ARTICLES

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175 Years of the California Supreme Court

The story of the California Supreme Court begins even before California becomes a state. Gold had just been discovered at Sutter's Mill in late January 1848. And a mere nine days later, the Treaty of Guadalupe Hidalgo, ceding California to the United States, was signed. In the following seventeen months, there was an influx of new residents into the state, such that the population skyrocketed from a mere 10,000 in the summer of 1846 to 50,000 by August 1849.[1] Despite the significantly increased population, the only civilian government was the rudimentary *alcalde* system left over from the Mexican years. With assemblies in San Jose, San Francisco, Sacramento, Monterey, and Sonoma demanding a territorial government, the military governor, General Bennet C. Riley, called a statewide election for August 1, 1848 to select delegates to a constitutional convention.[2] That convention convened in Monterey on September 3, 1848, and six weeks later, a constitution that established a high court was ready for the people's approval.[3]

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1 Hunt, The Genesis of California's First Constitution, 1846–1849 (1895), p. 30.

2 *Id.* at pp. 26–27.

3 At one point, a delegate proposed excluding "clergymen, priest[s], or teacher[s] of any religious persuasion, society or sect" from the Legislature. Future Chief Justice Hastings responded by proposing that "lawyers, physicians, or merchants" be added to the list of banned professions. *Id.* at p. 50.

Specifically, the Constitution assigned the state's judicial power to a Supreme Court consisting of a Chief Justice and two associate justices appointed by the Legislature. Below the Supreme Court were the district courts, county courts, and justices of the peace. The Supreme Court had appellate jurisdiction in all cases where the amount in controversy exceeded $200 (about $8,251 today). The Court could also hear cases involving the legality of any tax, toll, impost, or fine as well as felony criminal cases.[4] The Legislature elected Serranus C. Hastings, a former Chief Justice of the Iowa Supreme Court, as the first Chief Justice of California by a vote of 44 to 2. Henry A. Lyons and Nathaniel Bennett completed the composition of the first Court.[5]

As the Court got organized in San Francisco, its new clerk, Mr. Thorpe, faced the initial step that any organization faces: procuring office supplies. His first order consisted of "1 large Journal full bound," "4 bottles red ink," "1 bottle black ink," "3 gross Gillett's pens," "1 parallel ruler," "6 gold pens," "12 sheets blotting paper," "1 dozen pencils," "24 sticks red tape," "6 stamps," "6 reams fine blue linen cap" paper, and "2 hydrostatic inkstands."[6]

THE COURT'S EARLY YEARS

Ironically, three of the Court's earliest cases involved the man who would ultimately become the only person in history (so far) to serve as both Chief Justice of California and as a Justice of the United States Supreme Court: Stephen J. Field. In the first matter, *People v. Field* (1850) 1 Cal. 152, the future Justice Field sought a writ of mandamus to overturn a finding of contempt against him entered by a district judge in Yuba County. The Court concluded that mandamus would be improper but directed that the trial record be sent up on a writ of certiorari, since the Court was unable to determine what Field had done.

In *Ex Parte Field* (1850) 1 Cal. 187—the second case involving Field—although the Court received a response to its writ, it was still unable to determine what had happened and accordingly reversed the contempt finding and dismissed the matter.

The third case, *People ex rel. Field v. Turner* (1850) 1 Cal. 188, was brought by Field himself, seeking a contempt finding against the judge who had entered the contempt order against him, arguing that the judge had been directed to vacate his order disbarring Field, but had failed to do so. The Court denied the motion, finding that the judge had "in substance" obeyed.

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[4] The text of the 1849 Constitution is available here: http://www.dircost.unito.it/cs/pdf/18490000_UsaCalifornia_eng.pdf

[5] Johnson, History of the Supreme Court Justices of California (1963) vol. 1, pp. 20, 32.

[6] Dear and Levin, Historic Sites of the California Supreme Court (1998–1999) 4 Cal. Sup. C. Hist. Soc'y Yearbook, pp. 63, 64.

In its first several years, the Court was also plagued by frequent fires—a phenomenon all too familiar to Californians today. In *Elliott v. Osborne* (1851) 1 Cal. 396, the Court commented that "The papers in this cause were destroyed by the late fire, and we must rely upon our recollection of the facts, as presented on the argument."

In *Weber v. City of San Francisco* (1851) 1 Cal. 455, Chief Justice Hastings added the following unique note to the majority opinion: "The record having been destroyed in the late fires, I have prepared no opinion in this case and cannot now concur or dissent."

In 1854, the state Legislature declared Sacramento to be the state capital and directed the Supreme Court to hold its sessions there.[7] But the Supreme Court declared, by a vote of 2 to 1 on March 24, that San Jose be the state capital, and one week later, the Court moved to San Jose in a "handsome Express wagon of Messrs. Adams & Co."[8]

Now comfortable in its newly declared capital, the Court handed down one of its more surprising early opinions, *Johnson v. Gordon* (1854) 4 Cal. 368, on October 1, 1854. *Johnson* entailed a request for the transfer of a case to the federal courts on the ground that the defendant was an alien. Today, of course, removal merely requires a single-party notice. But in an opinion by Solomon Heydenfeldt, our state high court held that the Judiciary Act of 1789, which authorized removal in such cases, was unconstitutional! And so began our state court's independent attitude.

Meanwhile, the dispute with the Legislature over the location of the State's capital remained. *People ex rel. Vermule v. Bigler* (1855) 5 Cal. 23 resolved the issue in 1855. Justice Alexander Wells, a San Jose resident who had been part of the 2 to 1 majority in the case the previous year, had been replaced by Justice Charles H. Bryan, and Bryan voted with Chief Justice Hugh Murray to rule that the state capital was Sacramento.

THE EARLY JUSTICES

The justices of the California Supreme Court in the 1850s were a colorful group, to put it mildly. For instance, in 1853, Hugh C. Murray, who had become Chief Justice of California at the age of twenty-six, chased future Senator John Conness around a San Francisco barroom with a bowie knife. Three years later, he assaulted a Sacramento abolitionist with a heavy bludgeon.[9]

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[7] *Id.* at p. 67, *citing* Stats. 1854, ch. 9, § 1, p. 21.

[8] Dear and Levin, *supra*, at p. 68.

[9] Grodin, California's Supreme Court and Constitution: The Early Years (2003) 29 San Francisco Attorney, pp. 141, 144.

Another justice, David S. Terry, had established a reputation for violence by the time he took his seat as an associate justice in 1855. He openly admitted that it was "my custom" to carry a bowie knife in his breast pocket, and he may even have stabbed a defendant in the courtroom in a case where he represented the plaintiff.[10]

In 1856, a wave of violence and vigilantism swept through San Francisco, and during a street riot, Terry—who was in town to try to negotiate a resolution between the vigilantes and the city government—stabbed Sterling Hopkins of the Vigilance Committee. Terry was imprisoned for two months at Fort Gunnybags, the Vigilance Committee's headquarters across Sacramento Street from what is now Two Embarcadero Center. He was ultimately "convicted" by the vigilantes of assault without intent to kill and released from captivity with orders to resign from the Court. Defiant, he resumed his seat, rising to the position of Chief Justice the following year upon the death of Chief Justice Murray.[11]

Three years later, during a bitter political campaign, California Senator David Broderick read an account of a speech by Chief Justice Terry denouncing the senator in strong language. Broderick commented that Terry was "just as bad" as the other members of the Court, and Terry responded by challenging Broderick to a duel. During the duel, Terry shot Broderick in the chest, and the senator died two days later.[12] However, reflecting some sense of decorum, Terry had resigned from the Supreme Court just before the duel and was succeeded by Justice Stephen Field.

GROWING PAINS: THE EARLY COURT'S CONFOUNDING DECISION INVOLVING SLAVERY

The growing pains of the early Court arose in a case regarding the California Constitution's prohibition against slavery at a time that the Fugitive Slave Act was federal law. In January 1858, Charles Stovall, a Mississippian who had resided in California for several months, applied to Judge Robert Robinson of the Sacramento County Superior Court for a writ of habeas corpus, arguing that a Mr. Archy Lee was a fugitive slave subject to federal rather than state jurisdiction.[13] During the hearing on Stovall's petition, Mr. Lee was asked whether he wanted the writ to be issued. And Mr. Lee, presumably aware that African Americans were forbidden at the time from speaking in any way against whites in court, said nothing.[14] Judge Robinson transferred the matter

[10] Johnson, *supra*, at p. 53.

[11] *Id.* at pp. 54–55; Rahm, *Justice David S. Terry and Federalism* (2020) 15 Cal. Legal Hist., pp. 9, 18, 21–27.

[12] Rahm, *supra*, at pp. 27–28; *Burlington Times*, Oct 11, 1859, p. 2.

[13] McGinty, *Archy Lee's Struggle for Freedom* (2020) at p. 37.

[14] *Id.* at p. 39.

to George Pen Johnston, the U.S. Commissioner authorized to issue writs pursuant to the Fugitive Slave Act.[15] Troubled by the case, however, Johnston adjourned to give himself time to consult with Federal District Judge Matthew Hall McAllister. After Johnston and McAllister had consulted for four days, Johnston dismissed the case on January 15, ruling that since Stovall admitted that he had peaceably brought Mr. Lee into the state in his wagon train, as opposed to Lee having "escaped" into the state, the Fugitive Slave Act did not apply, and he had no jurisdiction.

Accordingly, the case was returned to Judge Robinson, who ruled that Mr. Lee was not a fugitive, and that comity did not require enforcing Mississippi law, particularly given the California Constitution's ban on "tolerating" slavery.[16] So Stovall was told he would have to look to the state courts for a remedy.[17]

However, after Judge Robinson dismissed the case, a state justice of the peace authorized the arrest of Mr. Lee on the petition of Stovall's allies, and Chief Justice Terry of the California Supreme Court authorized a writ of habeas corpus. The hearing was scheduled to begin on February 6, 1858.[18] And later that day, the *Daily California Express* predicted that the "opinion will doubtless be that [Mr. Lee] is made free by his sojourn in California."[19]

The California Supreme Court announced its decision five days later.[20] The Court began by deciding that where a citizen from another state took up residence in California for an extended period, his or her rights as a slave were lost due to California's ban on slavery. Given that Stovall had not merely passed through California, but had resided there for months teaching school, any rights Stovall claimed to Mr. Lee had been lost. However, at the end of the decision, the Court decided that notwithstanding that holding, the Court would hand Mr. Lee over to Mr. Stovall. The majority opinion offered no rationale for this inconsistent result, aside from a vague reference to "circumstances."

Press reaction to the Court's decision was, for the most part, deservedly extraordinarily harsh. The *Enterprise-Record* wrote, "We denounce this decision as a disgusting display of expediency, in direct violation of law and facts."[21] The *Nevada Democrat* wrote, "We had always supposed it to be the duty of Judges to decide according to the law, without reference to the effect such

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[15] It is not entirely clear from the surviving evidence that Archy Lee was legally Stovall's slave when he accompanied Stovall to California. *Id.* at p. 12.

[16] *Id.* at pp. 43, 46.

[17] *California Daily Alta*, vol. 10, n. 13, Jan. 14, 1858; *Enterprise-Record* (Chico, CA), Jan. 15, 1858, p. 2.

[18] McGinty *supra*, at pp. 52, 54.

[19] *Daily California Express* (Marysville, CA), Feb. 8, 1858, p. 2.

[20] McGinty *supra*, at p. 54.

[21] *Enterprise-Record* (Chico, CA), Feb. 15, 1858, p. 2.

decision may have in individual cases."[22] The *San Joaquin Republican* wondered, given the Court's decision that under California law, Mr. Lee was free, "by what authority [the Court] can remand him into a state of slavery."[23] The *Daily Evening Express* likewise wrote that the decision was "so extraordinary as to elicit general denunciation."[24] And according to the *California Daily Alta,* the decision was "generally condemned by the press as absurd and contrary to law and justice."[25]

In the days that followed, James Riker, a leader in the city's African American community, enlisted the aid of two respected attorneys, Elisha O. Crosby and Walter H. Tompkins. Crosby and Tompkins prepared an affidavit that Riker signed, swearing that Mr. Lee was no one's slave and that Stovall was attempting to spirit him out of the jurisdiction. Based upon that affidavit, San Francisco Judge Thomas Freelon issued a warrant for Stovall's arrest on a charge of kidnapping.[26] As a result, considerable numbers of African American residents of San Francisco collected at the Market Street wharf, watching for any attempt to spirit Mr. Lee onto a waiting steamer. Ultimately, Stovall met the steamer in a large rowboat and tried to take Mr. Lee aboard. However, after a brief altercation, Stovall was arrested, and Mr. Lee was taken pursuant to a writ of attachment.[27]

By the time the case came before Judge Freelon, Colonel Edward Baker, a former Congressman, had joined Mr. Lee's defense team. After a short hearing, Judge Freelon ordered Mr. Lee's release; however, Lee was immediately arrested on a warrant issued by U.S. Commissioner Johnston, the man who had started it all.[28] Before Commissioner Johnston, the case dragged on through multiple hearings and live witness testimony until on April 13, 1858, Johnston reaffirmed his previous decision that he lacked jurisdiction and ordered Lee released.[29]

THE COURT'S EXPANSION AND THE FAIR AFFAIR

In the 1862 election, the voters approved a constitutional amendment expanding the Court to five justices and setting the justices' terms at ten years.[30]

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22 *Nevada Democrat* (Nevada City, CA), Feb. 17, 1858, p. 2.

23 *Sacramento Daily Union*, Feb. 16, 1858, p. 2, quoting from *San Joaquin Republican*.

24 *Daily Evening Express* (Lancaster, PA), Mar. 16, 1858, p. 2.

25 *California Daily Alta*, vol. 10, n. 62, Mar. 4, 1858, p. 1.

26 *California Daily Alta,* vol. 10, n. 64, Mar. 6, 1858; McGinty, *supra*, at pp. 63–64.

27 McGinty, supra, at pp. 65–67; *California Daily Alta*, vol. 10, fn. 64, Mar. 6, 1858; *Anti-Slavery Bugle*, Apr. 24, 1858, pp. 1–2.

28 McGinty, *supra,* at pp. 73, 76.

29 *Id.* at pp. 77–88. A detailed report of the arguments appears at *California Daily Alta*, vol. 10, n. 76, Mar. 18, 1858. *See also* "How a Slave Got His Freedom—A Little Bit of California History," *San Francisco Chronicle*, Nov. 10, 1873, p. 1.

30 Roth, A History of the California Supreme Court in Its First Three Decades, 1850–1879, Calif. Legal Hist. (2019) vol. 14, p. 305.

One possible reason for the voters' approval can be found in an observation by *Gold Hill Daily News*, which wrote: "The celebrated 'Archy decision' which made that Court the laughing stock of Christendom, would never have been rendered had there been five judges on the bench."[31]

Significantly, the Court's most heavily publicized case of the nineteenth century began shortly after that election. Alexander P. Crittenden, a well-regarded lawyer and former member of the State Legislature, began an affair in 1863 with Laura Fair, a much younger, twice-married owner of a Sacramento boarding house. For a time, Crittenden told Fair that he was a widower, but ultimately, she learned that his wife was alive and well. Crittenden repeatedly assured Fair that he was getting a divorce, but that prospect never progressed beyond the talking stage.[32] In 1867, Fair abruptly married another man; however, that marriage quickly ended in divorce under circumstances apparently orchestrated by Crittenden.[33]

The evidence suggested that in the first months of 1870, Fair may have had an abortion. But what is clear is that she was increasingly addicted to chloral hydrate, a sedative and hypnotic that was widely abused by nineteenth-century doctors.[34] In the first days of November, Fair learned that Mrs. Crittenden was returning with her children from an extended trip to the East Coast. Fair met the ferryboat *El Capitan* in its slip in Oakland, where it was about to return to San Francisco. Moments after the boat cast off, Fair stepped out of a crowd, pulled a pistol and shot Crittenden once in the chest. Crittenden died forty-eight hours later.[35] Coincidentally, the Governor had appointed Crittenden as the Reporter of Decisions for the Supreme Court only twenty-four hours earlier.[36]

The drama immediately brought out the press's worst impulses. The *San Francisco Chronicle* headlined their story, "A Woman's Revenge: The Career of the Assassin—The Wicked Wiles of a Bold, Bad Woman."[37] The *Gold Hill Daily News* commented that "the she-devil, Mrs. Fair . . . deserved hanging long ago."[38] The *St. Albans Daily Messenger* was succinct: "The reporter of the California Supreme Court has been shot by a woman."[39]

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[31] *Gold Hill Daily News* (Gold Hill, Nev.), Nov. 18, 1863, p. 2.

[32] Lamott, *Who Killed Mr. Crittenden?* (1963), pp. 18–24, 27, 29, 44, 55, 59; Carole Haber, *The Trials of Laura Fair: Sex, Murder, and Insanity in the Victorian West* (2013), pp. 24, 26, 29, 109.

[33] Lamott, *supra*, pp. 70–72; Haber, *supra*, p. 38.

[34] Lamott, *supra*, pp. 67–68, 124–25; Haber, *supra*, pp. 87–89, 95.

[35] Lamott, *supra*, pp. 3, 85.

[36] *Id. at* p. 77.

[37] *San Francisco Chronicle,* Nov. 4, 1870, p. 3.

[38] *Gold Hill Daily News* (Gold Hill, Nev.), Nov. 4, 1870, p. 2.

[39] *St. Albans Daily Messenger* (St. Albans, Vt), Nov. 7, 1870, p. 2.

Fair's trial for capital murder began in April 1871 and was widely attended by San Francisco notables—including the founder of the California Women Suffrage Association and even the "Emperor" Norton.[40] Fair's primary defense was temporary insanity brought on both by her medical difficulties and by Crittenden's conduct. On April 26, after only one ballot, the jury returned a verdict of guilty.[41] Following the denial of defense motions for a new trial, Fair was sentenced to become the first woman in California history to be hanged.[42]

Fair's appeal to the California Supreme Court turned on three issues. First, the defense presented evidence that one of the jurors seated at trial had been overheard saying beforehand that Mrs. Fair was guilty and deserved to be hanged. Second, the defense alleged that the trial court's refusal to allow the defense the final closing statement was reversible error. Third, the defense argued that thirteen different witnesses had been allowed to testify over the defense's objections to Mrs. Fair's supposed reputation for unchastity.

The Supreme Court unanimously reversed the judgment. Although the incapacity of the juror had been waived by the defense's failure to raise the matter before the verdict was returned, the Court agreed that both the order of the closing statements and the admission of testimony about Mrs. Fair's reputation were reversible errors, necessitating a new trial.[43] Since Mrs. Fair's original lead counsel died while the case was on appeal, she hired a new lead for her second trial. And unlike the first defense team, the new lead counsel flatly refused to put Mrs. Fair on the stand. She was acquitted.

