations are nothing out of the ordinary—in fact, they are essential—at an institution such as ours," she wrote. "But especially in light of the current state of public discourse, our procedures may deserve a closer look insofar as they demonstrate how people holding diverse views can work through difficult issues in a manner that is both civil and thorough."

The dialogue among judges starts at petition conferences, moves to a conversation around memorandums, which leads to some back and forth and an exchange of ideas, and ultimately a majority coalescing around a tentative analysis and ruling on a case before it even gets to oral argument.

A momentum is created for resolving differences. Oral argument then becomes a way for justices to "engage" with counsel over issues developed in the dialogue among justices. The "conversation" sounds familiar. It's what Lucas was after, notwithstanding a justice's political viewpoint.

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127 Byrhonda Lyons, *Four Justices Vie to Keep Spots on "Collegial" California Supreme Court*, Cal Matters (May 2, 2023), https://calmatters.org/justice/2022/10/california-supreme-court-ballot-collegial.

128 Janna Adelstein & Alicia Bannon, *State Supreme Court Diversity—April 2021 Update*, Brennan Center for Justice (April 20, 2021), https://www.brennancenter.org/our-work/research-reports/state-supreme-court-diversity-april-2021-update.

129 Lyons, *Four Justices*, note 127, *supra*.

130 Tani G. Cantil-Sakauye, *Foreword*, 53 Loy. L.A. L. Rev. 369 (2020), https://digitalcommons.lmu.edu/cgi/viewcontent.cgi?article=3070&context=llr.

To this day, former Chief Justice Ronald George[131] touts the effort "to work things out"[132] in the pursuit of a unanimous court. Lucas's successor remains in admiration of Lucas's bond with Stanley Mosk, who while ideologically on different sides of the political spectrum found common ground in ways that Bird and Mosk could not. That was despite how, on paper, Bird and Mosk seemed like a stronger match ideologically.

"He was often a dissenter to Lucas but they still got along very well," George said of Mosk. "They were able to talk about their differences, able to work them out sometimes, and sometimes not." "That's a tribute to Lucas," George said—adding it was an example that resonated as he led the court. "I certainly tried to continue it. And my impression was that my successors certainly did."[133]

Lucas's son, Greg, acknowledged he's no objective observer of his father's legacy. But in reflecting on the polarization of the current national moment, he echoed Ronald George. "You can have a nice relationship with your colleagues and still disagree," he said, reflecting on his father's relationship with Mosk, "who couldn't have been more different in their politics."[134]

It's about finding "reasons for commonality," he said. "Just the very act of doing that gives you a better perspective. That's the thing that has largely died in our politics."

His father put it another way, pointing back to his childhood days back in Long Beach, and his own mother. "She was a truly magnificent woman," he told McCreery. "My brothers and I were very fortunate to have her, after my father died, give total dedication and devotion to us and to, in a very quiet way, ensure that we were on the straight and narrow, we got good educations, and we went ahead."

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[131] George was appointed to the Supreme Court by Pete Wilson in 1991. He succeeded Lucas as chief justice in 1996 and served until his retirement in 2011. His story is an Oral History Q&A in itself. And that's exactly what McCreery did. *See* Ronald George & Laura McCreery, Chief: The Quest for Justice in California (2013). See also McCreery's primer on her work on George—*Chief Justice Ronald M. George Records Comprehensive Oral History*, Calif. Sup. Ct. Hist. Soc. Newsl. (Fall/Winter 2011), https://www.cschs.org/wp-content/uploads/2014/08/2011-Newsletter-Fall-Ronald-George-Records-Oral-History.pdf.

[132] Telephone interview with former Chief Justice Ronald George (Aug. 17, 2024).

[133] *Ibid.*

[134] See notes 7, *22,* and 61, *supra*. Mosk's colleague, William P. Clark, were also close. "Clark viewed Stanley Mosk as a role model of sorts. Although he and Clark were usually on opposing sides in the decisions that divided the Court, Justice Mosk rarely let rancor in the conference room affect his work- ing or personal relationships with his fellow Justices. He welcomed Clark to the Court with warmth and genuine affection, and Justice Clark gratefully reciprocated. Their close friendship continued long after Clark's departure from the Court." *The Longest-Serving Justice, Highlights from a New Biography of Justice Stanley Mosk by Jacqueline R. Braitman and Gerald F. Uelmen*, Cal. Sup. Ct. Hist. Soc. Newsl. (Spring/Summer 2014), at 10, https://www.cschs.org/wp-content/uploads/2014/05/2014-Spring-Stanley-Mosk-Biography.pdf.

He went on: "Her era was an era of—as far as public service goes—of noblesse oblige, not meaning that you were from the lordly classes and it was your duty to assist the serfs, but just, you're a human being who happens to be well educated, maybe have a little cash, and it's your duty to spend some time, or maybe dedicate your life to something important for your government. JFK was able to impart that feeling. There hasn't been much of that around since then, unfortunately."

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Associate Justice Keith Sparks

Special In Memoriam Session of the Court of Appeal, Third Appellate District

August 19, 2024

Justice Keith Sparks and I served together for seven years on the Third Appellate District, from 1990 until he retired in 1997. Earlier, I worked with him while I was Executive Director of the California District Attorneys Association in the mid-1970s and he was Chief Deputy District Attorney for Placer County. He was a careful and conscientious prosecutor who presciently, creatively, and timely anticipated the unexpected and often disruptive reforms imposed on the administration of criminal justice by the U.S. Supreme Court during the Warren Court era.

Justice Sparks' visionary work in that regard was exemplary, but largely unknown outside Placer County. In that county, the high court's reform work was not disruptive. You will be inspired when you hear about all that in his California Appellate Legacy Project interview referenced by Presiding Justice Laurie Earl and linked below.

Justice Sparks was a careful and conscientious jurist. His opinions were meticulously researched and eloquently written. He was humble, polite, and gentle, while wise, courageous, and strong. He bent when he should, and stood tall when he should. He was wonderful friend and a joy as a colleague, on and off the bench. [Editor]

Presiding Justice Laurie Earl

Good Morning, today begins the oral argument calendar for August, 2024. We will open the calendar with a special In Memoriam session for former Justice Keith F. Sparks who served as an associate justice on this court for 19 years until retiring in 1997. Justice Sparks passed away on May 23, 2024.

Keith Fogus Sparks was born on March 19, 1933, in Sacramento, though he grew up and spent most of his life in Placer County. After graduating from Placer Union High School, he followed his father and older brother to UC Berkeley where, in 1955 he earned a Bachelor of Arts degree in political science.

In 1956, Justice Sparks married his high school sweetheart, Mary. They had four children together and would go on to enjoy 66 years of marriage.

Following college, Justice Sparks served a brief stint in the United States Navy where he served on the U.S.S. Bennington, Justice Sparks then returned to U.C. Berkeley's Boalt Hall. Studying law this time, he was an editor of the California Law Review and was elected to the Order of the Coif before obtaining his Juris Doctorate in 1961.

While in college, Justice Sparks interned at the Attorney General's office, which was then housed in this very Library and Courts Building. After passing the bar, Justice Sparks worked for a time in private practice before becoming a public servant. In 1963, he became the Chief Deputy District Attorney for Placer County, a position he held until 1977 when he was appointed by then Governor Jerry Brown to the Placer County Superior Court. Justice Sparks enjoyed being sworn into office by his father, Lowell who also served as a judge on the Placer Superior Court.

In 1981, then Judge Sparks was again appointed by Governor Brown, this time to the Court of Appeal for the Third Appellate District. In October of 1981, he was confirmed by the Commission on Judicial Appointments, by a

panel consisting of then Attorney General George Deukmejian, Chief Justice Rose Bird, and Third District Presiding Justice Bob Puglia. Justice Sparks served on this court until his retirement in 1997.

During his tenure at the Third District Court of Appeal, Justice Sparks wrote the majority published opinion in 237 cases, as well as 8 published concurrences and 7 published dissents. He was also the force behind the creation of the Court's internal opinion repository, which led to countless efficiencies in the days before online research services began collecting non-published and partially published opinions.

In 2007, Justice Sparks was interviewed by retired Justice George Nicholson for the Judicial Council's Appellate Legacy Program.* Justice Sparks described his feelings about his service on the court of appeal:

"I loved it, and I think it's one of the premier jobs of the world, actually. I mean, we're very fortunate to have served in that capacity, because you get to help frame the law and direct it and resolve extraordinarily interesting and complex decisions."

I think my colleagues and I would whole heartedly agree.

A self-styled eclectic reader, Justice Sparks was a lifelong bibliophile. When his long, daily commute to Sacramento threatened his reading time, he would listen to audiobooks during the drive. In his retirement, Justice Sparks was instrumental in the creation of the Sparks Law Library in Auburn and he continued supporting his local legal community as a mentor, advocate, and private judge.

Justice Sparks was known by those who served with him on the bench as a kind and thoughtful jurist whom his colleagues at the Court loved. The Court family mourns the loss of our friend and former colleague and we offer condolences to the Sparks family, including his daughter, Kathryn who is with us today.

At this time, I'd like to turn to Justice Hull who will offer some brief words about Justice Sparks.

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* Audio/video Interview with Justice Keith Sparks, https://www.youtube.com/watch?v=q7sYic044Zc, transcript of the interview, https://appellate.courts.ca.gov/system/files/2023-11/keith_sparks_6029.pdf, the interview took place on March 16, 2007.

Associate Justice Harry Hull

Thank you, Justice Earl.

I did not have the privilege of serving with Justice Sparks on this Court because he retired in late 1997 and I was appointed to his seat in early 1998.

But fortunately, my wife, Karen and I came to know Keith and his wonderful wife, Mary, after Keith retired, by way of their long friendship with Justice Rick Sims, another of our court colleagues who our court family lost to complications from cancer in 2020.

Rick and Keith both had served as superior court judges in Placer County before each was appointed to the Third District Court of Appeal. They were great friends on and off the court and, through Rick, Karen and I got to know Keith and Mary and enjoyed a number of social occasions with them. Keith and Mary were warm and accomplished people and we valued their company.

During the 26 years I have been on this court, I have often—while researching the law—discovered opinions that Justice Sparks authored during his years here and have found them well thought out, cogent and concise. Each exhibited a fine touch towards the ends of justice. During the years 1981 to 1997 Justice Sparks was one of the giants of this court adding luster to the court and to the court's jurisprudence.

I wish the Sparks family well.

Presiding Justice Earl

Thank you to those of you in attendance today, both in person in our beautiful courtroom, and to those of you who have joined us remotely to honor Justice Sparks. We appreciate your support of Justice Sparks and our tribute to him.

The Special Session of the Third District Court of Appeal is now closed. We will take a brief recess to constitute the panel for our next matter.

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STUDENT ESSAY WINNERS

GABRIELLE BRAXTON*

Guess Who's Coming to Stanford:

The Battle for the Desegregation of an Elite Law School

The 1960s were a time of dramatic change for elite law schools. There still had not been much progress in racial diversity at the graduate school level after the *Brown* decision,[1] in part because of the time required for Black students to trickle through the educational system and attain the prerequisite credentials for graduate study. In fact, nearly 60 percent of students—of any race—did not even graduate from high school in 1960, and only roughly 11 percent of those who had graduated went on to college.[2] Indeed, only 3.5 percent of Black Americans held a bachelor's degree in 1960.[3] In short, at that time, many students did not complete high school or college, and those who did were often white and/or wealthy.

* J.D. Candidate, Stanford Law School, 2025; B.A. Washington and Lee University, 2019. I am incredibly grateful to William B. Gould IV, whose story served as the foundation for the earliest drafts of this article; Thelton Henderson, without whom my presence at Stanford Law would not have been possible; Rabia Belt, the first supporter of pursuing this project; Thomas Ehrlich, who offered many illuminating recollections and perspectives on our walks; LaDoris Cordell, for sharing her inspiring story with me at her home in Palo Alto; Michael Wald, who has been critical in editing later drafts of this research; and Imani Nokuri, a tireless advocate for Black students at Stanford Law.

1 Brown v. Board of Education of Topeka, 347 U.S. 483 (1954).

2 National Center for Education Statistics, "Rates of High School Completion and Bachelor's Degree Attainment among Persons Age 25 and Over, by Race/Ethnicity and Sex: Selected Years, 1910 through 2023," *Digest of Education Statistics*, Table 104.10.

3 National Center for Education Statistics, "Rates of High School Completion," Table 104.10.

However, the 1960s ushered in a period of major development, spurred by student protests of the Vietnam War and Martin Luther King Jr.'s assassination, which began the process of truly desegregating American law education. This article will examine how one law school in particular went about this process and the challenges it faced in the early years.

In 1962, approaching its seventieth birthday, Stanford Law School was still housed in the main quadrangle of campus with a faculty of twelve white men. Still viewed as a regional university at the time, Stanford was considered adequate, yet average, when compared to Ivy League schools such as Harvard and Yale. Downtown Palo Alto was nothing like the commercialized Silicon Valley town that we know today; only a single city block had been developed at that point, with miles of orchards covering the rest of the land down to San Jose. The law school would see significant growth during the early 1960s, with eight members added to the faculty who brought fresh ideas and new attitudes about the future of the school, paving the way for the integration of Black students.[4]

This article represents an initial attempt to create a cohesive narrative of desegregation at Stanford Law School.[5] By weaving together disparate archival threads, I will demonstrate the complexity and difficulty of building a Black community at an elite institution—an institution that sought to structurally exclude Black students and faculty. I echo a question posed by Audre Lorde: "Can the master's tools dismantle the master's house?"[6] Or, as Kenneth Mack puts it, "Can socially subordinated groups contest their subordination using the same social structures and ideologies that define those groups as inferior?"[7] At Stanford Law, Black students and faculty simultaneously grappled both with and within the exclusionary power structures of academia. In doing so, they reconstructed the gaps in these power structures into channels not only for "contesting their subordination," but also for the acquisition of their own power as Black lawyers and educators.[8]

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4 Michael Wald, interview with author (May 16, 2024). Professor Wald has been a member of the Stanford Law faculty since 1967 and has had a distinguished career as an academic researcher, teacher, and public official.

5 Due to limits of space and time, as well as archival access restrictions, this narrative will not be exhaustive. Additionally, many documents were lost when the law school moved to its current location or were never created at all, due to fear of litigation and/or a drop in alumni support. Instead, the dean would give an in-person report to the faculty each year. This article will focus primarily on Black students at the law school, and additional forthcoming research will expand upon many of the issues raised here.

6 Audre Lorde, *Sister Outsider: Essays and Speeches* (Berkeley, CA: Crossing Press, 1984), 110. As paraphrased in Kenneth Walter Mack, "A Social History of Everyday Practice: Sadie T. M. Alexander and the Incorporation of Black Women into the American Legal Profession, 1925–1960," *Cornell Law Review* 87, no. 6 (2002): 1472.

7 Mack, "A Social History of Everyday Practice," 1472.

8 Mack, "A Social History of Everyday Practice," 1411.

There is much to be learned from the story of integration at Stanford. This is a story that cannot be told neutrally; in constructing such a narrative, any author will reveal what Jerome Culp calls "mythic assumptions about race."[9] But for as long as this story goes untold, it is impossible to truly understand either the full history or the present state of Stanford Law School and its interactions with the American legal system.[10] Chronicling the struggle of integration is a crucial step toward dismantling the socioeconomic structures that served to gatekeep universities like Stanford.

The Early Years: The Beginnings of Integration

Sallyanne Payton finished her undergraduate degree in English at Stanford in 1964 and spent the following year working as a social caseworker in her native Los Angeles.[11] Payton had plans to attend a master's program at Harvard when she learned of a fellow Stanford English alumna, Brooksley Born. Born had just graduated from Stanford Law in 1964 after serving as editor of the *Stanford Law Review*.[12] Payton began considering law school for herself, and "[n]oting an increased susceptibility to the two occupational diseases of social workers—cirrhosis and cynicism—she returned to law school (the diseases are the same but the pay is better)."[13]

Back at Stanford, Payton excelled as the law school's first Black graduate, despite her description of class as "infallibly soporific."[14] She, too, was selected for the *Stanford Law Review*, shocking many of her peers and mentors, many of whom viewed her abilities through a lens of racial prejudice.[15] Payton later recalled: "You could hear the jaws drop all the way down the steps of the law school . . . My favorite professor said to me, 'When I turned over the paper and found that you had written it, I nearly had a stroke.' This was during the

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[9] Jerome McCristal Culp, Jr., "Autobiography and Legal Scholarship and Teaching: Finding the Me in the Legal Academy," *Virginia Law Review* 77 (1991): 545.

[10] Jerome McCristal Culp Jr., "Toward a Black Legal Scholarship: Race and Original Understandings," *Duke Law Journal* (1991): 76.

[11] Stanford University, Stanford Law School Yearbook 1968 (Palo Alto, CA: Stanford University, 1968).

[12] Sharon Driscoll, "Sallyanne Payton: A Groundbreaking Legal Career," *Stanford Lawyer* 102 (Spring 2020).

[13] Stanford Law School Yearbook 1968.

[14] Stanford Law School Yearbook 1968. There were earlier Black students at the law school, but Payton was Stanford Law's first graduate. I have been unable to positively identify these earlier students.

[15] Stanford Law School Yearbook 1968. Payton "protestingly toiled" in her work for the law review. At the time, law reviews were staffed based on grades, so any students on law review were necessarily at the top of the class.

time of 'social Darwinism.' And I didn't fit the stereotype."[16] Yet despite the stereotype, Payton flourished.

In her second year, Payton was joined by other Black students at the law school. Leroy Bobbit, a native of Mississippi, came to Stanford from Michigan State University after working for two years with the Office of Economic Opportunity.[17] Vaughn Williams arrived immediately after finishing his studies in American History and Literature at Harvard and eventually became the president of the *Stanford Law Review* for its twenty-first volume before going on to clerk for Judge McGowan at the D.C. Appeals Court.[18]

Many of these early students were unique, crossing the Mississippi for law school long before it was commonplace to do so. Many of them had been excellent students throughout their academic careers, granting them plenty of options for their legal education. They were well positioned to be competitive when it came to grades and the job market and accordingly, excelled at Stanford. This was especially clear for students like Vaughn and Sally, who served on the law review at a time when the selection was based solely on grades—only those students who ranked in the top twenty in the class were chosen for positions.[19] They had both been first-rate students as undergraduates, had parents who had sat on the bench, and attended private schools.[20]

Yet, the pool of students like Vaughn and Sally was small. This problem would persist for many years and was especially significant at law schools, where both admissions and hiring took a largely credentials-based approach.[21] More than a decade after *Brown*, the number of Black students earning college degrees was growing, but still modest, and the number of those students who attended undergraduate institutions considered satisfactory for admission to Stanford was even smaller.

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16 Driscoll, "Sallyanne Payton." "Doomed by an unsought success, [Payton] . . . reluctantly abandoned her life goal of becoming a blues guitarist in favor of a less penurious future in the law." Stanford Law School Yearbook 1968. After graduating with her LL.B. in 1968, Payton forged an illustrious career in Washington D.C., beginning at the firm of Covington & Burling; continuing as a member of the White House Domestic Council during the Nixon administration in 1971; serving as the chief counsel to the Urban Mass Transportation Administration in 1973; and ultimately becoming the first Black woman to join the faculty of the University of Michigan Law School in 1976, where she spent nearly forty years. She was elected to Stanford's Board of Trustees not once, but twice—initially as a "young alumni under 35" in 1972. Driscoll, "Sallyanne Payton." *See also* Sallyanne Payton, "Reflections on Being a Lawyer," *Stanford Lawyer* 12, no. 1 (Spring 1977).

17 Stanford Law School Yearbook 1968.

18 Stanford Law School Yearbook 1968.

19 Wald interview, May 16, 2024.

20 Wald interview, May 16, 2024.

21 Wald interview, May 16, 2024. Robert Gordon, interview with author, January 17, 2024.

The "pipeline problem" was particularly important at Stanford Law, where the administration was pushing for the school to improve its status nationally. Bayless Manning had been appointed dean in 1964 and had set his sights on transitioning from a regional law school, attended primarily by young men from wealthy West Coast families, to a top contender with Ivy League schools.[22] He had been hired by President J. E. Wallace Sterling, who sought to build a "first-rate national university" in part by building out graduate programs like business, law, medicine, and engineering.[23] Seeking to compete with schools like Harvard, Yale, and Columbia, Sterling looked to the faculty of these schools to find new leadership for his own university. Indeed, Manning himself came to Stanford from Yale.[24] As dean, Manning pushed for the expansion of the faculty and new, independent buildings for the law school with a better library.[25] The emphasis on attaining prominence within the rankings of legal education meant an increased focus on admitting only the best students. However, this focus, combined with the "pipeline problem," meant that the number of Black students at Stanford Law in the late 1960s remained quite small.

In the spring of Payton's final year at Stanford, the political climate on campus became turbulent. Tensions peaked on April 3, 1968, when a group of students seized a university building in protest of the Vietnam War and the "imperialistic oppression of the peoples of the Third World."[26] The following day, Martin Luther King Jr. was assassinated in Memphis, Tennessee.[27] As the news of his murder spread, riots broke out across the country.[28] Just one week later, the Academic Council of the Faculty Senate adopted a resolution intended to quell the unrest on campus. This resolution had several goals: (1) to double the enrollment of minority students within two years through "accelerated recruitment and financial aid programs"; (2) to double the employment of minority workers within one year; (3) to establish a pilot program in the upcoming academic year for ten minority students who would not otherwise be admitted; and (4) to create supplementary educational opportunities to ensure

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[22] Letter from Dean Manning to President Sterling, February 3, 1964, SC216, box A39, folder 10, Sterling (J. E. Wallace) Papers, Green Library Special Collections, Stanford University.

[23] Manning to Sterling, February 3, 1964.

[24] Manning to Sterling, February 3, 1964.

[25] Manning to Sterling, February 3, 1964.

[26] Unlabeled memo to Assistant Provost Simmons, n.d., SC0154, box 1, folder 10, Black Affairs Records, Green Library Special Collections, Stanford University. Executive Committee of the Black Student Union, "BSU Statement," *The Colonist* 1, no. 1 (1969): 2.

[27] *King Encyclopedia*, s.v., "Assassination of Martin Luther King, Jr.," accessed June 25, 2023.

[28] *King Encyclopedia*, "Assassination of Martin Luther King, Jr."

the pilot program's success.[29]

A new committee was created to oversee the new admissions criteria for "disadvantaged youth" and to coordinate the tutoring programs.[30] The committee was also asked to consider the addition of Black history to the standard curriculum. A memo addressed to the Faculty Senate stated: "The activities of the last ten days concerned with racial problems at the University have mainly involved the students and the administration of the University. The result has been a commitment by the administration, endorsed by the faculty, to make a large increase in the minority group population at Stanford."[31] The provost, Richard Lyman, also sent a memo to the Senate's Academic Council, in which he confirmed the school's commitment to a "systematic and sustained effort" to address racial issues on campus, both through the creation of the new pilot program and by increasing recruitment efforts and financial aid opportunities for minority students.[32] Lyman wrote:

We have had brought home to us the deep and bitter alienation of our black students from the University, as from society at large. It would have been easy to respond to the outward signs of that alienation with resentment and rigidity . . . We have much to learn from our black students and much to teach them. We face a challenge to the capacity for growth of each member of the University, young and old, black and white. We must find ways to move with the urgency required for these times. We must do so without impairing those values that are essential to the maintenance of a true university at any time. . . Stanford is entering a new era. It will not be easy. It will require extraordinary financial efforts and it will force all of us to reevaluate intellectual and educational positions we have long taken for granted. The one point on which I have complete confidence is that as we succeed we will be building an even greater University.

Enrollment of minority students did begin to increase, albeit slowly. By the end of the fall quarter of the following academic year, 1968–69, university-wide enrollment of Black and Mexican-American students had grown to 291 from 175 (nearly halfway to the goal set in the previous academic council resolution), and eleven students had been admitted to the pilot program—

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[29] Resolution of the Academic Council, April 11, 1968, SC0193, box 1, folder 6, Academic Council Records, Green Library Special Collections, Stanford University.

[30] Proposal for the Creation of a Committee of the Academic Council on Racial Problems, April 16, 1968, SC0193, box 1, folder 6, Academic Council Records, Green Library Special Collections, Stanford University.

[31] Proposal for the Creation of a Committee, April 16, 1968.

[32] Letter from Provost Lyman to Members of Academic Council, April 17, 1968, SC0193, box 1, folder 6, Academic Council Records, Green Library Special Collections, Stanford University.

eight Black and three Latino.[33] Provost Lyman made it clear that the goal of increasing minority enrollment was to be pursued at both the undergraduate and graduate levels, and that each school or department should be proactive in recruiting students.[34] Accordingly, the law school established its own minority program, which allowed students to take four years (rather than the usual three) to earn their LL.B., and had already enrolled three students.[35] Leroy Bobbit was among the first to take part in the four-year program.

The university administration, including Lyman, was not—and could not—be a neutral actor. The university's leadership was comprised of white men who directly profited from the institution's reputation and prestige.[36] They relied on donations from alumni as well as respect from the academic and professional community for survival. But the political unrest and social tensions on campus also tarnished the school's reputational value. Realpolitik calculations of the 1960s, especially following the murder of Martin Luther King Jr., required a public realization of the homogeneity and gatekeeping that dominated educational institutions, especially elite ones. Otherwise, Stanford risked losing its standing as an enlightened and sophisticated university. Still, the proposal for increasing minority presence on campus proved inadequate. The small steps taken by the administration failed to appease the student body and calls for increased diversification continued.

In February 1969, at a noon rally in White Memorial Plaza with approximately six hundred "quiet, attentive" attendees, Lyman was presented with a list of demands made by the Black Student Union, which had been established two years prior in 1967.[37] The demands included increased admission of minority students—with Black students serving as admissions

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[33] Stanford University News Service, December 3, 1968, SC0193, box 7, folder 8, Academic Council Records, Green Library Special Collections, Stanford University.

[34] Letter from Provost Lyman to Members of the Stanford Faculty, January 27, 1969, SC0193, box 7, folder 8, Academic Council Records, Green Library Special Collections, Stanford University.

[35] Lyman to Members of the Stanford Faculty, January 27, 1969. See more on the establishment of this program below.

[36] Deborah Rhode, *In Pursuit of Knowledge: Scholars, Status, and Academic Culture* (Redwood City, CA: Stanford University Press, 2006), 6. Rhode has explained why reputation is so important to administrators and faculty at elite institutions: "Desires for recognition shape much human behavior, but they are particularly pronounced in American academic settings. The nation's competitive culture reinforces a preoccupation with rankings. And higher education attracts individuals with especially strong needs for achievement. Those who end up in faculty and administrative leadership positions are individuals who, by definition, have done well in competitive educational settings and who value the form of recognition that academic reward structures provide. By the same token, once these high achievers become academics, their status is in part derivative; their standing depends to some extent on the prestige of their employers. Almost nine out of ten surveyed faculty report that the reputation of their institution or department is 'important' or 'very important to them personally.' There are tangible as well as psychological reasons for that concern; faculty salaries are higher and teaching loads are lower in prestigious institutions. The vast majority of academics are understandably invested in their schools' rankings, however imperfectly measured."

[37] Stanford University News Service, February 5, 1969, SC0193, box 7, folder 8, Academic Council Records, Green Library Special Collections, Stanford University.

coordinators for each graduate school—and the addition of Black history to the curricular offerings.[38] Students attended rallies off campus too. In nearby San Francisco, "Free Huey" rallies were being held by the Black Panther Party in support of their leader Huey Newton, who was serving a fifteen-year prison sentence after being convicted of voluntary manslaughter.[39]

On April 4, 1969 (the first anniversary of Martin Luther King Jr.'s assassination), Provost Lyman offered his remarks to the community: "On this day last year, forces were set in motion which accelerated the movement of this University down a road along which it had barely begun to walk. . . The progress Stanford has made in minority group relations brings tension in direct proportion to its success. In the short run, at least, it will be very hard to tell victory from defeat."[40] Lyman would become the university's president the following school year, in the fall of 1970.[41]

The Late 1960s: Thelton Henderson, the Minority Program, and the Manning Plan

It was 1968 when Thelton Henderson stepped into this situation, with the hope of increasing minority admissions nearly fourteen years after *Brown*.[42] Henderson had moved west from Louisiana to attend the University of California at Berkeley, where he earned a degree in political science in 1956 and his LL.B. in 1962.[43] He had served as the head of the Legal Aid Office in East Palo Alto since 1966, where he employed Stanford students who spoke often of Sallyanne Payton.[44] Henderson was "aghast" after learning that Stanford Law had not graduated any Black students until 1968.[45] Henderson scheduled a meeting with Bayless Manning and Keith Mann (Associate Dean), respectively. Manning and Mann offered Henderson a position as an associate dean, with the intent of diversifying the student body. Dean Manning was under considerable pressure from white students to bring Black students and faculty to the law school; several of the students personally advocated for

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38 Ray Davis, "BSU's Unanswered Demands," *The Colonist* 2, no. 1 (1969): 2.

39 *Encyclopedia Britannica,* s.v., "Huey P. Newton," accessed June 25, 2023. Newton's conviction was overturned in 1970. "Rally a Success," *The Colonist* 1, no. 4 (1969): 1.

40 Stanford University News Service, April 4, 1969, SC0193, box 7, folder 8, Academic Council Records, Green Library Special Collections, Stanford University.

41 "History of Stanford Presidents," Office of the President, Stanford University, accessed June 25, 2023.

42 Thelton Henderson Interviews, 2012, SC0932, Stanford Historical Society Oral History Program, Green Library Special Collections, Stanford University.

43 Henderson was one of only two Black students in his class at Berkeley Law.

44 Henderson Interviews, 2012.

45 Henderson Interviews, 2012.

Henderson to be hired.[46] Henderson accepted the offer, albeit on a half-time basis so that he might continue his work at Legal Aid.[47] Yet, Henderson quickly "realize[d] there's no such thing as two half-time jobs, and [he] was sort of working, killing [him]self trying to do both jobs."[48] After one year, he left his job at Legal Aid and came to Stanford full time.

Henderson's duties as associate dean included implementing a recruiting program aimed at Black, Latino, and Native American students; he was also the Dean of Student Affairs, overseeing the budgets and activities of student organizations, and served on the Minority Employment Committee.[49] In addition to these duties, Henderson found time to do courtroom supervision for an eight-unit course on Juvenile Law, offer a seminar on the defense of the criminally insane, and teach civil procedure.[50]

Henderson was officially responsible for the law school's "legal education opportunity programs," but played many roles on campus.[51] When a Puerto Rican student from New York came to Henderson and said he was considering dropping out, Henderson "got him drunk and started loosening up, and took him home, and by that time, he was feeling a little better."[52] He wrote letters to prospective students, such as a note written to Miss Lilia Nolina, who had requested information about the school's minority program: "Unfortunately we have no written information about our program for minority students, but if I can answer any specific questions, please feel free to contact me."[53] According to one of his students, Tyrone Holt, Henderson "was the entire recruitment program. . . Thelton was responsible for me getting here."[54] Henderson was a source of comfort for his students, a task he would later remember fondly: "I felt I'd been through some things that you younger people hadn't, and wanted to share it, about how you deal with racism and feelings of alienation. And I loved sharing that with you, and I loved helping you get through those

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46 Wald interview, May 16, 2024.

47 Henderson Interviews, 2012,

48 Henderson Interviews, 2012.

49 Henderson Interviews, 2012, Letter from Thelton Henderson to President Pitzer, May 16, 1969, SC0154, box 2, folder 28, Black Affairs Records, Green Library Special Collections, Stanford University.

50 Henderson, Stanford Historical Society Oral History Program. Juvenile Law became the foundation of Stanford Law's clinical program as it exists today, pioneering the eventual ubiquity of clinical education at law schools across the country. Henderson later served on the first board of the Community Law Clinic.

51 Stanford Law School Student Handbook (1968).

52 Henderson, Stanford Historical Society Oral History Program.

53 Letter from Thelton Henderson to Lilia Nolina, August 12, 1970, SC0154, box 1, folder 29, Black Affairs Records, Green Library Special Collections, Stanford University.

54 Henderson, Stanford Historical Society Oral History Program.

psychological motions and trying to do things to counteract it and trying to be creative about it. I'd never done it before, so I was learning as I went."[55]

Because of Henderson's efforts, Stanford Law was, in many ways, more successful than other elite schools in building a Black community. Henderson went out of his way to take personal care of everyone and was, by far, the most integral player in the desegregation of Stanford Law. His students and colleagues alike remember him as soft spoken, but extremely persuasive and well respected.[56] He was empathetic and caring, and extremely supportive of every Black student, often interceding on their behalf with the financial aid office or a professor. One student recalled, "We always knew we always had a friend in Thelton . . . he treated us like family."[57] Henderson was also unusually effective, maneuvering with the faculty and Dean Manning to implement important changes, usually so smoothly that others were happy to go along with his plans.[58] Henderson had considerable support from several members of the law school faculty, especially those who had been appointed in the early to mid-1960s.

Having set his sights on increasing minority enrollment, Henderson faced several challenges: increasing the number of applicants, determining the proper admissions standards, convincing admitted students to enroll, and ultimately ensuring that those students succeeded once they got to Palo Alto. As a recruiter, Henderson used his contacts around the country to find candidates—a difficult task because "those who did come down the pipeline, especially if they were from the East, were also eligible to go to Harvard and Yale, and that was their preference."[59] Other students were reluctant to attend Stanford due to the lack of fellow minority classmates. Henderson would fly to various schools around the country to conduct interviews with potential Black admits "with the profile that [he] thought would allow them to succeed in a school like Stanford with its rigorous courses."[60] Henderson's "biggest recruiting ploy" was to invite students from the East Coast to visit Stanford's campus in April, when cities like New York, Boston, and Washington D.C. were still cold and snowy, and "walk them down Palm Drive with all the palm trees

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55 Henderson, Stanford Historical Society Oral History Program.

56 Wald interview, May 16, 2024. Harold Boyd, interview with author, March 10, 2024. Dianne Millner, interview with author, April 30, 2024.

57 Millner interview, April 30, 2024.

58 Wald interview, May 16, 2024.

59 Henderson, Stanford Historical Society Oral History Program.

60 Henderson, Stanford Historical Society Oral History Program.

and sit out in the sun."[61] The substantial travel costs required for recruiting were funded by two law school alumni, Miles L. Rubin and Victor Palmieri, who gave roughly $500,000 to support Henderson's recruiting commitments in addition to a third-year student's tutoring salary.[62]

Henderson examined every application, considering people who could succeed in a variety of ways beyond grades and test scores. Looking for abilities such as leadership and adaptability, Henderson often weighed unusual criteria, such as community organizing or prior work experience. Manning had granted Henderson a great deal of latitude to build a more diverse class. However, Henderson was acutely aware that many of these students would face exams at Stanford Law School that would be different than anything they had ever encountered before. Accordingly, Henderson sought not only to get Black students into Stanford Law, but also to make sure that they thrived there. He knew that they would be competing with classmates who had attended elite undergraduate institutions and considered it part of his duties to make sure the Black students whom he admitted would be equipped to do so.[63]

Thus, Henderson also played a critical role in the creation of the abovementioned four-year minority program, which he proposed to the dean and law faculty almost immediately after his arrival. Meant to offer "access to an increased number of minority students within the law profession," the program provided "disadvantaged candidates" with an extra year of study and the chance to "avoid undue pressure" while completing their coursework.[64] The idea for the program came from Henderson's own personal experience at Berkeley, where he had turned in a "disastrous" exam.[65] Henderson attributed his own failure to inadequate previous education at all-Black schools and a lack of academic support during his first year at college. He believed the four-year program would benefit Black law students "by breaking the first year into two years, slowing it down. . . They may not have [had] the background to get it immediately."[66] During the first two years, students would receive tutoring and "get the hang of it," with the opportunity to graduate in three years by

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61 Henderson, Stanford Historical Society Oral History Program. This tactic is still quite successful today.

62 Henderson, Stanford Historical Society Oral History Program. The same two alumni gave a large donation to start the Spaeth fund (see below).

63 Wald interview, May 16, 2024. Professor Wald worked closely with Thelton Henderson on these issues and had even worked with him in East Palo Alto prior to his hiring.

64 Affirmative Action Program, n.d., SC0154, box 1, folder 9, Black Affairs Records, Green Library Special Collections, Stanford University.

65 Henderson, Stanford Historical Society Oral History Program.

66 Henderson, Stanford Historical Society Oral History Program.

attending summer school.[67] The program received national attention when it was introduced in 1968, and by September 1969, four students were enrolled in the minority program.[68]

In the end, only three classes of students went through the law school's four-year program. Although Henderson believed the program did achieve its goals, "it was psychologically bad for the students. They didn't like it. We worked very hard to construct it in a way that they weren't identified and the people that went through it weren't personally identified, but within the minority community, they didn't like it. They felt second-class citizens. They resented it. They thought they didn't need it."[69] The social and psychological stigma attached to the program only reinforced the negative perception of minority students on campus and further disconnected them from the campus community.[70] The program had procedural disadvantages, too; students could be forced to drop classes halfway through the semester if their grades were not up to par, and could not opt out of the program in the first two years.[71] Henderson anticipated that the students' "gratefulness for getting into Stanford would outweigh their resentment for getting in this way. That was our hope. It turned out not to be that balance that we hoped for."[72] At the same time, minority recruitment was gaining momentum, "more students were coming through the undergraduate pipeline," and students were being admitted that did not require the transition period.[73] The four-year minority program was abolished in the spring of 1971.[74]

Indeed, more minority students were coming to Stanford, with 152 Black students applying to Stanford Law for entry in the 1970–71 academic year.[75] Of these, thirty-two were admitted (a figure "based largely on budgetary considerations"); nineteen accepted enrollment; and eleven ultimately registered to attend.[76] At that time, the application did not have any questions about a student's race, so Henderson identified Latino students primarily by their names and Black students through their extracurriculars or undergraduate

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67 Henderson, Stanford Historical Society Oral History Program.

68 Bob Johnston, "Ill-Fated Minority Program Abolished," *Stanford Law School Journal* 1, no. 10 (1971): 1, 9. "September 1969 Registration," *Stanford Lawyer* 5 (Spring 1970).

69 Henderson, Stanford Historical Society Oral History Program.

70 Johnston, "Ill-Fated Minority Program Abolished," 9.

71 Johnston, "Ill-Fated Minority Program Abolished," 9. The inability to opt out of the program was Henderson's idea.

72 Henderson, Stanford Historical Society Oral History Program.

73 Henderson, Stanford Historical Society Oral History Program.

74 Johnston, "Ill-Fated Minority Program Abolished," 9.

75 Bob Johnston, "Minority Admissions," *Stanford Law School Journal* 1, no. 2 (1970): 1.

76 Johnston, "Minority Admissions," 1.

institution.[77] The law school still had the least number of Black entering students of any graduate school at Stanford, compared with sixty-two students in the humanities and sciences, twenty-two at the business school, twenty each at the education and engineering schools, and fifteen at the medical school.[78] Nonetheless, graduate programs were accepting more minorities: "Black and [Latino] students are coming to Stanford in greater numbers for graduate work and have a lower 'drop out' rate from the University than whites."[79]

Henderson confessed that he "didn't feel too good" about the number of minority students enrolled until he contacted other schools for comparison figures.[80] Chicago had admitted ten minority students total; Yale, twenty; and Harvard, sixty.[81] The comparison did not assuage everyone; one student, Ed Hayes, proclaimed the number was "still deplorable" and "not significant enough to represent any commitment or particular interest on the part of the Administration in making legal education possible to non-white students."[82] By the end of the year, some students were threatening to leave the school and transfer elsewhere, citing inadequate admissions policies leading to only sixteen Black students in total enrolled in the 1971–72 school year.[83] Minority students demanded the administration establish a quota of at least thirty minority students in the entering class.[84]

Although Dean Manning rejected the quota, he agreed to institute a new admissions policy whereby a minimum predicted GPA (PGPA) would be established. The PGPA concept had been first considered a decade earlier. In a 1958 memo from the previous dean, Carl Spaeth, to the law faculty, Spaeth had inquired whether it would be "feasible to develop probability tables, combining LSAT and [undergraduate] GPA figures which would furnish a basis for predicting law school success of a particular student from a particular

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77 Johnston, "Minority Admissions," 8.

78 Stanford University News Service, December 3, 1970, SC0193, box 18, folder 2, Academic Council Records, Green Library Special Collections, Stanford University. Minority Graduate Enrollment, 1968–70, March 9, 1971, SC0770, box 2, folder 4, School of Law Faculty Minutes and Committee Records, Green Library Special Collections, Stanford University.

79 Minority Graduate Enrollment, 1968–70, March 9, 1971, SC0770, box 2, folder 4, School of Law Faculty Minutes and Committee Records, Green Library Special Collections, Stanford University.

80 R.P.J., "20 Minority Students to Enter," *Stanford Law School Journal* 2, no. 1 (1971): 1.

81 R.P.J., "20 Minority Students to Enter," 1. Harvard's enrollment numbers were proportionally similar to Stanford's.

82 R.P.J., "20 Minority Students to Enter," 1.

83 R.P.J., "20 Minority Students to Enter," 1.

84 "Minority Admission Problem Brewing a Long Time," *Stanford Law School Journal* 2, no. 15 (1972): 2.

school."[85] Dean Manning thereafter introduced a bar for admission based on the lowest PGPA of the previous year's admits; any minority applicants above this minimum PGPA would be "substantially automatically" admitted. Significantly, he also removed the institutional limits placed on minority scholarships and financial aid.[86]

The idea for this new policy was also Henderson's (although it would later come to be known as the Manning plan). In a prior conversation with Dean Manning, who took the position that the law school didn't discriminate against any candidate, but "welcome[d] any minority student, any student who has a 3.7 GPA and a 90-something percentile LSAT score," Henderson asked to see the lowest scores and GPA of those students already admitted—suspecting that some "legacy" admits would have less than ideal figures.[87] In his later recollections, Henderson said, "I think their hearts were in the right place. They just didn't know quite how it should be done. There weren't any models out there to tell them."[88] The Manning plan was adopted, deemed successful, and has remained in place for decades, albeit in varying forms.[89]

Yet, the four-year minority program at the law school perpetuated prejudice against minority students as intellectually inept and academically inadequate. The program left its primary assumption unsaid: that minority candidates could not handle the "pressure" of law school like white students. The program vindicated those among the university's administration who believed that Black students were unqualified or incompetent. Furthermore, the program's procedural deficiencies put minorities at an even further disadvantage. Still, Henderson's personal background was certainly a strong influence on the structure of the program and his experience may have resonated with some students.

But even if the program was intended to aid these students, in effect it isolated and discredited them. Henderson's belief that the students would be so grateful for their admission to Stanford that they would not be insulted by the aftermath was not only shortsighted, but deeply misguided. Nonetheless, Henderson's tireless efforts to increase diversity were critical to the integration of the law school. Like so many other Black educators at elite institutions, Henderson was overworked, functioning not only as "the entire recruiting

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85 Memo from Carl Spaeth to Law School Faculty, October 2, 1958, SC0770, box 2, folder 4, School of Law Faculty Minutes and Committee Records, Green Library Special Collections, Stanford University.

86 Bob Johnston, "Minority Students Threaten to Leave School," *Stanford Law School Journal* 1, no. 10 (1971): 1, 10.

87 Henderson, Stanford Historical Society Oral History Program.

88 Henderson, Stanford Historical Society Oral History Program.

89 It is unclear if this policy is still used today.

program," but also as a professor, administrator, negotiator, and confidant.[90] Dedicated as ever, Henderson continued to take on duties in his quest to provide adequate support for Black students.

The implementation of the Manning plan solidified the role of statistics in minority admissions at Stanford. The use of data points in the law school's admissions process allowed the administration to claim its policies were neutral and meritocratic, preserving Stanford's reputation as a first-rate institution.[91] But in reality, the Manning plan allowed the university to quell tensions while comprising no more than necessary—that is, more than it already had for the children of important donors and alumni. While "substantially automatic" admission was a device used only for minority students, the minimum PGPA mirrored the lowest qualifications seen among legacy admits, matching the law school's threshold for students deemed suitable for Stanford Law. The policy may have been facially meritocratic, but the university failed to acknowledge that its statistical approach could not divorce educational attainment from socioeconomic status. In a practice that persists to this day, Stanford admits students who test well and then boasts its "cosmetic diversity." The Manning plan amounted to what Lani Guinier has described as an admission policy that "merely mimic[ked] elite-sponsored admissions practices that transform[ed] wealth into merit, encourage[d] over-reliance on pseudoscientific measures of excellence, and convert[ed] admission into an entitlement without social obligation."[92]

The Early 1970s: Affirmative Action and BLSA

As the Manning plan was introduced, a newly created university-wide affirmative action program sought to increase the number of minority faculty. An affirmative action report at the time identified several key areas for improvement: the racial composition of the workforce, the racial composition of applicant flow, the employment and selection process, promotion practices, termination and layoff procedures, apprenticeship and training programs, and

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[90] Rhode, *In Pursuit of Knowledge*, 105. This phenomenon has been examined by many scholars, including the prolific Deborah Rhode: "[A] small proportion of faculty members perform the vast majority of service. Women and minorities are disproportionate among them. For commendable reasons, institutions want diversity of backgrounds on any important decision-making body. But in many fields, a shortage of diversity among those eligible to serve leaves women and minorities deluged with service obligations. These groups find it particularly difficult to evade the draft because they lack ready replacements and are sympathetic to the argument that decision-making bodies should not be all-white or all-male. But no good deed goes unpunished. . . When such burdens are coupled with the disproportionate advising and mentoring obligations that fall to underrepresented groups, the price is often paid in scholarly productivity. Yet academic institutions seldom adjust teaching and research expectations for those who provide exceptional service."

[91] Rhode, *In Pursuit of Knowledge*, 9. Rhode argued that in a phenomenon known as "upward drift," institutions with less prestige are under a great deal of pressure to achieve "legitimacy" and as a result, tend to "imitate rather than innovate and to replicate the priorities of more prestigious universities rather than to develop distinctive strengths." Thus, Stanford's policies have the potential to impact not only students on its campus, but also at schools who look to these institutions for guidance.

[92] Lani Guinier, *The Tyranny of the Meritocracy: Democratizing Higher Education in America* (Boston: Beacon Press, 2016), 23.

overall faculty representation.[93] The report admitted: "The data supplied on minority faculty can be summarized by saying that the numbers have grown but are still small. The prospect for the future is that the numbers will grow further, but slowly and unevenly, and that in the immediately foreseeable future they will remain small."[94]

At the law school, there was only a single Black professor out of thirty-eight total faculty; the only other Black employees were a technician, a clerical worker, and an office manager.[95] This small figure was attributed to a low number of eligible candidates "trained for university teaching," a problem declared especially troublesome for "the relatively small number of colleges and universities at the apex of educational quality."[96] Although the law school did submit a minority hiring plan in December 1970, claiming to be willing to "work in any way possible to meet affirmative action goals although no openings are anticipated due to budget conditions," the hiring plan itself was left blank.[97]

Nevertheless, the growing presence of Black students and faculty led to the creation of Black organizations. The Black Law Students Association (BLSA) was established in the 1970–71 academic year, "formed to meet the special needs of Blacks attending the Law School as well as the needs of the surrounding Black community. These needs inter-relate because, as it presently exists, the traditional white educational apparatus tends to overlook illiterate Blacks and to train literate Blacks to ignore the problems of their own people."[98] James Ware became its first president.[99] Students on campus began to openly discuss the prejudice and homogenization they were experiencing. Willie Newberry, a graduate student in sociology and cochairman of the BSU, declared: "Stanford University is racist to the core."[100] Another student wrote in the Black newspaper:

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93 Affirmative Action Program, n.d., Black Affairs Records.

94 Affirmative Action Program, n.d.

95 Work Sheet for Minority Hiring Plans, December 15, 1970, SC0154, box 1, folder 9, Black Affairs Records, Green Library Special Collections, Stanford University. I was unable to positively identify the name of this Black professor.

96 Affirmative Action Program, n.d.

97 Work Sheet for Minority Hiring Plans, December 15, 1970.

98 Stanford University, Stanford Law School Student Handbook (1970).

99 Stanford Law School Student Handbook (1970). That same year, James Ware won the moot court competition, which was judged by Justice Thurgood Marshall. "Jim Ware Sweeps Kirkwood Competition," *Stanford Law School Journal* 1, no. 10 (1971): 1. In 1990, Ware was nominated by President George H. W. Bush to the bench for the Northern District of California, on which he served until 2012. His daughter, Carlie, is now a beloved member of the Criminal Defense Clinic at Stanford Law, where she works as a supervising attorney.

100 Stanford University News Service, May 12, 1971, SC0193, box 18, folder 2, Academic Council Records, Green Library Special Collections, Stanford University.

Stanford without question is an instrument of oppression. Hence, Black people at Stanford must recognize that this University will at every point of our stay attempt to reinforce the notion of individuality. It will in the same breath reinforce the denial of our peoplehood, our Blackness. Stanford supports the values and experiences of White America. It does not, nor can it, support the Experimental Communality of Blackness. . . Make no mistake about it, part of Stanford's job is to get our Blackness. Also, recognize that, if the University believed it could not destroy the Experimental Communality supportive of our Blackness (a process they mistakenly call education), there wouldn't be a single Black here. What I'm trying to say is, if Stanford did not believe that it could control and reshape out minds to the point where we really believed that (evidenced by our presence here) we must be the smartest niggers in the country, i.e. the Black intellectual elite, which by the oppressor's psychology means we are "unique" and "different" from all those other Black people, we would not be here. Once we believe this, that is, once our Stanford education is accomplished, Stanford will have stolen our Blackness.[101]

The campus was, at times, physically unsafe for minority students as well. According to a newspaper that served as "The Organ of Black Students of Stanford University," in April 1970 the police arrested Black students on campus because the university "felt that its property was in danger and chose to defend it with guns, mace, and sticks."[102] The Black student who authored the article warned: "Anyways bloods should watch out for these motherfuckers, they all have the same piggish mentality. They don't think we belong here and you never know what kind of humbug might go down with all these racist fools with guns running around this campus."[103] In 1971, William Shockley, a Stanford physics professor and Nobel laureate, openly advocated for the sterilization of illiterate Blacks.[104] Thus, BLSA became an important source of community for students who felt isolated or endangered at Stanford. Furthermore, BLSA was "dedicated to ending the isolation between Black law

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[101] Wade Nobles, "Stanford's Gonna Steal Your Blackness," *The Colonist* 2, no. 15 (1970): 4. Lani Guinier, Michelle Fine, and Jane Balin, *Becoming Gentlemen: Women, Law School, and Institutional Change* (Boston: Beacon Press, 1997), 100–1. Guinier spoke eloquently on this same concept and the importance of narrative in overcoming homogenization: "I began to comprehend once again what W. E. B. DuBois eloquently described at the dawn of this century as the twoness, the double identity of being black and American. For me, there was a threeness because I also was a woman. As an outsider 'within the veil,' I, like DuBois, saw myself revealed through the eyes of others. . . Ours is a story about imprisoned and silenced by the status quo. Ours is a story of being admitted into Wonderland but only on condition that we for all practical purposes become something we are not. Our stories, though, are not monolithic. Nor are they monotone or monologue. Our stories help form a conversation in which we can define and redefine the world in terms that accommodate different perspectives and experiences . . . Legal education is strengthened by including those who were once left out."

[102] Cinque, "The Season of the Pigs," *The Colonist* 2, no. 17 (1970): 1.

[103] Cinque, "The Season of the Pigs," 1.

[104] Stanford University News Service, May 12, 1971, Academic Council Records.

students and Black ghetto residents."[105] In February 1970, a Berkeley man was indicted for manslaughter after shooting a Black youth for "stepping on his lawn"; a San Francisco police station was bombed.[106] The general unrest in the Bay Area and across the country made community engagement a priority for Stanford Law students.

The university administration recognized the gravity of racial issues during this time; President Lyman proclaimed that "[r]ace remains America's most important domestic problem," and called it "dangerous and insidious" to equate the effort to diversify the student body with lower admissions standards.[107] He went on to add: "If we're going to mean business about education for black [and other minority] people, we're going to have to mean business at every level of education. . . This kind of institution in particular should be concerned about postgraduate and professional education to enable disadvantaged minority people to get into the professions and get their fair share of the skills and equipment to deal with their problems." Lyman blamed a lack of funding for minority students to account for the slow increase in minorities and pushed to continue limiting admissions to only those students who could be financially supported—a policy Lyman claimed was reflected by the high retention rates for minority students at Stanford.[108] Moreover, the president saw increased tensions on campus as a catalyst for improvement: "This is fourth consecutive academic year in which we have found ourselves in often angry discord over issues raised by minority members of the Stanford community. This discord may actually signify progress: as the number of minority students, staff, and faculty continues to grow, so does the number of persons who perceive the ways in which Stanford might do better."[109]

While Lyman claimed to "mean business," his attempt to explain away the very real threats Black students faced as no more than productive dissent

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[105] Stanford Law School Student Handbook (1970).

[106] The Tasmanian Devil, "Bulletin Board," *The Colonist* 2, no. 13 (1970): 4.

[107] Stanford University News Service, January 6, 1971, SC0193, box 18, folder 2, Academic Council Records, Green Library Special Collections, Stanford University. Not everyone saw race as a serious issue, however. A Board of Visitors survey sent to law school alumni in 1971 reported: "The typical graduate is male, married, white and Protestant. He grew up in California, probably in Los Angeles County. He is a Republican and considers himself moderately liberal. His father was either in one of the professions or in business management and sales." Thirty-three percent of responding alumni said they would give no weight to ethnic or racial diversity in the admissions process; only 16 percent thought diversity merited considerable weight as a factor. When asked for the "single most responsible cause of student unrest," less than 1 percent selected "racism in America." Most respondents chose "students perceive actual defects in American society, not necessarily on the campus," at 38 percent. Indeed, many at Stanford saw the campus as utopia, free from worldly, mundane issues like racial violence and discrimination. "Responses to the Board of Visitors Survey of the Stanford Law School Alumni," *Stanford Lawyer* 11 (Spring 1972).

[108] Stanford University News Service, January 6, 1971.

[109] Stanford University News Service, July 8, 1971, SC0193, box 18, folder 2, Academic Council Records, Green Library Special Collections, Stanford University.

intentionally ignored the danger presented by their mere presence on campus. Furthermore, Lyman looked to Black people to bear the burdens of integration and suffer the costs of overcoming the university's discriminatory structures, including admissions practices that disproportionately benefited white and/or wealthy students, underrepresentation in faculty and leadership, and inadequate academic and social support systems. This challenge was intensified by the necessity of battling these larger systemic issues while simultaneously grappling with their day-to-day impacts, striving to effect change from within the system as they sought to transform it entirely. The administration turned to excuses that would become familiar—a lack of funding and a lack of candidates. The affirmative action report's allegation that the latter was especially problematic "at the apex of educational quality" revealed the underlying assumption that even those candidates who were qualified were often still inadequate for elite universities like Stanford. While the law school professed to be willing to "work in any way possible" to diversify, the blank squares of its minority hiring plan would become a perfect metaphor for the empty promises of Stanford's affirmative action program in the 1970s—pretensions of equality and opportunity that remained illusory and unsubstantiated. Organizations like BLSA must have been incredibly important to Black students during these times, offering fora for discussion and the support of a community in the face of mental, emotional, and physical violence. These organizations allowed Black people to look out for one another, on and off campus.

Despite many other changes in the university's administration, Dean Henderson stayed on at the law school. Henderson hoped to institutionalize his diversity efforts, which were finally beginning to succeed, and feared a potential drop in the admission and enrollment statistics if he were to leave.[110] Henderson was still facing resistance from some of the law school faculty, too. When approached by a small group of professors and asked about the increasing percentage of minorities in the entering class, Henderson expected to be congratulated. Instead, they asked: "Well, don't you think that's enough? That's about there. . . Let's not keep going."[111] While Henderson recognized that he may not be able to increase the proportion of minorities further (students of color in the class of 1975 comprised roughly 22 percent), he sought to prevent a backslide in admissions policies.[112]

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[110] This prediction would ultimately prove correct, with a backslide beginning when Henderson left his position.

[111] Henderson, Stanford Historical Society Oral History Program.

[112] Henderson, Stanford Historical Society Oral History Program. People of color make up approximately 44 percent of the author's class at Stanford Law (class of 2025).

In the spring of 1972, minority students demanded again that the administration establish a quota system. This time the students pressed for fifty minority students in the entering class, which would contain 160 students in total.[113] This quota was to be comprised of twenty Black students, twenty Latinos, and ten Native Americans.[114] The faculty again refused to establish a quota, instead favoring the continuation of the Manning plan—which guaranteed "substantially automatic" admission for any minority applicant with a PGPA above that of the lowest nonminority student admitted in the prior year.[115] The faculty also rejected the students' demands for an outside consultant to evaluate the utility of the PGPA statistic and increased financial aid for minority students. Instead, a special committee was appointed, chaired by Professor William Cohen, to study and oversee Henderson's discretion in administering the admissions process.[116] The students believed the faculty created the special committee because they feared too many minority students would be admitted.[117]

While the class of 1975 did substantially increase minority representation at the law school by 53 percent over the previous year's class, and 164 percent from the class of 1973, no quota was established.[118] Four hundred and seventy-eight minority students applied; sixty-one were admitted; and twenty-nine enrolled in the fall.[119] Dean Henderson was very pleased with this peak in admissions data, citing an increased number of minority applicants (one hundred more than the previous year) and a more flexible admissions formula.[120] But students like LaDoris Cordell, who gave a statement on behalf of BLSA, were "extremely, extremely dissatisfied with the number."[121]

And the university was still ill equipped to offer sufficient support to these minority students once they arrived. The responsibility of challenging and dismantling discriminatory power structures—such as admissions policies, racism and violence on campus, housing discrimination, a limited number of institutional advocates, and social exclusion—often fell to minority students. By transferring the burden of activism to students and colleagues of color, white

113 "Minority Admission Problem Brewing a Long Time," *Stanford Law School Journal* 2, no. 15 (1972): 2.

114 "Minority Admission Problem," 2.

115 "Minority Admission Problem," 2. By this time, the PGPA was accompanied by another admissions statistic known as the LQI.

116 "Minority Admission Problem," 2. Cohen was one of the most conservative members of the faculty at that time (see below).

117 "Minority Admission Problem," 2.

118 R.P.J., "Minority Admissions Greater Than Past Years," *Stanford Law School Journal* 3, no. 1 (1972): 1.

119 R.P.J., "Minority Admissions," 1.

120 R.P.J., "Minority Admissions," 1.

121 R.P.J., "Minority Admissions," 1.

men in power allowed themselves the privilege of a recess from the discomfort and difficulties of Stanford's racial strife. They could publicly announce their achievements, asking: "Well, don't you think that's enough?" while claiming there were "no pressing problems" at a place like Stanford.

The law school's dean at the time, Thomas Ehrlich, had witnessed the development of diversity on campus. Appointed to the faculty in 1965, Ehrlich had arrived the same year as Sallyanne Payton.[122] After only three years, Ehrlich gained tenure, and after another three years, was selected to succeed Bayless Manning as dean.[123] He had served on the Faculty Senate since 1968 and experienced the chaotic and politicized environment of Stanford's campus in the late sixties and early seventies.[124] Ehrlich saw a pressing need to diversify not only the student body but also the faculty, which was still all-white and all-male when he became dean in the autumn of 1971.[125] He declared: "[the] first priority [was] that we had to have at least a woman faculty and an African-American faculty before we went further."[126]

In May 1971, Ehrlich (at that time still dean-designate) met with the Committee on Minority Affairs to discuss the "restrictive nature of the screening processes used by law faculties when choosing new colleagues."[127] Ehrlich was joined by Professor John Barton, who brought a list of forty prospective Black candidates for faculty positions, but emphasized "the minuscule body of lawyers from minority communities, much less academic lawyers from minority communities."[128] Barton remarked that many of the best candidates had other opportunities that may have greater appeal.[129] Ehrlich and Barton advocated for the creation of a Minority Faculty Leverage Fund, which would offer funding for the hiring of more diverse faculty at the law school and elsewhere

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[122] Ehrlich, Stanford Historical Society Oral History Program. Dean Ehrlich had a fascinating life. After graduating law school, he clerked with Learned Hand. During his move to Stanford, "[he] camped in Yosemite next to a guy with a beard who was taking a lot of pictures and taught us how to make tacos, who turned out to be Ansel Adams." He went on to be the provost of the University of Pennsylvania and the president of Indiana University. He was also the first president of the Legal Services Corporation in Washington, D.C. He is author, coauthor, or editor of fourteen books and holds five honorary degrees. Bill Gould remembers Thomas Ehrlich as one of the best deans Stanford Law has ever had, along with Paul Brest.

[123] Ehrlich, Stanford Historical Society Oral History Program. Ehrlich recalled that Manning announced at a faculty meeting that he was divorcing his wife and leaving the Law School at the same time—before he told his wife, who "never forgave him for this, understandably." Manning "went off to be the head of the Council on Foreign Relations in New York, left his wife, took up with a student from Stanford."

[124] Ehrlich, Stanford Historical Society Oral History Program.

[125] Ehrlich, Stanford Historical Society Oral History Program.

[126] Ehrlich, Stanford Historical Society Oral History Program.

[127] Committee on Minority Affairs Minutes, May 3, 1971, SC0154, box 1, folder 10, Black Affairs Records, Green Library Special Collections, Stanford University.

[128] Committee on Minority Affairs Minutes, May 3, 1971.

[129] Committee on Minority Affairs Minutes, May 3, 1971.

on campus, and discussed recruitment strategies.[130] The Fund was eventually created (furnished with $75,000) once the university administration conceded that "increasing the number of minority and women faculty members is a virtual precondition for durable success in many of our educational and other institutional goals."[131]

The Mid-1970s: William B. Gould IV and the Spaeth Fund

Such was the state of affairs when Professor William Gould was invited to join the law school faculty in 1972.[132] He had been a visiting professor at Harvard during the year prior.[133] Gould was hired at the same time as Barbara Babcock, Stanford Law's first woman professor; both had the full support of Dean Ehrlich, who described them as "just splendid, first rate, extraordinarily capable people."[134]

Professor Gould didn't know anyone at Stanford when he received a call "out of the blue" inviting him to visit the campus and meet with Associate Dean Mann as well as an alum.[135] Gould was "put off. . . and surprised by [the] rough-cross examination" he experienced during his interview, although he was later told it was simply "par for the course."[136] Furthermore, during a lunch with Dean Ehrlich and a tax law professor, there was a confrontation about an article Gould had written in 1962.[137] But his excellent reputation as a labor lawyer and extensive body of written work spoke for itself, and "very quickly thereafter" Gould received an offer from Dean Ehrlich to join the faculty as a fully tenured professor.[138] Gould later recalled that the law school administration was under a great deal of pressure to hire a Black professor and

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130 Committee on Minority Affairs Minutes, May 3, 1971.