THE LOCATIONS FOR ORAL ARGUMENT ARE RESOLVED

Meanwhile, for over a generation, a standoff regarding where the Court should be holding its sessions had been going on. In 1872, the Legislature determined that the Supreme Court would be required to sit in Sacramento.[44]

Nevertheless, by early 1874, the Supreme Court was instead holding many of its sessions at 640 Clay Street in San Francisco. Later that year, the Legislature acquiesced, agreeing that the Court's January and July terms could be in San Francisco.

However, in 1878, the Legislature expanded the Court's schedule, and mandated argument sessions in Sacramento, San Francisco, and Los Angeles.[45]

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[40] Emperor Norton - Wikipedia.

[41] *San Francisco Chronicle*, Apr. 27, 1871, p. 3.

[42] *San Francisco Chronicle*, Jun. 2, 1871, p. 2; Jun. 3, 1871, p. 2; Jun. 4, 1871, p. 3.

[43] *People v. Fair* (1872) 43 Cal. 137

[44] Dear and Levin, *supra*, pp. 71–72.

[45] *Id.* at p. 72.

PROGRESS TOWARD JUSTICE IN CRIMINAL TRIALS

During this period, the Court also instilled some fairness into the criminal justice system, albeit in a minor way. The *Yankton Press and Dakotan* reported on February 1, 1876 that an application for a new trial had been made to the California Supreme Court "on the ground that the jurors had liquor in their room during their deliberations." The application was denied, with the Court observing that the practice had become "sanctified" by the custom of thirty years.[46]

However, six years later, the Court decided *People v. Gray* (1882) 61 Cal. 164, reversing a second-degree murder conviction based on evidence that the jurors had drunk 17½ gallons of beer and two demijohns of wine during their deliberations, in addition to drinking wine and whiskey with their meals.

THE CONTINUING CHALLENGES IN ADDRESSING THE COURT'S HEAVY DOCKET AND ITS LOCATION

Despite the Court's expansion to five justices, the perception continued to grow that the Court was unable to deal with its heavy workload. On March 30, 1878, the Legislature passed an act calling for a new constitutional convention. That convention convened in Sacramento on September 28, 1878, and adjourned *sine die* on March 3, 1879, with a new constitution ready for the voters' approval.[47]

The convention adopted multiple provisions to address the Court's heavy docket.[48] First, the convention expanded the Court to seven justices—the Chief Justice and six associate justices. Second, most cases would be heard in one of two three-justice departments, although the Court would decide cases en banc when it desired. Third, all the state's appellate courts were required to render their decisions "in writing, and the grounds of the decision shall be stated."[49] However, adding to the workload, all decisions had to be handed down within ninety days of their submission.[50]

Yet, when the convention turned its attention to the seat of the Supreme Court, the debate got interesting. The convention was nearly equally divided between camps favoring San Francisco, Los Angeles, or Sacramento. Charles

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[46] *Yankton Press and Dakotan*, Feb. 1, 1876, p. 2.

[47] The debates of the Constitution are online at 1878–1879 Constitutional Convention Working Papers: California Secretary of State.

[48] The 1879 Constitution is reprinted at Constitution of the State of California Adopted and Ratified in 1879.

[49] 1879 Constitution, art. VI, sec. 2. This provision was necessitated by the decision of Justice Field in *Houston v. Williams* (1859) 13 Cal. 24, 25, striking down an earlier statute requiring "reasons stated" for all the Court's opinions. "The legislature," wrote Field, "can no more require this Court to state the reasons of its decisions, than this Court can require, for the validity of the statutes, that the Legislature shall accompany them with the reasons for their enactment."

[50] 1879 Constitution, *supra*, art. VI, sec. 24.

Beerstecher, a delegate from San Francisco, spoke against Sacramento's candidacy: "For my part, sir, I hope to see the day when neither the Legislature nor the Court will sit in Sacramento, for it is the most unhealthy spot in the State of California. I think the river will drown out this city."

Henry Edgerton of Sacramento County shot back: "You have only to look at the gentleman himself to see a complete refutation of the charge he has made. He has gained fifty pounds this Winter."[51] A few moments later, Edgerton took a shot at Los Angeles:

> Now, I have no doubt Chief Justice Wallace, who is just as good a fellow as anybody else, felt as anybody else would have felt. He fell into the hospitable hands of my friend Ayers and his colleague, General Howard, and we all know what delicious wines they make down there, and what orange groves they have there, and it is no wonder anybody should get a little stuck after the city of angels.[52]

But a moment later, Edgerton defended his home city of Sacramento and took another shot at Los Angeles:

> As far as health is concerned, statistics show that this is the healthiest city on the globe, Los Angeles not excepted. There are sudden cases of mortality here as everywhere else. The people who die here generally come from Los Angeles. Their climate down there is very hot, and a man soon gets lazy who lives in it. And it would not be very long, if you have the Supreme Court down there, before you would see the Chief Justice, and my friend, General Howard, walking arm in arm under huge Panama hats, hunting a cool place. It will not do.[53]
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> Volney Howard of Los Angeles County fired back at the Sacramento delegates:
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> Why, you cannot tell what day this town will be drowned out. The Judges will be seen some of these days coming out of the Court-room in a boat. Yet they should be obliged to stay here. I have had some little experience with this climate myself. It is the hottest place outside of—the one down below we read of.[54]
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> Howard also had a theory about Los Angeles's appeal:
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> The Judges all prefer to go to Los Angeles. Whether it is because we

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[51] Willis and Stockton, Debates and Proceedings of the Constitutional Convention of the State of California (1881) vol. 2, p. 952.

[52] *Id.* at pp. 952–53.

[53] *Id.* at p. 953.

[54] *Id.*

> have good wine there, I do not know, I leave that for the gentleman from Sacramento. Certain it is that we have good wine there. And it is about the only place in the State where you can get wine that is not adulterated.[55]

> Finally, San Francisco delegate Clitus Barbour took this potshot at Sacramento:

> Sacramento is not well situated. The gentleman speaks of the advantages of Sacramento. Why, there is one disadvantage that is sufficient to condemn it, and that is the tendency to make men dissipated. I have heard that wine is a mocker and strong drink raging, but men will put it in their mouths, and I would like to know what sort of Supreme Court can exist and do business upon the water we find in Sacramento? It is enough to drive men to intoxication. And they don't even get good whisky . . . they have the most villainous whisky of any city I have ever had occasion to be in.[56]

In the end, an evenly divided convention punted, opting for the status quo: sessions in San Francisco, Los Angeles, and Sacramento—an option that delegate Abraham Freeman of Sacramento County derided as "a Supreme Court on wheels."[57]

Ironically, many years later, Chief Justice Donald R. Wright commented that the convention had stumbled into the right answer by having the Court spend much of its time outside the state capital: "I think it is a great advantage," observed Chief Justice Wright, explaining that he had become acquainted with Supreme Court justices from around the country, and "almost without exception they regretted the fact that they were located in the capital city of the state wherein the executive branch and the legislative branch of the government were located."[58]

The newly expanded California Supreme Court organized itself in San Francisco on January 5, 1880.[59] At the Court's first session a week later, Chief Justice Robert F. Morrison announced that Justices Elisha McKinstry, Samuel McKee, and Erskine M. Ross had been assigned to Department 1, and Justices James D. Thornton, Milton H. Myrick, and John R. Sharpstein would be in Department 2. Justices McKinstry and Thornton were then elected Presiding Justices of their respective departments. The Court boasted: "There will practically be two Supreme Courts for the transaction of business,

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55 *Id.*

56 *Id.* at p. 955.

57 *Id.*

58 *Oral History Donald R. Wright: Chief Justice of California (1970–1977)* (2014) 9 Cal. Legal Hist., p. 61.

59 *Napa Valley Register*, Jan. 6, 1880, p. 1; *Sacramento Union*, Jan. 6, 1880, p. 2; *Arizona Daily Star*, Jan. 8, 1880, p. 1.

as the Departments can hold Court in [San Francisco], Sacramento or Los Angeles, or in any two of those places at once."[60] And dividing the caseload was easy: Chief Justice Robert F. Morrison announced that all even-numbered cases would be assigned to Department 1, while odd-numbered cases would be assigned to Department 2.[61]

The next day, the new Court handed down its first decision, *Ex Parte Hung Sin alias Ah Fong Chi* (1880) 54 Cal. 102, unanimously holding in a three-paragraph opinion that a prisoner charged with grand larceny could only be granted bail by the magistrate who issued the arrest warrant.[62] And the Court began making quick headway against its backlog, deciding 170 cases in its January term, 125 in its April term, and 104 in its July 1880 term.[63]

Unfortunately, this progress was short-lived. A mere two years later, the *Pacific Coast Law Journal* insisted that the time for fundamental reform had come again, characterizing "the practical working of the Court at present" as "a positive denial of justice." When a case "must remain upon the calendar nearly two years before it is reached for argument and decision," the *Journal* wrote, "it is a lamentable commentary upon a system said to be one of quick but sure justice."[64] At the opening of the Court's January 1882 term, "the Chief Justice remarked to the Bar that they must rely mainly upon their briefs, as the Court had not time to listen to oral arguments." Still, the Court did not abolish oral arguments entirely, however; it limited arguments to thirty minutes (as the Court does today).[65]

Nonetheless, by 1885 the *San Francisco Chronicle* reported that there were 9,000 appeals pending before the Supreme Court and that its backlog was growing.[66] How could this be? Many observers concluded that the effect of the department structure was being virtually wiped out because so many cases were being reheard en banc.[67]

Accordingly, in the hopes of reducing the Court's workload, the Legislature authorized the Court to appoint three Commissioners: "Cases will be sent to the Commissioners by the Court, and after the necessary investigation, will be reported upon, with a written opinion recommending their affirmance or

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[60] *Sacramento Union*, Jan. 13, 1880, p. 2, quoting *San Francisco Bulletin*, Jan. 10, 1880.

[61] *San Francisco Chronicle*, Jan. 13, 1880, p. 1.

[62] *Sacramento Bee*, Jan. 13, 1880, p. 3.

[63] Bakken, *The Court and the New Constitution in an Era of Rising Industrialism, 1880–1910*, in Constitutional Governance and Judicial Power: The History of the California Supreme Court (Scheiber, edit., 2017) pp. 76, 80.

[64] Baggett, *Pacific Law Journal* (1882), vol. 5, p. 722.

[65] *Id.*

[66] *San Francisco Chronicle*, May 14, 1885, p. 3.

[67] *California Courts in Historical Perspective* (1970), 22 Hastings L.J. 170.

reversal, and the Court will then pass upon the opinion and affirm or reverse in accordance with its conclusions."[68] In 1889, the Legislature authorized the Court to appoint two additional Commissioners.[69]

THE NINETEENTH-CENTURY COURT ADDRESSES DISCRIMINATION

Naturally enough, as times changed, so did the nature of the Court's cases. By the mid-1880s, California had been plagued for a generation by increasingly virulent attacks on Chinese residents and immigration. As far back as 1861, the Court had addressed the constitutionality of "An Act to protect free white labor against competition with Chinese coolie labor and discourage the immigration of the Chinese into the State of California," holding in *Lin Sing v. Washburn* (1861) 20 Cal. 534, that the Act was invalid pursuant to the federal government's exclusive power to regulate immigration. Nonetheless, in the late 1870s the Workingmen's Party demanded the abolition of Chinese labor and the expulsion of the Chinese from the state.[70] Debates in the 1878–1879 Constitutional Convention were marred by ugly racist attacks on Chinese immigration.[71]

Unfortunately, the San Francisco City Council enacted multiple discriminatory ordinances during this period. The council enacted both an ordinance prohibiting gambling within Chinatown and a second ordinance against the smoking of opium. In 1880, the council enacted an ordinance banning laundries from operating in wooden buildings without a permit from the council. In 1884, Lee Yick was granted a permit, but when he applied for renewal in 1885, he was denied, despite his having certificates from the Board of Fire Wardens and the Board of Health.[72] When he refused to shut down his business, he was convicted of violating the ordinance. After he was imprisoned, he petitioned the California Supreme Court for a writ of habeas corpus. The Supreme Court denied the petition in an opinion by Commissioner Niles Searls, and the justices endorsed the Commissioners' opinion without comment.[73]

But the United States Supreme Court unanimously reversed the California Supreme Court's decision. The Court pointed out that of 320 laundries in San Francisco located in wooden buildings, over 200 were owned by Chinese. Of

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[68] *Id.*

[69] Cal. Stat. ch. 16, § 1, p. 13.

[70] Bakken, *The Court and the New Constitution*, *supra*, p. 66.

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

[72] *San Francisco Examiner*, Dec. 29, 1885, p. 3.

[73] *In re Yick Wo* (1885) 68 Cal. 294.

those applicants, only one was granted renewal, while all but one of the non-Chinese applicants were granted renewal. The Court held that the combination of discriminatory enforcement and the City Council's intent to shut down Chinese-owned laundries rendered the ordinance a violation of the Fourteenth Amendment's Equal Protection Clause.[74] The *Solano-Napa News Chronicle* aptly observed that given the clear evidence of discriminatory enforcement, "it was hardly possible for the opinions of the justices to be otherwise than they were."[75] And happily, the city of San Francisco has honored Yick with the christening of the Yick Wo Alternative Elementary School, a highly rated neighborhood school in the Chinatown District.

CALIFORNIA'S GROWTH YIELDS NEW LEGAL DEVELOPMENTS IN WATER RIGHTS, TRANSPORTATION, AND ULTRAHAZARDOUS ACTIVITY

During this period, California's population grew exponentially, increasing 38 percent from 1880 to 1890 and doubling again between 1890 and 1910. At the same time, the population center shifted from the San Francisco area to southern California.[76] The principal drivers of this growth were three: (1) the liberalization of water rights, (2) the expansion of the railroads, and (3) the opening of East Coast markets to California's fruit crop and lumber supplies.

An important early step in the law of water rights was *California v. Gold Run Ditch and Mining Company* (1884) 66 Cal. 138. This case involved hydraulic mining—the practice of directing water at high pressure at hillsides, resulting in the exposure of some gold (along with prodigious amounts of dirt, sand, and grass). However, the runoff raised the beds of both the American and the Sacramento rivers by between six and twelve feet, causing flooding and impairing navigation.[77] As a result, the Supreme Court took its first steps toward developing the state's water law, declaring the rivers to be "public highways." As such, the people had "paramount and controlling rights" to use the water for "transportation and commercial intercourse."[78] The Court declared the "unauthorized invasion of the rights of the public" to be an enjoinable public nuisance.

Two years later, the Court took another important step in the development of water law in the case of *Lux v. Haggin* (1886) 69 Cal. 255. *Lux* was the product of the inevitable collision of two different theories of water use that

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74 *Yick Wo v. Hopkins* (1886) 118 U.S. 356.

75 *Solano-Napa News Chronicle*, May 13, 1886, p. 2.

76 Bakken, *The Court and the New Constitution*, *supra*, p. 81.

77 *Id.* at p. 88.

78 *California v. Gold Run Ditch and Mining Company*, *supra*, 66 Cal. at p. 146.

had existed simultaneously in California for thirty years: riparian rights, which held that any property owner has the right to use water running through or adjacent to his or her property so long as the riparian's use did not impair the rights of downstream riparians; and the prior appropriation theory, which held that rights in water were acquired by the first to take them, whether one had nearby property or not. In this case, Charles Lux and his partner Henry Miller had bought up 40,000 acres along the Buena Vista Slough during the 1860s to provide pastureland for their cattle. Years later, in 1877, the defendants built a diversion dam and the Calloway Canal north of Miller and Lux's properties to irrigate desert lands, with the result that the downstream flow to the lands of Lux and Miller was significantly impaired.

The Court held that the riparian rights of downstream property owners like Miller and Lux could not be impaired by upstream prior appropriators without just compensation being paid. The Court declared that irrigation of farmland or pastureland was a public use, and that the holders of riparian rights could reasonably use water for purposes of irrigation.[79]

As California agriculture evolved and grew, the railroad industry invested heavily in the newly productive areas of the state. By 1886, the advent of the refrigerator car enabled the shipment of an entire trainload of oranges to the East Coast. Twenty years later, the industry was shipping 82,000 carloads of fruits and nuts to eastern markets.[80] By 1910, the state had four direct transcontinental railway links.[81]

In 1886, the Court decided *Colton v. Onderdonk* (1886) 69 Cal. 155, an early landmark in national tort law. Andrew Onderdonk was a San Francisco contractor. He chose to blast rocks, using gunpowder, on a lot adjoining the house that was owned by Mrs. Colton. As a result, the house was damaged, both by rocks thrown against the house by the force of the blasting and by the resulting concussion of air.[82] Supreme Court Commissioner Foote rejected Onderdonk's invocation of the negligence standard, appending a lengthy string cite of cases across the country and from England, including the landmark case of *Rylands v. Fletcher* (1868) L. R. 3 H. L. 330.[83] Blasting rocks in the middle of a large city with a residence next door, the Commissioners found, was an "unreasonable, unusual, and unnatural use" of the property, and "no care or skill" could excuse the defendant from being responsible in

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[79] *Lux v. Haggin*, 69 Cal. at p. 264–65.

[80] Bakken, *The Court and the New Constitution*, *supra*, p. 90.

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

[82] *Lux v. Haggin*, *supra*, 69 Cal. at 159.

[83] *Id.*

damages for the natural and proximate results of his blasting.[84] The justices endorsed the unanimous opinion of the Commissioners without dissent. In doing so, the Court helped lay the foundation of what today is called the law of ultrahazardous activity.

THE DECLINE AND FALL OF FORMER CHIEF JUSTICE TERRY

In January of 1888, a different, long-running melodrama arrived on the Court's doorstep. William Sharon had served one term in the U.S. Senate, representing Nevada from 1875 to 1881. However, Sharon lived full-time in San Francisco for virtually the entirety of his term; indeed, he was present for only five sessions and was recorded as voting in less than one percent of all roll calls.[85] Near the end of his term, in 1880 Sharon met Sarah Althea Hill, and the two began a year-long relationship. When Sharon tried to end the relationship, Hill sued, charging that they had been secretly married.[86] Senator Sharon countersued in federal court—again relying on his fictional Nevada residence—alleging that the purported marriage contract that Hill had produced was fraudulent. But Hill prevailed at trial in the California state court, due in part to her new lead counsel, former Chief Justice David S. Terry, and his five-day closing statement![87] Not long after the trial court's judgment, Senator Sharon died. In January 1886, the federal circuit declared the marriage contract produced by Hill to be a forgery. But by that time, Hill had married Justice Terry.[88]

Meanwhile, the state court judgment in favor of Hill was initially affirmed three years after Senator Sharon's sudden death.[89] However, the following summer, a second appeal—this one from denial of the motion for a new trial by Sharon's estate—arrived at a much different Supreme Court with several new justices. A majority, mostly consisting of the dissenters from the previous year, reversed, holding that the evidence "shows conclusively that these parties did not live and cohabit together 'in the way usual with married people.' They did not *live* or *cohabit* together at all."[90] Accordingly, the Court concluded that "[t]heir acts and conduct were almost entirely consistent with the meretricious relation of man and mistress, and almost entirely inconsistent with the relation of husband and wife."[91]

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84 *Id.* at pp. 158–159.