131 Memo from William Miller to Deans of Schools, Directors of SLAC and the Food Research Institute, and the Dean of Undergraduate Studies, September 30, 1971, SC0154, box 1, folder 10, Black Affairs Records, Green Library Special Collections, Stanford University. This would be equivalent to approximately $575,000 today. Bureau of Labor Statistics, CPI Inflation Calculator, https://data.bls.gov/cgi-bin/cpicalc.pl.

132 "News of the School," *Stanford Lawyer* 10 (Spring 1972).

133 Bob Johnston, "School Names First Black and Woman Profs," *Stanford Law School Journal* 2, no. 7 (1971): 1.

134 Johnston, "School Names First Black and Woman Profs," 1. Barbara Babcock was a renowned expert in the study of women in the legal profession and was the first woman appointed to the permanent faculty at Stanford Law School. Before joining the Stanford faculty, she served as the first director of the Public Defender Service in Washington, D.C. (where she worked with Professor Wald, who initially recruited her to teach at Stanford). She also served as assistant attorney general for the Civil Division in the U.S. Department of Justice during the Carter administration and played a critical role in the appointment of many women and minorities to the federal bench, most notably the late Ruth Bader Ginsburg. Professor Babcock was the Judge John Crown Professor of Law, emerita, until her death in April 2020.

135 William Gould Interviews, 2018, SC0932, Stanford Historical Society Oral History Program, Green Library Special Collections, Stanford University. William Gould, phone call to author, April 20, 2023.

136 Gould, Stanford Historical Society Oral History Program.

137 Gould, phone call to author, April 20, 2023.

138 Gould, Stanford Historical Society Oral History Program; Gould, phone call to author, April 20, 2023.

a woman professor in the fall of 1972.[139] In his view, Stanford Law was "late to racial desegregation—no doubt about it" and the lack of minority faculty made the law school "inhospitable for Black and Latino students."[140]

Gould was not unfamiliar with the isolation of being the only Black lawyer in his community, however. He was the only African American student while in law school at Cornell and had grown up in an all-white neighborhood.[141] Professor Gould was "relatively light-skinned," which sometimes led to comments that would not otherwise be made in his presence, and posed a quandary for those at Stanford who wanted to hire a professor that "looked Black."[142] Dean Henderson, who became close friends with Professor Gould, noted: "Bill had a little different problem, because I think the word had to get out that he was, in fact, black, because visually it wasn't that clear. I think some of the students weren't quite sure what that meant, but very, very quickly, they knew that Bill was the real deal."[143]

On one occasion, at a meeting with the Board of Visitors that Professor Gould and some other faculty attended, a law school alum began to discuss the "superiority of the Indo-European people" and "opined emphatically that he felt Blacks were an inferior race" over dinner.[144] Gould "went out after him," and the two men had a "very emotional back and forth confrontation."[145] Dean Ehrlich championed Gould's position and declared that "he wouldn't tolerate" such racist views.[146] Ehrlich called a meeting of the faculty where he made a public statement reprimanding the discriminatory remarks.[147]

At other times, it was fellow faculty members who were hostile. Professor William Cohen, who had chaired the special committee overseeing Henderson's

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139 Gould, phone call to author, April 20, 2023.

140 Gould, phone call to author, April 20, 2023. Stanford hired its first Latino professor, Miguel Mendez, in 1977. Professor Mendez came to Stanford following a public interest litigation career as a public defender in Monterey County, deputy director of California Rural Legal Assistance Inc., and staff attorney for the Mexican American Legal Defense and Educational Fund. He played a crucial role as a trailblazer of clinical legal education, which began at Stanford in the 1970s (cf. note 48). He was well known as a leading authority on both the federal and California rules of evidence. After retiring in 2009, Professor Mendez joined the law faculty at the University of California, Davis, School of Law. He continued to serve as the Adelbert H. Sweet Professor of Law, emeritus, at Stanford until his death in May 2017.

141 Gould, phone call to author, April 20, 2023. Bob Johnston, Ed Firestone, Pete Shapiro, and Jim Tune, "William Gould: A Labor Lawyer, A Black, A Boston Red Sox Fan," *Stanford Law School Journal* 3, no. 7 (1972): 5.

142 Gould, phone call to author, April 20, 2023.

143 Henderson, Stanford Historical Society Oral History Program.

144 Henderson, Stanford Historical Society Oral History Program. Gould, phone call to author, April 20, 2023. Professor Gould recalls the dinner occurring in 1973 or 1974.

145 Gould, Stanford Historical Society Oral History Program. Gould, phone call to author, April 20, 2023.

146 Gould, phone call to author, April 20, 2023.

147 Gould, Stanford Historical Society Oral History Program.

admissions decisions, commented to Professor Gould that the administration "got [him] from a very special list."[148] Other law professors "approached [Gould's] appointment begrudgingly," or "had backward views" in his opinion. For example, Gould remembers Charlie Meyers, whom he considered to be an antagonistic, right-wing Texan, as "backsliding in [his] attitudes about desegregation of the law school."[149] And in some situations, Gould "felt [his] views were not taken into account as much as other professors would," such as when he wanted to invite a South African graduate student to attend the law school.[150] It wasn't until Gould had written letters to the *New York Times*, the diocese, and others that the student was admitted.[151]

And yet, Gould also had many positive experiences at Stanford. He enjoyed access to the school's vast resources, especially the law library; he had many more opportunities to research his ideas on labor and civil rights issues, rather than being called from crisis to crisis; he taught the school's first employment discrimination seminar to enthusiastic students; and he was able to pursue "pure litigation" and appellate work on a pro bono basis, funded by the American Civil Liberties Union of New York City, among others.[152] Gould advocated for the administration to hire more diverse faculty members, and asserted that "[i]n order for most faculties to have black law professors, they are going to have to go out looking for them."[153] Unfortunately, according to Gould, his proposal to revise—not lower—the hiring standards was met with an "unenthusiastic" response.[154]

Professor Gould's appointment as a fully tenured professor was warranted by his many achievements in practice and his record as a brilliant educator. But even more than that, Gould had what Stephen Carter calls "the right

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148 Gould, Stanford Historical Society Oral History Program. This was perhaps the same list Ehrlich took to the Committee on Minority Affairs in May 1971.

149 Gould, phone call to author, April 20, 2023. Meyers would eventually become dean (see below).

150 Gould, phone call to author, April 20, 2023.

151 Gould, phone call to author, April 20, 2023. This experience did push the administration to create a formal graduate program.

152 Gould, phone call to author, April 20, 2023.

153 Johnston et al., "William Gould," 5.

154 Gould, phone call to author, April 20, 2023. Gould, Stanford Historical Society Oral History Program. Professor Gould had a long and distinguished global career as an academic and labor rights lawyer. A prolific scholar of labor and discrimination law, he is the critically acclaimed author of eleven books and more than sixty law review articles, as well as the recipient of five honorary doctorates. He has served as Secretary of the Labor and Employment Law Section of the American Bar Association, Chairman of the National Labor Rights Board during the Clinton administration, Chairman of the California Agricultural Labor Relations Board, and most recently as Independent Reviewer on Equal Employment Opportunity for the mayor of San Francisco. Professor Gould has been a member of the National Academy of Arbitrators since 1970. He has arbitrated and mediated hundreds of labor disputes and continues to do so as of this writing. He is currently the Charles A. Beardsley Professor of Law, emeritus, at Stanford Law School and a dear mentor to the author.

paper record." In his memoir, Carter reflected: "One might have thought, and I suppose I thought it myself, that someone with my credentials would have no trouble landing a teaching job. But what people told me was that any school would be happy to have a black professor with my credentials."[155] Stanford, like many of its fellow law schools, was under immense pressure to diversify not only its student body but also its faculty. Nevertheless, the unwillingness of Gould's colleagues to reevaluate the criteria for faculty hiring clearly revealed their reluctance to fully commit to an increase in minority law professors.

Despite the dispassionate attitudes at the law school, the presence of minority professors and students continued to grow across the campus. In January 1973, a minority faculty report noted that "women and ethnic groups have accounted for more than a third of Stanford's new appointments to professorial rank."[156] Out of ninety appointments, nine Black professors joined the faculty, including one Black woman, bringing the total number of Black faculty to twenty (with four tenured).[157] Another report, sent to the Faculty's Senate Academic Council that October, commented:

While these numbers represent no dramatic advance in the representation of blacks on our faculty, they should be viewed in the context of a representation of less than one percent by blacks in our national PhD pool. The numbers do make me believe that we can anticipate a steady flow of blacks to our faculty, with an acceleration when the large increase in black undergraduate and graduate students leads to a significant increase in the number of black PhDs.[158]

A new subcommittee was established at the law school in the fall of 1973 with orders to create a similar report for the law faculty on minority admissions. The subcommittee's report advocated for a "preferential admissions program" to "further the legitimate and desirable aim of ameliorating the inequality of legal representation" and "educationally enrich" the law school.[159] Six more years would pass before the faculty eventually rejected this proposal.

At the law school, a minority scholarship fund had been established in the same year that Professor Gould was hired, 1972. The fund honored Carl

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[155] Stephen L. Carter, *Reflections of an Affirmative Action Baby* (New York: Basic Books, 1992), 58–59.

[156] Unlabeled news release, January 26, 1973, SC0193, box 27, folder 6, Academic Council Records, Green Library Special Collections, Stanford University.

[157] Unlabeled news release, January 26, 1973. Report to the Senate of the Academic Council on Faculty Affirmative Action, October 2, 1973, SC0193, box 39, folder 2, Academic Council Records, Green Library Special Collections, Stanford University.

[158] Report to the Senate of the Academic Council on Faculty Affirmative Action, October 2, 1973, Academic Council Records.

[159] Report from Law School Minority Admissions Subcommittee to Faculty, Fall 1973, SC0193, box 39, folder 2, Academic Council Records, Green Library Special Collections, Stanford University.

Spaeth, who had been dean of the law school from 1946 until 1962.[160] The project was spearheaded by two alumni, Victor Palmieri and Miles Rubin, who (again) made a generous donation of $225,000 to establish the fund.[161] The money was to be allocated as a grant on the basis of need, with a preference for minority students.[162] Despite the issuance of several grants to students in its founding years, the fund continued to grow through pledges and contributions; by the summer of 1974, its coffers had increased by $30,000.[163] In a sponsorship booklet (presumably meant for potential donors), Dean Ehrlich wrote that the fund "has been vital to Stanford's ability to attract qualified students for careers in law. . . Without such funds, most qualified minority applicants cannot attend Stanford Law School. The School is eager to provide the best legal education to all qualified minority students."[164] Ehrlich went on to declare: "Now that the initial barrier of attracting applicants has been overcome, there is no shortage of qualified minority applicants."

The Late 1970s: Minority Enrollment Decline and LaDoris Cordell

Regardless of the growth in funding at Stanford, minority enrollment at the law school began to decline. The decline was accompanied by a change in administration in 1976, with Henderson leaving (after a year of only half-time duties) and Charlie Meyers succeeding Ehrlich as dean.[165] At the same time, "[s]harp cutbacks in federal funding" contributed to a nationwide decrease in enrollment of minority students.[166] In a vicious cycle, lower numbers of minorities at the law school led fewer students to apply and if admitted, enroll at Stanford.[167]

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[160] Spaeth Memorial Scholarship Fund Booklet, n.d., Crown Library Special Collections, Stanford University. "Spaeth Fund to Benefit Minorities," *Stanford Law School Journal* 2, no. 15 (1972): 3.

[161] "Spaeth Fund to Benefit Minorities," 3. Palmieri and Rubin were the same two alumni who had given a large sum to support Henderson's recruiting efforts.

[162] Spaeth Memorial Scholarship Fund Booklet, 3.

[163] Spaeth Memorial Scholarship Fund Booklet. The fundraising effort for the Spaeth Fund paled in comparison to the money raised for the construction of the new law school buildings, which totaled $11,900,000. "Crown Quadrangle," *Stanford Lawyer* 10, no. 2 (Fall 1975).

[164] Spaeth Memorial Scholarship Fund Booklet.

[165] Henderson, Stanford Historical Society Oral History Program. Ehrlich, Stanford Historical Society Oral History Program. Judge Henderson went on to be the first black attorney in the Civil Rights Division of the U.S. Department of Justice and has served as a federal judge in the Northern District of California since 1980. During his time on the bench, he blocked enforcement of Proposition 209, although his decision was later overturned by the Ninth Circuit. Proposition 209 instituted a ban on discrimination or preferential treatment on the basis of race, sex, color, ethnicity, or national origin in public employment, public education, and public contracting, which remains in effect today and governs, among other things, admissions policies at public institutions in California, like U.C. Berkeley (Henderson's alma mater).

[166] Report to the Senate of the Academic Council on Faculty Affirmative Action, October 2, 1973, Academic Council Records.

[167] Bob Laurenson, "Women, Minorities Continue to Decline," *Stanford Law School Journal* 8, no. 2 (1977): 1.

The Manning plan was still the law school's primary minority admissions policy, although by this time the minimum PGPA was calculated by averaging the five lowest nonminority LSAT scores and GPAs from the previous year.[168] Any minority candidate within fifty points of this minimum PGPA was "substantially automatically" accepted.[169] The fifty-point margin was meant to compensate for the LSAT's "cultural bias," and students outside of this range could still be considered under "exceptional circumstances."[170]

Although Henderson was still technically in charge of the minority admissions program until his departure, the special committee (previously assigned to oversee Henderson's decisions) had assigned Assistant Dean William Keogh and Professor William Baxter to approve any candidate Henderson admitted.[171] And Baxter and Keogh were giving "concurrence less and less" to students outside of the requisite point spread.[172] This growing reluctance had a significant impact, considering that only half of the minority students admitted were within the "substantially automatic" range.[173] Any applications outside of this range were placed on hold until every other application had been reviewed; thus, admittances from this group were typically sent out late, with the unfortunate result that they reached the candidates after they had accepted offers at other schools.[174] Keogh remarked that he would approve only the "best intellectually-equipped minority" students, and Baxter admitted that he was not "looking for particular kinds of students except insofar as they have particular kinds of numbers."[175]

Henderson still felt that the law school was "headed in the right direction, but it's slow as hell" and that "Stanford [was] very good about minority admission in comparison to other schools."[176] Henderson continued to devise plans for increased recruitment, including personalized letters to admitted students written by members of BLSA.[177] However, students felt the extra responsibility of recruiting would only put them at a further disadvantage, and

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168 Stephen Samuels, "Minority Admissions Faces Questions," *Stanford Law School Journal* 6, no. 10 (1976): 4.

169 Samuels, "Minority Admissions Faces Questions," 4.

170 Samuels, "Minority Admissions Faces Questions," 4.

171 Samuels, "Minority Admissions Faces Questions," 4.

172 Samuels, "Minority Admissions Faces Questions," 4.

173 Samuels, "Minority Admissions Faces Questions," 4.

174 Jan Chichester and John Lewis, "Minority Admissions Under Fire," *Stanford Law School Journal* 7, no. 5 (1976): 1.

175 Samuels, "Minority Admissions Faces Questions," 4.

176 Samuels, "Minority Admissions Faces Questions," 4. Yale enrolled 23 minority students in a class of 170; Harvard enrolled 64 among a class of 546.

177 Samuels, "Minority Admissions Faces Questions," 4.

petitioned the administration to hire a full-time recruiter.[178]

The number of minority students at the law school continued to drop after 1974: enrollment fell from twenty-eight students in 1974, to twenty in 1975, to fifteen in 1976, to thirteen in 1977 (18 percent, 12 percent, 8 percent, and 7 percent of the student body, respectively).[179] The percentage of minority admits who chose to accept offers of admission declined as well; while the figure was relatively high at 45 percent in 1975, it dropped to 37 percent in 1976 and fell again to 22 percent in 1977.[180] While Henderson believed this drop was at least partially due to a declining interest in the study of law, he admitted that it could also be attributed to "less initiative on his part."[181]

After Henderson's departure, Professor Baxter became the sole member of the law school's admissions committee in 1977, and "was essentially responsible for the selection of the class of 1980," which certainly played a role in the abysmal minority admission and enrollment rates.[182] In response, Dean Meyers issued a statement in which he declared that he was "concerned about the number of minority persons—Blacks, Chicanos, and Native Americans—who enrolled in the first-year class in September 1976"; but he also said that there was a lack of "qualified applicants" and the number of admitted students had already reached the necessary "critical mass."[183] Meyers justified the administration's decision not to hire a replacement for Henderson because, in his view, "it would be irresponsible to appoint a full-time administrator of such a program. It would be unfair to the person appointed and it would be an unwise use of resources to make such an appointment while the decision in *Bakke* is pending."[184]

That was a reference to *Regents of the University of California v. Bakke*, 438 U.S. 265, ultimately decided by the U.S. Supreme Court in 1978. The *Bakke* decision was on the mind of the law faculty as well. Paul Brest, still a professor at the time, wrote an article in which he postulated that the use of "nonracial admissions standards" may be preferable to avoid the "dirty business" of racial inquiries and "blunt the psychological impact of being rejected—or

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178 Jan Chichester and John Lewis, "Minority Admissions Under Fire," 1. This demand was never met.

179 Samuels, "Minority Admissions Faces Questions," 4. Chichester and Lewis, "Minority Admissions Under Fire," 1. Laurenson, "Women, Minorities Continue to Decline," 1. "The Class of 1978: A Statistical Profile," *Stanford Lawyer* 10, no. 2 (Fall 1975). The class of 1978 was the largest entering class in the last five years, yet minority enrollment continued to decline.

180 Laurenson, "Women, Minorities Continue to Decline," 1.

181 Samuels, "Minority Admissions Faces Questions," 4.

182 Laurenson, "Women, Minorities Continue to Decline," 1.

183 Chichester and Lewis, "Minority Admissions Under Fire," 1.

184 Chichester and Lewis, "Minority Admissions Under Fire," 1.

accepted—under a racial criterion."[185] Yet, Brest expressed doubt that any substantial minority enrollment would occur under such standards. He wrote:

Why should a minority's claims to compensation for past discrimination be preferred to the claims of other persons—many of them white—whose present position results from past economic exploitation and other social injustices? . . . If preferential treatment based on race is not required, or is even disfavored, by principles of justice, should an institution nonetheless retain a preferential program to avoid erroneous perceptions of injustice and their harmful consequences? These difficult questions of policy and justice are as much the concern of Stanford as they are of the University of California.[186]

By 1978, Meyers had acquiesced to the demand for Henderson's replacement, and LaDoris Cordell—still a fairly recent graduate—was selected to fill the position.[187] After graduating from Stanford Law in 1974, Cordell had become the first person outside of the South to be awarded an Earl Warren Fellowship by the NAACP Legal Defense Fund, which granted her the funds to start her own practice.[188] Cordell used the money to start the first private legal practice in East Palo Alto, at the time a predominantly Black and Hispanic community.[189] Much like Henderson, Cordell shifted from East Palo Alto to campus after being appointed assistant dean; however, Cordell successfully maintained her private practice throughout her four-year tenure at Stanford.[190]

Yet, in some ways Cordell found herself in more difficult circumstances than Henderson had been. On the one hand, she had the benefit of the strong foundation laid by Henderson in the early to mid-1970s. On the other hand, Henderson had operated with the support of several faculty members and a great deal of latitude from the dean. Cordell, on the other hand, faced the challenge of working with Meyers, as well as Baxter and later Cohen, some of the most conservative members of the faculty at the time.[191] Nonetheless, Cordell successfully revived minority admissions and established Stanford Law as national leader in the enrollment of Black students.[192] She brought a fresh set of skills and a great deal of tenacity to the job, succeeding even in this precarious context.

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185 Paul Brest, "Preferential Admissions After *Bakke*," *Stanford Lawyer* 12, no. 1 (Spring 1977): 2–4. Brest wrote this article before the case reached the United States Supreme Court.

186 Brest, "Preferential Admissions After *Bakke*," 2–4.

187 LaDoris Cordell, interview with author, March 8, 2024.

188 Cordell interview, March 8, 2024.

189 Cordell interview, March 8, 2024.

190 Cordell interview, March 8, 2024.

191 Adrien Wing, interview with author, January 11, 2024.

192 Cordell interview, March 8, 2024.

In March 1979, Professor William Cohen took over as the "one man show" in admission.[193] Brest proposed to Cohen that he aimed to diversify the student body by adjusting the admissions standards, and Cohen agreed to do so—albeit only for a single year. As a result, the admission of minorities increased by 55 percent, with thirty-one students enrolled in the following year,[194] largely due to Cordell's increased recruiting efforts. She recruited even more widely than Henderson had, traveling to historically Black colleges and universities in addition to the University of California system and the Ivy League schools.[195] In the fall of 1979, Cohen stepped down as the chair of admissions after "taking much heat," and was replaced by Professor Jack Friedenthal.[196] Friedenthal supported increased diversity at the law school and was open to changes in the admissions formula:

I do feel strongly that we must maintain very high academic standards. But at the same time, within the broad range of good people out there who clearly qualify, there is flexibility. There is room for flexibility for trying to get a balance, an interesting group of people, based on what they have done and who they are and where they come from. That includes of course minorities. It's certainly not the only criterion. I do believe in the critical mass theory. For recognized minority groups I think it is helpful to them to have enough people here so that they feel they have their own community available. I think it makes people more comfortable.[197]

At the same time, an ad hoc committee on admissions policy was formed, comprised of Professors Paul Goldstein, William Baxter, Gerald Gunther, Brest, Friedenthal, and Gould. The committee met several times over the summer and interviewed students and organizations at Stanford as well as other law schools.[198] The committee recommended that the law school formally adopt an admissions policy evaluating students for diversity and not aptitude.[199] But when faculty took a vote in November 1979, they did not adopt the committee's recommendation, favoring the continuation of the Manning plan.[200] The vote was justified based on concerns that the program would not be meritocratic

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193 Julie Saulnier, "Committee Changes Admissions Policy," *Stanford Law School Journal* 9, no. 6 (1979): 1.

194 Saulnier, "Committee Changes Admissions Policy," 1. Geoffrey L. Bryan, "Minority Enrollment Increases by Half," *Stanford Law School Journal* 10, no. 1 (1979): 1. Cohen initially opposed the lower standard, "citing fear that minorities would form an identifiable bottom layer."

195 Cordell interview, March 8, 2024.

196 Bryan, "Minority Enrollment Increases by Half," 1.

197 Bryan, "Minority Enrollment Increases by Half," 1.

198 Bryan, "Minority Enrollment Increases by Half," 1.

199 Bryan, "Minority Enrollment Increases by Half," 1.

200 Janice Rhodes, "Faculty Rejects Admission Plan," *Stanford Law School Journal* 10, no. 2 (1979): 1.

and its implementation would generate costs (especially in terms of the faculty's time).[201] Professor Baxter was the sole dissenter on the committee, and voted with the majority of the faculty based on similar considerations: "Thinking about diversity is not a change . . . The difference in this report is what we'd be willing to pay for diversity—even sacrificing intellectual horsepower."[202]

The faculty's vote revealed tacit assumptions about their "meritocratic" system. The Manning plan was understood as a fair and neutral method of determining which students deserved admission to Stanford. Scholars then and now have questioned whether a test, like the LSAT or a law school exam, is even capable of measuring "functional merit," or the ability to do the work of a lawyer.[203] Yet, the faculty feared that abandoning the Manning plan would allow students to "cheat the meritocratic system," a criticism the late Lani Guinier criticized as problematic and circular: "It blames the canaries for the poisonous air in the defective mine we have built. In the defective, poisonous mine that is our current meritocracy, 'merit' is defined by a set of characteristics that primarily mirror wealth. And affirmative action adapts to and operates within this meritocracy without disturbing its fundamental assumptions."[204] Henderson also recognized this issue as early as 1970. He believed that "while law schools generally didn't set out to discriminate against minorities, using the same criteria for judging minority and non-minority applications—especially the heavy emphasis on the LSAT—produced the same result."[205]

The late seventies were, in many ways, a troubling time for Black students at Stanford Law. The appointment of Dean Meyers and the power granted to Professor Baxter and Assistant Dean Keogh resulted in an initial sharp decline in the enrollment of minority students. The shift to a single-member admissions team, combined with the persistence of the Manning plan, resulted in a self-perpetuating cycle of decreasing diversity. Meyers's refusal to hire a full-time recruiter in the year after Henderson's departure also revealed a continuing reliance on student labor and an unwillingness to provide the necessary support

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[201] Rhodes, "Faculty Rejects Admission Plan," 1.

[202] Rhodes, "Faculty Rejects Admission Plan," 1. Baxter was not a supporter of affirmative action programs.

[203] Guinier, *The Tyranny of the Meritocracy*, 39.

[204] Guinier, *The Tyranny of the Meritocracy*, 39–40. Ironically, Guinier herself came from an elite family. Lawrence Graham explains: "Guinier is one of those Brooklyn names that are heard at gatherings of socialites, businesspeople, educators, and old families." Guinier's mother, Doris, had "all the right credentials. . . but her credentials are Brooklyn ones—not Harlem ones. . . She was on the board of directors of the Y, she went to all the right schools, belonged to the right church, married the right husband, summered in the right place. She even had the right relatives." Her father attended Harvard (as its only Black student at the time) and later taught at both Harvard and Columbia. Lawrence O. Graham, *Our Kind of People: Inside America's Black Upper Class* (New York: Harper, 1999), 265–66. Guinier became the first woman of color to be tenured at Harvard Law School and remained on the faculty there until her death in 2021. Her son, Nikolas Bowie, is the Louis D. Brandeis Professor of Law at Harvard.

[205] Johnston, "Minority Admissions," 1.

for diversity to flourish. Instead, the administration relied on its familiar excuses: lack of applicants, lack of funding, and Stanford's apparent superiority over other elite schools in affirmative action progress. The *Bakke* decision became a new rationalization for the stagnation of minority enrollment. Brest's rumination about the utility of a preferential program "to avoid erroneous perceptions of injustice and their harmful consequences" echoed the underlying message of the minority hiring plan left blank in 1970; both were proclamations merely intended to preserve the image and reputation of the institution, rather than functionally and practically improving the lives of its Black students. Indeed, if it were not for the work of LaDoris Cordell during these years, the presence of a Black community at Stanford Law would have been at best insignificant and at worst nonexistent. Her tireless efforts to recruit and support Black students, much like Henderson had before her, were instrumental during this difficult time and ensured that minority enrollment not only continued but flourished.[206]

Black Women on the Faculty: The Long Road to Diversity at Stanford

The efforts made throughout the 1970s to desegregate Stanford Law School represented significant progress toward a more diverse student body and faculty; yet, the inclusion of Black women on the faculty was particularly delayed. Twenty-five years after Sallyanne Payton started at the law school, Stanford appointed a Black woman to its permanent faculty for the first time: Kim Taylor Thompson was the first woman of color to be appointed to a tenure-track position at the law school in 1991.[207] Two years later, Professor Taylor Thompson was joined by Linda Maybry.[208]

In October of 1998, Professor Tom Heller and Paul Brest (dean at the time) asked Maybry to meet with Coca-Cola representatives to secure a grant for a program in international business law, Maybry's specialty.[209] Yet when the grant was secured, not only was Maybry not asked to be a part of the program, she wasn't even notified the grant had been awarded.[210] At the next faculty

[206] In 1982, Cordell became the first Black woman to serve as a judge in Northern California. She spent nineteen years on the bench, and later served on the Palo Alto City Council following a grassroots campaign that accepted no monetary donations. She has long played an important role in local politics and has spent much of her career making real changes for the people in her community. She is a talented artist, musician, and cartoonist.

[207] Kim A. Taylor Thompson, interview with Mary Murphy (Pembroke Center Archivist), Brown University, September 21, 2018. Professor Taylor Thompson's appointment came at the same time as the Anita Hill hearings and Clarence Thomas's nomination to the Supreme Court. She later reminisced: "It's funny, I'm now remembering that Anita had called me during the summer and was saying, you know, 'Are you ready? Are you feeling ready for teaching?' Because she was teaching then. And I said, 'Yeah I think so.' And she said, 'You know, I just really am envious of you beginning this thing that's new.'"

[208] Linda Maybry, *Falling Up to Grace: A Memoir* (Palo Alto, CA: Faultline Press, 2012), 66. Taylor Thompson left Stanford shortly after Maybry's arrival. She is currently an emerita professor at New York University School of Law.

[209] Maybry, *Falling Up to Grace*, 85–88.

[210] Maybry, *Falling Up to Grace*, 88.

meeting, Maybry gave the following statement:

I want this faculty to think about the history of faculty of color at the law school and what it says about how we have been treated—how we have been marginalized, excluded and demeaned. How we have been invisible. You know, it takes 250% of who we are to do this job well—and we don't all do it well. You can't ask someone to give that much and then treat them this way. Some of you have told me that what happened to me had nothing to do with my race or my gender—that some white men also have been marginalized and excluded. My position is that this should not happen to anyone on faculty. But it does. And it happens consistently to people of color. And when it happens to those of who are hanging on at margins by the skin of our teeth, the consequences are devastating.[211]

Maybry resigned two months later. Her resignation was followed by student protests and press interest.[212]

Another three decades would pass before a Black woman would actually obtain tenure. In 2023, Professor Rabia Belt became the first Black woman to receive tenure as a law professor at Stanford. That such a development did not occur until now, fifty-five years after the law school's first promises of diversity, is both startling and concerning. And yet, it also inspires hope that as the world continues to evolve, so too will Stanford Law School.

I must acknowledge that the conclusion of this article is abrupt. Indeed, there is much more to be said about each of these women and the intervening years for which this article does not allow adequate space. In mentioning their stories, I intend to expose the gaps in both historical coverage and the deeper experiences of these women (in addition to others not included here). There is much more to explore about the journeys of Black students, as well as other minority students—at the law school, on the broader campus, and at other law schools across the country. These gaps merit further attention, and I look forward to expanding on the narratives introduced here (and those yet to be discovered) as this research progresses.

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[211] Maybry, *Falling Up to Grace*, 89.

[212] Michael Moline, "Stanford Students Protest Professor's Departure—Officials Decline to Comment on the Resignation of Lone Black Woman," *Stanford Daily* (1999). Professor Maybry would later join a class-action complaint against Stanford for alleged discrimination, but the suit remained unresolved upon her death in 2007.

DOUGLAS C. SANGSTER*

The Codification of Independent Living in California State Law

I began with the Department of Rehab and it was my first job in a large bureaucracy. After about a month, I felt kind of like a bureaucrat. I thought "What's happening?" What I really am is an "advocrat," half advocate and half bureaucrat. That's what we need to be; we need to be advocates in every part of our systems. It works.

Ed Roberts, 1979[1]

Lynn Thompson wanted to live independently. Living in the Sepulveda neighborhood of Los Angeles, California during the 1970s, Thompson experienced muscular dystrophy; the agony was so excruciating that she had her legs disconnected from her hips to alleviate some of the pain. She was classified by the Social Security Administration (SSA) as "totally disabled" and incapable of engaging in "substantial gainful activity." She received welfare benefits that included Medi-Cal, attendant care, and Supplemental Security Income (SSI). After paying $285 for rent she had very little spending money, and so she started working as a telephone dispatcher where she earned $492 per month. In 1976, an individual could not earn more than $230 per month

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1 "Draft of Roberts' Speech in Dallas, Texas," April 25, 1979, p. 10, in Edward V. Roberts Papers, 1975–1998, The Bancroft Library, UC Berkeley, BANC MSS 99/34, Carton 1. Edward V. Roberts often referred to himself as "Ed," as did his friends and family. I use the name "Ed" in this article as that was how he chose to self-identify.

and still receive benefits. She did not hide her employment—on the contrary, it was publicized in local newspapers—but she also did not report it to the SSA. Years passed and when the SSA finally did find out, it rescinded her benefits and mandated that Thompson pay back the money for those benefits, amounting to approximately $10,000. Facing a crippling debt and a loss of independence, Thompson felt trapped. In February of 1977, seeing no way out, she killed herself.[2] In her recorded message before her suicide, Thompson explicitly blamed the SSA for her final fatal decision:

> Give Social Security a message for me. Tell them thanks for being the straw that broke the camel's back . . . It would be great if I could work and support myself and still receive the full attendant's benefits and some kind of medical benefits . . . If I ever get to the point where I can make $1,200 or $1,500 a month, fine. They can keep their money and the medical insurance. I wouldn't need them then. But for $492 of salary it's just not enough to pay these expenses.[3]

The plight of Lynn Thompson illustrates the centrality of a medical assessment when establishing a disability under the law. Disability can be understood through two lenses: (1) the internal view of the individual experiencing the condition, and (2) the external view of medical assessments and examinations by medical professionals and administrators.[4] Activists have argued that the internal view should be prioritized over any external view, claiming that those experiencing a physical or medical condition are best equipped to assess it and prescribe solutions to mitigate the condition, such as benefits or accommodations.[5] However, throughout American history and within contemporary legal understandings of disability, medical evaluations

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[2] Douglas A. Martin, National Leader in Reforming Social Security and Medicare Disability Programs; ADA/504 Compliance Officer at UCLA; First Executive Director of the Westside Center for Independent Living, an oral history conducted by Lou Breslin in 2002 in *Shaping National Disability Policy: Transportation Access and Social Security Reforms*, Regional Oral History Office, The Bancroft Library, University of California, Berkeley, 2004, 124–125; "Coalition Urges Moratorium," *Paraplegia News*, April 1978, 27; Terry Brickley, "Handicapsules," Column, *Santa Cruz Sentinel*, May 22, 1978, 4; Terry Brickley, "Handicapsules," Column, *Santa Cruz Sentinel*, May 30, 1978, 13; Sonny Kleinfeld, "Declaring Independence in Berkeley," *Psychology Today*, August 1979, in the Deborah Kaplan Papers at the Bancroft Library, University of California, Berkeley, BANC MSS 99/369, Carton 1; Social Security, Substantial Gainful Activity, https://www.ssa.gov/oact/cola/sga.html.

[3] Terry Brickley, "Handicapsules," Column, *Santa Cruz Sentinel*, May 30, 1978, 13.

[4] I take this internal/external distinction from Amartya Sen, *The Idea of Justice* (Cambridge, MA: Harvard University Press, 2009), 284–285.

[5] Douglas Martin, oral history, Bancroft Library, 119; Judith Heumann, "Pioneering Disability Rights Advocate and Leader in Disabled in Action, New York: Center for Independent Living, Berkeley; World Institute on Disability; and the US Department of Education 1960s–2000," an oral history conducted by Susan Brown, David Landes, and Jonathan Young in 1998–2001, Regional Oral History Office, The Bancroft Library, University of California, Berkeley, 2004, 60–61; Ed Roberts, oral history in *University of California's Cowell Hospital Residence Program for Physically Disabled Students, 1962–1975: Catalyst for Berkeley's Independent Living Movement*, Regional History Office, The Bancroft Library, 27–28; Michael Oliver, *Understanding Disability: From Theory to Practice*, 2nd ed. (New York: Palgrave Macmillan, 2009), 35, 171–172; Joseph P. Shapiro, *No Pity: People with Disabilities Forging a New Civil Rights Movement* (New York: Three Rivers Press, 1994), 51–52.

are often essential to establish a legal disability and dispositive in judicial opinions and administrative decisions determining disability.[6] How Lynn Thompson experienced muscular dystrophy and what she felt she could do with it (the internal view), as opposed to how others in medical and administrative apparatuses viewed what she could do (the external view), is a tension present in many cases for those considered disabled. Thompson's plight reveals the stark and at times devastating relationship between ability and work when defining "disability" as a legal category. Here, what determined whether Thompson was disabled was her earning capacity—by earning more than $230 she was deemed no longer disabled before the law. Nothing about her physical ability had changed; she still suffered from muscular dystrophy and required attendant care. However, her income came to define her as no longer disabled and hence no longer eligible to receive the benefits necessary to live and work as she had been doing.

Thompson's case emphasizes the connection between an individual's abilities and the environment around them—what is called the distinction between the medical and social models of disability. Many scholars have slightly different definitions of each model, but the main point is that the medical model seeks to change the person, while the social model seeks to change the environment.[7] In this essay, I will explore the extent to which the shift from the medical model to the social model is manifested historically by analyzing the performance of important actors in this shift such as activists, state officials, state institutions, and private health care providers in California during the period from 1954 to 1980.

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[6] Oliver, *Understanding Disability*, 64; Deborah Stone, *The Disabled State* (Philadelphia, PA: Temple University Press, 1984), 68–89; Craig Konnoth, "Medicalization and the New Civil Rights," *Stanford Law Review* 72 (2020): 1165, 1172, 1175–1184; Deirdre M. Smith, "Who Says You're Disabled? The Role of Medical Evidence in the ADA Definition of Disability," *Tulane Law Review* 82 (2007): 1, 4–5; Frank S. Bloch, "Medical Proof, Social Policy, and Social Security's Medically Centered Definition of Disability," *Cornell Law Review* 92 (2007): 189; Keith Wailoo, *Pain: A Political History* (Baltimore, MD: Johns Hopkins University Press, 2014), 45.

[7] Samuel R. Bagenstos, *Law & the Contradictions of the Disability Rights Movement* (New Haven, CT: Yale University Press, 2009), 18–20; Samuel R. Bagenstos, *Disability Rights Law: Cases and Materials*, 2nd ed. (St. Paul, MN: Foundation Press, 2014), 4; Edward D. Berkowitz, *Disabled Policy: America's Programs for the Handicapped* (New York: Cambridge University Press, 1987), 8–9; Eric Garcia, *We're Not Broken: Changing the Autism Conversation* (New York: Harvest, 2022) 44, 111; Paul K. Longmore and Lauri Umansky, "Introduction," in *The New Disability: American Perspectives*, ed. Paul K. Longmore and Lauri Umanski (New York: New York University Press, 2001), 12; Ruth O'Brien, "From a Doctor's to a Judge's Gaze: Epistemic Communities and the History of Disability Rights Policy in the Workplace," *Polity* 35 (April 2003): 329, 337; Oliver, *Understanding Disability*, 42–43; Larry M. Logue and Peter Blanck, *Race, Ethnicity, and Disability: Veterans and Benefits in Post-Civil War America* (New York: Cambridge University Press, 2010), 1–2; Harlan Hahn, "The Politics of Physical Differences: Disability and Discrimination," *Journal of Social Issues* 44 (1988): 39–40; Sharon Barnartt, Kay Schriner, and Richard Scotch, "Advocacy and Political Action," in *Handbook of Disability Studies*, ed. Gary L. Albrecht, Katherine D. Seelman, and Michael Bury (Thousand Oaks, CA: Sage Publications, 2001), 430–431; Liz Moore, "I'm Tired of Chasing a Cure," in *Disability Visibility: First-Person Stories from the Twenty-First Century*, ed. Alice Wong (New York: Penguin Random House, 2020), 75.

This essay argues that disability as a legal concept shifted from an emphasis on work, welfare, and rehabilitation to a focus on engagement, inclusion, and assimilation in all aspects of life through the independent living movement. It does so by demonstrating how activists worked against and with state officials in state institutions to alter the conception of disability in California state law. These interactions between activists and state institutions show a sharp distinction between rehabilitative medical-based treatments of disability and alterations of social environments. University activism transformed into legislative advocacy and the passage of Assembly Bill 204 in 1979, codifying independent living in California state law. In 1950, Californian state institutions sought to alter the individual with the disability; after the 1960s and 1970s, those institutions such as the California Department of Rehabilitation (CADR) began to understand disability as a product of social environments. Disability theorists have argued over the extent to which disability should be attributed to medical conditions and social environments. Disability activists were having this debate in their daily lives, both among themselves and with the institutions and systems surrounding them.

Part I: Cowell Hospital and the Activist Origins of Independent Living

The creation of a residence for students with disabilities in Cowell Hospital at Berkeley in the early 1960s and the development of the Independent Living Movement in the late 1960s and early 1970s both expanded the autonomy of those considered disabled. An examination of the CADR, Cowell Hospital, and the Physically Disabled Students' Program (PDSP) contributes to a more nuanced understanding of the relationship between state institutions and people with disabilities. State officials could serve as both obstacles and conduits for access and opportunity depending on their choices. They often served as vital resources for people seeking to attend university who had been previously limited by those very same institutions. Disability activists who entered CADR in the 1970s would learn from their experience at university in the 1960s in creating opportunities for the disabled community in the last quarter of the twentieth century. The activism and advocacy of students with disabilities in California during the 1960s and 1970s offers insight into how social conceptions of disability could change, while at the same time showing the stark reality of a lived experience with a physical impairment that would not be altered along with that social conception of disability. Institutions and systems may be altered, but it often takes internal actors and external activists to shape those entities in ways that improve the lives of those with disabilities.

Rather than a simple state versus activists binary, the experience at UC Berkeley in Cowell Hospital and the Physically Disabled Students' Program during the 1960s and 1970s shows how state institutions and officials can also be important facilitators of change.

A. The California Department of Rehabilitation and Cowell Hospital

The relationship between CADR and disability activists in the 1960s was multifaceted. First, and arguably foremost, CADR played an important role in funding the higher education of those considered disabled. CADR provided books, tuition, and transportation for students considered disabled attending university. Budget allocation for these services would have a dramatic effect on the educational experience of students with disabilities. Furthermore, CADR was instrumental in providing the funding necessary to convert the third floor of Cowell Hospital into a residence for students with disabilities. In these ways, CADR was an essential entity in creating and expanding the possibilities for those with disabilities seeking higher education in the 1960s and 1970s. However, CADR would also place limits on autonomous decision-making of students residing at the hospital. Cowell was where the activists and state institutions would collide, challenging each other's conceptions of what it meant to be disabled and the role the state would play in providing resources and services.

Cowell Hospital was a facility under the umbrella of the Student Health Service at UC Berkeley (SHS). The SHS started in the first decade of the twentieth century after the 1906 earthquake and served as an impetus for a health care system at the university. During its first twenty years, the SHS was located in a small, brown-shingled house on College Avenue that was equipped with twenty beds. Alumnus Ernest V. Cowell died and left $250,000 to UC Berkeley to build a hospital. In the late 1920s, the university hired Arthur Brown, Jr., who designed Coit Tower, to be the architect for Cowell Hospital. The hospital opened its doors to patients in 1930.[8] It was in this hospital that students with disabilities would first arrive and live while attending UC Berkeley.

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[8] Dorothy S. Harvey "A Brief Summary of the Early Years of SHS," Medical Record Department, 1937–1972; Margaret Alter, "Memories of a Cowell Nurse," *California Monthly*, January 1954, 17–18, 31–33; "UC Hospital Busy Serving Student Body," *Berkeley Daily Gazette*, May 6, 1954; Robert T. Legge, "University of California Students' Health Center," reprint from *The Pacific Coast Journal of Nursing* 27, no. 1 (January 1931); Robert T. Legge, "A Quarter of a Century of Health Work in the University of California Health Service," reprint from *The Journal-Lancet* 60, no. 5 (May 1940): 236; Ruby Cunningham, "Cowell Memorial Hospital," *The Prytanean*, January 1932, Berkeley, California; "50 Years of Service: University Student Health History," *The Daily Californian*, February 1, 1957, 17; "50-Year Record of U.C. Hospital Hailed," *Oakland Tribune*, February 3, 1957; "Hospital Addition Dedicated," *University Bulletin* 9, no. 8, December 5, 1960; "The Way It Was: Images of Berkeley's Architectural Heritage," *Berkeley Voice*, June 29, 1989. All materials relating to the history of Cowell Memorial Hospital and the University of California, Berkeley Student Health Service, located in Bancroft Library, UC Berkeley, CU-527.

Dr. Bruyn had the idea of housing Ed Roberts in the Cowell Hospital as a makeshift dorm room that would allow him to attend school.[9] For Bruyn, if a student was accepted based on academics, they could and should be able to attend UC Berkeley, and there was an entire wing going unused on the third floor of the hospital. CADR played an important role in establishing Cowell as a home for students with disabilities by assisting in recruitment and funding for refurbishing the wing to house students with disabilities. Ed Roberts would be the first student with a disability to live in Cowell Hospital and attend UC Berkeley, starting in 1962.[10]

Ed's acceptance at UC Berkeley and his residence at Cowell illustrates the double-sided nature of CADR and state institutions. Bruyn was a state official representing the public institution of the University of California and a medical expert who was crucial in helping Roberts receive a Berkeley education. When Ed and his mother, Zona, went to visit Berkeley and Cowell, Bruyn gave them hope that an education for Ed was possible, saying:

> You people who were in the polio epidemic are getting to be of college age now, and you haven't had a chance to go to college, and you really should have that chance. It's getting to be time to do that. This is a student-supported health center, so it can't cost the students any money for you to go to school here, or to live in Cowell. So we'd have to figure out a way for this to be paid for, but I think you could live in Cowell Hospital.

That was a transformative position and experience, according to Zona. Reflecting on that time, she said, "Just those few words from Henry Bruyn opened up a whole door for us that had been seemingly closed. How we were going to do this, or how we were going to get there, I didn't know. But with those words from Henry Bruyn, things began to happen."[11] State institutions certainly created some obstacles for those with disabilities seeking opportunities, but they also opened doors.

Ed Roberts had been at Cowell for approximately six months when Bruyn received a call from a doctor in Martinez. The doctor said that he had a patient who would be a good candidate for the disability program in Berkeley. Bruyn said they did not have a disability program, but that there was a new student

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[9] Henry Bruyn, "Director, Student Health Services, 1959–1972," an oral history conducted in 1994–1995 by Susan O'Hara in UC Berkeley's Cowell Hospital Residence Program: Key Administrators and California Department of Rehabilitation Counselors, Regional Oral History Office, The Bancroft Library, University of California, Berkeley, 2000, 5–6; Roberts, oral history, 84–86; Timothy Pfaff, *California Monthly*, 1.

[10] Henry Bruyn, oral history, 4–12; Henry Bruyn, "Disabled Students Live-In Program," memo as Director of Student Health Service, Cowell Memorial Hospital, no date, in Herbert Willsmore Papers, The Bancroft Library, BANC MSS 99/249c.

[11] Edward V. Roberts, oral history, 6–10; Zona Roberts, oral history, 84–85.

with disabilities, and he was doing well at the university. The Martinez doctor asked Bruyn to come visit him in Contra Costa County Hospital.

When Bruyn arrived, the doctor took him into a room where there were four people with disabilities. Three were watching television, while the fourth was surrounded by books and listening to French broadcasts on the radio. Bruyn asked if that lone figure was Hessler, and the doctor confirmed that it was. Then and there, before Bruyn had even talked to Hessler, Bruyn told the doctor that Hessler was accepted based solely on that contrasting image—the singular individual surrounded by books and listening to French radio programs.[12]

Services provided at Cowell included a private room, three meals per day, custodial service, towels, maintenance of standard utilities, orderly and nursing care on a twenty-four hour basis, part-time services of a registered nurse, services of a social worker aide, and all staff had to knock before entering an individual's private room and receive permission to enter.[13] Despite these services, students would still consider the hospital wing to be their dorm.

The shift from hospital ward to dormitory floor could be seen in the aesthetic of Cowell's third floor. When Ed Roberts moved into the hospital in 1962, it was a sterile hospital wing. By 1970, it had converted into a dormitory straight out of the 1960s. Incense and marijuana smoke filled the air, with candles placed around creatively draped tie-dyed sheets and Indian bedspreads. A pool table and large dining table surrounded by free-flowing psychedelic painting schemes served as gathering spots. Afghan blankets and bookshelves were added to the rooms of students. As more students began to live at Cowell, parties became common and added to tension with the hospital staff.[14]

CADR also funded the education of those considered disabled, but the extent to which this funding was conditional on CADR rules and standards was contested by those with disabilities receiving it. Lucile Withington was the CADR counselor at Cowell from 1969 to 1971 and represented the interests of the state institution providing the funding. Ed Roberts was the

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[12] Henry Bruyn, oral history, 7–8.

[13] "Cowell Rehabilitation Program," interdepartmental memo of Student Health Service, September 26, 1969, in Herbert Willsmore Papers, The Bancroft Library, BANC MSS 99/249c.

[14] Edna Brean, "Nurse Coordinator, Cowell Residence Program, 1969–1975," an oral history conducted in 1994–1995 by Susan O'Hara in UC Berkeley's Cowell Hospital Residence Program: Key Administrators and California Department of Rehabilitation Counselors, Regional Oral History Office, The Bancroft Library, University of California, Berkeley, 2000, 40–42; Charles A. Grimes, "Attendant in the Cowell Residence Program, Wheelchair Technologist, and Participant/Observer of Berkeley's Disability Community, 1967–1990s," an oral history conducted in 1998 by David Landes, Regional Oral History Office, The Bancroft Library, University of California, Berkeley, 2000, 57–63.

main representative of the activists who argued that the funding should not be conditional on academic performance.

Roberts does not mince words when reflecting on his experience with Withington—he explicitly refers to her as "the villain," and that even on her best day she "may not have been a very nice person." He took issue with the rules and standards she set as prerequisites for funding. She demanded that students provide her with their grades at the end of every semester in order to continue to receive support from CADR. Roberts was frustrated by these new rules and the threatening nature with which Withington implemented them, as she would threaten to revoke money if they were late providing her with their grades or did not provide them at all. He explicitly states that his effort to reach out to the press was an attempt to pressure Withington and CADR through vilification. Roberts and his fellow activists succeeded; Withington was transferred.[15]

As one might expect, Withington's recollection of this episode differs greatly from Roberts's. For her, it was a matter of providing funds to those who would appreciate them and take advantage of the opportunity, rather than arbitrarily depriving certain students of an education. According to her, Don Lorence and Larry Biscamp were two students receiving funding from CADR and they were not attending class or earning a GPA high enough to deserve the help from CADR. She saw the funding and the beds at Cowell as a zero-sum situation: every person there was taking the place of another individual considered disabled and therefore should fully utilize the educational experience and opportunities they had been provided through CADR funding. If they were not going to attend class and earned a failing GPA, they should leave and make room for someone else who would better appreciate the opportunity.[16]

Ed Roberts appeared to attribute malice when perhaps there was a genuine concern from Withington to make the most of the funding from CADR. In turn, Withington was perhaps too strict in her implementation of rules and standards for students. If they were not expelled or punished by the university, why was it in her power to impose different standards on the students than their peers who did not receive the funding? This adversarial exchange was less about which side was right and more about the extent to which state funding was conditional. Roberts and Withington were fundamentally arguing over whether and how CADR funding should be allocated. The question at the

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15 Edward V. Roberts, oral history, 35–39; Timothy Pfaff, *California Monthly*, 3.

16 Lucile Withington, "Department of Rehabilitation Counselor, Cowell Residence Program, 1969–1971," an oral history conducted in 1994–1995 by Susan O'Hara in UC Berkeley's Cowell Hospital Residence Program: Key Administrators and California Department of Rehabilitation Counselors, Regional Oral History Office, The Bancroft Library, University of California, Berkeley, 2000, 85–87.

heart of their struggle appears to be whether state funding for vocational education was a right or a privilege. Roberts argued that it was a right and that Withington's intervention violated that right. Withington argued that funding was a privilege earned through high standards and achievement.

This early conflict between Roberts and Withington demonstrates the shades of gray in the relationship between CADR and the people it sought to help. Although CADR provided funding, it could also impose restrictions to which others who were not considered disabled were not subject. CADR was assisting in expanding capabilities and opportunities of those with disabilities, but the activists argued that the services and resources were simply establishing an even playing field rather than special treatment.

For Dr. Henry Bruyn, CADR was vitally important in establishing Cowell through its funding for nurses, tuition, housing, and devices, as well as recruiting candidates for the program. However, he recognized the ambiguity of what exactly Cowell was: both a hospital and a residence. At an apartment or dorm, the residents can come and go as they please and have extensive autonomy over what they do and how they do it. If they wish to smoke, or invite people over, or arrive home late at night, that is their prerogative. A patient in a hospital does not have that same autonomy. While at the hospital, they are subject to the rules and control of medical professionals. These were college students who threw parties with alcohol and marijuana, and yet they were technically on the third floor of a hospital. Their attendants were also in the hospital wings of Cowell taking food from the kitchen upstairs to their clients, and the nurses took issue with scruffy tie-dye clothing—what Bruyn called "goodwill chic."[17] Here was a fundamental difference in how the medical and public professionals saw the residents on the third floor of Cowell and how the residents saw themselves. The medical professionals viewed them as patients in need of care, and subject to the rules of nurses and CADR counselors, while the residents themselves saw their situation as students in a dorm like any other Berkeley student.[18] Bruyn saw the conflict between CADR and the students in the Withington-Roberts clash as an extension of this dynamic. Settling on an understanding of exactly what Cowell was and who had control of the third floor was a prolonged and difficult process. The compromise eventually worked out allowed the residents more autonomy than patients, although less than students.[19]

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[17] Henry Bruyn, oral history, 11–12.

[18] Karen Topp Goodwyn, "Department of Rehabilitation Counselor in Berkeley, 1972–1983," an oral history conducted in 1997–1998 by Mary Lou Breslin in UC Berkeley's Cowell Hospital Residence Program: Key Administrators and California Department of Rehabilitation Counselors, Regional Oral History Office, The Bancroft Library, University of California, Berkeley, 2000, 125.

[19] Henry Bruyn, oral history, 23–24; Zona Roberts, oral history, 106–107, 127.

Cowell was not just a waystation in group consciousness,[20] it was a marked shift away from the medical model and toward the social model. The students with disabilities were advocating for accommodations that allowed them to pursue higher education within the same parameters as other students: in dorms, with autonomy over their living space, and academic standards left to the university to administer. CADR, as a California government institution, represented both the push and the pull the state had in this process by both providing the funding and facilities but then setting standards and conditions for those provisions.

Cowell was also where a sense of possibility developed through education and independence. Those with disabilities at this time saw education that was subsidized by state institutions like CADR as an opportunity to engage in their communities and live fulfilling lives with their disabilities. After becoming paralyzed in a car accident at the age of nineteen, Herbert Willsmore realized that he would need to use his mind to make a living if he could not do so with his body, saying "I knew that I couldn't make my living with my body any longer. So I thought, Well, this is an opportunity to use my brain." Eleanor Smith, a medical expert and nurse who specialized in rehabilitation, made Willsmore aware of the Cowell residence option, and a letter from Henry Bruyn started his process of enrollment at the university.[21] The emphasis on education and mental capacity was often cited as an avenue forward for opportunity after experiencing a physical impairment.[22]

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[20] For a good analysis of the emergence of political activism and the development of the Rolling Quads, see Scot Danforth, "Becoming the Rolling Quads: Disability Politics at the University of California, Berkeley, in the 1960s," *History of Education Quarterly* 58, no. 4 (November 2018): 506–536.

[21] Herbert R. Willsmore, "Student Resident at Cowell, 1969–1970, Business Enterprises Manager at the Center for Independent Living, 1975–1977," an oral history conducted in 1996 and 1999 by Susan O'Hara in *University of California's Cowell Hospital Residence Program for Physically Disabled Students, 1962–1975: Catalyst for Berkeley's Independent Living Movement*, Regional Oral History Office, The Bancroft Library, University of California, Berkeley, 2000, 156–159; "Autobiographical Summary," Herbert Willsmore, no date, 1–3, in "Herbert Willsmore Papers," The Bancroft Library, BANC MSS 99/249c.

[22] Lynn Kidder, "They Fought Disabilities and Won," *Daily Ledger*, May 2, 1982, 11 (speaking of John Hessler's resolve to get an education after his paralysis); Catherine Campisi, "Leader in Higher Education and Disabled Student Services; Deputy Director and Director, California Department of Rehabilitation," an oral history conducted by Sharon Bonney in 2001, in *Rehabilitation, Higher Education, and Independent Living Services in California*, Regional Oral History Office, The Bancroft Library, University of California, Berkeley, 2004, 45; Brenda Premo, "Founding Director, Dayle McIntosh Center in Orange County; Member, National Council on Disability; Director, California Department of Rehabilitation," an oral history conducted by Kathy Cowan in 2001, in *Rehabilitation, Higher Education, and Independent Living Services in California*, Regional Oral History Office, The Bancroft Library, University of California, Berkeley, 2004, 79; Ed Roberts, oral history, 4, 29; Judith Heumann, "Pioneering Disability Rights Advocate and Leader in Disabled in Action, New York: Center for Independent Living, Berkeley; World Institute on Disability; and the US Department of Education 1960s–2000," an oral history conducted by Susan Brown, David Landes, and Jonathan Young in 1998–2001, Regional Oral History Office, The Bancroft Library, University of California, Berkeley, 2004, 49–50; Hale Zukas, "National Disability Activist: Architectural and Transit Accessibility, Personal Assistance Services," an oral history conducted in 1997 by Sharon Bonney in *Builders and Sustainers of the Independent Living Movement in Berkeley, Volume III*, Regional Oral History Office, The Bancroft Library, University of California, Berkeley, 2000, 100–101; Ed Roberts called education his "path to freedom," in Timothy Pfaff, *California Monthly*, February 1985, retyped story by Minnesota's Governor's Council on Developmental Disabilities, 1.

The activism of students with disabilities within UC Berkeley was an explicit and direct origin of the Independent Living Movement. The students used the skills, knowledge, and cohesion they had learned to probe different avenues of developing organizations and institutions that would contribute to a wider impact on disability issues across the state and nation. John Hessler and Ed Roberts took their experience with the university administration and CADR at Cowell Hospital and used it to establish new organizations that would expand the services and accommodations developed while attending UC Berkeley. The first of these entities would be the Physically Disabled Students Program (PDSP) at the university.

B. The Physically Disabled Students Program

John Hessler founded the Physically Disabled Student Services at UC Berkeley during the 1960s. Services offered included financial aid, attendant referral and employment, and wheelchair maintenance. This expansion was possible due to federal funding through the Department of Education's Rehabilitation Services Administration.[23] Starting in 1969, Hessler led the movement to establish an organization that would implement the lessons of the Cowell experience.[24] The PDSP was set up in a building on Durant Avenue, a block away from the university campus above what was then and still now the local favorite Top Dog eatery. PDSP started primarily as an accommodating physical space where staff fixed devices, such as wheelchairs, and established an

[23] Hale Zukas, "National Disability Activist: Architectural and Transit Accessibility, Personal Assistance Services," an oral history conducted in 1997 by Sharon Bonney in *Builders and Sustainers of the Independent Living Movement in Berkeley, Volume III*, Regional Oral History Office, The Bancroft Library, University of California, Berkeley, 2000, 118–119, 135–136; James Donald, Student Resident At Cowell, 1967–1968, Attorney and Deputy Director of The California Department Of Rehabilitation, 1975–1982," an oral history conducted in 1998 by Kathryn Cowan in *University of California's Cowell Hospital Residence Program for Physically Disabled Students, 1962–1975: Catalyst for Berkeley's Independent Living Movement*, Regional Oral History Office, The Bancroft Library, University of California, Berkeley, 2000, 83; Cathrine Caulfield, "First Woman Student in the Cowell Program, 1968," an oral history conducted in 1996 by Susan O'Hara in *University of California's Cowell Hospital Residence Program for Physically Disabled Students, 1962–1975: Catalyst for Berkeley's Independent Living Movement*, Regional Oral History Office, The Bancroft Library, University of California, Berkeley, 2000, 137; Judith Heumann, oral history, 249; Linda Perotti, "An Employee Perspective on the Early Days of the Cowell Residence Program, Physically Disabled Students' Program, and the Center for Independent Living," an oral history conducted by Kathy Cowan in 1998, Oral History Office, Bancroft Library, UC Berkeley, 2000, 121–125, 134; Ed Roberts, oral history, 45; Zona Roberts, oral history, 126; Betty H. Neely, "Recollections of the Director of Student Activities and Programs," an oral history conducted in 1984 by Herb Wiseman in *Disabled Persons' Independence Movement: The Formative Years, 1962–1977*, Regional Oral History Office, The Bancroft Library, University of California, Berkeley, 1987, 15.

[24] Lynn Kidder, "They Fought Disabilities and Won," *Daily Ledger*, May 2, 1982, 1, 10–12, in Herbert Willsmore Papers, The Bancroft Library, BANC MSS 99/249c.

official attendant referral service for students with disabilities.[25] It was a place where individuals with disabilities could meet and converse. Like Cowell, the PDSP office was a place where peers could network and support one another. It was loosely structured with few rules and flexible services, which could be a strength when addressing individuals with unique and diverse impairments.[26]

PDSP grew out of the Cowell experience and was needed for those who were seeking to leave the dormitory and navigate the university beyond the walls of the hospital. The political conflict with the university and the desire for more independence and autonomy led to its creation.[27] PDSP's main focus was centered on the individual with the disability and on infusing them with the autonomy and discretion over their own needs and capacity to integrate into the community. Hale Zukas, a Cowell resident and early disability rights activist, listed three primary functions for PDSP and what would later become tenets of the Independent Living Movement: First, "Those who know best the needs of disabled people and how to meet those needs are the disabled themselves." Second, "The needs of the disabled can be met most effectively by comprehensive programs which provide a variety of services." And third, "Disabled people should be integrated as fully as possible into their community."[28] After their experience at Cowell, Berkeley students wanted to implement a program that prioritized the individual. Herbert Willsmore stated, "That's what Disabled Students' Program and the Center for Independent Living were all about: consumer input—the people that received the services actually having an effect over the design of the program and the evaluation of the program."[29]

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[25] Carol Fewell Billings, "Attendant and Observer in the Early Days of the Physically Disabled Students' Program and the Center for Independent Living, 1969–1977," an oral history conducted by Kathy Cowan in 1998, Oral History Office, Bancroft Library, UC Berkeley, 2000, 27; Cathrine Caulfield, oral history, 139; Karen Topp Goodwyn, oral history, 129, 136; Charles A. Grimes, an oral history, 72, 79; Linda Perotti, "An Employee Perspective on the Early Days of the Cowell Residence Program, Physically Disabled Students' Program, and the Center for Independent Living," an oral history conducted by Kathy Cowan in 1998, Oral History Office, Bancroft Library, UC Berkeley, 2000, 126–127, 131–132; Zona Roberts, oral history, 142. When Judith Heumann moved to Berkeley she would regularly have to go there for an accessible bathroom while on campus, see Judith Heumann, "Pioneering Disability Rights Advocate and Leader in Disabled in Action, New York: Center for Independent Living, Berkeley; World Institute on Disability; and the US Department of Education 1960s–2000," an oral history conducted by Susan Brown, David Landes, and Jonathan Young in 1998–2001, Regional Oral History Office, The Bancroft Library, University of California, Berkeley, 2004, 89, 238; Proposal for Renewing Special Services' Grant, Fiscal Year 1971, no credited author but signed by John Hessler, in Hale Zukas Papers, The Bancroft Library, UC Berkeley, BANC MSS 99/150c, Carton 2, 5, 10–11.