85 Keraghosian, "How Notorious Tycoon William Sharon Left SF's Children a Still-Popular Landmark."

86 Keraghosian, *supra.*

87 Rahm, *Justice David S. Terry and Federalism*, *supra*, p. 35.

88 *Id.*; Keraghosian, *supra*.

89 *Sharon v. Sharon* (1888) 75 Cal. 1.

90 *Sharon v. Sharon* (1889) 79 Cal. 633.

91 79 Cal.3d at 663.

When the Terrys returned to federal court in 1888, they found themselves before none other than Terry's successor on the Supreme Court—Stephen Field, now a justice of the United States Supreme Court. Field held that the handwritten will that Hill had produced was a forgery. And Hill and Terry were both arrested following a violent confrontation in the courtroom. Justice Field sentenced both to jail for contempt of court.[92] While serving their sentences, both Hill and Terry threatened to kill Justice Field. Only a couple of weeks after the California Supreme Court's (second) decision, Justice Field returned to California to hear court on circuit. The U.S. Attorney General directed David Neagle of the United States Marshals to protect Justice Field.[93]

After their jail terms expired, Terry and Hill returned to Fresno. In August 1889, they happened to board a train that Justice Field and Neagle were on. Former Justice Terry saw Justice Field and struck him. Marshal Neagle rose and warned Terry, but when Terry drew back a fist, poised to strike again, Neagle shot him. Terry died in a few moments.[94]

THE BEATTY COURT'S TUMBLES AND SUCCESSES

After a succession of chief justices, Warren Beatty became Chief Justice of the California Supreme Court in January 1889 and served until the beginning of World War I.[95] A contentious probate matter wound up bringing tensions within the Court into public view. Gershom P. Jessup was a wealthy San Francisco bachelor. In 1865, he had met a young African American woman. A child, christened Richard Jessup, was the result. Jessup supported the boy throughout his mother's life, visiting frequently, and according to friends and associates, referring to Richard as "my boy." But when the mother died, support payments ceased. Moreover, when Gershom Jessup died, notwithstanding his earlier promise to provide for the boy in his will, his brothers and sisters claimed the entire estate. Richard Jessup filed suit, claiming the surviving child's share of the estate. On July 1, 1889, in an opinion by Justice Works, the California Supreme Court affirmed the lower court's judgment upholding Richard's claims.[96]

But only three weeks after that decision, Justice Charles Fox was appointed to the Court following the resignation of Justice Jackson Temple. Shortly thereafter, an order was entered by the clerk granting rehearing, but no signed

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[92] Rahm, *Justice David S. Terry and Federalism*, *supra*, at p. 41; Makley, The Infamous King of the Comstock: William Sharon and the Gilded Age in the West (2006) pp. 202–203.

[93] Makley, *supra*, p. 205.

[94] Keraghosian, "How Notorious Tycoon William Sharon," *supra*; Rahm, *Justice David S. Terry and Federalism*, *supra*, p. 44; Makley, *supra*, p. 206.

[95] Bakken, *supra*, pp. 96–97.

[96] *In re Jessup* (1889) 81 Cal. 406, 436.

order was filed as required by section 45 of the Code of Civil Procedure.

On November 30, 1889, the Court issued a second opinion reversing the lower court judgment in an opinion by Justice Fox.[97] The new majority insisted on strict construction of the Probate Code, whereas the original majority opinion had endorsed a liberal construction. The majority also endorsed an explicitly racist rationale to suggest there was no presumptive adoption of Richard, writing, "Instead of providing for him among people of his own race, he reared him and had him brought up in a colored family, respectable, it is true, but still a family of another race, commonly considered inferior, and to be brought up among whom is regarded by most [whites] . . . as degrading."[98]

Richard's attorneys moved for issuance of the remittitur based upon the original decision, arguing that because the order granting a rehearing had not complied with Code of Civil Procedure section 45, no rehearing was permissible. In a brief opinion by Chief Justice William Beatty, the majority denied the motion and struck down section 45.[99] Justice Works filed a twenty-page dissent from the Chief Justice's opinion, arguing that section 45 was constitutional because the Constitution said nothing about rehearing of cases heard en banc.[100]

"The liberality of the court in granting rehearings needs some check," said Justice Works. "The fact that a court of last resort must hear and decide a case twice in order to decide it correctly is not calculated to inspire confidence in either its wisdom or its integrity."[101] Justice Works publicly objected to Justice Fox having voted on the rehearing petition.[102]

Three years after *Jessup*, the Court set another enduring precedent in *Ball v. Rawles* (1892) 93 Cal. 222. There, the plaintiff was accused by the defendant of having maintained an illegal game in Boonville, Mendocino County. The plaintiff was arrested, but the jury hung, at which point the plaintiff sued for malicious prosecution. The plaintiff lost at the trial court, but the California Supreme Court reversed for error in the instructions. In an opinion by Justice Ralph Harrison, the Court held that while "[m]alice is always a question of fact for the jury," the presence (or absence) of probable cause "is always to

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[97] *Id.*, 81 Cal. 406.

[98] *Id.* at pp. 432–433.

[99] *Id.* at pp. 459–474.

[100] *Id.* at p. 476.

[101] *San Francisco Chronicle*, Dec. 21, 1889, p. 8.

[102] *Id.* Neither Justice Works's comment regarding the power of the Court to rehear cases initially heard *en banc* nor his comments about Justice Fox appear in his dissent. The inference, therefore, is that Justice Works took the extraordinary step of airing his issues with the Court directly in the *Chronicle*.

be determined by the court from the facts in each particular case."[103] The decision in *Ball* has continued to be cited in the California courts as recently as 1986.[104]

In November 1904, the electorate made another attempt to alleviate the Court's crushing workload. New article VI, section 4 of the state Constitution created three district Courts of Appeal—the First in San Francisco, the Second in Los Angeles, and the Third in Sacramento.[105] To fill those new courts, all five commissioners were appointed justices of the new Courts of Appeal.[106]

Meanwhile, the Court was thrust once again into the public spotlight: "The period from 1902 to 1906 was the most scandalous in San Francisco's history."[107] Political boss, Abraham Ruef, had engineered the election of his friend, Eugene Schmitz, as mayor. For four years, they ran protection rackets for a variety of unlawful businesses and sold government favors. In November 1906, a grand jury began investigating. Soon, Ruef confessed. The matter reached the Supreme Court in September 1907, when one of the alleged bribers sought a writ of prohibition, arguing that the grand jury was not validly constituted. Once the writ was denied, the *San Francisco Call* was ecstatic: "The last drowning clutch of San Francisco's wealthy grafters at the phantom wisp which they hoped against hope might save them from meeting retribution for their crimes has failed."[108]

But the story was far from over. In early January 1908, the Court of Appeal threw out Schmitz's bribery conviction on the ground that the Penal Code required that the defendant's threat be to do something illegal. In this case, as mayor, Schmitz had the right to withhold a liquor license from a house of prostitution.[109]

On March 9, 1908, the case came before the Supreme Court on the petition of the prosecution. In a *per curiam* opinion, the Court summarily affirmed the Court of Appeal, both on the grounds cited by the Court of Appeal and on a second basis—the indictment had failed to allege that Schmitz was Mayor of San Francisco and Ruef was a powerful political boss and therefore that the two were in a position to make good on their threats.[110]

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[103] *Ball*, 93 Cal. at 227, 233; *San Francisco Chronicle*, Feb. 5, 1892, p. 10.

[104] Bakken, *The Court and the New Constitution*, *supra*, p. 112, *citing Williams v. Coombs* (1986) 179 Cal.App.3d 636.

[105] Courts of Appeal | Judicial Branch of California.

[106] Dear, *California's First Judicial Staff Attorneys*, Calif. Legal Hist. (2020) vol. 15, p. 126.

[107] Johnson, History of the Supreme Court Justices of California (1966) vol. 2, p. 76.

[108] *San Francisco Call*, Sept. 24, 1907, p. 1.

[109] *People v. Schmitz* (1908) 7 Cal. App. 330, 342–69.

[110] *Id.* at 373.

The Court's decision prompted a firestorm of criticism—so much so that Chief Justice William Beatty took the extraordinary step of sending a letter to the editor of the *Sacramento Bee* defending the ruling.[111] The *San Francisco Call* was not impressed: "To say that the court cannot take cognizance of a fact of official record, such as the incumbency of a mayor, is to make the law a foolish and impotent thing."[112] Later that year, the *Call* called the Chief Justice's defense of the *Schmitz* decision "singularly weak." The newspaper wrote that the decision "pounces on an immaterial mistake of a conjunction" and that Beatty "has an eye for the infinitely little." The *Call* accused the Chief Justice of "building up trifling and immaterial technicalities to the height of mountainous obstacles on the path of justice."[113]

But two years later, the Ruef fiasco had a sequel that would again trigger public criticism, together with calls for judicial reform. In that case, Abraham Ruef was accused of offering a bribe to Supervisor John Furey in hopes of influencing him to vote for granting a franchise to operate streetcars by an overhead trolley electric system, rather than the underground cable the franchisee was using.[114] Ruef was convicted, and in November 1910, the First District Court of Appeal in San Francisco unanimously affirmed the judgment.[115]

On the last day of 1910, the defendant filed a "petition for the transfer of the . . . case from the district court of appeal to the Supreme Court for hearing." On January 23, 1911, an order signed by four justices granting the petition was filed in the clerk's office.[116]

But when the lawyers examined the Court's order, things got interesting. Justice Frederick Henshaw's signature on the order was dated January 10, 2011. This raised the initial question of why Henshaw had not recused himself, given his close ties with the Ruef machine.[117]

And when the lawyers consulted the docket, a more serious question arose: The state's brief in opposition to Ruef's petition had been filed on January 12, 2011—two days *after* Justice Henshaw had signed the order granting review.[118] When this was revealed, William Denman, a prominent San Francisco attorney,

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111 *San Francisco Call and Post*, May 3, 1908, p. 48, *quoting Sacramento Bee.*

112 *Id.* at p. 20.

113 *San Francisco Call and Post*, Nov. 2, 1908, p. 6.

114 *People v. Ruef* (1910) 14 Cal.App. 576, 583.

115 *Id.* at 620.

116 *Id.* at 621.

117 *San Francisco Call*, May 14, 1908, p. 1.

118 *Id.*

appeared before the Legislature's Judiciary Committee to demand Henshaw's impeachment.[119] A still bigger problem was that Justice Henshaw had left the state immediately after signing the order, meaning that he was not in California when the fourth justice signed, making the order ineffective.[120]

When the state filed a motion to vacate the order granting review on the grounds that it was a nullity, this led to two extraordinary events. At the outset of the argument on the motion, the Court issued a statement, rendered by Chief Justice Beatty and signed by all seven justices (including Justice Henshaw), explaining the Court's procedures for arriving at decisions on the merits and decisions on petitions for hearing.[121] On February 28, 1911, the Court issued an opinion, holding that Justice Henshaw was unable to exercise any judicial functions during his absence from the State of California, and therefore the order granting review had not had the concurrence of four justices and must be vacated. Once again, the opinion was signed individually by all seven justices, including Justice Henshaw.[122]

Notwithstanding the controversial conclusion to the last thirty years, the years 1880 to 1910 were nonetheless foundational to the Court's stature. The Court and the Legislature had attempted to address the crushing workload of the Court, first by creating the Court commissioners, and later by creating the first three District Courts of Appeal. The Court had also filed landmark opinions in water law, which contributed significantly to California's explosive growth. And the Court had made lasting law on inherently dangerous instrumentalities, malicious prosecution, as well as other areas. By 1918, Senator Roscoe Conkling commented that there was no court in the United States of higher standing than the California Supreme Court.[123]

THE PROGRESSIVE REFORM ERA

Hiram Johnson was only an assistant district attorney during the Rueff-Schmitz prosecutions.[124] But in 1911, he rode the popularity of that endeavor to election as governor.

Within eighty-five days of Johnson's election, the California Legislature passed more than eight hundred bills and twenty-three constitutional

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[119] *Id.*

[120] *People v. Ruef,* 14 Cal.App. at 625.

[121] *Id.* at 621–623.

[122] *Id.* at 626; Older, My Own Story (1926), pp. 146–48. Older credits Charles S. Wheeler with spotting the fatal flaw in the Court's order on rehearing.

[123] Johnson, *supra*, vol. 1, p. 100.

[124] Johnson, *supra*, vol. 2, p. 131.

amendments.[125] The Legislature's progressive revolution included: (1) the adoption of the right to voter initiatives and referenda (Proposition 7); (2) recall (Proposition 8), and the direct primary, all intended to break the Southern Pacific Railroad's hold on politics;[126] (3) nonpartisan elections and the authority to impeach judges (Proposition 21);[127] (4) a vast expansion in the authority of the Railroad Commission; (5) a declaration that all pipelines, gas and electric plants, water systems, and warehouses were businesses affected with the public interest and therefore public utilities (Propositions 12 & 14);[128] and (6) a comprehensive workers' compensation system (Proposition 10).[129] Finally, the Legislature enacted a constitutional amendment extending the vote to California's women (Proposition 4).[130]

Support for progressive reform was not universal, of course. In an article entitled "The Legislature of a Thousand Freaks," the *San Francisco Call* reported on one of the more unusual proposals:

> Among the curiosities in the line of freak legislation, of which the sitting legislature is making a collection that might grace a museum, if it served no other purpose, perhaps the most extraordinary is that offered by Senator [Lester] Burnett, who proposes for submission a constitutional amendment declaring all bills enacted at this session to be a part of the state constitution. This amendment might justly be described as a plan to drive the constitution down a steep place into the sea.[131]

In 1903, Lucien Shaw, a renowned expert on water law,[132] had been elected to the Supreme Court and assigned to Department One, which was considered the liberal wing of the two-department Court.[133] In the years before the 1911 legislative session, Shaw had written two important water law decisions for the Court, which helped set the stage for the Legislature's changes. *Katz v. Walkinshaw* (1903) 141 Cal. 116, addressed the rules applicable to percolating water—underground bodies of water, not flowing in any defined stream, which reached the surface by percolating up through saturated soil. Such supplies were important, particularly in southern California and the enormous citrus

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[125] Mowry, The California Progressives (1951), pp. 147–148.

[126] *The Times-Herald*, Oct. 11, 1911, p. 1.

[127] *Id.*; Documents on the State-Wide Initiative, Referendum and Recall (1912), pp. 265–270.

[128] Hallett, The Public Utilities Act of California (1912), 1912publicutilitiesactofcaliforniatemp.pdf

[129] Glenn M. Shor, The Evolution of Workers' Compensation Policy in California (2021), vol. 16, pp. 52–58.

[130] Spencer C. Olin, California's Prodigal Sons: Hiram Johnson and the Progressives, *1911–1917* (1968), p. 55.

[131] *San Francisco Call and Post*, Mar. 20, 1911, p. 4.

[132] Shaw, *The Development of the Law of Waters in the West* (1922).

[133] Salyer, *The California Supreme Court in an Age of Reform, 1910–1940*, in Constitutional Governance and Judicial Power: The History of the California Supreme Court (Scheiber, edit., 2017), p. 147.

fields planted there. The Court held that the doctrine of riparian rights did not apply to these water supplies. Instead, if the percolating supply was on land owned by the claimant, the claimant was entitled to whatever supply he or she was putting to beneficial use, and no more. Accordingly, landowners using percolating water for irrigators were entitled to an injunction that barred the diversion of such supplies by third parties for sale on distant lands.

And in *Duckworth v. Watsonville Water Company* (1907) 150 Cal. 520, Justice Shaw further developed the rights of riparian water rights owners. In that case, plaintiffs owned 320 acres on Pinto Lake in Santa Cruz County. One plaintiff claimed riparian rights over the lake and the other also claimed appropriator's rights. But the defendant water company owned the lakebed and claimed riparian rights over the entire water supply of the lake. The Court held that riparian rights are limited to the use of water as it passes the owner's property, plus the right to enjoin diminution or pollution above the owner's property to the extent they interfere with the owner's use. Accordingly, the Court held that the water company had riparian rights to the entire lake, subject only to what the landowners were using. But that wasn't the end of the story. In that case, the water company was using none of the water on the adjoining property. Instead, it was shipping it to distant landowners for sale. As a result, the water company's rights were limited to the water it was accessing; its riparian rights did not extend to the remaining supply.

In 1911, as the Progressive era was launched, the Legislature began the process of sorting out the conflicts between riparian and appropriators' rights in water via the concept of beneficial use. The Legislature provided that all water within the state was the property in common of the people of the state. Two years later, the Legislature established time limits in which both appropriators and riparian owners would be required to put their claims to beneficial use.[134] This was a direct response to the Supreme Court's decision in *Miller & Lux v. Madera Canal and Irrigation Co.* (1909) 155 Cal. 59, in which the Supreme Court had declined to subject the riparian owners Miller & Lux to a "reasonable use" limitation on their rights.

Five years later, in *California Pastoral & Agricultural Co. v. The Madera Canal and Irrigation Co.* (1914) 167 Cal. 78, the Supreme Court limited appropriators' rights in a way it had earlier declined to limit riparian rights owners. There, the defendant had appropriated waters from the Fresno River before Miller & Lux had acquired their riparian rights. An appropriator, the Court held, acquired rights to whatever quantity of water was reasonably necessary for the

[134] Salyer, *supra*, p. 179.

purpose that the appropriator was putting it to, no more.

One year earlier, the Supreme Court had addressed the new powers conferred by the Legislature on the Railroad Commission. According to article XII of the state Constitution, the Legislature had "plenary" power to confer new powers on the Commission, and such power was "unlimited by any provision of this constitution."[135] Nonetheless, the Supreme Court overturned the Commission's order in *Pacific Telephone and Telegraph Company v. Eshleman* (1913) 166 Cal. 640. Notwithstanding the clear language of the Constitution regarding the Commission's powers, the Court held that a private corporation must actively and intentionally dedicate its property to public use in order for the state to acquire rights under the police power to regulate it.[136]

The Court also pumped the brakes on the Legislature's progressive revolution in another area in *Associated Pipe Line Company v. Railroad Commission* (1917) 176 Cal. 518. By way of background, in 1913 the Legislature had enacted legislation deeming every oil pipeline company to be a public utility and common carrier. In its argument before the Supreme Court, the Railroad Commission relied on the proposition that any business affected with the "public interest" is per se a public utility and subject to regulation. But the Supreme Court unanimously disagreed, pointing out that the charter of the pipeline company had expressly stated that it was *not* a common carrier and that the company had only carried the oil of two companies in its pipeline. Accordingly, the Court held that any attempt to extend the Commission's regulatory power over the pipeline violated the Fourteenth Amendment. Thus, the Court struck down the portion of the 1913 Act that declared all oil pipelines to be public utilities.