[26] Karen Topp Goodwyn, oral history, 129–130; Charles Grimes, oral history, 87; Proposal for Renewing Special Services' Grant, Fiscal Year 1971, no credited author but signed by John Hessler, in Hale Zukas Papers, The Bancroft Library, UC Berkeley, BANC MSS 99/150c, Carton 2, 10.

[27] Herbert Willsmore, "Autobiographical Summary," no date, in Herbert Willsmore Papers, The Bancroft Library, BANC MSS 99/249c.

[28] Edward V. Roberts, "California," in *Independent Living: Emerging Issues in Rehabilitation*, ed. Susan Pflueger (Washington, DC: Institute for Research Utilization, 1977), 47, in Edward V. Roberts Papers, 1975–1998, The Bancroft Library, UC Berkeley, BANC MSS 99/34, Carton 1.

[29] Herbert Willsmore, oral history, 182.

At the heart of all the services and accommodations provided by PDSP, student activists ultimately had one major goal: independent living.[30] Beyond attendant referrals, counseling, and wheelchair repair, PDSP had a philosophy of independence for its students with disabilities. A grant proposal in the early years of the program makes that clear; the proposal read:

> The long term goals are many but they can be summed up in one word and that is—independence. All of our efforts lead to this goal. Academic success, physical stability, building self-confidence, encouraging students to handle their own financial affairs, hiring their own attendants, controlling their own lives, their own homes, all of these things that the program emphasizes have but one reason and that is to permit the disabled student to become an independent member of society . . . In the years to come it will no doubt be evaluated also by many members in the community who may for the first time realize that disabled individuals are human beings whose lives have value.[31]

PDSP was a shift from purely reactive development of accommodations and services by the university toward a clear concerted effort at providing a path to independence for students at UC Berkeley. During their time at Cowell, the students were responding to limitations and restrictions placed on them by hospital staff, the university, and CADR. At PDSP they were taking a more active and preemptive role in establishing methods and paths for independence.

Despite the clashes with government agencies and a push beyond paternal oversight, PDSP was still funded through federal grants and matching support from UC Berkeley. Both CADR and the federal Department of Health, Education, and Welfare provided vital funding for PDSP, and UC Berkeley worked closely with PDSP to create opportunities for students with disabilities. The relationship was not always adversarial; at times these state and federal entities were essential in promoting independence and opportunities for students with disabilities. Just as with the establishment of Cowell as a residency for students with disabilities, the state of California and the federal government would be instrumental in establishing the institutions that would help people

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[30] Proposal for Renewing Special Services' Grant, Fiscal Year 1971, no credited author but signed by John Hessler, 14–16; "Revisions to the Physically Disabled Student's Programs' Proposal for Special Services Funding Fiscal 1971," no author, no date, no page number; both in Hale Zukas Papers, The Bancroft Library, UC Berkeley, BANC MSS 99/150c, Carton 2.

[31] Proposal for Renewing Special Services' Grant, signed by John Hessler, quote on 14–15.

with disabilities.[32]

Overall, the impact of PDSP was profound, even lifesaving. A report by UC Berkeley's Disabled Students Program in February of 1987 surveyed former participants, and the testimonials describe just how powerful the Cowell Program and PDSP had been in transforming the lives of students. Since 1962,[33] 155 students had participated in programs meant to aid students with disabilities, whether the Cowell program or PDSP.[34] A small sample includes: "It saved me from being institutionalized." "It was very valuable. You might say the Residence Program is what allowed me to live." "It allowed me to develop independently from my family . . . which led to working, home ownership, and a more fulfilling life." "I believe at the time, 1970, it was the most important single factor in changing my life to a more productive and meaningful one." "The residence program was very important to my gaining independence. My mother had done everything for me. I had never done anything on my own. I probably would still be living at home and not working if the Program had not existed." "Without it I would be dead."

These messages of gratitude and appreciation for the program illustrate its effectiveness. But its impact had been limited to students at UC Berkeley. The graduating students wanted to do more, and to do so they started the Center for Independent Living (CIL) to address the needs of the large community—not just students. The CIL would start out of a corner of PDSP's office on Durant Avenue.[35]

Part II: "Advocrats" and the Passage of Assembly Bill 204

The passage of Assembly Bill 204 into California state law on July 2, 1979, codified the independent living ideas and concepts that had been developed at Cowell Hospital, the Physically Disabled Students' Program, and the Center

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[32] Charles Grimes, oral history, 72, 81–84, 100; No author, no date, appears to be a draft of a grant proposal to the federal Department of Health, Education, and Welfare's Special Services Project, in Hale Zukas Papers, The Bancroft Library, UC Berkeley, BANC MSS 99/150c, Carton 2, 5–6; many of the grant proposals in Hale Zukas Papers, The Bancroft Library, UC Berkeley, BANC MSS 99/150c, Carton 2 target federal funding. See also, Zona Roberts, oral history, 143–144; Michael Fuss, "Attendant for Cowell Residents, Assistant Director of the Physically Disabled Students Program, 1966–1972," an oral history conducted by Kathy Cowan in 1997, Oral History Office, Bancroft Library, UC Berkeley, 2000, 62–63.

[33] The report seems to consider SHS's creation of the Cowell Residence Program as the "beginning" of PDSP, which is a mistake; PDSP was officially started eight years later.

[34] "Report on Employment Survey, Physically Disabled Students' Residence Program," Disabled Students' Program, UC Berkeley, report dated February 1987, in "Herbert Willsmore Papers," The Bancroft Library, BANC MSS 99/249c.

[35] Hale Zukas, oral history, 118–119; Carol Fewell Billings, "Attendant and Observer in the Early Days of the Physically Disabled Students' Program and the Center for Independent Living, 1969–1977," an oral history conducted by Kathy Cowan in 1998, Oral History Office, Bancroft Library, UC Berkeley, 2000, 12; Michael Fuss, oral history, 84–87.

for Independent Living into California state law.[36] It defined what independent living centers (ILCs) were in state law and it provided funding for them to operate and expand throughout the state. It was the union of state institutions and outside activism into a government funded nonprofit program that provided resources and services for those with disabilities.

Ed Roberts was appointed director of CADR on November 1, 1975, by Governor Jerry Brown Jr.[37] As director, he would help guide this statute through the legislature with the help of other Berkeley alumni and Cowell residents like John Hessler and Jim Donald, among others, while they worked with Roberts at the California Department of Rehabilitation. Yet AB 204 also had staunch allies in the legislature to author and advocate for the bill. Its legislative champion was Assemblyman Tom Bates. Disability activists would enter the halls of power and become agents of change within the system alongside important allies inside and outside of government. This process of codifying independent living in state law reveals the extent to which legal machinations are not abstract applications of words through agencies, but real flesh and blood people pushing and pulling through funding cuts, statutes dying in committees, expiring grants, and oppositional advocates to implement different conceptions of meaning—in this case the meaning of disability.

A. The Students Leave Campus: The Center for Independent Living

Scholars have discussed Berkeley and the independent living movement as a major component of the disability rights movement.[38] While these important contributions have analyzed the independent living movement broadly, none have explored the impact this movement had on the relationship between the activists and state officials that culminated in the establishment of ILCs and their funding through state law.

The Center for Independent Living in Berkeley (CIL) was a direct product

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[36] Assembly Bill Final History, Volume 1, California Legislature at Sacramento, 1979–80 Regular Session, 196; Office of the Governor Press Release, Barbara Metzger, Press Secretary, July 2, 1979, in California State Archives, Department of Rehabilitation, R204.004:20 (Box 3).

[37] Letter from Leslie F. James of Portland State University to Ed Roberts, with remarks from a meeting attended together, April 25, 1977; Edward V. Roberts, "A Founder's Perspective on Independent Living," World Institute on Disability, no periodical info, draft, both in Edward V. Roberts Papers, 1975–1998, The Bancroft Library, UC Berkeley, BANC MSS 99/34, Carton 1; Miriam Pawel, *The Browns of California: The Family Dynasty That Transformed a State and Shaped a Nation* (New York: Bloomsbury Publishing, 2018), 221.

[38] Bagenstos, *Contradictions*, 15–17; Colin Barnes and Geof Mercer, *Exploring Disability*, 2nd ed. (Cambridge: Polity Press, 2010), 165–166; Edward D. Berkowitz, *Disabled Policy: America's Programs for the Handicapped* (New York: Cambridge University Press, 1987), 199–202; Shapiro, *No Pity*, 41–55; Doris Zames Fleischer and Frieda Zames, *The Disability Rights Movement: From Charity to Confrontation, Updated Edition* (Philadelphia, PA: Temple University Press, 2011), 37–45.

of the Cowell and PDSP experience.[39] CIL was founded by Cowell residents, and it was the third manifestation of independent living concepts that had started at the university hospital and evolved into PDSP. Although it was grounded in the same principles, it was founded to address the needs of the wider community beyond the university's borders and student population.[40]

Hale Zukas was a Berkeley student who was considered to be one of the more extreme radical activists in the disability rights movement (DRM).[41] He did not live in Cowell, but was active in protest movements, such as pouring asphalt to make unofficial curb ramps and he even insisted on being drafted during the Vietnam War despite his limited mobility in a wheelchair.[42] Zukas was instrumental in both the founding of PDSP and CIL, and he writes about what he considered to be a profound shift in understanding disability through the creation of these two institutions:

> The approach envisioned in the proposed Physically Disabled Students' Program (PDSP) was a radical departure from past practice in the medical and rehabilitation fields. In contrast to the fragmentation which characterized the existing services, the PDSP would take a holistic, integrated approach by providing a comprehensive array of services in recognition of the fact that disabled people are likely to have a variety of needs, and functional independence will be hard to achieve unless *all* those needs are met. Self-evident though this may seem in hindsight such an approach had, to our knowledge, never been tried before.[43]

This is an additional layer to the original and creative breakthrough that was independent living. Both PDSP and CIL focused on the control of the organizations through a majority of board members with disabilities, and the autonomy of the individual by placing the individual's needs and discretion before that of the medical professional; but in addition to these concepts, CIL also provided comprehensive services. Rather than a piecemeal approach, independent living centers gave clients access to multiple different options at once, all in one place. It was an expansion of tangible assistance to live more fully and independently.

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[39] Hale Zukas, "Part I: C.I.L. History," no date, 1, in Center for Independent Living Records, Bancroft Library at UC Berkeley, BANC MSS 2000/43c, Carton 5.

[40] Hale Zukas, "National Disability Activist: Architectural and Transit Accessibility, Personal Assistance Services," an oral history conducted in 1997 by Sharon Bonney in *Builders and Sustainers of the Independent Living Movement in Berkeley, Volume III*, Regional Oral History Office, The Bancroft Library, University of California, Berkeley, 2000, 135–136.

[41] Jim Donald, oral history in *University of California's Cowell Hospital Residence Program for Physically Disabled Students, 1962–1975: Catalyst for Berkeley's Independent Living Movement*, Regional History Office, The Bancroft Library, 85–86.

[42] Hale Zukas, oral history, 109–110, 121–122.

[43] Hale Zukas, "Part I: C.I.L. History," 3, emphasis in original.

The first meeting to create CIL was on May 17, 1971, before it was even founded and incorporated. It featured eight disability advocates including John Hessler, Hale Zukas, and one of the students targeted by CADR counselor Lucile Withington in the attempt to pull funding at Cowell, Donald Lorence.[44] It essentially proclaimed the intent to create CIL, and the first board meeting would be later that same month on May 27, 1971. The proposed services it would provide were explicitly drawn from the PDSP proposal and the meeting itself would take place at PDSP offices.[45]

Aspirations of the disabled community also continued to be a concern. Early CIL members were worried that community involvement would be difficult because, "As we all know, most people are convinced that there is nothing they can really do to improve their lot. They have dreams but rarely do they know how to act effectively to realize their dreams."[46]

Founders of CIL did not just want to provide tangible services, they wanted to galvanize the community and demonstrate that achievement of goals it thought were impossible were actually attainable. The articles of incorporation for CIL stated that the first and primary purposes of founding CIL were "to establish, maintain and operate non-profit community service centers relating to, and for the purpose of improving, the physical, social and financial condition of physically disabled individuals."[47]

From the beginning, funding was an issue. The main problem that plagued CIL was a lack of reliable resources to sustain the program and provide it with the requisite certainty of operations going forward. In its early days it mainly sought small-scale charity donations.[48] It was not until the federal Department of Health, Education, and Welfare's Rehabilitation Services Administration provided a grant of $50,311 on June 30, 1972, that CIL had actual substantial

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[44] "First Meeting of the Potential Board of Directors," Center for Independent Living Records, Bancroft Library, UC Berkeley, BANC MSS 2000/43c, Carton 10; Hale Zukas, "Part I: C.I.L. History," 5; Hale Zukas, oral history, 118. Although Ed Roberts featured prominently in the DRM from Cowell to his directorship at CADR and beyond, he was not at these early meetings for CIL and John Hessler seemed to be the primary mover for both PDSP and CIL. Hale Zukas appears to disagree with the label of "co-founder of CIL" for Ed because of his absence from these first meetings. See Hale Zukas, oral history, 119. Ed would not get involved in CIL until approximately two years after its founding.

[45] "First Meeting of the Potential Board of Directors," Center for Independent Living Records, Bancroft Library, UC Berkeley, BANC MSS 2000/43c, Carton 10. This appears to be an appendix to the first meeting.

[46] "First Meeting of the Potential Board of Directors," Center for Independent Living Records, Bancroft Library, UC Berkeley, BANC MSS 2000/43c, Carton 10.

[47] "Articles of Incorporation of The Center for Independent Living, Inc.," in Center for Independent Living Records, BANC MSS 2000/43c, Carton 18.

[48] "Minutes of the Meeting of the Board of Directors on Monday, September 13, 1971," Center for Independent Living Records, Bancroft Library, UC Berkeley, BANC MSS 2000/43c, Carton 10; Hale Zukas, oral history, 119; Hale Zukas, "C.I.L. History," 6.

funding.[49] When that grant expired a year later in June 1973, Ed Roberts and John Hessler sought $15,000 in funding from both Vice Chancellor Robert Kerley of UC Berkeley and the City of Berkeley.[50] It was in 1973 that Ed Roberts would begin attending CIL board meetings.[51] This funding would last until the end of the year. More was provided by the San Francisco Foundation in December 1973 and Alameda County in March 1974.[52] On May 22, 1975, CIL would sign an agreement with CADR for funding of a new office on University Street in Berkeley and other expenditures. This would be CIL's first Innovation and Expansion grant, funded by the Rehabilitation Act of 1973, as amended in 1974 (the Rehabilitation Act hereafter). The act provided funding that was channeled through state agencies, in this case, CADR.[53]

This funding pattern conveys two important aspects of disability activism and its capacity to meet the needs of the community. First, it again illustrates the importance of state support through officials providing the funding needed for the services, along with overhead and labor at the office itself. The federal Rehabilitation Services Administration, the public institution of UC Berkeley, and local government in the form of Alameda County and the City of Berkeley provided vital resources for the activists to implement their ideas and concepts of independent living. As with Dr. Henry Bruyn at Cowell Hospital, state representatives would be crucial in aiding activists with their advances in the disability rights movement.

However, a second and limiting aspect of this federal and local funding was that it was precarious and temporary. For CIL not only to expand but just operate on a steady basis, it would need a more reliable source of funds. It would not be until the passage of AB 204 that the state of California would become directly involved in funding independent living centers.

In order for the activists to establish dependable funding, they would need

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[49] "Project Development Grant, Program Title: Planning for a Community Rehabilitation Services Facility," Department of Health, Education, and Welfare, Rehabilitation Services Administration, Edward Newman, Commissioner, June 30, 1972, in Center for Independent Living Records, Bancroft Library, UC Berkeley, BANC MSS 2000/43c, Carton 10; Hale Zukas, oral history, 119.

[50] "Minutes CIL Board Meeting," July 30, 1973; "Minutes Board Meeting," August 27, 1973, both in Center for Independent Living Records, Bancroft Library, UC Berkeley, BANC MSS 2000/43c, Carton 10[CHECKED] Hale Zukas, "C.I.L. History," 6–7.

[51] "Minutes Board Meeting," August 27, 1973; "Meeting of the Board of Directors of CIL," November 26, 1973; both in Center for Independent Living Records, Bancroft Library, UC Berkeley, BANC MSS 2000/43c, Carton 10.

[52] Hale Zukas, "C.I.L. History," 6–7.

[53] Agreement between the State of California Dept. of Rehabilitation and the Center for Independent Living, Inc., in Hale Zukas Papers, The Bancroft Library. University of California, Berkeley (accessed online), https://oac.cdlib.org/view?docId=hb5w1004g3&brand=oac4&doc.view. "Minutes, Regular Meeting of the CIL Board of Directors," March 28, 1977, in Center for Independent Living Records, Bancroft Library, UC Berkeley, BANC MSS 2000/43c, Carton 10. There are no minutes in the records for 1976, but this record of board minutes shows an agenda item as "renewing I&E grant," suggesting they started receiving this funding in 1976.

more state allies. One way of gaining support from state officials was to become state officials. Ed Roberts, John Hessler, and Jim Donald would all go to work at CADR when Ed Roberts was appointed director. But for them to achieve the goal of state legislative funding, they would need a state legislator to write the bill and introduce it to the floor. That legislator would be Tom Bates.

Tom Bates was also an alumnus of UC Berkeley before entering government.[54] He represented Berkeley and North Oakland on the Alameda County Board of Supervisors, and it was at this time he met Ed Roberts and became aware of the Center for Independent Living.[55] Bates would work with CIL to improve accessibility in county buildings.[56] Roberts went before the County Board to ask for grants that would fund CIL, so Bates started working to allocate county funds to the center as a supervisor. It was this initial connection that would lead to Roberts and Bates working together to pass AB 204 in 1979.[57]

B. The Need for AB 204

Prior to AB 204's passage in 1979, ILCs were primarily funded through two means, one from above the state level and one from below: federal grants and local governments. Both these funding sources would be strained in the years and months leading up to July 1979. First, Proposition 13 reduced funding for local governments, and second, federal "Innovation and Expansion grants" (I&E grants) under the Rehabilitation Act were set to expire after three years.

Proposition 13s passage on June 6, 1978, caused funding reductions and threats to operations for ILCs. Proposition 13 was a citizen initiative that limited both the initial and annual increases to the property tax rate while also mandating that two-thirds of voters approve special taxes from local governments.[58] This was a major blow to ILCs at the local level. Thomas Church, Executive Director of an ILC, wrote that his center saw a 15 percent reduction in funding due to Proposition 13, and that continued reductions could cause a loss of services.[59]

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[54] Oral history interview with Tom Bates: California State Assemblyman, 1977–1996, Alameda County Supervisor, 1973–1976, interviewed by Leah McGarrigle, Regional Oral History Office, University of California, Berkeley, BANC MSS 2004/274c, 30–49.

[55] Tom Bates, oral history, 109–122, 179–180, 497–498.

[56] "Regular Board Meeting," February 25, 1974, in Center for Independent Living Records, Bancroft Library, UC Berkeley, BANC MSS 2000/43c, Carton 10.

[57] Tom Bates, oral history, 127–128, 179.

[58] Mark Baldassare, Dean Bonner, Alyssa Dykman, and Lunna Lopes, "Proposition 13: 40 Years Later," Public Policy Institute of California, June 2018, https://www.ppic.org/publication/proposition-13-40-years-later/.

[59] CADR Memorandum from Roger Chapman to Jan Dell, February 9, 1979; in California State Archives, Department of Rehabilitation, R204.004:20; Letter from Tom Bates to Pamela King, April 6, 1979; California State Archives, Tom Bates Papers, Bill Files, LP394:38; Letter from Thomas E. Church, Executive Director of Adult Independence Development Center, to Tom Bates, April 6, 1979, in California State Archives, Senate Health and Welfare Committee, Bill Files, LP207:67.

AB 204 was not the first attempt by Bates to pass legislation providing state funding to independent living centers in California. Just a year before, Bates had authored AB 3051 which would have provided funding from the state, but the passage of Proposition 13 caused a funding earthquake, and AB 3051 died in the Assembly Ways and Means Committee.[60] In a bill analysis opposing AB 3051, the State Finance Department summarized AB 3051 as a bill that "would provide for State funding of existing independent living centers for the disabled and the development of new centers to provide services to disabled individuals to assist them in achieving social and economic independence. The bill also would require the Department of Rehabilitation to evaluate centers funded by this bill and appropriates $3,000,000 for the program."[61] Proposition 13 killed AB 3051 in committee in 1978, but that same proposition would be a major impetus and motivation for AB 204 a year later.

The second major effect on funding for ILCs leading up to the passage of AB 204 was the sunsetting of federal I&E grants under the Rehabilitation Act. These grants illustrate the push and pull of federal influence. The Rehabilitation Act had tremendous value in opening the door of civil rights to people with disabilities. Section 504 of this act began tying federal funding to accessibility and accommodations for people with disabilities.[62] But in addition to that provision, it also authorized funding for states to provide nonprofits working to promote opportunities for those with disabilities. These grants were meant to "initiate or expand such services to individuals with the most severe handicaps, or of special programs . . . to classes of handicapped individuals who have unusual and difficult problems in connection with their rehabilitation, particularly handicapped individuals who are poor." When Ed Roberts became

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[60] Bill Analysis from Ed Roberts as Director of CADR, January 19, 1979; Bill Report from Ed Roberts as Director of CADR, May 31, 1979; Memorandum on AB 204 provided to Chairman of the Assembly Human Resources Committee Richard Alatorre, hearing date March 6, 1979 (also in Bates papers, see below); all located in California State Archives—Department of Rehabilitation, R204.004:20 (Box 3). See also, Draft of Letter to Assembly Colleagues from Tom Bates regarding Independent Living Centers (AB 204), January 4, 1979; Draft of Letter to Members of the Senate and Assembly from Tom Bates regarding Independent Living Centers (AB 204), January 4, 1979; Letter from Tom Bates to Leo Mouton, January 17, 1979; Senate Committee of Health and Welfare, Staff Analysis of Assembly Bill 204 (Bates) (As Amended May 3, 1979); Assembly Office of Research, "Unfinished Business: Concurrence Amendments," no date (appears to be after Assembly vote on May 10, 1979 and before Senate vote on June 22, 1979); "Assembly Third Reading AB 204 (Bates) As Amended: May 3, 1979," by Assembly Office of Research, May 10, 1979; all located in California State Archives, Tom Bates Papers, Bill Files, LP394:38.

[61] Bill Analysis, AB 3051, California State Department of Finance, no date, in California State Archives, Department of Rehabilitation, R204.004:20 (Box 3).

[62] Edward D. Berkowitz, *Disabled Policy: America's Programs for the Handicapped* (New York: Cambridge University Press, 1987), 212–215; Robert L. Burgdorf Jr., "Substantially Limited Protection from Disability Discrimination: The Special Treatment Model and Misconstructions of the Definition of Disability," *Villanova Law Review* 42 (1997): 409, 414–417; Nielsen, *A Disability History of the United States*, 165–167; O'Brien, "From a Doctor's to a Judge's Gaze," 328–329; Richard K. Scotch, *From Good Will to Civil Rights: Transforming Federal Disability Policy* (Philadelphia, PA: Temple University Press, 2001), *passim*.

Director of CADR, he used these grants to set up nine additional ILCs.[63]

In February of 1979, thirteen ILCs in California received $831,200 in federal funding from I&E grants; and at least eight of those centers were in their third and final year of funding. Many ILCs that received I&E grants through the Rehabilitation Act would lose that funding between June 30 and December 30 of 1979, and at least five would likely shut down after the I&E grants expired.[64] CADR recognized that this was an existential threat to ILCs throughout California toward the end of 1978, and began studying solutions to the reduction in funding, which included legislative action.[65]

Local governments and the nonprofits themselves highlighted the gravity of reduced funding as I&E grants began to expire.[66] Douglas C. Broten, Director of the California Association of the Physically Handicapped Service Center in Fresno, wrote to Thomas Bates about AB 204, stating that their I&E grant would expire on November 14, 1979, and at the time of writing they had no funding beyond that date. He went on to state, "at the conclusion of the I&E Grant we might have to close our doors."[67] From internal government memorandums to letters of nonprofit directors, it is clear that the looming reduction in federal funding through these grants was a major impetus for the passage of AB 204.

With two major sources of funding expiring, proponents of independent living needed a solution that would provide a firmer funding source for ILCs across the state. Activists at CIL and other ILCs wrote to state legislators and

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[63] Ed Roberts Testimony on the Center for Independent Living, Subcommittee on House of Representatives, Subcommittee on Select Education Hearing, January 5, 1978, in Edward V. Roberts Papers, 1975–1998, The Bancroft Library, UC Berkeley, BANC MSS 99/34, Carton 1; 29 U.S.C. §§ 740 and 741 (Supp. IV, 1974) (quote from §741).

[64] "Comments on Your A.B. 204 Analysis," CADR Memorandum from Jim Wigton to Jan Dell, January 18, 1979; Bill Analysis of AB 204 (Bates), Health and Welfare Agency, Department of Rehabilitation, Director Edward V. Roberts, January 19, 1979; "Back Up for AB 204 (Bates)," CADR Memorandum from Roger Chapman to Jan Dell, February 9, 1979; all in California State Archives, Department of Rehabilitation, R204.004:20 (Box 3). See also, Senate Committee on Health and Welfare, Staff Analysis of Assembly Bill 204 (Bates) (As Amended May 3, 1979); Assembly Office of Research, "Unfinished Business: Concurrence in Senate Amendments," AB 204 (Bates); Legislative Analyst (no name), "Analysis of Assembly Bill No. 204 (Bates) As Amended in Senate May 31, 1979, 1979–1980 Session," June, 1979; Bill Analysis of AB 204 (Bates), California Department of Finance, 1979; in California State Archives—Tom Bates Papers—Bill Files—LP394:38. Exact projections differed, but the sources agree that at least eight were in their last year of funding and at least five would likely fail without additional funding.

[65] CADR Memorandum from Robert W. Chapman to Resources Specialists, Subject: ILP Short-Term Survival, October 18, 1978; in Center for Independent Living Records, Bancroft Library at UC Berkeley, BANC MSS 2000/43c, Carton 5.

[66] Letter from Norman D. Boyer, Legislative Representative of the City Council of the City of Los Angeles, to Assemblyman Tom Bates, June 5, 1979; Letter from Douglas C. Broten, Director of The Fresno County Chapter of the California Association of the Physically Handicapped, to Tom Bates, March 30, 1979; in California State Archives, Tom Bates Papers, Bill Files, LP394:38.

[67] Letter from Douglas C. Broten, Director of The Fresno County Chapter of the California Association of the Physically Handicapped, to Tom Bates, March 30, 1979, in California State Archives, Tom Bates Papers, Bill Files, LP394:38.

advocated for state funding. With Roberts, Hessler, and Donald at CADR, and Bates in the state assembly, actors inside government were positioned to provide that funding through AB 204.

C. The Passage of AB 204

Proponents of AB 204 were bolstered by a letter-writing campaign from ILCs and other interested organizations throughout the state. During the first six months of 1979, impacted organizations wrote to state assembly members[68] and senators.[69] Beyond support and appreciation, they emphasized three major points. First, they argued that this was a cost-saving measure for the state by providing the means for individuals with disabilities to achieve employment and no longer use welfare payments. Douglas Martin, Executive Director of Westside Community for Independent Living, wrote, "enactment of [AB 204] would be highly cost-effective. By helping existing independent living programs and stimulating the development of new ilp's [*sic*], tens of thousands of disabled people could continue to live in their communities, saving the state the expense of institutionalization."[70] Mary Rodocker of UC San Francisco's Department of Psychiatry made a similar point, writing, "The results of these services, if degrees of independence can be measured in dollars, are cost effective."[71] Framing AB 204 as a cost-saving mechanism was a crucial component of the advocacy for its passage.

Second, they pointed out that without this additional funding, their centers would either need to reduce services or shut down entirely. F. A. Caligiuri of the California Association of the Deaf wrote, "Without the funding provided by AB 204, over half of these [ILCs] in the State will close."[72] The ILCs were facing an existential funding threat in the wake of Proposition 13 and the sunsetting of I&E grants. AB 204 would not just boost services for those with disabilities, it was a lifeline after a dramatic reduction in funding.

Third, they put the passage of the bill in existential terms for those living with disabilities. It was a threat to their capacity to exist in communities and

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[68] Letters found in California State Archives, Tom Bates Papers, Bill Files, LP394:38**;** and California State Archives, Department of Rehabilitation, R204.004:20 (Box 3).

[69] Letters found in California State Archives, Tom Bates Papers, Bill Files, LP394:38; and California State Archives, Senate Health and Welfare Committee, Bill Files, LP207:67.

[70] Letter from Douglas Martin, Executive Director of Westside Community for Independent Living, to Thomas Bates, March 2, 1979, in California State Archives, Tom Bates Papers, Bill Files, LP394:38.

[71] Letter from Mary M. Rodocker, Training Supervisor, Sex and Disability Training Project at UC San Francisco, to Thomas Bates, February 5, 1979, in California State Archives, Tom Bates Papers, Bill Files, LP394:38.

[72] Letter from F.A. Caligiuri, Executive Director of The California Association of the Deaf to state senators, June 20, 1979; in California State Archives, Tom Bates Papers, Bill Files, LP394:38.

have meaningful lives. Phil Draper and Judy Heumann of CIL at Berkeley wrote letters to state senators and Governor Brown (the language was the same in each) stating, "Within the next few days you must make a very important decision. You must decide whether to enable persons with disabilities to live as independent, self-supporting, tax-paying citizens. You must decide whether de-institutionalization of disable [*sic*] individuals is a priority in California." They included the story of a client who had been a post-polio quadriplegic since the age of three. His parents could no longer care for him after he reached the age of twelve, so he moved among various medical facilities, only seeing staff and his own immediate family. With CIL's help, the client had been able to move into a college dormitory at the age of twenty-seven. He would be moving into his own apartment with continued assistance from CIL.[73]

Support for AB 204 also came from inside state agencies and local government.[74] To no one's surprise, arguably the fiercest advocate for the passage of AB 204 was CADR director Ed Roberts himself.[75] Roberts took the lessons from Cowell, PDSP, and CIL into California state government "advocracy" and devoted them to winning state funding for ILCs. While the exact date and time that the position of the "social model" became viable is unclear in the disability scholarship, it was definitely instrumentalized by Ed Roberts on May 2, 1977, in his efforts to establish ILCs as CADR director—the same year as Lynn Thompson's suicide. In an internal CADR document, Roberts advanced social model concepts to justify the need for ILCs and the need for state funding. The exact language of his position is striking in its affirmation of the social model for independent living and is worth quoting at length. He writes,

> We have all seen over and over again that the severity of the disability, whether it be mental, physical or addictive, is not the overwhelmingly critical factor that prevents an individual from functioning independently in society . . . We know now that it is not the severity of the disability

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[73] Letter draft, Center for Independent Living, marked "This is going to everyone in the senate who hasn't voted on the bill yet," June 13, 1979; Letter from Phil Draper and Judy Heumann of Center for Independent Living to Governor Jerry Brown, June 26, 1979; both in California State Archives, Tom Bates Papers, Bill Files, LP394:38.

[74] Memorandum from Roger Chapman to Jan Dell promoting AB 204, January 10, 1979; Letter from Harry N. Greenblatt, Chief of Research Section of CADR, to Ted Lasher, Assembly Human Resources Committee, March 5, 1979; Memorandum from Richard B. Spohn, Director, and Steve Fishbein, Legislative Coordinator of the Legislative Office, to Diana Dooley, Legislative Secretary in the Governor's Office, April 27, 1979; Memorandum "Bi-Weekly Report" from Jan Dell, Legislative Coordinator of CADR to James Donald, Deputy Director for Legal Affairs, CADR, May 4, 1979; Letter from Tom Bradley, Mayor of Los Angeles, to Leo McCarthy, Speaker of the Assembly, May 8, 1979; all in California State Archives, Department of Rehabilitation, R204.004:20 (Box 3).

[75] Letter from Ed Roberts to Richard Alatorre, Chairman of the Assembly Human Resources Committee, February 28, 1979 [date crossed out]; Letter from Ed Roberts to Chairman of the Assembly Human Resources Committee Richard Alatorre, March 6, 1979; in California State Archives, Department of Rehabilitation, R204.004:20 (Box 3).

> that prevents an individual from integrating into society. The major factors are the attitudinal barriers shared by society and by disabled persons themselves, the feelings of devaluation, the isolation, the lack of social skills and the scarcity of role models. It is our system of institutionalization and our welfare programs that penalize those who try to find jobs or to live on their own. And finally, it is the lack of basic support services in the community and the existence of mobility barriers.[76]

Roberts could have been writing explicitly about Lynn Thompson, especially in his reprobation of institutionalization and welfare programs that served as obstacles to independence. He explicitly placed the onus on environmental and attitudinal barriers as opposed to individual impairments. ILCs were a way of ameliorating these conditions to provide more opportunities for those with disabilities.

In December of 1977, Roberts characterized independent living as "the civil rights movement of millions of Americans with disabilities. It is the wave of protests against segregation and discrimination and an affirmation of the right and ability to share fully in the responsibilities and joys of our society." He again used language of an early version of the social model of disability to advance an argument for independent living's role in rehabilitation, writing that, "The problem we now face is how to make changes in our environment so that these persons can complete the rehabilitation process and become actively participating and valued members of our communities."[77]

If the first tenet of Roberts's conception of independent living was the removal and destruction of barriers, a second tenet was the importance of individual agency. The centrality of individual choice was the "ability to actively participate in society—to work, have a home, raise a family, and generally share in the joys and responsibilities of community life. 'Independent living' means freedom from isolation or from the institution; it means the ability to choose where to live and how; it means the individual's ability to carry out activities of daily living that non-disabled often take for granted." Individual choice and

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[76] Ed Roberts, Department of Rehabilitation Report, "The Case for Independent Living" May 2, 1977 (quote); he would express similar opprobrium against attitudinal barriers in Edward V. Roberts, "The Courage to Take Risks," *The Unesco Courier*, January 1981; Edward V. Roberts, "Disabled Peoples' International: A Symbol of Determination," in *Rehabilitation/WORLD*, Summer/Fall 1982; in Edward V. Roberts Papers, 1975–1998, The Bancroft Library, UC Berkeley, BANC MSS 99/34, Carton 1.

[77] Edward V. Roberts, "Foreword," in *Independent Living: Emerging Issues in Rehabilitation*, ed. Susan Pflueger, for the Institute for Research Utilization, December 1977, ii, in Edward V. Roberts Papers, 1975–1998, The Bancroft Library, UC Berkeley, BANC MSS 99/34, Carton 1.

agency were of crucial importance.[78] In 1981, Roberts would write, "We are entering a new era and are finally recognizing that people with disabilities are not objects of charity. They are people with rights: specifically, the right to develop to their fullest potential, whatever that might be. A new philosophy is taking hold, one that acknowledges each person's potential; we are realizing that we can't write anyone off, and that we can't define people's limits for them. People have to define their own limits."[79]

A third major tenet in Roberts's argument for ILCs was the importance of integration rather than segregation. He remarked, "It seems to me that segregation in and of itself has been one of the most devastating things that disabled people could have experienced. Not so much the fact that people have been pushed aside in our society, but the fact that people have been systematically segregated. It wasn't done by evil people. I think it was done in a meaningful way."[80] Segregation was a twofold impediment for individuals with disabilities. First, it prevented a proper socialization of the individual into their community through a deprivation of skills that could have been developed through social interaction. Second, it negatively impacted the perspectives of those in the wider population for people with disabilities, making them scarce and unseen in institutions rather than immersed in the community.[81]

For Roberts, independent living centers were products of a government-funded nonprofit program, but also the instantiation of a paradigm shift in thinking about disability. They altered the meaning of what it meant to be disabled and shifted the burden of responsibility for engagement and action. They were the manifestation of a move away from a pure individualistic medical model and toward the social model's placement of responsibility on social remedies as opposed to individual ones.

The language of AB 204 drew heavily on the thoughts, ideas, and specific language developed at Cowell, PDSP, and CIL. Hale Zukas stated three basic

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[78] Edward V. Roberts, Director, CADR, and Susan Stoddard, Senior Analyst, Berkeley Planning Associates, "Independent Living: Concept and Programs," draft, prepared for *American Rehabilitation*, April 5, 1978, in Edward V. Roberts Papers, 1975–1998, The Bancroft Library, UC Berkeley, BANC MSS 99/34, Carton 1.

[79] Ed Roberts, "Statement by Ed Roberts, Director, California Department of Rehabilitation for the Geneva Committee for the International Year of the Disabled," in *A New Look for New Perspectives*, July 8, 1981, in Edward V. Roberts Papers, 1975–1998, The Bancroft Library, UC Berkeley, BANC MSS 99/34, Carton 1.

[80] Letter from Leslie F. James of Portland State University to Ed Roberts, with remarks from a meeting attended together, April 25, 1977, in Edward V. Roberts Papers, 1975–1998, The Bancroft Library, UC Berkeley, BANC MSS 99/34, Carton 1.

[81] Ed Roberts, speech draft, March 25, 1977, no exact location/context provided; Ed Roberts, speech draft, California Behavior Analysis Conference, March 30, 1977; in Edward V. Roberts Papers, 1975–1998, The Bancroft Library, UC Berkeley, BANC MSS 99/34, Carton 1.

principles of PDSP and CIL. All three were embedded in the statute. The first principle was: "Those who know best the needs of disabled people and how to meet those needs are the disabled themselves." The role of those with disabilities and the primacy of their agency can be found in §§ 19801(a) and 19801(b), with the requirement that the majority of board members must be disabled individuals and the staff "shall include as large a proportion as is practicable of disabled individuals." The second principle was: "The needs of the disabled can be met most effectively by comprehensive programs which provide a variety of services." The comprehensive scope of programs and services can be found in §§ 19801(c) and 19801(d), featuring the list ILCs were to provide according to the statute, which was almost word for word the same as those listed by PDSP and CIL. The third principle was "Disabled people should be integrated as fully as possible into their community."[82] The integration of individuals with disabilities into the community was addressed in §§ 19800 and 19801(d), which explicitly stated the legislature's intent to "assist [disabled] individuals in their attempts to live fuller and freer lives outside institutions," and also provided services such as transportation, mobility assistance, and communication assistance. The activists' words and intent were inscribed in state law.

In 1972 Larry Biscamp, a Cowell Hospital resident who was one of the students Withington deprived of funding, and Herbert Willsmore, who had been president of the Rolling Quads,[83] had written a report with another undergraduate, Judy Taylor, explicitly defining PDSP as a counterbalance to CADR. These three founding members of CIL had argued in their college paper that organizations like PDSP would promote the agency and independence of individuals with disabilities.[84] That position from their college paper was now state law.

There are countless stories from every disability activist—from Hessler confined to a hospital listening to French tapes, to Zukas's mother told by doctors that he should be institutionalized, to Roberts told by CADR that he would never work, to the conflicts at Cowell Hospital with Lucile Withington, to the early reports and studies by student activists on rehabilitation more broadly. Throughout there has been a constant struggle for the primacy of agency for those with disabilities. AB 204 codified that agency.

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[82] Susan Pflueger, "Independent Living: Emerging Issues in Rehabilitation" for the Institute for Research Utilization, in Edward V. Roberts Papers, 1975–1998, The Bancroft Library, UC Berkeley, BANC MSS 99/34, Carton 1; Chapter 191, *Statutes of California*, 420–421.

[83] Grimes, oral history, 42–45; "Autobiographical Summary," Herbert Willsmore, no date, in Herbert Willsmore Papers, The Bancroft Library, BANC MSS 99/249c, 2; Lucile Withington, oral history, 85–87; "Proposal for Renewing Special Services' Grant," fiscal year 1971, signed by John Hessler, in Hale Zukas Papers, The Bancroft Library, UC Berkeley, BANC MSS 99/150c, 16.

[84] Larry Biscamp, Judy Taylor, and Herbert Willsmore, with Charles Cole, "An Evaluation of Rehabilitation Counselor Training Programs from the Perspective of Disabled Clients," Working Paper, May 1972, Bancroft Library, pf HD7255.5.B5 1972, 4.

The language of the statute also followed PDSP's founding language with respect to services provided. Section 19801(c) stated that an ILC "shall provide, but not be limited to, the following services to disabled individuals: (1) Peer counseling, (2) Advocacy, (3) Attendant Referral, (4) Housing assistance and (5) Other referrals." Section 19801(d) would also provide "other services and referrals . . . such as transportation, job development, equipment maintenance and evaluation, training in independent living skills, mobility assistance, and communication assistance."[85] This language was derived straight from disability activists at Cowell Hospital and PDSP. Recall that when PDSP was founded, together with its non-university affiliated CIL, it was for attendant care, transportation, referrals, peer counseling, and wheelchair maintenance.[86]

The explicit language of AB 204 reflected the concepts of independent living developed by these student activists turned bureaucrats. Their work at the university, nonprofits, and government offices culminated in a statute that provided funding for the ILCs they had created, in a way that recognized the agency of those with disabilities and provided the services that they themselves said they needed.

D. The Impact of AB 204

AB 204 funding was conditional on a report to the legislature and governor assessing different metrics of the ILCs funded by the statute.[87] Two reports on AB 204 and independent living in California were generated in March of 1980 to describe the impact of the legislation. The first was a report produced by the independent Berkeley Planning Associates (BPA) and sent to CADR on March 1, 1980 (the BPA Report).[88] It was a thorough analysis based on a methodology of sending a survey to a random sampling of center clients, as well as site visits to each center and interviews with providers, administrators, and CADR staff.[89] During the month of March, 1980, this report was condensed by CADR and its parent Health and Welfare Agency, and then sent to the state legislature on

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[85] Chapter 191, *Statutes of California*, 420–421.

[86] Cathrine Caulfield, "First Woman Student in the Cowell Program, 1968," an oral history conducted in 1996 by Susan O'Hara in *University of California's Cowell Hospital Residence Program for Physically Disabled Students, 1962–1975: Catalyst for Berkeley's Independent Living Movement*, Regional Oral History Office, The Bancroft Library, University of California, Berkeley, 2000, 139–140; Linda Perotti, "An Employee Perspective on the Early Days of the Cowell Residence Program, Physically Disabled Students' Program, and the Center for Independent Living," an oral history conducted by Kathy Cowan in 1998, Oral History Office, Bancroft Library, UC Berkeley, 2000, 126–132, 138; "Proposal for Renewing Special Services' Grant," fiscal year 1971, signed by John Hessler, in Hale Zukas Papers, The Bancroft Library, UC Berkeley, BANC MSS 99/150c, 10–11.

[87] Chapter 191, *Statutes of California*, 421.

[88] "Evaluation Report on the State's Independent Living Centers Funded by AB 204 Final Report," submitted to CADR by Susan Stoddard, Project Director, Berkeley Planning Associates, March 1, 1980, in California State Archives, Department of Rehabilitation, R204.013:4 (hereafter, "Evaluation Report, BPA").

[89] Evaluation Report, BPA, ix.

March 30, 1980 (the CADR Report).[90] The CADR Report primarily focused on the highlights of the BPA Report (hereafter, I will use "the Reports" when referring to both).

The BPA Report stressed that the move to an independent setting provided psychological and symbolic value, as well as enabling clients to move beyond dependent behaviors. Movement to an independent setting was meant to allow the individual to be free to make decisions about day-to-day activities such as when to get up, eat, sleep, go outside, and so forth.[91] Between first contact with a center and the time of the survey (approximately two years), 28 percent of the respondents changed their housing situation, and there was a 61 percent decrease in those living in an institution.[92] The BPA Report also quoted feedback from clients about their new-won independence, with some clients saying: "My morale and outlook on life is much more positive. Thank you." and "The center is making me independent." Ultimately, 65 percent of clients surveyed reported that the centers "had a positive impact on their housing situation."[93]

It was more difficult for the BPA to assess the effect on family and community relationships. Most clients reported no impact on family and community participation. When there was an effect, however, it was positive. According to the BPA Report, "about one-third of the clients responding indicated a positive effect on social relationships with friends and in the community." Direct feedback from clients helped to illustrate the nature of that positive impact. One client commented, "This center gave me an opportunity to meet other disabled persons, successfully living independently, and helped me put my own situation and disabilities into proper perspective. In other words, it gave me a realization of all the things I *am*, not what I *am not*. I feel more confident about myself and am much more vocal in what I believe in." Another client said, "This center has helped me to get my self-respect. They have helped me to be useful. Helped me to be needed. They have helped me build up my self-image so much that I feel free to ask a woman out for a date. I have only started dating within the last four years."[94] Despite the difficulty in assessing family and community engagement, such feedback suggested a strong positive impact from contact with the centers.

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[90] "Special Report to the Legislature: Independent Living Centers Evaluation and Recommendations (Authorized by Assembly Bill 204, Chapter 191, Statutes of 1979)," State of California, Health and Welfare Agency Mario G. Oblego, Secretary, and Department of Rehabilitation, Edward V. Roberts, Director, March 30, 1980, in California State Archives, Department of Rehabilitation, R204.004:21 (hereafter, "Special Report, CADR").

[91] Evaluation Report, BPA, 25.

[92] Evaluation Report, BPA, 27.

[93] Evaluation Report, BPA, 31–32.

[94] Evaluation Report, BPA, 62–63, emphasis in original.

The Reports were submitted less than a year after the governor signed the law. Although some of the metrics were difficult to analyze, and there were some rising costs in public funds, the feedback from clients and the increase in services suggest the centers were making a positive impact on the disabled population in California. This positive impact was made possible due to "advocrats" such as Tom Bates, Ed Roberts, John Hessler, Jim Donald, and many others.

On the CADR website today, one can find a banner that reads "Employment and Independent Living for Californians with Disabilities since 1963."[95] While the department has existed since 1963, independent living only became a part of its mission through the efforts of disability activists operating inside and outside of government in the two decades after students started living in Cowell Hospital while attending UC Berkeley.[96] Still, that mission continues to be a part of the department today. The department's webpage states that:

> The California Department of Rehabilitation (DOR) works in partnership with consumers and other stakeholders to provide services and advocacy resulting in employment, independent living, and equality for individuals with disabilities. DOR administers the largest vocational rehabilitation and independent living programs in the country . . . Independent living services may include peer support, skill development, systems advocacy, referrals, assistive technology services, transition services, housing assistance, and personal assistance services.[97]

Resulting from AB 204 and the tenure of disability activists at CADR, the department continues to provide independent living services explicitly listed in PDSP's founding documents by Cowell residents, such as peer support, housing assistance, and personal assistance services.

The decade had started with the rebellion against Withington at Cowell, and the founding of PDSP and CIL. It would end with the passage of AB 204 establishing independent living in California state law. It was not only the activists, but the counselors, legislators, hospital directors, and university administrators who worked with the activists that achieved these goals. Ed Roberts was not the only advocrat. Although he may have been one of the more zealous and fervent of them, they existed on a spectrum. Henry Bruyn, Tom Bates, John Hessler, Jim Donald, Arleigh Williams, Edna Brean, Jean Worth, and Phil Morse were all advocrats, too, and all worked to create opportunities for those with disabilities.

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[95] https://www.dor.ca.gov.

[96] See various reports, no attributed author(s), in California State Archives—Department of Rehabilitation—F3934:1, F3934:4, F3934:7, F3934:8 in Administrative Files—Projects, Box 1.

[97] https://www.dor.ca.gov/Home/DepartmentOverview.

PDSP and CIL both still exist. PDSP is now the Disabled Students' Program (DSP)—dropping the "physically." UC Berkeley instructors are sent emails from DSP in the weeks before every semester, with letters that state the needs and accommodations of every student with a disability. DSP continues to work with students to provide the best possible experience at the university. CIL in Berkeley also continues its operations. Anyone in need of its services can take BART to Ashby station. They would then leave through the exit from the BART station featuring a plaque recognizing Hale J. Zukas's outstanding leadership and service in making transportation more accessible to people with disabilities. After exiting, they can use the ramp and elevator to enter the Ed Roberts Campus, where people working at CIL are waiting to offer a list of services, first formulated by Cowell residents over fifty years ago.

Conclusion

I do not know if independent living centers could have helped Lynn Thompson, because I do not know what was going on in her life. There may have been more to her sadness and despair than the frustrations of disability law, with its restrictive benefits and deterrents to opportunity. But in her suicide note, she explicitly blamed the limitations of welfare benefits and their impact on a disabled person's capacity to work for her plight. Law was at the heart of this devastating impact. Amendments to federal statutes had created the benefits. The absence of California state laws and the limited promulgation of the few that were on the books limited her options. A statute that could have provided more funding for services to people struggling like Thompson was two years away. It is difficult to imagine that there would not have been some benefit for Thompson from the independent living movement and AB 204.

Independent living concepts developed through the lived experience of student activists at UC Berkeley in the 1960s. Surrounded by the Free Speech Movement and the Civil Rights Movement, students living at Cowell Hospital reframed their "medically disabled" condition as something else. It was not their own lack of mobility that was the issue, it was the discrimination from counselors and employers, as well as the physical environment that prevented them from achieving their social and professional goals. Working both with and against nurses, counselors, and administrators at UC Berkeley taught these students how they could implement change not only in their living conditions, but in the regulations and policies of the institution. They formulated concepts for a new framework of disability, one that focused on the agency of the individual with the disability, rather than the medical assessment of the doctor or CADR counselor. This was a profound shift away from the medical

evaluations used to assess a capacity for work and toward a fuller understanding of an individual's ability to exist in their community.

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CAROLINE LESTER*

Justice Denied and Forgotten:

The Hidden History of Alaska's World War II Internment Camps

Introduction

The U.S. government's removal and internment of more than a hundred thousand ethnically Japanese people during World War II is widely known. Thanks to efforts by activists and educators, the existence of Japanese concentration camps is now taught in schools and recognized as one of the most shameful acts of U.S. history.[1] But a key part of that story remains largely unknown: the evacuation and internment of nearly nine hundred Alaska Natives from the Aleutian Island chain.

The Unangan internment camps were different, but no less brutal, than the Japanese camps in the continental United States. Ten percent of the villagers, mainly elders and young children, died.[2] When they were finally allowed to return to their homes, the islanders found villages wrecked

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[1] Japanese activists have largely coalesced around the phrase "concentration camps" as a descriptor for the prisons run by the War Relocation Authority. Alaska Native scholars still largely use the phrase "internment camps" when referring to the places used to house evacuated Unangan.

[2] Holly Miowak Guise, *Who is Doctor Bauer?: Rematriating a Censored Story on Internment, Wardship, and Sexual Violence in Wartime Alaska, 1941–1944*, 53 W. HIST. Q. 145, 151 (2022). With the death of the elders came the death of the culture, a lingering effect that has continued to reverberate through generations of Unangan.

by military occupation. Their churches were ransacked, their houses were ruined, and everywhere they looked, their landscape was littered with military trash.[3] To this day, huge, half-sunken ships remain in the bays around the island. Musty bunkers, covered with graffiti, dot the low-lying hills near town.[4] Hikers are still warned away from areas of tundra scattered with unexploded ordnance.[5]

Both the initial offense and the subsequent attempts at remedying the injuries from internment are widely unknown to those outside the Unangan diaspora. The descendants of interned Japanese Americans know very little, too. Although I grew up learning about Japanese internment, I never learned about the Alaska Native community that underwent similar hardships. Most *sansei* and *yonsei* I know are also unaware of the Unangan story,[6] but the history of the two groups is intertwined.

In 1988, President Reagan signed into law the first and only reparations bill to ever make it through Congress. The Civil Liberties Act apologized for the U.S. government's role in the "grave injustice" and paid out $20,000 to each Japanese American interned during World War II.[7] Unangan internees were included under their own section of the bill with some markedly different remedies. First, the United States established a trust fund for the benefit of the six surviving Unangan villages that were removed: Akutan, Atka, Nikolski, Saint George, Saint Paul, and Unalaska.[8] The government deposited $4.7 million into the fund and distributed an additional $12,000 to each surviving internee.[9] But unlike in the Japanese portion of the bill, the United States never apologized for interning the Alaska Natives.

The Civil Liberties Act is primarily understood to be a triumph of a longstanding effort by Japanese American communities, but it was also the product of Unangan lobbying. The differences between what each group received from the Act reflect how the government viewed each group's experience.

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[3] Comm'n on Wartime Relocation and Internment of Civilians, Personal Justice Denied 355–356 (1982) (citing Report on Unalaska Community (no date). NARS. RG 75 (CWRIC AL 6307–08)).

[4] This information is based on my personal experience living in Unalaska, Alaska.

[5] *Id.*

[6] *Sansei*: third-generation Japanese Americans; *Yonsei*: fourth-generation Japanese Americans.

[7] 50 U.S.C.A. § 4202; 50 U.S.C.A. § 4215.

[8] 50 U.S.C.A. § 4235.

[9] *Id.*; 50 U.S.C.A. § 4236. The fund still exists to this day: now, most of the money is primarily used for scholarships for Unangan students. Valentine Sherry, *Aleutian and Pribilof Islands Restitution Trust*, ProPublica, https://projects.propublica.org/nonprofits/organizations/926024502 (May 23, 2024); *The Aleut Foundation*, https://thealeutfoundation.org/purpose/ (last visited May 28, 2024).

This is the first legal scholarship to compare the experiences of Japanese and Unangan internees, both during the war and after, as they sought and won redress. Most scholarly engagement has analogized between Japanese American internment and general dispossession of Native nations, without noting that the same thing happened to both groups (or at least, a subset of them) and with almost no mention of the Unangan people.[10] Although other groups were also interned during World War II—notably Germans and Italians—only Japanese and Unangan internees received reparations. This difference is perhaps because, although wartime internment of any U.S. resident without justification is a violation of legal and human rights, the experiences of the Unangan and Japanese internees were both more egregious and violent.

The experience of European internees was markedly different from those of the Asian and Native populations. Although almost all internment camps included American citizens, the U.S. government interned ethnic Germans and Italians on an individual basis, examining each case file before determining whether they should be confined, rather than en masse, as they did to Japanese and Unangan populations. The scale of the internment was different, too. In 1940, more than six million people were either German-born or had two German-born parents living in the United States.[11] Imagine if the War Relocation Authority (WRA)—the federal agency that oversaw the detention of Japanese Americans—followed the same blood-quantum rules for Germans as they did for Japanese or Unangan. Under these rules, anyone who was 1/16th or 1/8th of each ethnic group, respectively, was eligible for removal,[12] meaning that tens of millions of people of German descent would have been interned during World War II. Instead, only approximately 11,500 German Americans and 3,000 Italian Americans were interned.

There was another significant but essential difference. Both German and Italian immigrants were eligible for citizenship, while Alaska Natives did not

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[10] *See, e.g.*, Cynthia Wu, *A Comparative Analysis of Indigenous Displacement and the World War II Japanese American Internment*, 42 Amerasia J. 1, 11–12 (2016); Karen J. Leong & Myla Vicenti Carpio, *Carceral Subjugations*, 42 Amerasia J. 103, 114 (2016); *see generally* Kristen L. Michaud, Japanese American Internment Centers on United States Indian Reservations: A Geographic Approach to the Relocation Centers in Arizona, 1942–1945 (Sept. 2008) (Master's thesis, University of Massachusetts, Amherst) (on file with the University of Massachusetts Library System). *But cf.* Juliana Hu Pegues, Space-Time Colonialism: Alaska's Indigenous and Asian Entanglements (2021) (a powerful work that explicitly compares the World War II internment experiences of both groups).

[11] Alan Rosenfeld, *German and Italian Detainees*, Densho Project Encyclopedia (July 29, 2015, 6:14 AM), https://encyclopedia.densho.org/German_and_Italian_detainees/.

[12] *A Brief History of Japanese American Relocation During World War II*, Nat'l Park Serv., https://www.nps.gov/articles/historyinternment.htm; Comm'n on Wartime Relocation & Internment of Civilians, *supra* note 3, at 334.

receive formal citizenship until 1940, just two years before their evacuation.[13] Moreover, *Issei* (Japanese immigrants to the United States) did not even qualify for citizenship until 1952, a decade after Japanese internment formally ended.[14] Although the citizenship status of Japanese Americans and Alaska Natives did little to deter their incarceration, the delay of citizenship grants may be rooted in the same causes that led to the worse treatment and living conditions in those camps.

Perhaps because of these differences, the Civil Liberties Act does not mention Germans, Italians, or Japanese Latin Americans interned during World War II.[15] Instead, it focuses solely on the experience of Japanese Americans and Alaska Natives. This choice reflects both the similarities in how the internment of each group was racialized and the differences in how that racialization was reflected in internment and reparations.

This paper has four parts. Part I gives the necessary historical background on the Unangan up to and during evacuation in World War II. Part II details the conditions of the camps in both Alaska and the continental United States, alongside the return home for both communities. (Most of Part II will be focused on the experience of the Unangan, given that lower-48 internment camp history is more widely known.[16]) Part III is a short history of the redress and reparations movement. Part IV explores why the two groups were interned during World War II and the differences in their reparations. Although Japanese American internment was justified as a kind of "security response" during the War, Unangan internment was supposedly for their own protection. But by looking at the orientalization of both Unangan and Japanese Americans, each group's control over valuable resources, and the difference in reparations, this paper identifies how these disparate groups were tied together by the federal government's colonial, racist acts.

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[13] Although members of Native Nations were granted U.S. citizenship in 1924 under the Indian Citizenship Act, Alaska wasn't admitted to statehood until 1958. Unangan only received formal citizenship under the Nationality Act of 1940. 8 U.S.C.A. § 1401.

[14] When the Immigration Act of 1952 passed, more than 90 percent of aliens made eligible for U.S. citizenship were Issei. Jane Hong, *Immigration Act of 1952*, Densho Project Encyclopedia (July 7, 2020, 7:45 PM), https://encyclopedia.densho.org/Immigration_Act_of_1952/.

[15] The United States interned approximately 1,800 Japanese Latin Americans in camps across the Southwest United States. Stephen Mak, *Japanese Latin Americans*, Densho Project Encyclopedia (Apr. 18, 2017, 9:06 p.m.), https://encyclopedia.densho.org/Japanese_Latin_Americans/. Japanese Latin Americans finally achieved some form of reparations and apology in the late 1990s, a decade after exclusion from the Civil Liberties Act. *See e.g.*, Mochizuki v. United States, 43 Fed. Cl. 97 (1999).

[16] Lower-48 is a term used in Alaska to define the continental United States.

Part I: History

Unangan translates to "seasiders" or "the people."[17] The group lived along the Aleutian Island chain for more than nine thousand years—one of the longest "continuous existence as an identifiable people in one place."[18]

The islands, comprised of low, treeless land made of volcanic ash and tundra, are not easy to live in. The chain forms a kind of frontier that divides the cold Bering Sea and the warm Pacific Ocean, resulting in fog, rain, and cyclonic winds.[19] Despite Unangan excellence at hunting and fishing, food was scarce and highly dependent on the seasons and environment. Unangam Tunuu, their language, reflects this: *Qisaguniŝ*, the word for the month of March, translates to "when they gnaw straps" or "month of hunger, gnawing thongs."[20] April, or *Agaluuĝiŝ qisagunaŝ*, means "the near hunger month" or "later famine." And yet Unangaŝ peoples not only lived but thrived. During the 1740s, their population was between 12,000 and 16,000—more than Philadelphia at the time.[21] This was the height of Unangan culture: over the next hundred years, their population would plummet to 2,000—the consequence of conflict with the Russian Empire, disease, and forced labor.[22]

The first recorded meeting between Russians and Unangan occurred in September 1741.[23] The Russians quickly discovered that Alaska was home to one of the most profitable resources in the world: sea otters. Called "soft gold," sea otter pelt sold for twenty-five to forty times as much as Siberian sable, the next most valuable animal in the Russian fur trade.[24] But otters were nearly impossible to hunt, given that they spend their entire lives offshore: they hunt at sea, eat at sea, and sleep in the calmer coastal waters rather than ashore. As a result, they must be hunted at sea, too. And only the Unangan—who honed their craft for thousands of years—had the skills to do so.[25] To get to the soft gold, Russian traders needed Unangan labor.

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[17] *Glossary/Vocabulary*, Aleutian Pribilof Islands Ass'n, https://www.apiai.org/community-services/traditional-foods-program/glossary-vocabulary/ (last visited Dec. 13, 2023); *Unangam Tunuu/Aleut*, Univ. of Alaska, Fairbanks, https://www.uaf.edu/anlc/languages-move/aleut.php (last visited Dec. 13, 2023).

[18] William S. Laughlin, Aleuts, Survivors of the Bering Land Bridge 141 (1980).

[19] When I lived there in 2020, the winter storms blew so strong that my entire house shook with each gust.

[20] Dean Kohlhoff, When the Wind Was a River: Aleut Evacuation in World War II 4 (1995).

[21] *Id.*

[22] Pegues, *supra* note 10, at 144.

[23] Frank Alfred Golder, Bering's Voyages: An Account of the Efforts of the Russians To Determine the Relation of Asia and America 147 (1922).

[24] Gwenn A. Miller, Kodiak Kreol: Communities of Empire in Early Russian America 24 (2010).

[25] *Id.* at 25.