The state's new workers' compensation system also came before the Court during these years. In 1911, the Roseberry Act had created workers' compensation in California. Two years later, the Boynton Act made the system compulsory.

The system survived its first constitutional challenge in *Western Indemnity Co. v. Pillsbury* (1915) 170 Cal. 686. There, a foreman had fired a worker and a fight ensued. In the violent altercation, the foreman suffered injuries to his face, hands, and arms.[137] A majority of the Court upheld the Commission's award, holding that the "conditions of modern industry" justified evolution away from the traditional common law view that an employer's liability should be

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[135] *Id.* at p. 151.

[136] *Id.* at pp. 153–154.

[137] *Western Indemnity*, 170 Cal. at 703–704.

limited to fault.[138] As for whether the injury arose in the course of the worker's employment, the majority cited the statute making the Commission's factual findings conclusive so long as supported by substantial evidence.[139] Justice Henshaw filed a vigorous dissent, complaining that the workers' compensation system was little more than a "general reapportionment of wealth" and placed California on the path to "socialistic paternalism."[140]

Not long after, the Court affirmed an award of death benefits by the Workers' Compensation Commission by a narrow 4-3 margin in *Western Metal Supply Co. v. Pillsbury* (1916) 172 Cal. 407. Despite the common law rule that the right of action in tort dies with the injured person, the majority held that "too strict and literal" an interpretation should not be given to the constitutional amendment establishing the workers' compensation system. Justice Henshaw once again dissented, writing, "I deny the power of the state constitution to take the property of one man under such circumstances and bestow it on another."[141]

Tragically, neither the state nor the Legislature had yet outgrown vicious racist attacks on the foreign-born, especially Japanese residents. In 1913, the Alien Land Law was enacted. The statute prohibited the sale of land to persons ineligible for citizenship—which at the time, Japanese residents were[142]—and limited leases of agricultural land to Japanese residents to three years.[143] However, the proponents quickly discovered that the law was ineffective. Between 1910 and 1920, the Japanese population of California increased by 50 percent, and Japanese land ownership more than doubled.[144] Moreover, it became routine to evade the 1913 Land Law by simply holding land in the name of resident immigrants' native-born children.

Although the racist campaigns were largely quiet during World War I, they resumed after the war was over. In 1920, the electorate approved a new Alien Land Law by a wide margin. The new law barred the transfer or lease of land to Japanese nationals, barred the acquisition of land by any corporation in which a Japanese national held a majority of the stock, and forbade Japanese

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138 *Id.* at 693.

139 *Id.* at 705.

140 *Id.* at 724.

141 *Western Supply*, 172 Cal. at 428.

142 The original naturalization statute had limited naturalization to "free white persons," and had been broadened to include African Americans after the Civil War. However, courts had ruled that Chinese and "other Orientals" were ineligible for citizenship until Congress legislated to the contrary. Daniels, The Politics of Prejudice: The Anti-Japanese Movement in California, and the Struggle for Japanese Exclusion (1966), pp. 50–51.

143 *Id.* at p. 62.

144 *Id.* at p. 82.

nationals from serving as guardians of their native-born children.[145] A separate initiative, which also passed, imposed a poll tax on alien nationals.[146]

The Supreme Court struck down the alien poll tax in *In re Kotta* (1921) 187 Cal. 27, on equal protection grounds. The following year, in *In re Estate of Yano*,[147] the Court struck down the ban on Japanese residents serving as the guardians of their native-born children, again on equal protection grounds.

About the same time, a scandal involving Justice Frederick Henshaw broke into print, bringing the controversial justice's career on the Court to an end. The story began with the death of James G. Fair, who had made many millions in the 1860s and 1870s through his interest in a silver mine in Virginia City, Nevada. Believing that his children would dissipate his fortune, Fair's will placed his money in a trust, assigning his children only the interest. Following Fair's death, the children challenged the trust, but the trust was upheld in the lower court, and by a vote of 4 to 3 (with Justice Henshaw in the majority), the Supreme Court affirmed.[148] The children sought a rehearing, and it was granted, with Justice Henshaw mysteriously changing sides and voting with the children. On rehearing, the Court held that the trust was invalid.[149] Justice Henshaw voted with the majority and added a concurrence to explain his abrupt change of heart.[150]

This was also a time of social unrest. On July 22, 1916, a large crowd gathered in downtown San Francisco to watch the Preparedness Day parade, staged to promote readiness for a likely war. Suddenly a bomb exploded at the corner of Steuart and Market streets. When the smoke cleared, ten were dead; forty were wounded.[151] Thomas Mooney, a labor organizer and avowed socialist, and an associate were convicted of murder—notwithstanding a photograph of Mooney and his wife taken standing on the roof of a building more than a mile away from the blast site only minutes before the bomb went off.[152] Mooney was sentenced to death.

Within two months of Mooney's conviction, significant new evidence came to light suggesting that testimony against him had been perjured. Nevertheless, the Supreme Court repeatedly refused to disturb Mooney's conviction, even

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145 *Id.* at pp. 88, 90.

146 *Id.* at pp. 82, 90.

147 *In re Estate of Yano* (1922) 188 Cal. 645.

148 *In re Estate of Fair* (1901) 132 Cal. 523, 563.

149 *In re Estate of Fair*, *supra*, p. 523 for the majority opinion on rehearing.

150 *Id.* at 550; Older, My Own Story, *supra*, pp. 197–198.

151 Older, My Own Story, *supra*, pp. 333–334; Salyer, *The California Supreme Court in an Age of Reform*, *supra*, p. 172.

152 Salyer, *supra*, p. 174.

though at the behest of the trial judge, the attorney general had confessed error and sought a new trial.[153] An article by a Modesto attorney in *The American Law Review* harshly criticized the Court's inaction:

> [I]f by means of fraud and perjury, a concededly innocent person is convicted of a crime and is condemned to death, the courts of this State, under the conditions stated, are so manacled and fettered by their own arbitrary rules and precedents as to be without power to undo the wrong . . . This is murder—judicial murder—and nothing less.[154]

Supporters of Mooney from all over the world charged that his conviction had more to do with his union activities and political beliefs than the facts. Felix Frankfurter urged President Wilson to pressure California authorities to intervene.[155] Crusading journalist Fremont Older, who had earlier been a major figure in the prosecution of Abraham Ruef and Mayor Eugene Schmitz, wrote in a banner headline in the *San Francisco Bulletin*, "[District Attorney] Fickert framed the Mooney Case."[156]

For months, Fremont Older kept the Mooney story alive. He knew that Fickert and Justice Frederick Henshaw were old friends and political allies, and he suspected that Justice Henshaw had been involved in the Mooney prosecution in some way. In late 1917, Older received a copy of a handwritten confession by William Dingee, who testified that he had funneled a bribe to Justice Henshaw in connection with the petition for rehearing in *In re Estate of Fair.* According to Dingee, Henshaw was paid $10,000 for switching his vote and supporting a rehearing, and $400,000 when the final decision was filed, narrowly reversing in favor of the Fair children and breaking the trust.[157]

Not long thereafter, former Mayor Schmitz visited Older's office and told him that Justice Henshaw wanted to meet with him.[158] After Older declined to come to Henshaw's chambers, the two met in the lobby of the Fairmont Hotel that evening. Justice Henshaw initially denied the story, but Older told him that Dingee's ledger supported the bribe allegation.[159] When Henshaw's wife interrupted the conversation, they agreed to meet again the next day. During that conversation, Henshaw allegedly confirmed the story and agreed to resign

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[153] *People v. Mooney* (1917) 175 Cal. 666; *People v. Mooney* (1917) 176 Cal. 105; *People v. Mooney* (1918) 177 Cal. 642; *People v. Mooney* (1918) 178 Cal. 525; Hindman, The Mooney Case, *American Law Review* LII (1918) 743.

[154] Hindman, The Mooney Case, *supra*, p. 745.

[155] Salyer, *supra*, pp. 172–73.

[156] Older, My Own Story, *supra*, p. 336.

[157] Older, *supra*, pp. 197–198.

[158] Older, My Own Story, *supra*, p. 199.

[159] *Id.* at p. 200.

from the Supreme Court, sever his ties with District Attorney Fickert, and urge the Governor to get Mooney a new trial.[160] Henshaw resigned from the Court effective January 1, 1918, citing a desire to participate in war work—just as he told Older he would.[161]

About a year later, Older left the *Bulletin* to become editor of the *San Francisco Call.*[162] He was given a copy of a draft report to Labor Secretary William Wilson from John Densmore, Director General of the United States Employment Bureau, who had been directed by Wilson to secretly place a dictaphone in District Attorney Fickert's office in hopes of unraveling the Mooney prosecution. The report contained recent conversations between Fickert and Henshaw directly related to the Mooney case.[163] Concluding that Henshaw had broken their agreement, Older published the draft report a few days later in the *Call,* including the story of the bribe to Henshaw.[164] But Henshaw denied the charges.[165]

THE 1926-1927 LEGAL SYSTEM REFORM: BLACK ROBES AND THE ESTABLISHMENT OF A STATE BAR

In 1918, the question of docket congestion yet again took center stage. On January 24, 1918, the banner headline in the *San Francisco Chronicle* announced "California Supreme Court is 20 Months Behind in Work."[166] The *Chronicle* reported that "Ordinary Appeals Filed Now Will Not Be Reached Until September 1919."[167] Still, this was an improvement: Not long before, Chief Justice Angellotti had reported that the Court had been five years behind on its docket.[168] In 1926, the voters approved a constitutional amendment establishing a judicial council and permitting the assignment of judges from one court to another to help alleviate docket congestion.[169]

Another important step in reform was taken in 1927 when the unified California State Bar was formed. The State Bar, a public corporation within the judicial branch, was created by the State Bar Act to assist the Supreme Court in regulating the legal profession and improving the administration of

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160 *Id.* at pp. 200–201.

161 *Id.* at p. 200.

162 *San Francisco Examiner*, Aug. 16, 1918, p. 8.

163 Older, *supra*, p. 203.

164 *San Francisco Examiner*, Nov. 24, 1918, p. 8; see *San Francisco Examiner*, Nov. 23, 1918, p. 6 for a summary of the audio tapes.

165 *San Francisco Examiner,* Nov. 23, 1918, p. 7.

166 *San Francisco Chronicle,* Jan. 24, 1918, p. 9.

167 *Id.*

168 *Id.*

169 *Id.*

justice. Chief Justice William Waste was the first name enrolled in the newly created statewide registry of attorneys.[170]

The following year, for the first time, the Supreme Court began wearing black robes when Court was in session. In a short piece entitled "And Anyone Who Giggles Will Do It In a Dungeon," the *San Francisco Chronicle* commented on the Chief Justice's innovation:[171]

> Some years ago a witness charged with perjury before a legislative investigating committee solemnly assured the judge before whom he was arraigned that had the members of the committee worn black silk robes like the judge's he certainly would have told the truth. He did not think it was really perjury to lie to a lot of men in business suits.
>
> There is something in this viewpoint. When seen in the setting of court the white wigs and gowns of English barristers are not so comical as they appear to the stranger as the wearers skip across the street from chambers to court. And there is little talking back to the judge, terrible in his uniform of justice as he sits upon the woolsack.
>
> The black silk of the United States supreme court justices is a reminder of the dignity of the law that has been adopted with advantage by the judges of some other courts. The custom of wearing black robes started by the state supreme court justices at the University of California charter day exercises, and which it is said will be followed hereafter when that court sits en banc will tend to make the court impressive to those who appear before it.

THE WASTE COURT

William Waste assumed the position of Chief Justice in January 1926 and held that position until June 1940, as the Nazis invaded France.

In 1926, the Court handed down another water law case that would become the last stand of classical water law theory. In *Herminghaus v. Southern California Edison Co.* (1926) 200 Cal. 81, the plaintiffs owned 18,000 acres near the Fresno River. The plaintiff had used the river water for many years for irrigation, including to flood pasturelands.[172] The Court held that the rule that a riparian owner of water rights is entitled only to access water for reasonable uses applied only to cases involving other riparian owners. As part of their riparian rights, the plaintiffs were entitled to not only the ordinary course of

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[170] State Bar of California, Celebrating 75 Years, pp. 3, 12.

[171] *Fresno Morning Republican*, Mar. 31, 1928, p. 4, quoting from *San Francisco Chronicle,* Mar. 30, 1928.

[172] *Herminghaus v. Southern California Edison Co.* (1926), 200 Cal. 81, 86.

the river, but to all routine yearly accretions arising from melting snow.[173] The defendants, who owned riparian property above the plaintiffs' property in the course of the river, proposed to divert nearly all of the river water by a system of dams and reservoirs to generate power, a diversion which would virtually destroy the plaintiffs' rights.[174] The Court struck down sections 11 and 42 of the Water Act, which had limited *all* water rights—both riparian owners and appropriators—to reasonable uses.[175]

The electorate responded in 1928, approving a new section 3 of article XIV of the state Constitution. Section 3 declared that "because of the conditions prevailing in this state, the general welfare requires" that *all* water rights—both riparian and appropriators—be limited to such amounts as the claimant could reasonably and beneficially use.

Accordingly, in *Peabody v. City of Vallejo* (1935) 2 Cal.2d 351, the Court held that in the wake of section 3, *Miller & Lux* and *Herminghaus* were no longer good law,[176] reversing the trial court's determination that the riparian owners were entitled to all of the ordinary and natural flow of the creek. The Court found that so long as no damage to the plaintiffs' use of water for irrigation was shown, section 3 mandated that the defendants were entitled to the excess.[177]

The Court completed the retreat from classical water law theory in *Meridian v. City and County of San Francisco* (1939) 13 Cal.2d 424. There, the defendant had appropriated water from the Tuolumne and San Joaquin Rivers by virtue of the construction of the Hetch Hetchy dam. The Court cleared the way for the dam project, holding that since the downstream riparian plaintiff still had ample water for all beneficial uses, even as an appropriator, the City was entitled to proceed.[178]

The Waste Court also engaged in other reforms around this time. Court historians often note that one of the most critical moments in the history of the jurisprudence of the United States Supreme Court was the decision in *West Coast Hotel Co. v. Parrish,* 300 US 379 (1937). The apocryphal story has long been that Justice Owen Roberts switched sides from the wing of the Court that had repeatedly struck down New Deal innovations to the liberal wing of the Court in order to discourage the need for Franklin Roosevelt's Court-packing plan.

Something like that happened in California around the same time. As

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[173] *Id.* at 91.

[174] *Id.* at 105–107, 109–112.

[175] *Id.* at 115–117.

[176] *Peabody v. City of Vallejo* (1935) 2 Cal.2d 351, 364–366.

[177] *Id.* at 368–369.

[178] *Meridian v. City and County of San Francisco* (1939) 13 Cal.2d 424, 446–447.

discussed, the California Supreme Court had repeatedly limited or outright rejected major innovations of the progressive era. But in the late 1930s, with two new justices on the Court, votes changed and reform gained several consecutive crucial victories.

First, in *Max Factor & Co. v. Kunsman* (1936) 5 Cal.2d 446, the Court upheld the Fair Trade Act. There, the plaintiff's exclusive sales agent had a system of contracts with all buyers of a product by which the resale price was fixed. But the defendant refused to sign the contract and instead accessed the product through the black market, selling it at cut-rate prices. Relying heavily on *Nebbia v. New York*,[179] in which the United States Supreme Court had approved an emergency measure passed in the early days of the Depression to prevent "cut-throat" price competition, the majority held that the police power had expanded in scope under current conditions to extend "to measures designed to promote the public convenience and the general prosperity."[180]

Reform scored yet another important win one day later in *Agricultural Prorate Commission v. Superior Court* (1936) 5 Cal.2d 550. Of note, *Agricultural Prorate* marks the second appearance of Matthew Tobriner[181] at that point in the Court's history. Although merely co-counsel for a petitioner's amicus in that case, he was set to play an important role for the Court decades later. As explained in that case, the Agricultural Prorate Act of 1933 set production ceilings for individual lemon producers in the hope of mitigating a market failure resulting from too much production chasing too little demand.[182] Although 99 percent of California's production was consumed in other states, the Court nevertheless rejected a preemption argument, holding that until the shipments actually crossed state lines, they were not in interstate commerce.[183] The respondent argued that the Commission was an unconstitutional delegation of legislative authority, but the Court pointed out that since the statute provided seven conditions that had to be met before production ceilings could be imposed, the Commission's power was sufficiently limited.[184]

During this period, the Court continued to be bedeviled by the same problem that had troubled it throughout its history—docket congestion. Justice Douglas Edmunds joined the Court in late 1936. At that time, the backlog at the Court was estimated to be three years. He undertook a study

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[179] 291 U.S. 502 (1934).

[180] *Max Factor*, 5 Cal.2d at 461.

[181] *See Agricultural Prorate Commission*, counsel list, 5 Cal.2d at 552.

[182] *Agricultural Prorate Commission,* 5 Cal.2d at 553.

[183] *Id.* at p. 559–563.

[184] *Id.* at p. 569.

attempting to determine the size of the docket arrearages and the reasons for it. He found 523 uncalendared cases languishing on the Court's docket. But it was his findings on counsel's briefs that may shock modern attorneys. Justice Edmunds determined that as of June 1939, briefs in a little more than half of the pending cases were 200 pages or less. But "[a] large number" ran between 200 and 500 pages. And some were between 500 and 1,000 pages, and four briefs were over 1,200 pages![185] Justice Edmunds's reform to address this situation had four parts: "extended oral argument"; shorter briefs—presumably, *much* shorter; more sessions; and a shift by the Court toward doing more of its work in conference.[186]

A BRUSH UP WITH THE PRESS

Only one month into the new decade, the California Supreme Court found itself in hot water. *Times-Mirror Co v. Superior Court* (1940) 15 Cal.2d 99, involved three editorials published by the *Los Angeles Times* in May and June 1938. The *Times* editorials were about union strikers, a political boss, and union members convicted of violence against nonmembers.[187] In each case, a verdict had been rendered, but the sentencing decisions were still pending. The newspaper and its managing editor were found guilty of constructive contempt.[188]

The Supreme Court affirmed the judgments of contempt on the grounds that the editorials had a "reasonable tendency to interfere with the orderly administration of justice."[189] Dissenting from the decision, Justice Phil Gibson wrote that the contempt charges were "a regrettable mistake" and commented, "I think that by our decision in this and the Bridges case[190] we have sacrificed a substantial part of our cherished freedom of speech and press in order to stamp out an evil that does not exist."[191]

Not surprisingly, the decision was criticized extensively in newspapers throughout the country. The *Edmonton Journal* quoted extensively from Justice Gibson's dissent.[192] The *Sacramento Union* quoted Justice Gibson's comment that "[w]e should not ignore the growing suspicions that courts are prone to place

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[185] This was several years before the advent of the California Rules of Appellate Procedure. Perhaps even more shocking than these page numbers, at this time the appellate courts "allow[ed] attorneys to file as many briefs as they choose." *Napa Journal*, Apr. 5, 1940, p. 12.