> The baidars, or boats, of Oonalashka, are infinitely superior to those of any other island. If perfect symmetry, smoothness, and proportion constitute beauty, they are beautiful; to me they appeared so beyond anything that I ever beheld. I have seen some of them as transparent as oiled paper, through which you could trace every formation of the inside, and the manner of the native's sitting in it; whose light dress, painted and plumed bonnet, together with his perfect ease and activity, added infinitely to its elegance.[26]
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> *Notes from Commodore Joseph Billings Expedition, 1790*

Russian traders began practicing "an economy of confiscation."[27] They kidnapped the women and children of local leaders, extracting furs from Natives in exchange for the "protection" of the captives.[28] This continued through the eighteenth century until it was eventually outlawed by the Russian government.[29] At the same time, the Russian-American Company (RAC) began to dominate the Alaskan fur trade.[30] The RAC operated under a conscription system: the Unangan were still forced into labor, but instead of paying tributes, they were paid in provisions.[31] All Unangan men between the ages of fifteen and fifty were required to work for the RAC.[32]

Sea otters typically have only one pup per year. Their low rate of reproduction could not meet the Russians' rapacious demands, and populations crashed.[33] Each time this happened, the Russians moved to a new island, taking Unangan men with them and forcing them to hunt.[34] In 1788, Russians seized Unangan hunters from Unalaska and Atka and brought them three hundred miles north to the previously uninhabited Pribilof Islands.[35] There, the Unangan established communities on Saint Paul and Saint George, two low-lying, rocky islands that are home to the largest population of northern fur seals in the world.[36]

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[26] Martin Sauer & Commodore Joseph Billings, An account of a Geographical and Astronomical Expedition to the Northern Parts of Russia 157 (1802). Sauer visited Unalaska in 1790.

[27] Miller, *supra* note 25, at 12.

[28] *Id.*

[29] *Id.* at 69.

[30] The RAC was modeled off the East Indian Company: it was the first and only Russian joint stock company: theoretically, any Russian could purchase its shares. *Id.* at 105. In reality, only nobles and merchants did. *Id.*

[31] *Id.* at 69–70.

[32] *Id.*

[33] *Id.* at 26.

[34] *Id.* at 127 ("The hunting parties frequently got caught in storms out on the open seas where many died.").

[35] Pegues, *supra* note 10, at 148.

[36] *Id.*

Unlike other Unangan villages in the Aleutians, the Pribilof villages existed solely to harvest fur seals for Russia. The RAC maintained total control over the population and kept "islanders in a state of abject slavery."[37] A change in the colonial regime did little to change life on the Pribilof Islands. In 1867, soon after the Alaska Purchase, the U.S. government ceded control over the Pribilof Islands to private businesses and formed a series of consecutive twenty-year leases with American firms.[38] In exchange for overseeing Unangan residents, the firms continued to demand that they harvest fur seals yearly. Within twenty years, the $7.2 million spent on the Alaska Purchase was paid off entirely from Pribilof fur seal harvests.[39]

Control of the islands shifted again when the federal government took over in 1911.[40] By the 1940s, the Fish and Wildlife Service—housed within the Department of the Interior—began overseeing the Pribilof Islands.[41] This agency helped supervise the evacuation and internment of Unangan during World War II.[42]

Life on the Pribilof Islands was more controlled than the rest of the Unangan communities. The Fish and Wildlife Service considered the Unangan "wards of the government" and refused to provide them voting rights.[43] The U.S. government continued to require all male Unangan to hunt fur seals and provided them with housing and food in exchange.

> The community was in two parts. You had the Aleut labor force living there, working for the US government. And they were managed and controlled by government agents—a very small, non-native group. Everyone had a government-provided home. It was almost like a military base. They were provided homes, they were provided with food. The Aleuts typically ate their seal meats that they froze and stored from the summer harvest. But the small force that was there, the government managers, lived a different life. The government employees—we called them the white people—typically ate different foods. When you were male, and you turned 14, you started to work for the government. No choice. This was a captive audience. Contact with the outside world was very limited. This was, in

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37 MILLER, *supra* note 25, at 26.

38 PEGUES, *supra* note 10, at 148.

39 OFF. OF RESPONSE & RESTORATION, *Henry Wood Elliott: Defender of the Fur Seal*, NAT'L OCEANIC AND ATMOSPHERIC ADMIN. (Feb. 22, 2019 11:39 AM), https://response.restoration.noaa.gov/multimedia/videos/henry-wood-elliott-defender-fur-seal.html.

40 PEGUES, *supra* note 10, at 148.

41 *Id.*

42 *See* COMM'N ON WARTIME RELOCATION AND INTERNMENT OF CIVILIANS, *supra* note 3, at 332, 338 (1997).

43 PEGUES, *supra* note 10, at 149.

> my view, a very happy community. And now, it sounds rather grim, rather weird, but this was a very controlled community.[44]
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> *General Jacob Lestenkof, Evacuee from St. George, b.1932*

Unalaska—the largest village in the Aleutians—was also the site of a Russian settlement in 1772.[45] In 1825, the Russians built an Orthodox church, a beautiful building that remains to this day.[46] The village was predominantly Unangan until 1939 when the U.S. Navy built a weather station.[47] The U.S. military identified the Aleutians as a possible area of invasion by the Japanese, so within two years, the military had occupied the town.[48] The population ballooned from 300 (mostly Unangan) to as many as 70,000 people.[49] The landscape transformed as well: grasses, sedges, and tundra were replaced with bunkers, air hangers, warehouses, gun mounts, barracks, deep water harbors, fuel tanks, and military vessels.[50] Yet, when war finally arrived, American forces were caught almost entirely unaware.

The first attack occurred on June 3, 1942.[51] Japanese planes bombed Dutch Harbor for two days and landed on Kiska Island, an island neighboring Unalaska, where they captured ten American soldiers.[52] On June 6 and 7, twelve hundred Japanese soldiers invaded Attu Island, captured forty-two Unangan, and occupied the village.[53] War had finally arrived in the Aleutian Island chain.

Down south, forced evacuations had already been in effect for two months.[54] On March 29, 1942, General DeWitt—acting under the authority of Roosevelt's executive order—announced a mass detention and deportation of

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44 Interview with General Jacob Lestenkof.

45 Jennifer Sepez et al., 30 *Unalaska, Alaska: Memory and Denial in the Globalization of the Aleutian Landscape*, Polar Geography 193–94 (2007).

46 *Id.*

47 *Id.* at 195.

48 Comm'n on Wartime Relocation and Internment of Civilians, *supra* note 3, at 320.

49 Sepez, *supra* note 46, at 195.

50 *Id.*

51 *Id.*

52 *Id.*

53 Kohlhoff, *supra* note 21, at 40.

54 Exec. Order No. 9066, 7 Fed. Reg. 1407 (Feb. 19, 1942).

Japanese residents, giving them only 48 hours' notice.[55] Japanese residents left their homes, businesses, and possessions behind. The rushed and inhumane removal tactics were repeated, thousands of miles north, in Alaska.

The Alaskan evacuation happened almost immediately, with "little preparation or planning."[56] Atka was evacuated first.[57] The military ordered the eighty-three villagers out of their homes and told them to retreat to their summer camp sites.[58] One officer recalled the suddenness of the evacuation: "They were evacuated while eating breakfast, and the eggs were still on the table—coffee in the cups. A lot of their personal clothing and stuff was still hanging in the closets."[59] That evening, the Navy dispatched a demolition crew to burn down the ancient village so occupying Japanese forces would not be able to use it.[60] By the next morning, everything had been reduced to ashes. A few days later, the Unangan were evacuated off the island.[61]

The Pribilof Islands were next. Islanders were given twelve hours to evacuate and were only allowed to carry one package of belongings each.[62] The soldiers were ruthless, refusing to allow the villagers any more. One sailor seized a beautiful set of china from an elderly woman and threw it into the water.[63] "A look of mingled horror and misery came over the woman's face; a faint moan could be heard coming through her sunken lips."[64]

Jacob Lestenkof's grandfather oversaw the keeping of the livestock for the white Fish and Wildlife Service agents to eat on the island.[65] "We had cows, pigs, chickens," he recalled.[66] "This was established for the benefit of the white people, so they could have beef instead of seal meat. So they could have milk, real milk from the cows. So they could have eggs from the chickens."[67]

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[55] Brian Niiya, *John DeWitt*, DENSHO PROJECT ENCYCLOPEDIA (Dec. 19, 2023, 6:51 PM), https://encyclopedia.densho.org/John_DeWitt/#The_Road_to_Executive_Order_9066. My grandmother was one of the very few who escaped the order. She and her family left California in early March, the day before all Japanese Americans were restricted to their homes.

[56] KOHLHOFF, *supra* note 21, at 68.

[57] *Id.* at 70.

[58] *Id.* Summer camps are places and structures—far from the village—where Unangan base themselves during the summer months. These are more rustic homes set up exclusively for the warm months when hunting, fishing, and harvesting can take place.

[59] *Id.*

[60] *Id.*

[61] *Id.*

[62] *Id.* at 72.

[63] *Id.* at 71–72.

[64] *Id.* at 72.

[65] Interview with General Jacob Lestenkof, *supra* note 45.

[66] *Id.*

[67] *Id.*

Lestenkof realized the seriousness of the evacuation when his grandfather was told to slaughter all the animals before they boarded the ship.[68]

> By the time the *USS Delarof* left the islands, 560 Unangan men, women, and children were packed onto the ship, which only had a capacity for 376.[69] The ship left the Aleutians on June 18 for an "unknown destination."[70] On June 24, the evacuees arrived at Funter Bay in Southeast Alaska's Tongass National Forest.[71] In an interview with me, one evacuee described the landing: "I remember my grandfather waking me up early in the morning. We were all in the hold, sleeping on cots. He woke me up and said, 'Come up on deck and see the trees.' I'd never seen trees before."[72]

Notably, the few white civilians on the islands were given the choice to stay. Only those who were one-eighth Unangan or more were required to leave.[73]

Part II: Life in and After Camp

In July, the villages of Akutan, Biorka, Kashega, Makushin, Nikolski, and Unalaska were removed and evacuated.[74] All Unangan ended up in camps scattered across Southeast Alaska.[75] Those in Funter Bay moved into an abandoned cannery with no sewage system, laundry rooms, or bathing facilities.[76] They were greeted by two identical, rotting barracks named the China House and the Filipino House after the nationalities of the cannery workers from years ago.[77] Families crafted privacy for themselves by stringing blankets along lines to create partitions and everyone slept on mattresses on the floor.[78] The facilities were so dilapidated that some people remember "see[ing] through the roof."[79] Evacuees were fed powdered eggs and clams—no fresh vegetables or meat.[80]

If the U.S. government viewed Unangan people as their wards, a poor analogy that does a disservice to the independence and resiliency of the Alaska

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68 *Id.*

69 Kohlhoff, *supra* note 21, at 72.

70 *Id.*

71 *Id.* at 77.

72 Interview with General Jacob Lestenkof, *supra* note 45.

73 National Park Service, *Forced to Leave*, Aleutian Voices (2015), https://www.nps.gov/aleu/learn/historyculture/upload/Aleutian-Voices-v2-508.pdf [https://perma.cc/C42M-PS7P].

74 Kohlhoff, *supra* note 21, at 77.

75 *See* Comm'n on Wartime Relocation and Internment of Civilians, *supra* note 3, at 318.

76 Kohlhoff, *supra* note 21, at 89.

77 *Id.*

78 *Id.* at 92.

79 *Id.*

80 *Id.*

Native group, then its treatment of the Unangan people bordered on criminal. By the end of the internment, 10 percent of Unangan had died.[81] Most of these Unangan were elders who were keepers of history and culture.[82] When they died, part of the culture died with them. These deaths were felt twice over: through the loss of the individuals and the loss of traditional knowledge. The Unangan diaspora is still recovering today.

Many of the deaths were preventable as they had been caused by "severe medical neglect."[83] The mistreatment started with the evacuation. All the villagers were placed in the hold of the ship.[84] There was only one bathroom.[85] Alice Petrevilli, a young girl from Atka, recalled that "there was not enough food, and no matter how you tried to keep clean it was just impossible."[86] Although the *Delarof* had a doctor on the ship, he refused to minister to the Unangan, and—in the words of the wife of a FWS employee who was on the ship—"could not be coaxed into the disagreeable crowded hold."[87] During the voyage, the first villagers experienced the first casualty of internment. A baby girl, three days old, died from bronchial pneumonia—likely contracted from a sick person in the hold.[88]

The camps were no better. Although the *Delarof* was supplied with medical supplies for the internees, they were seized by the military hospital at Dutch Harbor.[89] The sanitary facilities at the Kilisnoo camp consisted of a total of three outdoor pit toilets and a bathtub.[90] One of the camps at Funter Bay was a mile from a water source, and the three outdoor toilets relied on tidal waters to clear the sewage.[91] The camp doctor overseeing Funter Bay left for months, leaving more than three hundred women and children to fend for themselves.[92] The nearest hospital in Juneau would not take Unangan patients

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81 Guise, *supra* note 2, at 151.

82 COMM'N ON WARTIME RELOCATION AND INTERNMENT OF CIVILIANS, *supra* note 3, at 358.

83 *Id.*

84 Ryan Madden, *The Forgotten People: The Relocation and Internment of Aleuts During World War II*, 16 AM. INDIAN CULTURE & RES. J. 55, 61 (1992).

85 *Id.* at 61.

86 *Id.*

87 *Id.*

88 *Id.* The mother of the infant girl was Haretina Kochutin of St. Paul. She was interned at Funter Bay, where another one of her infant children later died.

89 *Id.* at 62.

90 *Id.*

91 *Id.*

92 *Id.* at 65.

without "advance notice."[93] The only way anyone could leave the camps was by "chance encounter" with a sympathetic fisherman, who could volunteer to bring the sick to a doctor.[94] Tuberculosis, influenza, pneumonia, and measles ripped through the camps.[95] In 1943, twenty-five villagers in Funter Bay died from preventable disease.[96] In Killisnoo, only two out of seven babies born at the camp lived.[97] In Ward, twenty people died from tuberculosis.[98]

History Professor Holly Miowak Guise recently uncovered evidence of sexual abuse by H. O. K. Bauer, the Bureau of Indian Affairs (BIA) doctor who oversaw medical care at Killisnoo, one of the camps in Southeast Alaska.[99] Bauer had been placed in Kotzebue—an Iñupiat community north of the Arctic Circle—before being transferred to the Southeast Alaskan camps.[100] Numerous letters, affidavits, and official documents show that the BIA was aware of Bauer's abuse when it transferred him to the even more rural, isolated camps.[101] Once there, he continued abusing Alaska Native women.[102]

Throughout that time, the government continued to extract resources and labor from the Unangan. Every summer, the U.S. government forced men from St. Paul and St. George to leave their families, return to an active war zone, and continue harvesting seals.[103]

The shock, isolation, and horror the Unangan felt at the conditions is difficult for those outside of the community to conceive. Most Unangan had never left the islands before they were evacuated.[104] After living in the vast horizons of the Aleutian Islands, some felt claustrophobic among the dense old-growth forest that surrounded them.[105] Still, despite their conditions, they survived.

Japanese camps in the lower-48 were markedly different. Technically, Unangan were free to leave and work in other communities, although they

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93 *Id.*

94 *Id.*

95 *Id.* at 65, 66, 67.

96 *Id.* at 68.

97 *Id.*

98 *Id.*

99 Guise, *supra* note 2, at 156. Dr. Guise is the first historian to bring this abuse to light. It is a powerful work, exposing both the federal government's institutional failures and Native women's resiliency and struggle against colonial powers.

100 *Id.* at 161.

101 *Id.* at 154, 157, 160, 161.

102 *Id.* at 163. He also medically abused Native children in other communities. Two Alutiiq children from villages on Kodiak Island reported permanent speech defects, caused by Bauer's botched tonsillectomies.

103 *Id.* at 150.

104 Kohlhoff, *supra* note 21, at 68.

105 *Id.*

needed permission to do so.[106] Additionally, the feasibility of leaving after being marooned in areas with no boats or roads was lower. On the other hand, WRA camps were fenced in, with armed guards and snipers ensconced in watchtowers being a daily presence.[107] In the beginning of the internment—before they requested rice, learned how to cook with government-provided ingredients, and built gardens in the camps—the incarcerated survived off moldy bread and hotdogs.[108]

Some Native women who were married to Japanese men chose to "self-intern" along with them.[109] The WRA, which managed the internment of 110,000 people, viewed Japanese Americans as "racial children in need of democratic tutelage."[110] This infantilizing mirrored that of Native people, who were viewed by the U.S. government as "dependent wards not yet fit for democratic citizenship."[111] Both groups were also repeatedly told that incarceration was to protect them: American officials warned of anti-Japanese sentiment flooding places like California and the dangers of more bombings in the Aleutian Island chain.[112]

When Japanese and Unangan internees returned home, they were both greeted with ruined homes and livelihoods. When the Unangan were allowed to return to their villages—three years after their initial removal—they found that their homes had been "vandalized and looted by occupying American military forces."[113] The entire village of Atka had been "burned to the ground by the Navy."[114] Military trash still litters the islands today.[115] Huge numbers of animals on which the Unangan relied for subsistence living were also gone.[116] Foxes, seals, and caribou were "slaughtered in great numbers . . . by bored

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[106] COMM'N ON WARTIME RELOCATION AND INTERNMENT OF CIVILIANS, *supra* note 3, at 341.

[107] *Immigration and Relocation in U.S. History, Behind the Wire*, LIBR. OF CONG., https://www.loc.gov/classroom-materials/immigration/japanese/behind-the-wire/#:~:text=Life%20in%20the%20camps%20had,their%20daily%20business%20in%20public [https://perma.cc/E354-5QMX].

[108] *Campu Episode Six: Food*, DENSHO PROJECT (June 2021) https://densho.org/campu/campu-food/ [https://perma.cc/7D7K-XAVD]; The Kitchen Sisters, *Weenie Royale: Food and the Japanese Internment*, NATIONAL PUBLIC RADIO (Dec. 20, 2007, 12:01 AM) https://www.npr.org/2007/12/20/17335538/weenie-royale-food-and-the-japanese-internment [https://perma.cc/7T34-JPPS].

[109] PEGUES, *supra* note 10.

[110] MAE M. NGAI, IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA 179 (2014).

[111] *Id.*

[112] COMM'N ON WARTIME RELOCATION AND INTERNMENT OF CIVILIANS, *supra* note 3, at 83, 318 (noting that the "poverty" of General DeWitt's arguments that Japanese Americans posed a threat committed him to a "growing emphasis on the danger of vigilantism") ("The evacuation of the Aleuts was a reasonable precaution to ensure their safety.").

[113] *Id.* at 355.

[114] *Id.* at 356.

[115] *Id.* at 356–57.

[116] *Id.* at 359.

servicemen."[117] Lagoons that once served as spawning locations for herrings were filled in and tidal-harvest foods were "destroyed" by Navy oil spills.[118]

For the Japanese communities, returning to the continental Western states was also very difficult.[119] Even after *Endo*, the Supreme Court case that led to the eventual closure of the camps, Japanese Americans remained apprehensive about returning home. Before Executive Order 9066, more than 90,000 Japanese Americans were living in California.[120] By March 1945, only 1,500 had returned to the state.[121] Those who did found that "their homes and farms had been stolen, destroyed, or ill cared for."[122]

Part III: Redress

The Civil Liberties Act is the first and only reparations bill to pass through Congress. It is the result of decades of grassroots efforts from both Japanese and Unangan communities. The history of those movements deserves its own paper. This section is a highly truncated version of that history.

Both Japanese Americans and Unangan underwent a form of "social amnesia," described as a kind of "group phenomenon marked by attempts to suppress feelings and memories of particular moments or extended periods[,] not a psychological pathology but a conscious effort to screen memories."[123] In this way, the groups' two divergent experiences became deeply connected.

The children of the internees—or those internees who were too young to remember—became active in the 1970s and began demanding redress.[124] For Japanese Americans, this movement came on the coattails of the "Yellow Power" movement of the 1970s, with the backing of the newly formed "pan-Asian" identity.[125] In the Aleutians, the Unangan also started lobbying for redress, also during a wider cultural moment. The "Red Power" movement

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[117] *Id.*

[118] *Id.*

[119] Ngai, *supra* note 93, at 188.

[120] *Japanese Americans in World War II*, Fresno State Libr. (July 19, 2022, 1:23 PM) https://guides.library.fresnostate.edu/c.php?g=636720 [https://perma.cc/KE8K-9MLJ].

[121] Ngai, *supra* note 93, at 188.

[122] *Id.*

[123] Rie Makino, *Absent Presence as a Nonprotest Narrative: Internment, Interethnicity, and Christianity in Hisaye Yamamoto's "The Eskimo Connection,"* 26 The Japanese J. of Am. Stud. 99, 104 (2015).

[124] *Id.*

[125] *See* Eric K. Yamamoto, Margaret Chon, Carol L. Izumi, Jerry Kang & Frank H. Wu, Race, Rights, and Reparation: Law and the Japanese American Internment 279 (2013).

President Ronald Reagan signing the Civil Liberties Act of 1988, with (from left to right): Hawaii Sen. Spark Matsunaga, California Rep. Norman Mineta, Hawaii Rep. Pat Saiki, California Sen. Pete Wilson, Alaska Rep. Don Young, California Rep. Bob Matsui, California Rep. Bill Lowery, and Japanese American Citizens League President Harry Hajihara. This object is protected by copyright, but the rights holder has allowed us to make it available to you for this non-commercial, educational publication; Densho Digital Repository, https://ddr.densho.org/ddr-densho-10-6.

started in the late 1960s, shortly before the Unangan started their campaign.[126] Alice Pertivelli—an Atkan, internee of Killisnoo camp, and strong advocate for the Unangan people—reflected on the movement:

> One positive effect that the evacuation had on the Aleut people as a whole was exposure to the political process. This helped the Aleut people become more self-determined about making decisions that affected their lives. It helped us achieve more independence from governmental agents who determined that we were incapable of planning our cultures and carrying out our goals concerning the way we wanted to live our lives. In spite of all that has happened to us we are still around, although gone are the secure Aleut lifestyles in which we were comfortable in our villages before World War II.[127]

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[126] Vine Deloria Jr., Custer Died for Your Sins 182, 254 (1969).

[127] Kohlhoff, *supra* note 21, at x.

Petrivelli first told her daughter about what happened to her and other Atkans during World War II during the redress movement. "Because it was not in the history books," Petrivelli recalled, "she did not believe me."[128] John Tateishi, one of the leaders of the JACL's redress movement, recalled that the first and biggest hurdle was convincing everyone that internment actually happened.[129] In an effort to spread the history, Tateishi went on a media tour that included radio talk shows. "Even in the Bay, which is such a liberal area, people would call in and accuse me of lying," he said.[130] "They'd say, 'This never happened in this country. Otherwise, we would know about it.'" [131]

Japanese and Unangan activists lobbied to get a congressional hearing. As a result, a bipartisan federal commission was established in 1980 to review the circumstances surrounding World War II internment camps.[132] Nine men—senators, congressmen, government officials, and even a judge—oversaw hearings all over the country and invited anyone who had been interned to testify. Over the course of six months in 1981, the Commission held twenty days of hearings and called more than 750 witnesses.[133] Three of those hearings occurred in Anchorage, Unalaska, and St. Paul. There, some Unangan people spoke about their experiences for the first time.

Part IV: Understanding

In 1988, the Civil Liberties Act finally passed. The election of Japanese Americans to national office after World War II was "crucial" to its passage.[134] So, too, were the political efforts by the Unangan; the Alaskan congressional representatives at the time—Don Young and Ted Stevens—had close ties to the Alaska Native community.[135] Yet despite these ties, the remedies for each group differed.

The unity that bound the Unangan and Japanese American activists was not reflected in the final version of the Civil Liberties Act. Congress split the

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[128] *Id.* at xi.

[129] Interview with John Tateishi.

[130] *Id.*

[131] *Id.*

[132] Sharon Yamato, *Commission on Wartime Relocation and Internment of Civilians*, Densho Project Encyc. (July 8, 2020, 8:26 PM), https://encyclopedia.densho.org/Commission_on_Wartime_Relocation_and_Internment_of_Civilians/ [https://perma.cc/R2SA-A6L6].

[133] Comm'n on Wartime Relocation and Internment of Civilians, *supra* note 3, at xxvii.

[134] Yamamoto et al., *supra* note 108, at 280.

[135] Marie (Matsuno) Nash, Alaska Women's Hall of Fame, https://www.alaskawomenshalloffame.org/alumnae/marie-nash/ [https://perma.cc/CQ4M-6JWP] (last visited Apr. 26, 2024) (Marie Matsuno Nash is half-Unangan and half-Japanese. She was born in Camp Minidoka and later served in Senator Stevens' office for years. She is one of the many hidden voices who contributed to the passage of the bill. Both Unangan and Japanese descendants are indebted to her.).

bill into two parts: the first was dedicated to the Japanese Americans, and the second was dedicated to the Unangan. The Japanese portion of the bill began with a historic apology:[136]

> Congress recognizes that. . . a grave injustice was done to both citizens and permanent resident aliens of Japanese ancestry by the evacuation, relocation, and internment of civilians during World War II. . . . [T]hese actions were . . . motivated largely by racial prejudice, wartime hysteria, and a failure of political leadership . . . . For these fundamental violations of the basic civil liberties and constitutional rights of these individuals of Japanese ancestry, the Congress apologizes on behalf of the Nation.[137]

It also earmarked $20,000 for each Japanese American interned during World War II and an additional $1.65 billion for a public education fund to "to inform the public about the internment of [Japanese] individuals so as to prevent the recurrence of any similar event."[138]

The Unangan section of the bill differed significantly. The Japanese portion made sure to recognize the "individuals" who had been interned. But the Unangan portion included no recognition of individuality, or any identity apart from the large umbrella term "Aleuts."[139] Unlike the section about Japanese internment, the Unangan internment had no apology.[140] Although the government recognized "the injustices suffered by the Aleuts during World War II," the statement reads almost contractually.[141] The government "failed to provide reasonable care" and to "protect Aleut personal and community property while such property was in its possession."[142] The only "remedy" for those losses was "appropriate compensation."[143] To that end, the Unangan received $4.7 million for a trust fund along with an additional $12,000 for each surviving internee.[144] (Although they lacked an apology, they did receive more money per capita than the Japanese.) The trust could be used to benefit elders or disabled villagers, help "students in need of scholarship assistance," preserve

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[136] Apology Resolution, Pub. L. No. 103–150, 107 Stat. 1510 (1993) (This apology is one of just two that Congress passed. The second, known as the Apology Resolution, apologized to Native Hawaiians on behalf of the U.S. government for overthrowing the kingdom of Hawai'i.).

[137] 50 U.S.C.A. § 4202.

[138] 50 U.S.C.A. § 4215.

[139] 50 U.S.C.A. § 4202.

[140] *Id.*

[141] *Id.*

[142] *Id.*

[143] *Id.*

[144] *Id.*; 50 U.S.C.A. § 4236.

Unangan "cultural heritage and historical records," improve community centers," and generally "improve the condition" of Unangan life.[145]

The Japanese apology included an acknowledgement of the removal and internment of citizens—a nod to the violation of legal rights that occurred.[146] The Unangan section contained nothing like that. Although it opaquely acknowledged the cultural loss caused by the removal, internment, and death of many Unangan, there was no recognition of the Alaskan native group's citizenship.

The differences between what each group received reflect the differences between how each group was racialized. Racism was used as a justification for both of their confinements (explored later in the article), but the differences in that racialization are evident in the text of the Act. Although the histories of Japanese Americans and Unangan differ greatly, they were sometimes racialized in similar ways: as "Oriental," as other, as non-citizens (despite legal citizenship) who, importantly, had desirable resources. This combination of racial threat and economic asset led to both groups' removal. However, the additional racialization of Unangan as government wards—thus lacking full citizenship rights, autonomy, and personhood—led to the absence of any apologies for what the Alaska Native group went through, and the contractual nature of their restitution.

Again, compare the contractual, impersonal nature of the Unangan section to the apology to every individual Japanese internee. The Civil Liberties Act may only have affected a relatively small portion of the U.S. population, but it represents something much larger: how the law—even one written to remedy historical injustices—reflects dominant assumptions about race.

A. Racialization

Issei, *Nisei*, and *Sansei* were all racialized as noncitizens, and therefore not worthy of citizenship's attendant rights. The United States has a strong tradition of civic ostracization of Asians from the body politic.[147] Even Asian Americans with formal citizenship have, historically, experienced "racial extraterritorialization."[148] Japanese concentration camps were the logical end to that excommunication. While most internees were formal citizens, "they were *excluded* from the category of American identity."[149]

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[145] 50 U.S.C.A. § 4202; 50 U.S.C.A. § 4236.

[146] 50 U.S.C.A. § 4202 ("[A] grave injustice was done to both citizens and permanent resident aliens of Japanese ancestry by the evacuation, relocation, and internment of civilians during World War II.").

[147] Claire Jean Kim, *The Racial Triangulation of Asian Americans*, 27 Pol. & Soc'y 105, 107 (1999).

[148] Devon W. Carbado, *Racial Naturalization*, 57 Am. Q. 633, 638 (2005).

[149] *Id.*

The orientalizing of the Unangan may have also contributed to their internment, both in tangible and intangible ways. By the late nineteenth century, it was generally believed that all indigenous coastal Alaskans came from Asia across the Bering Land bridge.[150] In 1867, Massachusetts senator Charles Sumner—during a three-hour speech in favor of ratifying the U.S.-Alaska purchase—classified "Aleutians" as "Mongolian in origin."[151] An ethnographer traveling through Alaska noted that "throughout British Columbia, there is the indisputable opinion that [Tlingit and Haida native people] are descendants of Japanese sailors."[152]

Political and anthropological discourses became preoccupied with the idea of distinguishing Alaska Native people from other indigenous groups in the continental United States, a distinction based "on perceived Asian origins."[153] By separating indigenous Alaskans from Native Nations in the south, American politicians successfully avoided the thorny question of whether indigenous groups needed separate treaties (or contracts) in order to approve of the Alaska Purchase.[154] This separation continued up until World War II. Alaska Natives weren't granted U.S. citizenship until 1940, nearly twenty years after indigenous people in the lower-48.[155] By racializing Alaska Natives—specifically Unangan—as Asian, the U.S. government was able to withhold corresponding rights.

Unangan were also racialized in more direct ways. The U.S. government's stated rationale for the Alaskan internment was for protection against Japanese invasion.[156] This likely was a significant factor in the decision to corral the Unangan population: after the bombing of Dutch Harbor and the invasion of Attu, it was reasonable to believe that the Aleutian Islands were unsafe for civilians.[157] But there was another, darker possibility. To the U.S. military, an Unangan man and a Japanese soldier were physically indistinguishable.

Why were white civilians not interned? The evacuation was based on race. Anyone in the region who was one-eighth Unangan or more was required to

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[150] FRANZ BOAS, THE ETHNOGRAPHY OF FRANZ BOAS: LETTERS AND DIARIES OF FRANZ BOAS, WRITTEN ON THE NORTHWEST COAST FROM 1886–1931 6 (ed. Ronald P. Rohner, 1969).

[151] PEGUES, *supra* note 10, at 25.

[152] BOAS, *supra* note 132, at 98.

[153] PEGUES, *supra* note 10, at 26.

[154] *But cf. id.* (that there was no need to orientalize Lower-48 Native Nations in order to seize their land).

[155] *See* 8 U.S.C.A. § 1401 (the delay may be attributable to the fact that Alaska was not granted statehood until the 1950s).

[156] Eve Tuck & K. Wayne Yang, *Decolonization is Not a Metaphor*, 1 DECOLONIZATION: INDIGENEITY, EDUC., AND SOC'Y 1, 18 (2012).