[186] Johnson, *supra*, vol. 2, p. 76.

[187] *Times-Mirror*, 15 Cal.2d at pp. 109–110, 112.

[188] *Id.* at p. 102.

[189] *Id.* at pp. 102–103.

[190] Justice Gibson was referring to *Bridges v. Superior Court* (1939) 14 Cal.2d 464, in which the Court affirmed a contempt conviction against union organizer Harry Bridges, who had written a telegram to Secretary of Labor Frances Perkins condemning a court decision which the press published.

[191] *Times-Mirror,* 15 Cal.2d at p. 129 (Gibson, J., dissenting).

[192] *Edmonton Journal,* Feb. 1, 1940, p. 15.

their own security above all other considerations." According to the *Union,* the *Times* contended that "any interpretation of the constitution under which such convictions are sustained is an erroneous one and fraught with grave danger to constitutional liberties."[193] The *Van Nuys News and Valley Green Sheet* quoted extensively from Justice Gibson's dissent, almost entirely ignoring the majority opinion.[194] In an editorial entitled "Not Above Criticism," the *Turlock Journal* also quoted extensively from Justice Gibson's dissent, concluding, "What it all boils down to, of course, is that no governmental institution of a democracy has the right to put itself forth as immune to the criticism of the people who created it. The people have the last word; and in a democracy, their chief medium for this expression is a free press."[195] The following year, both the Court's *Times-Mirror* and *Bridges* decisions were reversed by the United States Supreme Court in *Bridges v. California* (1941) 314 U.S. 252.

THE GIBSON COURT BEGINS

In late May 1940, Chief Justice William Waste was stricken by the recurrence of an old heart ailment. He ultimately lapsed into a coma and passed away on June 6, 1940. The Supreme Court immediately adjourned, putting over its calendar until its next session in Los Angeles.[196] The following day, Governor Culbert Olson nominated Associate Justice Phil Gibson, whom he had elevated to the Court less than a year earlier, to be the new Chief Justice.[197] On June 18, Justice Gibson was approved by the Judicial Qualifications Commission and sworn in as Chief Justice of California.[198]

The press immediately settled on Professor Max Radin of the University of California Law School as the Governor's likely nominee to assume Justice Gibson's seat as an Associate Justice.[199] Radin had been a law professor at the University of California School of Law in Berkeley since 1919.

But opposition to Radin coalesced rapidly. Earlier in 1940, Radin had become involved in the prosecution of several young employees from the State Relief Administration ('SRA"). The SRA employees had been called to testify before Sam Yorty's Assembly Relief Investigating Committee on Subversive Activities, had declined to testify about Communist affiliations or beliefs, and had then been prosecuted for contempt of the Committee. Professor Radin

[193] *The Sacramento Union,* Feb. 8, 1940, p. 4.

[194] *Van Nuys News and Valley Green Sheet,* Feb. 15, 1940, p. 13.

[195] *Turlock Journal*, Feb. 16, 1940, p. 4.

[196] *Redlands Daily Facts,* Jun. 7, 1940, p. 8.

[197] *The Los Angeles Times,* Jun. 8, 1940, p. 1; *Turlock Journal,* Jun. 8, 1940, p. 1.

[198] *Oakland Tribune,* Jun. 18, 1940, p. 2.

[199] *The Los Angeles Times,* Jun. 8, 1940, p. 1.

wrote letters and lobbied Stockton attorneys, advocating for leniency toward the young SRA employees. As a result, the San Joaquin County Bar Association adopted a resolution opposing his nomination on June 13 and declared that Professor Radin's support for the SRA employees "demonstrated his lack of ethical precepts and his unfitness to properly sit in judgment upon cases which should be determined solely upon the merits and rights legally presented."[200] The Stockton Chamber of Commerce followed suit the following morning, calling Professor Radin an "extreme leftist."

Nevertheless, Governor Olson formally nominated Professor Radin for the Supreme Court on June 26, 1940.[201] Assemblyman Yorty denounced Radin, accusing him of "sympathy for Communists" because of his action in the SRA case.[202]

On July 22, 1940, following a two-hour meeting, the Judicial Qualifications Commission rejected Professor Radin's nomination.[203] Reporting on the meeting, the Ontario *Daily Report* described Professor Radin as a "distinguished legal scholar and teacher." And Governor Olson said he was "greatly surprised" by the action.[204] But ironically, the rejection led to the appointment of one of the California Supreme Court's greatest jurists.

On July 31, 1940, Governor Olson named his new nominee—Professor Roger Traynor, also of the University of California Law School in Berkeley. Although only 40 years old, Traynor was an established expert of national stature in both tax and constitutional law.[205] Yet, even as he announced his new nomination, the Governor released copies of a letter to the Judicial Qualifications Commission protesting its treatment of Professor Radin. Professor Traynor's nomination was unanimously approved in a twenty-minute session of the Judicial Qualifications Commission on August 12, 1940.[206]

For the next thirty years, the California Supreme Court produced one opinion after another destined to wind up in law school casebooks around the country—many of them with Justice Traynor playing a leading role.

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[200] *Stockton Evening and Sunday Record*, Jun. 14, 1940, pp. 1–2.

[201] *Hanford Sentinel*, Jun. 27, 1940, p. 1.

[202] *Vallejo Evening News*, Jun. 28, 1940, p. 1.

[203] The *New Republic* was scathing: "As for [Attorney General Earl] Warren's liberalism, neither as District Attorney nor as Attorney General did he show any. He used his position to block the appointment of Max Radin, one of California's most brilliant jurists, to the Supreme Court, and gave no reason for so doing. It was well-known, however, that Radin's outspoken advocacy of the New Deal was anathema to Joe Knowland and the Republican hierarchy, who were already engaged in a red-baiting campaign, and Mr. Warren undoubtedly obliged." *The New Republic*, Jun. 23, 1952, p. 11.

[204] *Daily Report*, Jul. 23, 1940, p. 3.

[205] *Id.*

[206] *Oakland Tribune*, Aug. 13, 1940, p. 2; *Modesto Bee*, Aug. 13, 1940, p. 1.

Escola v. Coca-Cola Bottling Co. (1944) 24 Cal.2d 453—one of the Gibson Court's famous decisions—began when a bottle of Coca-Cola exploded in the hand of a restaurant waitress. At trial, the plaintiff relied on the doctrine of res ipsa loquitur—the notion that an accident like the one involved in the case does not happen absent negligence. The majority said there was no evidence that anything had happened at the restaurant, which instead led to the inference that something went wrong at the factory. The majority concluded that the jury was therefore entitled to infer that either the glass in the damaged bottle was defective or the factory added an excessive charge of pressure.

Justice Traynor concurred. He argued, however, that res ipsa loquitur should not govern. Citing the classic case of *McPherson v. Buick* (1916) 111 N.E. 1050, he argued that "it should now be recognized that a manufacturer incurs an absolute liability when an article that he has placed on the market, knowing that it is to be used without inspection, proves to have a defect that causes injury to human beings."[207] Justice Traynor saw clearly which way the balancing of the harms inclined: "The cost of an injury and the loss of time or health may be an overwhelming misfortune to the person injured, and a needless one, for the risk of injury can be insured by the manufacturer and distributed among the public as a cost of doing business."[208]

The following month, the Court decided *Fairchild v. Raines* (1944) 24 Cal.2d 818. In a majority opinion by Justice Rey Schauer, the Court held that a racially restrictive covenant was unenforceable because the racial composition of the surrounding neighborhood had changed, and that enforcement of the covenant would accordingly impose greater hardship on the defendants (a black couple) than a benefit to the plaintiffs. Concurring in the opinion, Justice Traynor took a broader view. He argued that the court should "consider whether enforcement would be contrary to the public interest in the use of land in urban communities where people are concentrated in limited areas."[209] Justice Traynor explained that racially restrictive covenants were contrary to the public interest in rapidly growing urban areas: "Race restriction agreements, undertaking to do what the state cannot, must yield to the public interest in the sound development of the whole community."[210]

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[207] *Escola*, *supra*, 24 Cal.2d at pp. 461–462.

[208] *Id.* at p. 462. Five months after *Escola*, the Court decided *Ybarra v. Spangard* (1944) 25 Cal.2d 486. There, the plaintiff had awakened with severe pain in his shoulder following surgery. In an opinion by Chief Justice Gibson, the Court held that since the plaintiff's body was in the exclusive control of the defendants when the injury happened, each defendant had the burden of refuting an inference of negligence if they could.

[209] *Fairchild*, *supra*, 24 Cal.2d at p. 831.

[210] *Id.* at p. 834.

Four months after *Fairchild,* the Court struck another blow for racial equity and inclusion in *James v. Marinship Corp.* (1944) 25 Cal.2d 721. There, the defendant operated shipyards in Sausalito.[211] The yards were closed shops. Indeed, the union had closed shop agreements with virtually every shipyard on the West Coast.[212] But the union did not admit African American members.[213] Instead, the union consigned African American craftsmen to the "Negro Auxiliary." The Negro Auxiliary had no vote in the union itself and no grievance committee, and was subject to dissolution by the union at any time.[214] The defendants argued that the plaintiffs' racial discrimination claim was subject to the exclusive jurisdiction of the National Labor Relations Board, but Chief Justice Gibson's unanimous majority opinion held that states were free to enjoin unlawful conduct that was not authorized by the National Labor Relations Act.[215] The Court also rejected the plaintiff's claim that racial discrimination could only be barred by an affirmative law, as opposed to the common law of the nation and the state.[216] Instead, the Court held that once a union achieved a closed shop agreement, it became affected with a public interest.[217] Although the Court did not compel the union to admit African American members, it did hold that "the union may not maintain both a closed shop and an arbitrarily closed or partially closed union."[218]

In *Danskin v. San Diego Unified School District* (1946) 28 Cal.2d 536, members and officers of the San Diego Civil Liberties Committee, affiliated with the American Civil Liberties Union, filed an application to use a junior high school auditorium for a series of meetings on the general theme of the "Bill of Rights in Post-War America."[219] But the school board conditioned the grant of the permit upon the applicants' execution of what amounted to a loyalty oath. The petitioners refused to comply, and the board denied the application for a permit.[220] However, the Civic Center Act[221] required that a permit be granted to any group that wished to discuss the "educational, economic, artistic, and moral interests of the citizens of the communities in which they reside."[222]

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211 *James*, *supra*, 25 Cal.2d at p. 725.

212 *Id.* at p. 727.

213 *Id.* at p. 725.

214 *Id.* at pp. 737, 739.

215 *Id.* at pp. 735, 743.

216 *Id.* at pp. 739–740.

217 *Id.* at p. 740.

218 *Id.* at p. 745.

219 *Danskin*, *supra*, 28 Cal.2d at p. 538.

220 *Id.* at p. 539.

221 Cal. Education Code § 19431 et seq.

222 *Danskin*, *supra*, 28 Cal.2d at 540.

On the other hand, section 19432 of the Education Code required the loyalty oath.[223] Granting the writ of mandate sought by the petitioners, the Court, in an opinion by Justice Traynor, commented, "Is it reasonable to suppose that meetings that would be harmless elsewhere would take on a sinister quality in a school building?"[224]

In a 1948 opinion by Justice Traynor, the Supreme Court decided a case that once again anticipated federal legal developments that took place decades later in *Perez v. Sharp* (1948) 32 Cal.2d 711. Since 1872, section 69 of the Civil Code had barred the issuance of licenses for a marriage between a white person and a "Negro, mulatto, Mongolian or other member of the Malay race."[225] The facts of the case were as follows: During the war years, Lockheed had an enormous plant on land that today encompasses the Burbank airport. Andrea Perez and Sylvester Davis were employees at the plant.[226] When they were denied a marriage license, they filed a petition for writ of mandamus directly with the Supreme Court.[227] At the time, federal law was governed by *Pace v. Alabama* (1883) 106 U.S. 583, which held that bans on interracial relations were not unconstitutional.[228] Largely because of *Pace,* Daniel G. Marshall, the couple's counsel, chose to ground their argument on freedom of religion. Both Perez and Davis were devout Catholics. Accordingly, they argued that since the Catholic Church did not ban interracial marriage, the state ban prevented them from practicing their religion.[229] The couple's supplemental brief, however, largely abandoned their freedom of religion argument, founding their claim squarely on the Equal Protection Clause.[230]

The California Supreme Court struck down the statute.[231] The Court held that the Equal Protection Clause applies to the rights of *individuals*, not entire *groups*.[232] Because of the fundamental nature of the right to marry, prohibiting the marriage of two persons must be based on observations about those persons, not generalizations about an entire race.[233] Writing that racial restrictions must be viewed with great suspicion, the Court rejected the notion that there

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223 *Id.*

224 *Id.* at p. 545.

225 *Perez*, *supra*, 32 Cal.2d at p. 712.

226 Caragozian, Perez v. Sharp: *A California Landmark Case that Overturned a Century-Old Ban on Interracial Marriage*, Calif. Legal Hist. (2022) vol. 17, pp. 242, 251–252.

227 *Id.* at p. 252.

228 *Id.* at p. 253.

229 *Id.* at p. 254.

230 *Id.* at p. 258.

231 *Id.* at p. 250.

232 *Perez*, 32 Cal.2d at pp. 716–717.

233 *Id.* at pp. 722–723.

is any racial correlation to intelligence.[234] The Court similarly rejected the notion that social stigmas against the progeny of such a marriage justifies the ban, holding that such biases are society's problem, and in any event, such a rationale could just as easily justify a ban on mixed religious marriages.[235] Justice Jesse Carter wrote a concurrence, charging that the statute at issue was the product of "ignorance, prejudice and intolerance."[236] Justice Carter also observed that judicial error had prevented the reconstruction amendments to the federal Constitution from accomplishing their intended purpose.[237] He ended his concurrence with a quotation about "race-crossing" from Hitler's *Mein Kampf.*[238] Naturally enough, the decision was the subject of considerable comment in the press, both in California[239] and elsewhere.[240]

One month after *Perez,* the Supreme Court handed down another landmark decision, this time from the pen of Justice Jesse Carter: *Summers v. Tice* (1948) 33 Cal.2d 80. In *Summers,* the plaintiff was struck by birdshot from a shotgun but was unable to identify which defendant fired it.[241] Analogizing the case to *Ybarra v. Spangard*,[242] Justice Carter wrote that both defendants were wrongdoers with respect to the plaintiff, so the burden of proof shifted to them to exonerate themselves if they could.[243]

In 1952, in *State Rubbish Collectors Association v. Siliznoff* (1952) 38 Cal.2d 330, the Court staked out another innovation in tort law governing the tort of intentional infliction of emotional distress. There, an association's rules provided that one member should not take a rubbish collecting contract from another member without paying for it.[244] In this case, although a member had signed the contract, everyone understood that the work would be done by the member's son-in-law, whom he was trying to establish in the business.[245] Although the plaintiff son-in-law ultimately agreed to pay for the contract pursuant to the Association's rules, the Association allegedly threatened him

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[234] *Id.* at pp. 719, 724.

[235] *Id.* at p. 724.

[236] *Id.* at p. 735 (Carter, J., concurring).

[237] *Id.*

[238] *Id.* at p. 739.

[239] *Sacramento Bee*, Oct. 1, 1948, p. 1; *Peninsula Times-Tribune,* Oct. 1, 1948, p. 1.

[240] *Courier-Journal*, Oct. 2, 1948, p. 10; *Chicago Tribune*, Oct. 2, 1948, p. 8. The *News Tribune* of Tacoma Washington followed their report on *Perez* by reporting that Washington state law did not forbid interracial marriages but noted that the state statute did permit county clerks to deny licenses where they doubted the sanity of the applicants, an "excuse [which] has been used in recent years by the Spokane county auditor." *New Tribune,* Oct. 2, 1948, p. 1.

[241] *Summers*, 33 Cal.2d at 82–83.

[242] *Ybarra v. Spangard* (1944) 25 Cal.2d 486.

[243] *Summers*, at pp. 86–87.

[244] *State Rubbish Collectors*, 38 Cal.2d at 334.

[245] *Id.* at pp. 333–334.

with violence. The plaintiff alleged that he had suffered extreme fright from the defendants' threats, which the defendants did not deny making.[246] In an opinion by Justice Traynor, the Court unanimously affirmed judgment for the plaintiff, recognizing the tort of intentional infliction of emotional distress without a showing of physical injury.

In 1955, the Court established another landmark, this time in criminal law, with Justice Traynor's opinion in *People v. Cahan* (1955) 44 Cal.2d 434. There, the defendants were convicted of conspiring to engage in horse-race bookmaking. Police officers admitted at trial to warrantless searches of the defendants' house, including numerous forcible entries and the installation of listening devices in multiple locations, all without a warrant. The Court noted scornfully:

> Thus, without fear of criminal punishment or other discipline, law enforcement officers, sworn to support the Constitution of the United States and the Constitution of California, frankly admit their deliberate, flagrant acts in violation of both Constitutions and the laws enacted thereunder. It is clearly apparent from their testimony that they casually regard such acts as nothing more than the performance of their ordinary duties for which the city employs and pays them.[247]

As a result and despite the fact that the United States Supreme Court had not yet applied the exclusionary rule to the states, the California Supreme Court held that the exclusionary rule applied in California.[248]

Six years later, Justice Traynor wrote *Muskopf v. Corning Hospital District* (1961) 55 Cal.2d 211. There, a patient fell and further injured a hip that was being treated.[249] The patient sued the hospital, which defended the suit on the grounds that it was a state agency and thus immune from tort liability.[250] The Court abolished the rule of governmental tort immunity, calling it an anachronism without a rational basis, which had existed only through the force of inertia.[251]

In 1962, two new justices began their terms on the Gibson Court. The first was Mathew Tobriner, a San Francisco labor law attorney, who was nominated to replace Maurice Dooling Jr. Tobriner had been appearing in the

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[246] *Id.* at pp. 335–336.

[247] *Cahan*, 44 Cal.2d at pp. 437–438.

[248] *Id.* at pp. 442–443. The United States Supreme Court held that the exclusionary rule applied across the country in *Mapp v. Ohio* (1961) 367 U.S. 643.

[249] *Muskopf*, 55 Cal.2d at p. 213.

[250] *Id.*

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

newspapers for many years. In 1914, an article in the *Oakland Tribune* reported that "Mathew Tobriner, 9-year-old son of Dr. and Mrs. Oscar Tobriner of San Francisco, is one of the youngest German students in California. He speaks and reads the German language and he enjoys the old German stories." The article featured a photo of the young Tobriner.[252] Seven years later, the *Examiner* reported that Tobriner had assembled a book based on his impressions of the Great Exhibit of Nations.[253] In 1922, Tobriner joined a team from Stanford to debate a team from the University of Southern California on a proposed water and power amendment.[254] Seven years later, Tobriner was elected to the first board of directors of the Young Lawyers group of the Bar Association of San Francisco.[255] In 1930, Tobriner published an article called "Equal Protection of the Law" in *The New Republic.*[256]

The other new justice was Paul Peek, who was appointed to the Court five months after Tobriner, succeeding Thomas P. White. Peek was a unique candidate for the bench, having served in the legislative branch as Speaker of the Assembly and in the executive branch as Secretary of State before joining the judiciary.[257]

In 1963, Justice Traynor finally achieved the goal that he set nineteen years before in *Escola. Greenman v. Yuba Power Products, Inc.* (1963) 59 Cal.2d 57, involved a wood lathe. An accident occurred when a piece flew out of the machine and struck the user in the head, fracturing his skull. The plaintiff sued for breach of warranty and negligence, but the unanimous court held that it was not necessary to establish a cause of action for breach of express warranty: "A manufacturer is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being."[258]

Reflecting Justice Traynor's influence, only one year later, relying upon *Greenman* and *Hemmingsen v. Bloomfield Motors* (N.J. 1960) 161 A.2d 69, the American Law Institute modified its Restatement of Torts to adopt strict liability in tort.[259]

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[252] *Oakland Tribune*, Oct. 22, 1914, p. 10.

[253] *San Francisco Examiner*, Nov. 27, 1915, p. 3.

[254] *Fresno Morning Republican*, Nov. 5, 1922, p. 35.

[255] *The Recorder*, May 16, 1929, p. 1.

[256] *The New Republic*, Oct. 15, 1930, p. 12.

[257] California Reports 3d, vol. 43, pp. 1421–1422.

[258] *Greenman*, 59 Cal.2d at 62.

[259] McClain, *The Gibson Era, 1940–1964*, in Constitutional Governance and Judicial Power: The History of the California Supreme Court (Scheiber, edit., 2017) p. 301.

Six months after *Greenman,* the Court handed down yet another landmark opinion in *Jackson v. Pasadena City School District* (1963) 59 Cal.2d 876. There, the complaint alleged that the defendant school board had deliberately gerrymandered a school district so that students from a particular elementary school would be assigned to a majority white school rather than a majority black one.[260] In a majority opinion by Chief Justice Gibson, the Court held: "This was done for the purpose of instituting, maintaining and intensifying racial segregation . . . permitting most white pupils to avoid attendance at schools where substantial numbers of Negroes are enrolled."[261] Reversing the judgment sustaining a demurrer, the Chief Justice stated: "The right to an equal opportunity for education and the harmful consequences of segregation require that school boards take steps, insofar as reasonably feasible, to alleviate racial imbalance in schools regardless of its cause."[262]

CHIEF JUSTICE GIBSON'S ADMINISTRATIVE REFORMS

In short order after taking the center seat as California's twenty-second Chief Justice, Phil Gibson also proved himself to be a superb administrator.

In 1934, Congress had given the power to make appellate rules to the United States Supreme Court. In the years that followed, several state legislatures gave similar authority to their state supreme courts. Accordingly, not long after taking office, Chief Justice Gibson urged the State Legislature to give the Judicial Council the authority to create rules of appellate procedure. In 1941, the Legislature complied, making an appropriation of funds necessary to hire experts and support staff to work with the judges of the Judicial Council in accomplishing this task. Bernard Witkin, then a member of the Supreme Court staff, was put in charge of the project. The new rules were approved by the Legislature and went into effect on July 1, 1943.[263]

Late in the 1940s, Chief Justice Gibson then turned his attention to the immense task of reforming the byzantine California court system. The California court system today is straightforward: the Supreme Court, the Court of Appeal, and the Superior Courts covering each county. But at this point in state history, it was a different world. Charles McClain sets the scene:

> There were at the time 768 inferior courts scattered over the state, falling into seven different categories. There were two different types of municipal court, one constitutionally based, the other not; township justices' courts,

[260] *Jackson*, 59 Cal.2d at pp. 878–879.

[261] *Id.* at p. 879.

[262] *Id.* at p. 881.

[263] McClain, *The Gibson Era, 1940–1964*, *supra*, at p. 250.

> again of two types; two different kinds of city courts; and finally tribunals known as police courts . . . It was, as Gibson put it bluntly in 1949, "a damn stupid arrangement."[264]

Several different entities, including the State Bar, had offered reform proposals in the late 1940s, but finally, the Legislature asked the Judicial Council to take on the job. The Council studied the problem in detail and began immediately to build political support for a solution. The resulting plan provided for only two types of inferior courts: municipal courts, serving districts with populations above 40,000, and justice courts, serving smaller districts. The plan was approved by the Legislature, the necessary constitutional amendment was endorsed by the voters, and the new plan went into effect in 1952.[265]

Gibson also instituted a pre-oral argument conference system at the Court, having previously commented in an oral history interview that a shocking number of justices went into oral argument with no idea what was in the briefs.[266] Once the new system was in place, the Chief believed that the old-fashioned vision of an oral argument turning a case around was quickly becoming a rarity: "Sometimes the oral arguments would have changed our views, some of us, at least. I don't think it did that very often."[267] Like many appellate judges to this day, Chief Justice Gibson was a proponent of appellate specialists in the bar: "It takes real talent and effort to do a good job of handling an appeal."[268]

THE GIBSON COURT'S GREAT DISSENTER

Justice Jesse W. Carter was one of the memorable personalities who sat on the Supreme Court during this era. During his private law practice, Carter had won approximately thirty personal injury cases against the Southern Pacific Railroad Company.[269] Just a few years before he was nominated to the Court, the railroad company settled all its pending cases involving Carter and hired him as its lawyer.[270]

If one counts dissents from the denials of rehearing, Justice Carter filed 510 dissents during his twenty-year tenure on the California Supreme Court.[271] Although Justice Carter was criticized at times for the acerbic tone of many of

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[264] *Id.* at p. 284.

[265] *Id.* at pp. 284–285.

[266] Gibson, *Conversation with Edward L. Lascher*, Cal. Legal Hist. (2010) vol. 5, p. 44.

[267] *Id.* at p. 45.

[268] *Id.* at p. 43.

[269] Johnson, *supra*, vol. 2, p. 161.

[270] *Id.*

[271] *Oral History, Justice Jesse W. Carter*, Cal. Legal Hist. (2009) vol. 4, p. 181.

his dissents, like many "Great Dissenters" throughout American legal history, Justice Carter lived to see many of his dissents become black-letter law. Two years before his death, Justice Carter personally compiled a list of cases in which the United States Supreme Court had agreed with his dissent and reversed the California Supreme Court:[272]

1. *Gospel Army v. City of Los Angeles* (1947) 331 U.S. 543, reversing *Gospel Army v. City of Los Angeles* (1945) 27 Cal.2d 232;
2. *Takahashi v. Fish and Game Commission* (1948) 334 U.S. 410, reversing *Takahashi v. Fish and Game Commission* (1947) 30 Cal.2d 719;
3. *Rochin v. California* (1952) 342 U.S. 165, reversing *People v. Rochin* (1950) 101 Cal.App.2d 140;
4. *Anderson v. Atchison, Topeka & S.F. Ry. Co.* (1948) 333 U.S. 821, reversing *Anderson v. Atchison, Topeka & S.F. Ry. Co.* (1947) 31 Cal.2d 117;
5. *Garmon v. Building Trades Council of San Diego* (1957) 353 U.S. 26, reversing *Garmon v. San Diego Building Trades Council* (1955) 45 Cal.2d 657;
6. *California v. Taylor* (1957) 353 U.S. 553, reversing *State of California v. Brotherhood of Railroad Trainmen* (1951) 37 Cal.2d 412;
7. *Konigsberg v. State Bar of California* (1957) 353 U.S. 252, reversing the unreported order of the California Supreme Court;
8. *Chessman v. Teets* (1957) 354 U.S. 156, reversing *People v. Chessman* (1950) 35 Cal.2d 455; *People v. Chessman* (1951) 38 Cal.2d 166; *In re Chessman* (1954) 43 Cal.2d 391; and *In re Chessman* (1954) 43 Cal.2d 408.

Justice Jesse Carter continued to serve on the Supreme Court until his death on March 15, 1959.

THE TRAYNOR COURT BEGINS

The late summer of 1964 saw the retirement of one major figure in the Court's history and the elevation of two others.

On August 10, 1964, Chief Justice Phil Gibson announced his retirement after twenty-five years' service as an associate justice and Chief Justice. Governor Edmund G. "Pat" Brown said in a statement: "With Chief Justice Gibson's retirement, American law loses one of its giants. His wisdom and learning in the law are matched by his compassion for human beings and his fierce dedication to justice . . . his efforts in behalf of better administration of justice through procedural reforms have been unmatched anywhere in the United States."[273]

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[272] *Id.* at pp. 332–333.

[273] *Sacramento Union*, Aug. 11, 1964, p. 3.

A few days later, Governor Brown announced the elevation of Associate Justice Roger Traynor to Chief Justice. The *Sacramento Legal Press* was enthusiastic:[274]

> Traynor's court opinions have been printed in law textbooks which are used in many law schools of the country. Articles by Traynor on federal and state tax law and analyses of taxation problems have appeared in many professional tax and accounting magazines and in many university law reviews.
>
> Former Chief Justice Walter V. Schaefer of the Supreme Court of Illinois said Traynor "has been for many years the nation's number one state court judge." A professor of law at Duke University once said that Traynor "carries on the great American judicial tradition of sensitivity, humaneness and reason."

The same day, Governor Brown announced the nomination of Attorney General Stanley Mosk to take Traynor's seat as Associate Justice. Mosk was first elected to the Los Angeles Superior Court in 1942, remaining there for sixteen years. In 1947, he made national news when he invalidated a racially restrictive covenant on constitutional grounds in *Wright v. Drye* one year before the United States Supreme Court followed suit in *Shelley v. Kraemer.*[275] In 1958, Mosk left the court to run for state Attorney General.

Meanwhile, the new Rumford Act, which banned racial discrimination in the renting of apartment buildings of five units or more and private dwellings financed with loans funded or insured by the government, had generated a firestorm of criticism from right-wing elements around the state. Proponents quickly gathered sufficient signatures to place Proposition 14 on the ballot as a constitutional amendment. It provided:

> Neither the State nor any subdivision or agency thereof shall deny, limit or abridge, directly or indirectly, the right of any person, who is willing or desires to sell, lease or rent any part or all of his real property, to decline to sell, lease or rent such property to such person or persons as he, in his absolute discretion, chooses.
>
> The ballot pamphlet argument in favor of the proposal said:[276]
>
> Your "Yes" vote on this constitutional amendment will guarantee the right of all home and apartment owners to choose buyers and renters of their

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[274] *Sacramento Legal Press*, Aug. 18, 1964, p. 6.

[275] *Congressional Record* (2001) vol. 147, pp. 13025-13026.

[276] Voter Information Guide for 1964, General Election (1964). https://repository.uclawsf.edu/ca_ballot_props/676

> property as they wish, without interference by State or local government . . . The Rumford Act establishes a new principle in our law—that State appointed bureaucrats may force you, over your objections, to deal concerning your property with the person they choose. This amounts to seizure of private property.

The argument against the proposal—which was cosigned by Attorney General Stanley Mosk—said:[277]

> Proposition 14 would write hate and bigotry into the Constitution . . . Proposition 14 is a deception . . . Proposition 14 says one thing but means another . . . Proposition 14 is not legally sound . . . Proposition 14 is misleading . . . Proposition 14 is a threat . . . Proposition 14 is immoral. It would legalize and incite bigotry. At a time when our nation is moving ahead on civil rights, it proposes to turn California into another Mississippi or Alabama and to create an atmosphere for violence and hate.

Proposition 14 passed with 65.39 percent of the vote.[278] It failed in only one of California's fifty-eight counties.

By a 5-2 vote, in *Mulkey v. Reitman* (1966) 64 Cal.2d 529, the California Supreme Court held that Proposition 14 violated the Equal Protection Clause:[279]

> We cannot realistically conclude that, because the final act of discrimination is undertaken by a private party motivated only by personal economic or social considerations, we must close our eyes and ears to the events which purport to make the final act legally possible. Here the state has affirmatively acted to change its existing laws from a situation wherein the discrimination practiced was legally restricted to one wherein it is encouraged, within the meaning of the cited decisions. Certainly the act of which complaint is made is as much, if not more, the legislative action which authorized private discrimination as it is the final, private act of discrimination itself.

The United States Supreme Court affirmed the Supreme Court in *Mulkey v. Reitman* (1967) 387 U.S. 369. Justice Paul Peek, the author of *Mulkey,* resigned seven months after the decision was filed on health grounds.[280]

Justice Peek was succeeded by Justice Raymond L. Sullivan, the Presiding

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[277] *Id.*

[278] https://repository.uclawsf.edu/ca_ballot_props/672/

[279] *Mulkey*, *supra*, 64 Cal.2d at 542; *Santa Cruz Sentinel*, May 10, 1966, p. 1.

[280] *Ukiah Daily Journal*, Dec. 8, 1966, p. 8.

Justice of the First District Court of Appeal.[281] From Justice Sullivan we learn that the Court's attitude toward amicus curiae briefs was much the same fifty years ago as it is today: "The chief justice would usually ask the associate justice . . . as to whether he wanted an amicus brief. The principle, I think, that all the members of the court operated on was: the more help, the better. And so invariably we authorized the filing of an amicus brief."[282]

The California Supreme Court continued to hand down important decisions even as the Traynor era drew toward its close. *Dillon v. Legg* (1968) 68 Cal.2d 728 was a claim for emotional distress by a mother who witnessed injury to her child. The prevailing rule at the time was that a plaintiff was barred from recovery unless she or he was in the "zone of danger" and feared for his or her own safety.[283] Justice Tobriner rejected the "zone of danger" constraint and allowed recovery as long as the plaintiff was near the scene of the accident, observed the accident, and had a close relationship with the victim. Chief Justice Traynor dissented.[284]

Rowland v. Christian (1968) 69 Cal.2d 108 was another landmark case in tort law. The defendant's landlord entered the apartment to fix the faucets and was injured due to the negligence of the resident.[285] The Court abolished the traditional common law distinctions in the scope of duty to a visitor to the property, holding that the ordinary rules of negligence applied.[286]

In the first weeks of 1970, the Court lost another giant of California law when Chief Justice Roger Traynor announced his retirement. Tributes poured in from all quarters. Upon his retirement, the *Independent Press-Telegram* wrote: "Roger Traynor, without question the most respected state judge in this nation, leaves behind him a body of work so sweeping and so grand and so solid of stature that it will command attention for generations."[287] Associate Justice Mathew Tobriner wrote a tribute to the retiring Chief Justice in a special issue of the *Harvard Law Review* dedicated to Traynor. In that article, Justice Tobriner included a list of "Some of the Chief's outstanding opinions." Omitting only the opinions that are discussed elsewhere in this history, Justice Tobriner's list

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281 *Oakland Tribune*, Dec. 8, 1966, p. 1.

282 Bakken, *Interview of Justice Raymond L. Sullivan* (1995) 2 Cal. Sup. C. Hist. Soc'y Yearbook, pp. 161, 182.

283 *Dillon*, 68 Cal.2d at p. 734.

284 *Id.* at p. 748.

285 *Rowland*, 69 Cal.2d at p. 110.

286 *Id.* at pp. 116–117.

287 *Independent Press Telegram*, Feb. 1, 1970, p. 16.

is set forth in the margin.[288]

In a special issue of the *California Law Review* dedicated to Chief Justice Traynor upon his passing thirteen years later, Judge Henry Friendly stated: "For the thirty years of his service on the Supreme Court of California, from 1940 to 1970, Roger Traynor was the ablest judge of his generation in the United States."[289] Former Governor Pat Brown likewise observed: "The Supreme Court of the State of California has always been a great court, but I do believe the court under the leadership of Roger Traynor was the best judicial body in the United States. This was not only my view, but the view of most legal scholars in our country."[290] According to Warren Burger, then–Chief Justice of the United States, "In all of his roles as a judge, scholar and administrator Roger Traynor will be remembered as one of the great contemporary figures of the law."[291] Professor Adrian Kragen wrote that Traynor "was a giant in the law and was recognized as such not only throughout the United States legal community but all over the western legal world."[292]

THE WRIGHT COURT

In April 1970, Governor Ronald Reagan announced his nominee as Traynor's successor: Justice Donald R. Wright of the Second District Court of Appeal.[293] As Chief Justice, Donald Wright placed tremendous emphasis on unanimity in the Court's decisions. Admirably, Chief Justice Wright spent considerable time trying to mediate differences among the justices, hoping to "manufacture" 6-1 or 7-0 decisions. "It takes someone willing to be an errand boy on occasion," he lamented, referring to his frequent trips from one Justice's chambers to another, discussing differences among the associate justices.[294]

In 1970, the California Legislature passed a new section 1009.5 to the Education Code, barring school districts from requiring busing of school children for any purpose "without the written permission of the parent or

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[288] Associate Justice Mathew O. Tobriner, *Chief Justice Roger Traynor* (Jun. 1970) 83 Harv. L.R., no. 8, 1769. Justice Tobriner's string cite appears at page 1770: *Malloy v. Fong* (1951) 37 Cal.2d 356 [abolition of charitable tort immunity]; *McCarroll v. Los Angeles County Dist. Council of Carpenters* (1957) 49 Cal.2d 45 [definition of jurisdiction of state and federal courts under National Labor Management Relations Act]; *MacLeod v. Tribune Publishing Co.* (1959) 52 Cal.2d 536 [major clarification of California law of libel]; *Reich v. Purcell* (1967) 67 Cal.2d 551 [adoption of governmental interest approach in determining applicable law in tort conflicts of law case]; *Jones v. H.F. Ahmanson & Co.* (1969) 1 Cal.3d 93 [enforcement of fiduciary duty of majority shareholders to minority shareholders].

[289] Friendly, *Ablest Judge of His Generation* (July 1983), 71 Calif. L.R., no. 4, 1039. Judge Friendly notes in a footnote to his tribute that he inserted the words "of his generation" only to avoid comparisons to Judge Learned Hand, who served until 1961.

[290] Brown, *A Judicial Giant*, (July 1983), 71 Calif. L.Rev., no. 4, 1054.

[291] Burger, *A Tribute*, (July 1983), 71 Calif. L.Rev., no. 4, 1038.

[292] Kragen, *A Legacy of Accomplishment* (July 1983), 71 Calif. L.R., no. 4, 1055.

[293] *Press Democrat*, Apr. 6, 1970, p. 1.