[157] KOHLHOFF, *supra* note 21, at 43.

evacuate.[158] But white civilians were given the choice to evacuate or not. This may be because, in the eyes of the U.S. government, the indigenous people posed a greater risk: Unangan were "difficult to differentiate from potential Japanese spies."[159] There were multiple incidents of the military detaining Unangan for being suspected Japanese soldiers.[160] In one incident, several Unangan men—out on a hike from the nearby Biorka village—were seized by the U.S. military and held for nearly two weeks.[161] The Unangan themselves were not blind to this. Years after internment, John Tateishi, a JACL activist, recalled meeting redress lobbyers from the Aleutians.

> I was over at the House, and all of a sudden these two men showed up, and they had come down from Alaska to testify. It was the first time I heard what that experience was like. One was Mike Zaharoff, and the other was Philemon Tutiakoff. You know, I met them, I looked at them and I said, "Shit. Except for your names, you could be Japanese." And one of them says, "Why the hell do you think they put us into those damn prisons?"[162]
>
> *John Tateishi, Redress Director of the Japanese American Citizens League*

Finally, several of the military commanders in charge of the island wanted the Unangan out of the way. Any argument that evacuating Unangan was for their safety was a "subtext," and nowhere was this more evident than the treatment of Unalaskans.[163] The villagers were evacuated after the bombing of Dutch Harbor—after the danger had subsided—while white civilians were allowed to stay. The commanding general of Fort Mears, an Army base just south of Dutch Harbor, called Unangan "degenerates" and saw their removal as a way to cleanse the area of social problems.[164] He feared that the Native people would "distract" military settlers through alcohol and sex.[165]

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[158] Levi J. Long, *WWII Internments Set Aleuts Adrift From Their Islands*, Seattle Times (Feb. 19, 2004), https://archive.seattletimes.com/archive/?date=20040219&slug=aleut19m [https://perma.cc/5GPM-P8S9]. Note the similarity to how race was legally defined. For example, Florida's anti-miscegenation law from 1865 identified anyone with more than one-eighth "negro blood" as fitting the definition of "a person of color." An Act to amend the Act entitled An Act Concerning Marriage Licenses, L. of Fla., Chap. 1,468 §§ 1–3 (1865).

[159] Tuck & Yang, *supra* note 138.

[160] Pegues, *supra* note 10, at 146.

[161] *Id.*

[162] Interview with John Tateishi, *supra* note 111.

[163] Kohlhoff, *supra* note 21, at 69.

[164] *Id.*

[165] *Id.* Using promiscuity and alcoholism as a justification for excluding native people (instead of whites) is textbook racism, and part of a long-standing playbook deployed against indigenous people in both the Lower-48 and Alaska.

B. Land Grab

> We're charged with wanting to get rid of the Japs for selfish reasons. We might as well be honest. We do. It's a question of whether the white man lives on the Pacific Coast or the brown man. They came into this valley to work, and they stayed to take over. . . . If all the Japs were removed tomorrow, we'd never miss them in two weeks, because the white farmers can take over and produce everything the Jap grows. And we don't want them back when the war ends, either.[166]
>
> *Austin Anson, Managing Secretary, Vegetable Grower-Shipper Association of Salinas (CA)*

Before World War II, Japanese farmers produced more than a third of all commercial crops in California, despite owning less than 2 percent of the state's total farmland.[167] In 1940, the average cost per acre of West Coast farms was $37.94, while the average cost of Japanese farms was $279.96.[168] Pearl Harbor gave white, Western farmers an opportunity. Shortly after the attack, Austin Anson—a member of a farmer's union—was "dispatched" to Washington to lobby for the removal of all *Issei* and *Nisei* from the West Coast.[169] A DOJ official warned the President against removal of farmers "who were helping feed the civilian population and the military," calling Anson's efforts "nonsense."[170]

The removal and internment of Japanese Americans was justified by (false claims of) national security.[171] And yet, the DOJ official's argument—that Japanese farms helped feed the military amassing throughout the West Coast—was also a form of a national security argument. These justifications were a sham. But white farmers' attempted land grab held more water.

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[166] Frank J. Taylor, *The People Nobody Wants*, THE SATURDAY EVENING POST (May 9, 1942), https://www.saturdayeveningpost.com/2017/05/people-nobody-wants/ [https://perma.cc/E3EB-4D5C].

[167] *History: Before the War*, HEART MOUNTAIN, https://www.heartmountain.org/history/before-the-war/ [https://perma.cc/97F9-4UCR].

[168] COMM'N ON WARTIME RELOCATION AND INTERNMENT OF CIVILIANS, *supra* note 3, at 122.

[169] Taylor, *supra* note 148.

[170] A.V. Krebs, Opinion, *Bitter Harvest: How Profiteers Forced the Nisei off Their Farms During WWII*, WASH. POST (Feb. 2, 1992), https://www.washingtonpost.com/archive/opinions/1992/02/02/bitter-harvest/c8389b23-884d-43bd-ad34-bf7b11077135/ [https://perma.cc/Q9KJ-TVQ7].

[171] *See, e.g.*, Korematsu v. United States, 323 U.S. 214, 223 (1944) ("Korematsu was not excluded from the Military Area because of hostility to him or his race. He was excluded because we are at war with the Japanese Empire, because the properly constituted military authorities feared an invasion of our West Coast and felt constrained to take proper security measures, because they decided that the military urgency of the situation demanded that all citizens of Japanese ancestry be segregated from the West Coast temporarily, and finally, because Congress, reposing its confidence in this time of war in our military leaders—as inevitably it must—determined that they should have the power to do just this.").

There were similar justifications—both false and real—for the internment of Alaska Natives. The predominant justification for the removal of the Unangan was grounded in safety, too. Throughout June 1942, the Japanese army bombed and invaded several islands along the Aleutian Island chain.[172] The evacuation was, supposedly, done for the personal safety of the Alaska Native peoples in the region.[173] And yet, it was undergirded by both racial animus (explained above) and—I argue—a desire for strategic land.

The Aleutian Island chain was strategically important given its position near most direct routes from northern Asia, the U.S. West Coast, Alaska, and the Hawaiian Islands, making them "most useful" to the U.S. military.[174] In 1935, one general told the U.S. Congress that "whoever holds Alaska will hold the world."[175] But the Unangan were in the way. By removing the Unangan, the military was able to freely occupy the islands and the buildings left behind.

To understand why the U.S. military, which moved thousands of troops through the Aleutian Island chain, desired the comparatively few hundreds of buildings left behind by the Unangan, one must first understand the geography of the region. The Aleutian Islands are so rural that most Americans have trouble comprehending that level of isolation. Even in the modern era, it can take days for planes to reach the islands—sometimes upwards of a week.[176] In such remote locations, existing infrastructure is incredibly valuable, something that the U.S. government was acutely aware of.[177]

C. Civil Liberties Act

Over the years, I have spoken to Senator Norman Mineta, John Kirtland (the lawyer who represented the Unangan during the reparations process), John Tateishi, and various other politicians and activists. None were able to explain why the two groups ended up with different allowances. Only one clue remains, buried deep in the legislative history: "The Aleuts' case for compensation derives not from the relocation orders executed by military

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[172] Comm'n on Wartime Relocation and Internment of Civilians, *supra* note 3, at 322.

[173] *Id.* at 69.

[174] W. L. Goldsborough, *The Aleutians—Their Strategic Importance*, 67 Proceedings 830, 832 (1941).

[175] Francis Pike, Hirohito's War: The Pacific War, 1941–1945 1003 (2016).

[176] *See, e.g.*, Sofia Stuart-Rasi, *Volcanic Ash Clouds Disrupt Medical Air Travel in Aleutians*, KUCB (Nov. 3, 2023, 9:02 PM), https://www.kucb.org/health/2023-11-03/volcanic-ash-clouds-disrupt-medical-air-travel-in-aleutians [https://perma.cc/ML6H-77YQ] (volcanic eruptions limiting medical evacuations from Unalaska); Andy Lusk, *Military Delegation Visit to Unalaska Postponed*, KUCB (Oct. 31, 2023, 3:07 PM) https://www.kucb.org/regional/2023–10–31/military-delegation-visit-to-unalaska-postponed [https://perma.cc/Q2VX-NDJD] (inclement weather leading to the cancellation of U.S. Coast Guard flights, Army flights, and Space Force flights to Unalaska); Jim Wilson, *On Assignment: Ceiling Briefly Unlimited*, N.Y. Times (Nov. 25, 2009) https://archive.nytimes.com/lens.blogs.nytimes.com/2009/11/25/assignment-16/ [https://perma.cc/Y9S5-N5AR] (weather forcing the grounding of a man flying from Unalaska to Nikolski for more than five days).

[177] Comm'n on Wartime Relocation and Internment of Civilians, *supra* note 3, at 69 ("If Aleuts were evacuated, their homes and lands would be open for military use.").

commanders on the scene, but rather from the treatment suffered at the hands of the Government following the evacuation."[178] These terms were proposed by the Aleutian/Pribilof Islands Association and the Aleut Corporation.[179]

Although there are differences in how money was allocated between the two groups—larger individual awards for Japanese Americans, trusts with varying prohibitions on how the money could be used for Unangan—the most significant difference was the apology. Why?

The Commission on Wartime Relocation and Internment of Civilians released a final report that Congress adopted almost word for word.[180] An explicit apology was only recommended for the Japanese.[181] By way of explanation, the Commission noted that it found "no persuasive showing that evacuation of the Aleuts was motivated by racism or that it was undertaken for any reason but their safety."[182] Other reports also insisted that the evacuation was "militarily justified."[183] But, as shown above, race was an explicit factor in determining who should be evacuated.[184]

The lack of apology may be rooted in the U.S. government's colonial posture toward indigenous people: that Native peoples are "wards," and in the Unangan case, wards who the U.S. government "failed to care for . . . properly."[185] This understanding of the colonialist attitude goes both ways: Unangan had long complained of "Interior Department paternalism and condescension."[186] Perhaps no fact can communicate that condescension more strongly than this: in the hundreds of pages of government documents, letters, and memorandums debating what to do about the Unangax̂, at no point is there any mention of anyone asking for their opinion.

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178 *Civil Liberties Act of 1985 and the Aleutian and Pribilof Islands Restitution Act: Hearings on H.R. 442 and H.R. 2415 Before the Subcomm. on Admin. L. & Gov. Rels. of the House Judiciary*, 99th Cong. 1601 (1986).

179 *Id.* at 1622.

180 *See, e.g.*, Comm'n on Wartime Relocation and Internment of Civilians, *supra* note 3, at 462 ("The Commission recommends that Congress pass a joint resolution, to be signed by the President, which recognizes that a grave injustice was done and offers the apologies of the nation for the acts of exclusion. removal and detention."); *cf.* 50 U.S.C.A. § 4202 ("Congress recognizes that, as described by the Commission on Wartime Relocation and Internment of Civilians, a grave injustice was done to both citizens and permanent resident aliens of Japanese ancestry by the evacuation, relocation, and internment of civilians during World War II.").

181 Comm'n on Wartime Relocation and Internment of Civilians, *supra* note 3, at 462 ("The Commission recommends that Congress pass a joint resolution, to be signed by the President, which recognizes that a grave injustice was done and offers the apologies of the nation for the acts of exclusion. removal and detention.").

182 *Id.* at 464.

183 Dept. of Def. Appropriations Act of 1989, Pub. L. No. 100–463, 102 Stat. 2270 (1989).

184 *See* Comm'n on Wartime Relocation and Internment of Civilians, *supra* note 3.

185 Pegues, *supra* note 10, at 151.

186 Comm'n on Wartime Relocation and Internment of Civilians, *supra* note 3, at 69.

In a brief submitted to Congress and arguing for redress, the Unangan are careful to distinguish themselves from the Japanese: "The Aleut experience in World War II is unique in the annals of modern American history. These citizens were neither accused nor suspected of any disloyalty to the United States in time of war."[187] The brief then referred to educational segregation and racial discrimination against Black Americans.[188] Perhaps it was this reference to the Civil Rights Movement, and specifically the reference to *Bolling v. Sharpe*,[189] that doomed the apology. If Congress apologized to the Unangan, then they might have to apologize for perpetuating the Jim Crow regime and, perhaps eventually, for slavery.

Congress was correct in making the connection between the treatment of Black and Unangan Americans, but deeply flawed in their rejection of it. One year after the Civil Liberties Act was signed into existence, Representative John Conyers introduced H.R. 40, *Commission to Study Reparation Proposals for African Americans Act.*[190] Rep. Conyers continued introducing the bill every session, for nearly thirty years, before he retired in 2017.[191]

Conclusion

Rie Makino—a literature professor who studied Japanese internment—wrote about the distinction between suppressing and forgetting. Suppression, as defined by Makino, is the act of concealing "emotional anger, grief, and protest arising from [the] trauma" of incarceration.[192] This was illuminated by the different generational experiences of those who went through internment: the children of internees were "aggressively involved in the redress movement," while their parents were reluctant to talk about it.[193]

As I have researched these twin stories of internment, I have tracked another similarity, one that does not fit neatly into the bounds of an academic paper. (Or at least, this academic paper.) This is a generational pattern, one I have developed largely through anecdotal evidence. Those who were interned did their best to move on from the experience; their children demanded redress; and now their grandchildren attempt to preserve the history. Perhaps that

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187 *Civil Liberties Act of 1985 and Aleutian and Pribilof Islands Restitution Act*, *supra* note 144, at 1642.

188 *Id.* at 1644.

189 (1954) 347 US 497

190 Sarah Hulett, *John Conyers, Detroiter and Former Dean of House of Representatives, Dead at 90*, Mich. Radio (Oct. 27, 2019, 4:31 PM), https://www.michiganradio.org/news/2019–10–27/john-conyers-detroiter-and-former-dean-of-house-of-representatives-dead-at-90 [https://perma.cc/9YSP-GWYG].

191 *Id.*

192 Makino, *supra* note 106, at 104.

193 *Id.*

generational removal is what helps them engage with it. But our explorations rely on the generosity of our elders, who share their painful stories. In the words of Jacob Lestenkof: "People tended to hesitate to talk about that experience, including me. They seem very reluctant. The people who are interested in the experience are people like you, who were not born yet."[194]

I am grateful for General Jacob Lestenkof, Leo Merculief, John Tateishi, Norman Mineta, Marie Matsuno Nash, and John Kirtland—all elders who took the time to speak with me personally. I am also grateful to the many, many people who spoke to historians to ensure that this painful history was not lost.

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[194] Interview with Jacob Lesteknof.

JOGGED MEMORIES

GEORGE NICHOLSON

Carlucci, Ashford, and Motley, Civil Rights Pathfinders

Caroline Lester's story of hidden history in Alaska, presented above, brings to mind another story of hidden history in the then territory and in nearby Canada, that of Cesare "CeCe" Carlucci. Before he died in 2008, Carlucci told me, while he was in the U.S. Army Corps of Engineers during World War II, he helped build the 1,400-mile Alaska-Canadian Highway (ALCAN) Highway from the United States through Canada to the then territory of Alaska. There, segregated white troops and black troops worked on the highway by day. Carlucci arranged campfires and evening meals with the white and black troops together, unsegregated. Commanding officers looked the other way, perhaps because Carlucci's risky, but thoughtful acts were enhancing morale among all the troops and improving productivity. The highway was finished in 1942. It was used as a military supply route throughout the remainder of World War II. It was not opened to the public until 1948.[1] It was another decade before Alaska became a state on January 3, 1959.

Carlucci's story doesn't end there. After the war, he went on to become the only umpire in the Pacific Coast League (PCL) Hall of Fame. He umpired more than 2,500 games. More importantly, Carlucci, a California resident, mentored two black, fellow PCL umpires, Emmett Ashford and Bob Motley, a former Negro Leagues umpire. The latter two men believed themselves in competition to become the first black umpire in the Major League Baseball

[1] That same year, 1948, three years after World War II ended, President Harry Truman signed Executive Order 9981, creating the President's Committee on Equality of Treatment and Opportunity in the Armed Services. The order mandated the desegregation of the U.S. military, "Executive Order 9981, Desegregating the Military," Charles Young Buffalo Soldiers National Monument, National Park Service, https://www.nps.gov/articles/000/executive-order-9981.htm#:~:text=On%20July%2026%2C%201948%2C%20President,desegregation%20of%20the%20U.S.%20military.

(MLB). They were right. Ashford, a graduate of Chapman University, prevailed and joined the big leagues in 1966. I saw him umpire many times, in both the PCL and MLB. I believe he remains the most agile and colorful umpire in the game's history.

In 2005, the AAA minor league all-star game between the Pacific Coast League and the International League was held at Raley Field in Sacramento, home of the River Cats (and soon for the next three years, the former Oakland A's). Branch Rickey III, Bob Hemond, executive vice president, Sacramento River Cats, and I, convened a memorial luncheon in Old Sacramento for the late Emmett Ashford. All four game umpires attended, as did Adrienne Ashford, the old umpire's daughter, and many other baseball notables, judges, and lawyers. Terry Flanigan unveiled his large portrait of Ashford as he appeared while umpiring a game, alert to call the action. The portrait hung in Raley Field during the festivities leading up to and during the all-star game. The PCL won the game, 11–5. It was televised nationally.

Terry Flanigan's painting of Emmett Ashford, Major League Baseball's first black umpire. Published with Terry Flanigan's permission.

In 2008, I invited Carlucci, 90, and Motley, 84, to serve on a panel, "Baseball and Freedom: The Roots of Order and Liberty, the story of baseball's umpires," to be moderated by Judge William Shubb, U.S. District Court, Eastern District, California. The panel was to be the 3-hour opening night that year for the Cooperstown Symposium on Baseball and American Culture, conducted annually by the National Baseball Hall of Fame and Museum. Both men accepted. Neither could afford the trip and wanted to take their wives. I personally bought airline tickets and reserved hotel rooms in Cooperstown for both couples. Those four airline tickets and hotel reservations were never used. The night before everyone was set to fly to Cooperstown, Carlucci was hospitalized by a stomach ailment and Motley broke his leg. Neither man made it to Cooperstown. Carlucci had never been in a hospital before. He never came home from this one. Motley recovered. Opening night went on without either man. Judge Shubb asked questions of Motley's son, Byron, a prominent singer, songwriter, filmmaker, photographer, author, and lecturer, and "of" Carlucci. In the latter instance, with prior knowledge of the judge's questions, videographers cut Carlucci's "answers" from three hours of an interview videotaped a few weeks before he was hospitalized. The new program was constructed overnight. It was not our best opening night, but it worked better than expected. I will always regret the two old umpires and their wives never made it to Cooperstown.

Bob Motley wrote a book, with Byron, *The Negro Baseball Leagues: Tales of Umpiring Legendary Players, Breaking Barriers, and Making American History* (2020). Opening and closing statements are included, written by, Bob Kendrick, president, Negro Leagues Baseball Museum; Larry Lester, research director and treasurer, Negro Leagues Baseball Museum; Dave Winfield, a member of the Baseball Hall of Fame; and Dionne Warwick, a prominent hit singer, actress, and television host. Byron Motley and his, "Viva Cuba Beisbal: A photographic journey into the heart and soul of Cuban baseball," a year later, enjoyed a six-month gallery exhibit at the National Baseball Hall of Fame and Museum.

Branch Rickey III, then president, Pacific Coast League, and I planned and conduced three opening nights for Cooperstown Symposia, in 2007, 2008, and 2009, along with five other programs. Our sponsors were, Ohio Wesleyan University, Chapman University School of Law, Negro Leagues Baseball Museum, Pacific Coast League and its Hall of Fame, San Francisco State University, Oakland Unified School District, Oakland Athletic League, and California Interscholastic Federation. All of our presentations dealt with

baseball and freedom by retelling stories about separate events in the game, all congealing to comprise and illustrate the key role baseball played in fostering freedom and harmony across all races in our nation. Branch III is the grandson of the elder Rickey, a lawyer and president of the Brooklyn Dodgers. The elder Rickey, over the unanimous opposition of all the other team owners, broke Major League Baseball's 20th century color barrier by bringing Jackie Robinson to the Dodgers in 1947.[2]

Brad Snyder then Professor, School of Law, University of Wisconsin, and now, St. Thomas More Professor in Law and History; Anne Fleming Research Professor, Georgetown Law, delivered one of the Cooperstown programs Branch III and I produced. He had just written a book, *A Well-Paid Slave: Curt Flood's Fight for Free Agency in Professional Sports,* the year before. A key element in Snyder's book was the supreme court case involved in Flood's fight to break out of absolute control of players by the teams for which they played. Flood lost the case, *Flood v. Kuhn* (1972) 407 U.S. 258, but won the war for players because free agency arrived soon thereafter.[3]

George Powles, as a McClymonds and Skyline High School teacher and coach in all sports for 30 years in the Oakland Unified School District and the Oakland Athletic League, won 28 league championships in the various sports and made a permanent and positive, though largely invisible mark on thousands of young black men, for the most part, and on their families and, especially, on the game he loved most, and on the nation he fought in combat to defend in World War II. All the while, Coach Powles did so, quietly, humbly, and thoughtfully, by dealing with everyone he coached and everyone he met as a presumptively worthwhile individual. Several of his student athletes made history in Major League Baseball, the National Football League, the National Basketball Association, and the Olympics. Coach Powles began all this in 1947, the same year, Branch Rickey brought Jackie Robinson to the Brooklyn

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[2] For some perspective on our first Cooperstown opening night, see, George Nicholson, "Kindred Spirits, Humble Heroes: Branch Rickey and William Wilberforce" (2007), http://www.independent.org/newsroom/article.asp?id=1949; and see the special Branch Rickey issue, including this article, Ericka Kurtz, "Scales of Justice," *Ohio Wesleyan Magazine*, p. 12 (Winter 2006), https://ohio5.contentdm.oclc.org/digital/collection/OWUmagazine/id/1028/rec/1.

[3] For more, see, George Nicholson, "Curt Flood and Coach Powles," Negro Leagues Baseball Museum (2014), https://curtfloodsymposiumkc.wordpress.com/2014/04/04/curt-flood-and-coach-powles. Flood got his start at Oakland Technical High School, while Frank Robinson and many other black players got their start at McClymonds High School, "The School of Champions." Dwight E. Nathaniel and Chris Nguon, *McClymonds High: The School of Champions* (2015); Paul Brekke-Meisner, *Home Field Advantage: Oakland, CA—The City that Changed the Face of Sports* (2013); and, George Nicholson, "Remembering Coach Powles," *Baseball and Freedom III*, at p. 7 (June 3, 2009), 21st Annual Cooperstown Symposium on Baseball and American Culture. Powles coached athletes from elsewhere than McClymonds during summer play in American Legion Baseball. His Legion teams were perennial winners, too.

Dodgers. Most of Coach Powles' student athletes were black. During a sad period when other teachers at McClymonds High did not, Coach Powles taught his student athletes to believe in themselves and to reach for the stars. Several of his student athletes did just that and earned their way into their respective major league sports Hall of Fame. Coach Powles was white.

Here are two of Coach Powles most notably successful student athletes:

After leaving McClymonds High, Bill Russell attended the University of San Francisco, where he led the USF Dons to consecutive NCAA championships in 1955 and 1956. He was named NCAA Tournament's Most Outstanding Player in 1956 and captained the gold medal-winning U.S. national basketball team at the 1956 Summer Olympics. Russell then led the Boston Celtics win 11 NBA championships in his 13 years of play. He then became the first black NBA head coach.

After leaving McClymonds High, Frank Robinson played Major League Baseball for 21 years. he only player to be named Most Valuable Player (MVP) in both the National League (NL) and the American League (AL).[4]

Robinson was named the NL MVP after leading the Cincinnati Reds to the pennant in 1961. He was named the AL MVP in 1966 while winning the Triple Crown (leading the league in hitting, homeruns, and runs batted in) playing with the Baltimore Orioles. He helped lead the Orioles to their first two World Series titles in franchise history in 1966 and 1970. He was named the World Series MVP in 1966 after leading the Orioles to a four-game sweep of the Los Angeles Dodgers. A 14-time All-Star, Robinson batted .300 nine times, hit 30 home runs 11 times, and led his league in slugging four times, and in runs scored three times. In 1975, Robinson became the first black manager in Big League history, as the player-manager of the Cleveland Indians, three years after Jackie Robinson attended his final World Series and, while there, lamented the lack of black managers.[5]

Cooperstown Symposia on Baseball and American Culture are unique in professional sports. They have been successfully conducted for more than

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[4] Although Shohei Ohtani of the Los Angeles Dodgers in the National League may repeat that feat in 2024, having previously been MVP in the American League while playing with the Los Angeles Angels.

[5] Frank Robinson was nicknamed, "Judge." Years later, in 2016, a "real" judge entered the game, a former Fresno State University athlete who was born in 1992 in Sacramento: Aaron Judge, a 6'7," 282-pound, prodigious homerun hitter. Judge who plays for the New York Yankees is the greatest player in the American League at present, while Shohei Ohtani of the Dodgers is the greatest player in the National League at present. Both men are quite likely the Most Valuable Player in their respective league.

30 years. The other major league sports halls of fame, whether NFL, NBA, or NHL, tried similar programs and failed. Only baseball has sustained an annual education program on the history of the game, especially its history of contributing to our nation's on-going quest for freedom for everyone. More than 140 university and law professors and deans, lawyers, judges, and New York baseball writers attend annually. It provides a mechanism for spreading the word throughout the nation on baseball and freedom.

When I was born in 1941, while Carlucci helped build the ALCAN Highway, there were only 16 big league teams, all of them east of the Mississippi. There were no minority players in any of those 16 teams and none until I was six years old. Since the Brooklyn Dodgers and New York Giants came west to Los Angeles and San Francisco, respectively, 30 teams now comprise the Major Leagues. They are in every corner of the nation. Of those 30, California has the most teams, a total of five, the San Francisco Giants, the Los Angeles Angels, the Los Angeles Dodgers, the San Diego Padres, and, at least temporarily, the former Oakland A's. At season's end in 2024, the A's left Oakland after more than a half century playing there and winning three World Series. The team will play in Sacramento for the next three years, before, they hope, heading to Las Vegas, Nevada. Now, there are people of most faiths and virtually all races at all levels of professional baseball. The most powerful hitter in the National League at present is Shohei Ohtani, a Japanese national. No one in the game pays the slightest attention to such matters any longer. The only question is, "Can he play the game?" That is just as Branch Rickey the elder would have it and declared in a 1956 radio broadcast.[6] I also have a 2-hour DVD copy of a public television interview of the elder Rickey from the early 1950s. By then, Jackie Robinson was the most popular man in America, second only to Bing Crosby. In his early 1950s telecast and his later, 1956 radio broadcast, Rickey presciently and passionately spoke of race in ways that were a quarter century ahead of the Civil Rights Movement. Indeed, Chief Justice Earl Warren and Rev. Martin Luther King, Jr., told Rickey and Robinson their early work created the receptive social environment in which they could do

[6] See, "Branch Rickey, "'One Hundred Percent Wrong Club' Speech," Atlanta, Georgia (January 20, 1956), broadcast on WERD 860 AM radio, https://www.loc.gov/collections/jackie-robinson-baseball/articles-and-essays/baseball-the-color-line-and-jackie-robinson/one-hundred-percent-wrong-club-speech.

their important work.[7] Robinson often worked with Rev. King and wrote to ask the elder Rickey to join him in a particular civil rights march. However, by then, Rickey was physically unable to do so and expressed his deep regret in his reply.

Branch Rickey, a lawyer, and Jackie Robinson, a four-sport letterman at UCLA, are both in the Baseball Hall of Fame. From the time I began to play the game in 1949, they were and remain my heroes, just as they were to millions of black and white boys all over the nation in that era. Rickey and Robinson were serious men of faith, family, and country, with open minds and open hearts. The two men helped all of us to become serious men of faith, family, and country, with open minds and open hearts. Rickey inspired some of us to enter the law. Ever since I first became a judge in 1987, I have been blessed to meet and work with Branch III, the elder Rickey's grandson, Sharon Robinson, Jackie's daughter, Thurgood Marshall, Jr., and several other descendants of great civil rights groundbreakers, in sports and out. I knew Chief Justice Earl Warren and his son, Judge Earl Warren, Jr. Earl, Jr. and I served for a time on the bench of the same trial court and attended Oakland A's games together from time to time.

I return to Ashford's story to conclude. His story is an exciting, groundbreaking story, but it was not all peaches and cream. He was a very energetic and entertaining umpire, one of but a handful that brought fans to the ballpark to see them call ballgames. Once in the Big Leagues, Ashford made it to the pinnacle, he umpired an All-Star Game and a World Series.

Earlier, during the years Ashford umpired in the PCL, then nation's top minor league at the time, he endured a painful blow delivered in front of the Portland fans and players, at a pre-game meeting of managers and umpires at home plate. Ashford had made a tough call the day before. One of those

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[7] Chief Justice Warren occasionally slipped out of Washington, D.C., and made his way by train to Brooklyn to attend Dodgers games and root for Jackie Robinson. He told his secretary to omit the trips from his schedule and to keep them confidential. Earlier, while governor of California, he passed on a potential opportunity to become commissioner of baseball when Commissioner Happy Chandler's contract was not renewed in 1951. Chandler had previously resigned his U.S. Senate seat in 1945 to succeed the late, former Judge Kenesaw Mountain Landis, as commissioner of baseball. Chandler's most significant action as commissioner was to approve Branch Rickey's proposed Jackie Robinson contract with the Brooklyn Dodgers in 1947, effectively integrating Major League Baseball. Chandler returned to Kentucky to seek election as governor. Warren's reluctant rejection of ticklers to become commissioner of baseball in 1951 were soon forgotten when President Dwight D. Eisenhower appointed him United States Chief Justice on September 30, 1953, under a recess appointment. The Senate confirmed the appointment on March 1, 1954. *Brown v. Board of Education* (1954) 347 U.S. 483 came the same year. In following years, Chief Justice Warren and his judicial colleagues changed the face of the nation and substantially altered the administration of criminal justice. A fine book to explain it all is journalist Jim Newton's, *Justice for All, Earl Warren and The Nation He Made* (2006). Chief Justice Warren never lost his interest in baseball or his respect for Branch Rickey and Jackie Robinson. His son, Judge Earl Warren, Jr., is my personal source for the previously unreported, personal facts in this footnote.

managers, convinced that Ashford's call had cost him the previous game, handed him the lineup card and said, 'It's not you I'm mad at, Emmett, it is the other two guys.'

"The crew chief, Cesar Carlucci, who worked nearly 1,000 games with Ashford, interrupted, 'What are you talking about?' he said.

"'Not you, the other two,' the manager said.

"'Who the hell are the other two?'

"'Abe Lincoln from freeing them and Branch Rickey for bringing them into baseball.'"[8]

Adrienne Ashford and the four umpires who called the 2005 Pacific Coast League and International League All-Star Game at Raley Field in Sacramento, July 12, 2005. Ashford is holding Terry Flanigan's portrait of her father, Emmett Ashford. The four umpires were Tripp Gibson, Pacific Coast League; Chris Segal, Pacific Coast League; Chad Whitson, International League; and Brad Myers, International League. Published with Brenda Nicholson's permission.

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[8] Jacobson, Steve, *Carrying Jackie's Torch, The Players Who Integrated Baseball—and* America (2007).

Method is much, technique is much,
but inspiration is even more.

Benjamin N. Cardozo
The Game of the Law,
In Law and Literature and Other Essays and Addresses (1931), p. 163.