[294] *Oral History of Chief Justice Donald R. Wright*, Cal. Legal Hist. (2014) vol. 9, p. 48.

guardian." The Court adjudicated a constitutional challenge to that statute in *San Francisco Unified School Dist. v. Johnson* (1971) 3 Cal.3d 937, in an opinion by Justice Tobriner. The Court explained that the statute was capable of two interpretations: first, that school districts were merely barred from requiring students to use buses provided by the district to travel to a school beyond walking distance; or second, that school districts were barred from assigning students to a school beyond walking distance at all.[295] If the second alternative was the correct construction, the Court held that the statute was unconstitutional on its face because it imported a private parental decision into the educational system, transforming it into state action and violating the Fourteenth Amendment in a way analogous to Proposition 14 in *Mulkey v. Reitman.*[296] The Court endorsed the view that "[t]he Constitution is both color blind and color conscious." The Constitution must be color blind when a classification denies a benefit, causes harm, or imposes a burden. "But the Constitution is color conscious to prevent discrimination being perpetrated and to undo the effects of past discrimination."[297] It would be "ironic indeed," Justice Tobriner wrote, "if the Fourteenth Amendment, adopted to secure equality of citizenship for the Negro, prevented school boards from providing equality of education for the Negro."[298]

The Wright Court handed down another monumental decision on equality of educational opportunity later that year in *Serrano v. Priest* (1971) 5 Cal.3d 584. At the time, California public schools were financed for the most part through property taxes collected within the particular school district's boundaries. But of course, the value of the property located within a particular district varied widely. For that reason, the Court wrote, the assessed valuation per unit of average daily attendance of elementary school children across the state varied from a low of $103 to a high of $952,156.[299] The Court held that the financing system invidiously discriminated because—unless a poorer district was willing to tax itself at a far higher rate than a richer one—the quality of a child's education (a fundamental interest) would depend on the wealth of his or her parents and neighbors.[300]

The Court's decision set off an even bigger firestorm of public criticism one year later when it decided *People v. Anderson* (1972) 6 Cal.3d 628. There, in an opinion by Chief Justice Wright, the Court held that the California death penalty statute violated the California Constitution. The Court began by

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[295] *San Francisco Unified School Dist.,* 3 Cal.3d at 945–946.

[296] *Id.* at pp. 948, 953.

[297] *Id.* at p. 951.

[298] *Id.* at p. 950.

[299] *Serrano*, at p. 592.

[300] *Id.* at pp. 614–615.

emphasizing a key distinction between the federal Constitution, which bars "cruel *and* unusual" punishments and the California Constitution, which bars punishments that are "cruel *or* unusual." Reviewing the debates from both of California's constitutional conventions, the Court concluded that the use of the disjunctive "or" was deliberate. The Court also noted that the majority of the state constitutions to which the delegates had access barred "cruel or unusual" punishments.[301] The Court endorsed the proposition that determining when a punishment was "cruel" depended on "evolving standards of decency that mark the progress of a maturing society."[302] The Court concluded that both the punishment of death itself and the lengthy imprisonment inevitably imposed prior to its imposition are cruel: "The dignity of man, the individual and the society as a whole, is today demeaned by our continued practice of capital punishment."[303] The state attempted to defend the death penalty on grounds of achieving retribution and deterrence, but the Court disagreed: "[I]t is incompatible with the dignity of an enlightened society to attempt to justify the taking of life for purposes of vengeance."[304] Governor Reagan professed himself "deeply disappointed" at the decision, claiming that the Court had "put itself above the people—above the legislature."[305] *Anderson* was overturned one year later when the voters adopted a constitutional amendment declaring the death penalty permissible.[306]

By 1975, Governor Reagan had chipped away at the composition of the Traynor court, nominating Justices Frank Richardson[307] and William Clark in the hopes of moving the Court toward a more conservative direction. Nevertheless, the Court handed down yet another landmark decision in *Li v. Yellow Cab Company* (1975) 13 Cal.3d 804. There, the Court abolished the traditional common law rule that when a plaintiff was at fault to any degree in an accident, all recovery from the defendant was barred. Calling its ruling preferable in "logic, practical experience, and fundamental justice," the Court adopted a system of "pure" comparative negligence, pursuant to which liability would be determined by the percentage of fault assigned to each party by the jury.[308]

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301 *Anderson,* 6 Cal.3d at pp. 634–636.

302 *Id.* at p. 648.

303 *Id.* at p. 650.

304 *Id.* at p. 651.

305 *Sacramento Bee*, Feb. 18, 1972, p. 1.

306 Scheiber, *The Liberal Court: Ascendency and Crisis*, in Constitutional Governance and Judicial Power: The History of the California Supreme Court (Scheiber, edit., 2017) p. 401.

307 Justice Richardson's nomination garnered unusual press attention a few months after he took his seat, when United Press International reported that Chief Justice Wright had broken his promise to Governor Reagan to retire in 1974 so that Richardson could be appointed Chief Justice. Chief Justice Wright denied that any such promise had been made. *San Francisco Examiner*, Feb. 28, 1975, p. 8.

308 *Li*, *supra*, 13 Cal.3d at 808.

The Court turned to criminal law in *Disbrow v. Superior Court* (1976) 16 Cal.3d 101. There, the police had obtained a confession from the defendant by falsely telling him that it could not be used against him. At the time, federal law held that statements obtained in violation of *Miranda* could be introduced at trial for purposes of casting doubt on his veracity if the defendant testified. Nonetheless, in an opinion by Justice Mosk founded upon the state Constitution, the Court held that the opposite rule would apply in California:[309]

> To instruct a jury that they are not to consider expressions of complicity in the charged crime as evidence that the speaker in fact committed the charged crime, but only for the purpose of demonstrating that he was probably lying when he denied committing the charged crime, would be to require, in the words of Learned Hand, "a mental gymnastic which is beyond, not only [the jury's] power, but anybody else's."

The long-running debate over school desegregation—particularly in the giant Los Angeles School District—returned to the Court in *Crawford v. Los Angeles Unified School District* (1976) 17 Cal.3d 280. There, the trial court had found that the Los Angeles schools were becoming increasingly segregated, and that the school board had taken affirmative steps that tended to perpetuate that segregation. The school board argued that the segregation in Los Angeles was "de facto" rather than "de jure," and that the board had no responsibility to alleviate "de facto" segregation. In a unanimous opinion by Justice Tobriner, the Court held that the Board had a responsibility to act regardless of the cause of segregation.[310]

That same year, the Court decided another important case in *Tarasoff v. Regents of University* (1976) 17 Cal.3d 425. There, a man told his psychiatrist of his intention to kill the plaintiffs' daughter, which he subsequently did.[311] The Court concluded that although most people did not owe a duty to warn anyone of potential harm from a third person, the common law had carved out an exception to that rule when the defendant and either the victim or the perpetrator were in a "special relationship." The Court held that psychiatrist–patient satisfied that "special relationship" requirement, and therefore the plaintiffs had stated a cause of action against the defendant therapists.[312]

The Court reviewed another important case regarding racial diversity in 1976, deciding *Bakke v. Regents of the University of California* (1976) 18 Cal.3d 34. There, the U.C. Davis Medical School had set up a special admissions

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[309] *Disbrow*, 16 Cal.3d at 112.

[310] *Crawford*, 17 Cal.3d at 285.

[311] *Tarasoff*, 17 Cal.3d at 430.

[312] *Id.* at p. 435.

committee charged with filling 16 of 100 places in incoming classes with minority candidates. The plaintiff, a white applicant who was twice denied admission, alleged an equal protection violation. In an opinion by Justice Mosk, the Court wrote that a racial quota "becomes no less offensive when it serves to exclude a racial majority."[313] Justice Tobriner filed a solo dissent, arguing that "our society cannot be completely colorblind in the short term if we are to have a colorblind society in the long term."[314]

Later that year, the *Serrano* case returned to the Court. *Serrano* was back partially because a United States Supreme Court decision after *Serrano I*—*San Antonio School Dist. v. Rodriguez* (1973) 411 U.S. 1—had apparently knocked much of the doctrinal support from under *Serrano I*, holding that the wealth of school districts was not a suspect classification, and that access to education was not a fundamental interest.

Serrano v. Priest (1976) 18 Cal.3d 728 arose from a sixty-day trial following the Court's initial reversal five years earlier. The trial court had concluded that the amendments to the Education Code made by the Legislature after *Serrano I* had not remedied the unconstitutionality of the system, at least under the state Constitution, and the Court agreed. Noting the U.S. Supreme Court's invocation of "local control" in *San Antonio*,[315] the California Supreme Court found that local control was a "cruel illusion" as long as the tax base of different districts varied so widely. "The poor district cannot freely choose to tax itself into an excellence which its tax rolls cannot provide. Far from being necessary to promote local fiscal choice, the present financing system actually deprives the less wealthy districts of that option."[316]

As the Wright Court era came to a close, Chief Justice Wright wrote one of his final majority opinions in *Ray v. Alad Corporation* (1977) 19 Cal.3d 22. There, the plaintiff had been injured by a defective ladder. The plaintiff's problem, however, was that the ladder was not manufactured by the defendant. Instead, the manufacturer had sold its plant, equipment, inventory, trade name, and good will to the defendant after the ladder was bought, and the manufacturer had ceased to exist.[317] However, after the deal, the "new" company (Alad) continued to manufacture the same ladders, using the same equipment, designs, and personnel.[318] Under the circumstances, the Court unanimously

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313 *Bakke*, at p. 62.

314 *Id.* at p. 73 (Tobriner, J., dissenting).

315 *San Antonio School Dist.*, *supra*, 411 U.S. 1.

316 *Serrano*, at p. 761.

317 *Ray*, at p. 24–25.

318 *Id.* at p. 25.

concluded that public policy did not allow the defendant to avoid liability by the shuffling of ownership.[319]

In terms of the Court's management of its workload, by the mid-1970s, the Wright Court's methods of handling its workload resembled, at least in general terms, the Court's procedures today. According to a law review article by two externs at the Court, once the justices agreed in conference as to which cases would be granted review, the Chief Justice assigned responsibility for preparing a "calendar memorandum" to one of the justices who had voted to grant review. That calendar memorandum "briefs the court on the facts and issues involved and sets forth tentative conclusions on the disposition of the case"[320]—which in general terms is the Court's procedures today.

THE BIRD COURT TAKES CENTER STAGE

On February 12, 1977, Governor Jerry Brown announced his nomination to succeed Chief Justice Wright—the Secretary of the Agriculture and Services Agency, Rose E. Bird.[321] The nomination was almost immediately met with shock. In an editorial, the *Peninsula Times Tribune* called the Bird choice "'a daring move.'"[322] Secretary Bird was only the second woman nominated for a state Chief Justice position.[323] Moreover, it was widely reported in the weeks following the Bird nomination that retiring Chief Justice Wright and Justice Tobriner had expected Justice Mosk to be the nominee, and that Mosk himself had wanted the nomination.[324] Justice Tobriner purportedly told an author that Justice Mosk complained "bitterly" to him about his having voted to approve the nomination on the Commission on Judicial Qualifications. "[H]e told me that I should have voted against her, that I should have known that she was not suited for this position."[325]

The new Bird Court made its first contribution to tort law in *Barker v. Lull Engineering* (1978) 20 Cal.3d 413. *Barker* involved a plaintiff who was injured at a construction site while operating a high-lift loader. In previous cases, tort law

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319 *Id.* at p. 34.

320 Scheiber, *The Liberal Court*, *supra* at p. 352; William Goodman and Thom Seaton, *Ripe for Decision: Internal Workings and Current Concerns of the California Supreme Court* (1974) 62 Calif. L.Rev. 309, 315. In the Oral History of his tenure, Chief Justice Wright commented that cases were not typically scheduled for oral argument "until you've written the opinion almost in its final form." *Oral History of Donald R. Wright*, *supra*, at p. 84. We will address later in this history a few recent justices' views as to how often the disposition of a case changes from the calendar memorandum following oral argument.

321 *The Times-Herald*, Feb. 13, 1977, p. 1.

322 *Peninsula Times Tribune*, Feb. 15, 1977, p. 12.

323 *Albuquerque Journal*, Feb. 13, 1977, p. 56.

324 Braitman and Uelmen, Justice Stanley Mosk: A Life at the Center of California Politics and Justice (2012) pp. 184–186; Medsger, Framed: The New Right Attack on Chief Justice Rose Bird and the Courts (1983) at 160–161.

325 Medsger, Framed, at p. 161.

had been based on a showing that a product was "defective." In a unanimous opinion by Justice Tobriner, the court reversed the judgment based on a jury verdict for defendants, holding that a products liability claim could be based *either* on a showing of defective manufacture *or* on a showing of "defective design."[326] However, the Court acknowledged that arriving at a satisfactory definition of design defect "has proven a formidable task,"[327] and indeed, many further cases on that issue were yet to come.

In 1978, the Court handed down an important decision for racial equity in jury selection. Both defendants in *People v. Wheeler* (1978) 22 Cal.3d 258 were African American. The victim was white. After the prosecutor struck several African Americans from the prospective jury, the defense attorney began requiring each prospective juror to state his or her race on the record. The defense ultimately moved for a mistrial on the ground that the prosecutor was deliberately excluding all African American prospective jurors. The prosecutor refused to explain his conduct, and the motion was denied. After the prosecutor struck several more African Americans, the defense moved again for a mistrial. Once again, the prosecutor refused to explain, and once again, the motion was denied. The Supreme Court ruled that although a defendant must establish a "strong likelihood" that the strikes were made because of race, the trial court had committed reversible error by failing to require the prosecutor to explain.

Chief Justice Bird faced her first retention election in November 1978. On election day, the *Los Angeles Times* ran a story claiming that the Court had decided to invalidate a 1975 law that required a prison term for those who used a gun during a violent crime, but that release of the decision was being delayed until after the election in order to aid the Chief Justice's chances in retaining her position.[328] The *Times* cited "well-placed court sources," and—after Justice Tobriner flatly refused to offer any comment at all—"two other Justices" as the sources for its story.[329]

Subsequent investigations have cast considerable doubt over whether the *Times* had anything at all that could fairly be called a "source" for the story, and certainly, brief telephone calls to any appellate specialists familiar with the

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326 *Barker*, at p. 417–418.

327 *Id.* at p. 418.

328 The case the *Times* was referring to is *People v. Tanner* (1979) 24 Cal.3d 514. The irony of this story, for which Justice Clark was supposedly one of the two sources, is that at least one book on the Bird controversy says that Justice Clark had "some" opinions in his chambers for more than a year, and "a few" for more than two years. (Medsger, Framed, *supra*, at p. 49), but that possibility did not address the timing of the delay in issuing this particular opinion.

329 *Los Angeles Times,* Nov. 7, 1978, p. 8.

Court's procedures would have made that abundantly clear.[330] Nevertheless, on November 24, 1978, Chief Justice Bird wrote a letter to Judge Bertram Janes, the Chair of the Commission on Judicial Performance, noting the controversy over the handling of the case and requesting an investigation.[331] Justice Frank Newman reported that Chief Justice Bird had sent the letter without asking any of the other justices for their opinions.[332] In any event, Chief Justice Bird was confirmed by a vote of 52 percent to 48 percent.

The Commission's hearings over the Chief Justice's handling of the case began on June 11, 1979. Ultimately, the Commission established very little, notwithstanding the public testimony of several justices, owing to Justice Mosk's successful lawsuit arguing that public hearings were unlawful. Nevertheless, the justices' public testimony revealed enough political motivations and petty backbiting that Professor P. J. Riga argued that:

> Some of the Justices of the State Supreme Court seem to have played politics with the juridical office. From here on in, it will be difficult (if not impossible) for people to have any deep trust or confidence in this court and when this happens——no matter what the individual responsibility of the Justices—the effectiveness of the court is at an end. What is called for is as drastic as the disease of moral suspicion from which the court suffers: resignation en masse of all seven Justices with the re-appointment of others to take their place.[333]

Ultimately, the Supreme Court overturned the mandatory prison-term statute three days before Christmas 1978. However, the Supreme Court granted rehearing and—with Justice Mosk switching sides without explanation—reversed its original decision in June 1979.[334]

Amid this public relations fiasco, the Supreme Court decided *Robins v. Pruneyard Shopping Center* (1979) 23 Cal.3d 899, expanding speech rights under the California Constitution. There, a group of high school students had set up a table at a privately owned shopping center to solicit signatures for a petition opposing a United Nations resolution on Zionism.[335] The Court held that the

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330 Preble Stolz, Judging Judges: The Investigation of Rose Bird and the California Supreme Court (Free Press, 1981), pp. 7–8, 131.

331 *Los Angeles Times,* Nov. 25, 1978, p. 24.

332 *Justice Frank C. Newman Oral History Interview* (2006) 1 Cal. Legal Hist., pp. 87, 121; Justice Malcolm Lucas found it "just incredible" that Chief Justice Bird had sent the letter without giving the associate justices a chance to vote on it. *Chief Justice Malcolm Lucas: How "Collegiality" and a "Steady Hand" Reset a Court in Crisis* (2024) 19 Cal. Legal Hist., p. 306.

333 *San Francisco Examiner,* Aug. 5, 1979, p. 27.

334 *People v. Tanner* (1979) 24 Cal.3d 514.

335 *Robins,* 23 Cal.3d at pp. 902–903.

California Constitution protected a broader spectrum of speech rights than the federal Constitution did.[336]

Another case of import during the Bird Court is *Gay Law Students Association v. Pacific Telephone & Telegraph Association* (1979) 24 Cal.3d 458, which was a class action alleging discrimination against LGBT employees based upon their sexual preference. The Court acknowledged that sexual preference was not one of the classifications listed in article I, section 7 of the state Constitution as protected classes. But the Court concluded that the list in section 7 was merely illustrative, not exhaustive, and in any event, this particular defendant was a state-protected monopoly, and thus, state action was established.[337]

Another significant case from the Bird Court was *Sindell v. Abbott Laboratories* (1980) 26 Cal.3d 588. There, a number of manufacturers were making the same product from the same formula.[338] The plaintiff was injured when her mother used the drug but was unable to identify the manufacturer. The plaintiff invoked *Summers v. Tice*, but the problem with reliance on *Summers* is that it included all possible tortfeasors.[339] In *Sindell*, the plaintiffs argued that if there was cooperation among the defendants and proof that the injury-causing substance was made by one of them, the plaintiff could shift the burden and require the defendants to exonerate themselves. The court held that each defendant could be held to a percentage of fault equal to their market share unless it proved that it could not have made the product that caused the plaintiff's injury.[340]

Three months after *Sindell*, the Court turned its attention to employment law in *Tameny v. Atlantic Richfield Co.* (1980) 27 Cal.3d 167. In *Tameny*, the plaintiff alleged that he had been fired for refusing to take illegal actions, but the termination arose in the context of classic "at-will" employment, where the employer could fire an employee for any reason at all.[341] The Court ruled that the classic theory of at-will employment had been substantially limited by legislation and allowed the action for wrongful termination.[342]

In *Committee to Defend Reproductive Rights v. Myers* (1981) 29 Cal.3d 252, a plurality of the Court, led by Justice Tobriner, struck down a budget act limiting Medi-Cal funding for abortions. Analogizing the case to *Danskin v. San Diego*

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336 *Id.* at pp. 908–909.

337 *Gay Law Students*, 24 Cal.3d at pp. 469, 490, 492.

338 *Sindell*, 26 Cal.3d at 605.

339 *Id.* at pp. 598–599.

340 *Id.* at pp. 615–616.

341 *Tameny*, 27 Cal.3d at p. 172.

342 *Id.* at p. 178.

Unified Sch. Dist. (1946) 28 Cal.2d 536,[343] the Court explained that California courts had repeatedly rejected the notion that simply because the state was not obligated to provide a benefit, it could provide it on a discriminatory basis.[344] Chief Justice Bird concurred, arguing that strict scrutiny should apply to the statute.[345]

In 1983, the Supreme Court addressed the issue of felony-murder in criminal cases. The issue in *Carlos v. Superior Court* (1983) 35 Cal.3d 131 was whether a defendant could be charged or convicted of murder with the special circumstance of felony-murder if he did not intend to kill or to aid in the commission of a killing. The Supreme Court held that intent to kill or intent to aid in killing was a necessary element of felony-murder special circumstances.[346]

However, following these decisions, but largely because the Bird Court had affirmed only five of the sixty-nine death penalty sentences it had considered,[347] the voters delivered an unprecedented rebuke to the Court in November 1986: Three Justices of the Court lost their bids for retention for another twelve-year term.[348] Justice Joseph Grodin carried 43.4 percent of the vote; Justice Cruz Reynoso carried 39.8 percent; Chief Justice Rose Bird carried only 33 percent of the vote.

THE LUCAS COURT

On November 26, 1986, Republican Governor George Deukmejian announced his nomination to succeed Rose Bird as Chief Justice—his friend and former law partner, Associate Justice Malcolm Lucas.349 By elevating Lucas, Governor Deukmejian opened up a third vacancy among the associate justices. On February 18, 1987, he filled those three seats, nominating John A. Arguelles, David N. Eagleson, and Marcus Kaufman, all three Court of Appeal justices, to the Court.350

The impact of the Deukmejian majority began to be felt almost immediately across a broad spectrum of California law. In *People v. Anderson*

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343 *Committee to Defend Reproductive Rights*, at p. 263.

344 *Id.* at p. 257–258.

345 *Id.* at p. 286 (Bird, C.J., concurring).

346 *Carlos*, at p. 141.

347 Egelko, *The Lucas Years, 1987–1996*, in Constitutional Governance and Judicial Power: The History of the California Supreme Court (Scheiber, edit., 2017), p. 520.

348 The usual explanation for this result is that the three Justices voted to reverse a large number of death penalty cases. In fact, thirty-nine of the sixty-two death penalty decisions which Chief Justice Bird voted to reverse were reversed due to an instructional error arising out of the standard set by the Court in *People v. Carlos. Chief Justice Malcolm Lucas: How "Collegiality" and a "Steady Hand" Reset a Court in Crisis* (2024) 19 Cal. Legal Hist. at p. 310.

349 *Oakland Tribune,* Nov. 27, 1986, p. 1.

350 *San Francisco Examiner*, Feb. 18, 1987, p. 1.

(1987) 43 Cal.3d 1104, the Court overruled the decision in *People v. Carlos* that had led to the reversal of so many death penalties during the Bird era.351 In *Elden v. Sheldon* (1988) 46 Cal.3d 267, in a majority opinion surprisingly written by Justice Mosk, the Court held that negligent infliction of emotional distress and loss of consortium claims were unavailable in tort unless the plaintiff and victim were actually married.352

The Court took a further step toward retrenching California tort law in *Moradi-Shalal v. Fireman's Fund Insurance* (1988) 46 Cal.3d 287. In an opinion by Chief Justice Lucas, the Court overruled its earlier decision in *Royal Globe Ins. Co. v. Superior Court* (1979) 23 Cal.3d 880, and instead held that third parties had no cause of action for an insurer's bad faith failure to settle.353 Justice Mosk, the author of *Royal Globe*, filed a vigorous dissent, joined by Justice Broussard.354

In the early fall of 1988, the Court resolved an unusual lawsuit asking that the Court be required to strictly comply with the clause of the state Constitution that required decisions to be filed within 90 days of their submission. For more than thirty years, the Court had "avoided" the provision by not filing an order deeming a case submitted until the opinions were ready for filing. The Court's new rule, enforcing the 90-day rule, drew mixed reactions.355 A Berkeley law professor worried that the tight deadline would mean that the justices "will have closed their minds before [oral] argument." Other attorneys expressed concern that the change would adversely affect the quality of the Court's opinions.356 In the wake of the new rule, the Court further formalized the "front-loading" procedure by which the assigned justice would prepare a calendar memo for the Court and the memo would be circulated for written preliminary responses and dissenting or concurring calendar memos.357 Peter Belton, a staff attorney at the Court for forty years, talked about oral argument during his oral history interview:

> Oral argument has never been as important to the court as it has been to counsel. Never. Even in the old days . . . a lot of the work that we do is very intellectual work. It requires an analysis of facts, of cases, of statutes; and oratory doesn't help . . . The main purpose it serves is to clarify—to give the lawyers the opportunity to clarify their position on the legal questions

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351 *Anderson*, 43 Cal.3d at p. 1147.

352 *Elden,* 46 Cal.3d at p. 277.

353 *Moradi-Shalal,* 46 Cal.3d at p. 304.

354 *Id.* at pp. 313–331.

355 *Internal Operating Practices and Procedures of the California Supreme Court*, Sec. VID.

356 *Los Angeles Times,* Sep. 21, 1988, *id.*

357 LaBerge, *Peter Belton Oral History* (2007) 2 Cal. Legal Hist. 1, 23–29.

> and to give the judges the opportunity to ask questions . . . It's not often that it will change the outcome of the case, but people might sometimes concede a point in oral argument. That's happened.[358]

Preble Stolz, the author of one of the book-length studies of the Bird court, agreed:

> The court's internal process invites this kind of disassociation of judicial opinions from counsel's arguments because the justices for the most part work from the opinion of the Court of Appeal and staff generated documents—the conference and calendar memorandums—rather than from the parties' briefs . . . The message that counsel's argument is irrelevant also emerges from the court's willingness to decide cases on issues not argued.[359]

Later in 1988, following the resolution of the lawsuit concerning the 90-day rule, a case came before the Court regarding the intersection between tort law and the Constitution's right to religious freedom. *Nally v. Grace Community Church* (1988) 47 Cal.3d 278, involved a young man's suicide. His parents sued the church and four clergy, alleging claims for clergy malpractice in addition to more traditional claims for negligence.[360] A major barrier to such a claim at the time was *United States v. Ballard* (1944) 322 U.S. 78, holding that a civil court could not adjudge the truth or falsity of a sincerely held religious belief. The majority in *Nally* held that despite the evidence suggesting that the church's counsellors held themselves out as competent to treat depression and schizophrenia, it would be impractical and "quite possibly unconstitutional" to impose a duty of care on pastoral counselors.[361] In the majority's view, there was no "special relationship" between the counselors and the young man sufficient to support such a duty.[362]

Although each of these decisions may fairly be characterized as conservative, the Court's decision in *Foley v. Interactive Data Corp.* (1988) 47 Cal.3d 654, was more of a mixed result. There, the plaintiff alleged that he had discovered that his new supervisor was under an F.B.I. investigation for embezzlement from a former employer and had passed that information to his former supervisor. After his termination, he sued.[363] The Court held that plaintiff had sufficiently

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[358] *Id.* at p. 30.

[359] Stolz, *Judging Judges*, *supra,* at pp. 403–404.

[360] *Nally*, 47 Cal.3d at p. 283.

[361] *Id.* at pp. 299, 306.

[362] *Id.* at pp. 293–294. Whether *Nally* might have a different result today following the United States Supreme Court's decision in *Employment Division v. Smith,* 494 U.S. 872 (1990) is an interesting question beyond our scope here.

[363] *Foley*, 47 Cal.3d at p. 662.

alleged a breach of an implied promise not to discharge. The Court also extended the implied covenant of good faith and fair dealing to employment situations; however, that also had the effect of limiting his claim to contract damages, not tort damages.[364]

In his oral history, Justice Edward Panelli, who concurred in the opinion in Foley, had interesting comments regarding oral argument. Ever since academics first applied analytics techniques to appellate oral arguments, the notion that such an analysis enables one to predict the winner and the author of the majority and any dissents has been controversial, both among judges and some lawyers. But according to Justice Panelli: "It wouldn't take a rocket scientist sometimes to know who had the majority and who had the minority, just by virtue of who was asking the questions." On the value of appellate argument, Justice Panelli observed: "[A]s far as really persuading you otherwise, after you've spent all that time reading and you have a half-hour to make your point, it doesn't—I never found it was all that helpful. You got to test your views, but as far as getting new information, rarely did you get much."[365]

In *Thing v. La Chusa* (1989) 48 Cal.3d 644, the Court pared back another Bird-era opinion, *Dillon v. Legg*. In *Thing*, the plaintiff did not directly witness the accident involving her child, but she nevertheless sought damages for emotional distress arising from her experience *after* arriving at the scene. The majority held that the cause of action for negligent infliction of emotional distress had to be limited to persons who were directly present and aware that the accident was causing injury to a close relative.[366]

On March 1, 1989, Justice John Arguelles announced his resignation from the Court, citing "a great deal of separation from [his] family" as the reason, given his weekly commutes from southern California to the Court.[367] Less than two weeks later, Governor Deukmejian announced Court of Appeal Justice Joyce Kennard as his nominee for the open seat on the Court. "Justice Kennard is superbly qualified and she has had a remarkable life of achievement and triumph over adversity," said the Governor. "[She] has proved that hard work, skill and intelligence, combined with the promise of the American dream, can lead one to great achievements."[368]

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[364] *Id.* at p. 663.

[365] *Oral History of Edward A. Panelli, Associate Justice, California Supreme Court, 1985–1994* (2022) 17 Calif. Legal Hist. p. 568.

[366] *Thing*, 48 Cal.3d at p. 647.

[367] *Sacramento Bee*, Mar. 2, 1989, p. 7.

[368] *Los Angeles Times*, Mar. 12, 1989, p. 1.

Justice Marcus Kaufman retired soon thereafter on March 31, 1989, and a few days later, Governor Deukmejian announced his nomination of Court of Appeal Justice Armand Arabian to succeed him. Deukmejian said Justice Arabian had "earned a reputation for well-reasoned legal opinions, intellectual honesty, open-mindedness and a great ability to analyze tough legal problems."[369] A former Los Angeles District Attorney predicted that "we can look forward to literally decades of service" from Arabian.[370]

In late 1988, California voters faced multiple competing initiatives billed as regulating the insurance industry. The only initiative eventually approved—after a campaign estimated to have cost $85 million—was Proposition 103, the Insurance Rate Reduction and Reform Act.[371] The Court heard multiple challenges to that measure in *Calfarm Ins. v. Deukmejian* (1989) 48 Cal.3d 805. In that case, the Court held that a provision of the Act barring rate increases, except where an insurer is threatened with insolvency, was unconstitutional on its face.[372] However, the Court upheld a provision regulating the insurer's ability to decline to renew policies, while noting that insurers retained the option of withdrawing from the California market.[373] Earlier this year, Reuters claimed that because of rate regulation put in place by Proposition 13, insurance costs were cheaper measured against home values in California's Pacific Palisades than in 97 percent of all United States postal codes.[374] (On the other hand, insurers have recently withdrawn from segments of the California insurance market because of the constraints on premiums.)

Separately, the Lucas Court illustrated how far it would go to uphold death penalty verdicts in *People v. Allison* (1989) 48 Cal.3d 879. Denying the motion for modification of the verdict, the trial judge had commented that "in view of the criminal record of the defendant . . . there would be no basis to modify." The trial judge also commented that the defendant had "earned the verdict the jury has given him" in view of "the long and distinguished record of the defendant in the criminal annals of the county."[375] Although the Court's majority conceded that in fact, the defendant had no record of prior violent

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[369] *Turlock Journal*, Feb. 5, 1990, p. 2.

[370] *Los Angeles Times*, Feb. 3, 1990, p. 26. In his Oral History interview, Justice Arabian had a very different view of oral argument before the Court than some others: "Believe me, you can turn parts of that so-called draft opinion around, in some cases you can change the whole outcome if it's done correctly." *Oral History Justice Armand Arabian* (2020) 15 Calif. Legal Hist., p. 630.

[371] *Los Angeles Times*, Mar. 31, 1989, pp. 3, 23.

[372] *Calfarm Ins.*, 48 Cal.3d at 815.

[373] *Id.*

[374] Pacific Palisades Fire May Spell an End to Cheap Homeowners Insurance in California, Jan. 9, 2025.

[375] *People v. Allison*, 48 Cal.3d at p. 909.

criminal conduct or prior felony convictions, it dismissed the judge's comment as "harmless error."[376]

The following year, the Court expanded employment tort law in *Rojo v. Kliger* (1990) 52 Cal.3d 65. The question in *Rojo* was whether sex discrimination in employment gives rise to a cause of action for wrongful discharge in violation of public policy. The Court not only held that the answer was "yes," but also held that (1) the employee/plaintiff was not required to exhaust his or her administrative remedies, and (2) the Fair Employment and Housing Act (FEHA) was not the exclusive remedy for sex discrimination in employment. The majority further held that FEHA expressly disclaimed any intent to displace the state's preexisting law on sex discrimination, and that an exhaustion of remedies was required only to bring a cause of action specifically authorized under FEHA.

In 1990, the Lucas Court decided thirty-nine civil cases and eighty criminal cases, including forty-one attorney disciplinary matters.[377] The Court also decided twenty-six death penalty cases, affirming nineteen decisions in all respects, affirming in part and reversing in part six cases and reversing outright in one case. The lag time for death penalty cases between the judgment below and oral argument was 1,798 days—just short of five years. (Of course, death penalty cases generally raise many more issues, and the Public Defender's Office was backlogged because it had responsibility for both death penalty appeals and habeas petitions, slowing its processing.) By contrast, the average lag time for civil cases was 449.62 days. Criminal non-death cases took an average of 484.15 days before decision.

In late July 1990, Governor Deukmejian nominated Justice Marvin Baxter of the Fifth District Court of Appeal to take Justice Eagleson's seat on the Supreme Court. The Governor said that:[378]

> . . . as an appellate court judge [Baxter] has established himself as a fair, but tough judge who respects the law and the principle of judicial restraint. Justice Baxter understands that the role of judges is to fairly and impartially interpret the law and that our judicial system should show as much compassion for the victims of crime and their families as it does for defendants.

In 1991, the Court answered one of the principal questions left unanswered by the Court's 1978 decision in *Barker v. Lull Engineering*. Whereas *Barker* held

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[376] *Id.* at p. 911.

[377] All of the analytics results from 1990 through 2024 are taken from my own research. Although habeas corpus cases and most mental health matters are technically civil, I treat them as criminal matters to avoid corrupting databases and predictive algorithms.

[378] *San Francisco Examiner*, Jul. 29, 1990, pp. 1, 14.

that plaintiffs could state a products liability claim based on the proposition that a product design was defective, the question in *Anderson v. Owens-Corning Fiberglass Corp.* (1991) 53 Cal.3d 987, was whether state-of-the-art evidence—that is, whether a risk was known or knowable at the time the product was manufactured and distributed—was admissible. The majority held that state-of-the-art evidence was admissible, at least in absence-of-warning cases.[379] Justice Broussard concurred, but pointed out that when the test invoked by the plaintiff was whether the product performed as safely as a reasonably informed user would be entitled to expect, knowability was not admissible.[380]

With Governor Deukmejian declining the run for a third term, U.S. Senator Pete Wilson won the 1990 election for governor and took office the following year. On July 29, 1991, Governor Wilson nominated Court of Appeal Justice Ronald M. George as the successor to Justice Allen Broussard. Wilson observed that Justice George "has from the start shown a keen understanding that there must be balance between the rights of the accused and the rights of victims and the safety of society."[381] According to the *San Francisco Examiner*, the Governor "ignored the advice of Broussard, the court's only black justice and final appointee of former Gov. Jerry Brown, who had urged Wilson to appoint another black to the court."[382] But such an appointment would come from Wilson in just a few years.

In *Legislature v. Eu* (1991) 54 Cal.3d 492, the Lucas Court faced another voter-adopted initiative and wound up getting in trouble with the Legislature. The Political Reform Act of 1990 had imposed a grab-bag of reforms, including term limits for constitutional state officers and state legislators, limits on the individual legislators' budgets and limits on members' pensions.[383] The initiative was a reaction in part to the presence of prominent legislators who had been in office for many years and by the fact that from 1968 to 1990, the Governor's budget had increased 417 percent while the Legislature's had risen by a surprising 838 percent.[384] In an opinion by Chief Justice Lucas, the Court invalidated the pension reforms with respect to incumbent legislators but approved the initiative in all other respects.[385] Justice Mosk dissented from everything aside from the incumbents' pension reform ruling, arguing that if the Political Reform Act did not violate the constitutional rule that

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379 *Anderson*, 53 Cal.3d at p. 1000.

380 *Id.* at pp. 1004–1005 (Broussard, J., concurring).

381 *Id.*

382 *San Francisco Examiner,* Jul. 29, 1991, p. 1.

383 *Legislature,* 54 Cal.3d at pp. 500–503.

384 *Id.* at pp. 525–526.

385 *Id.* at pp. 528–534.

initiatives must deal only with a single subject, then the single subject rule was a dead letter.[386] Following that decision and probably not coincidentally, the Legislature soon voted to slash the Court's budget by the same percentage that the initiative required cutting their own budget. In the event the Court did not get the message, Chief Justice Lucas was not invited to give another State-of-the-Judiciary address to the Legislature during his tenure.[387]

In 1991, the Supreme Court decided forty civil cases and sixty-seven criminal cases, including twenty-one disciplinary matters. The Court also decided twenty-five death penalty cases, affirming seventeen in all respects, affirming in part and reversing in part in seven cases, and reversing one in its entirety. The average lag time from pronouncement of judgment to oral argument in death penalty cases was 1,835.04 days—just over five years. Civil cases averaged 391.53 days.

As the Lucas era continued, the Court began showing signs of turning from retrenchment to carefully expanding certain kinds of claims. For example, *Gantt v. Sentry Insurance* (1992) 1 Cal.4th 1083 raised the question of whether an employee, who is allegedly terminated in retaliation for supporting a coworker's claim of sexual harassment, may state a claim for wrongful discharge in violation of public policy. In an opinion by Justice Arabian, the Court answered "yes." The majority concluded that attempting to induce a witness to lie in an investigation by the Department of Fair Employment and Housing was clearly against public policy, and therefore actionable under *Tameny v. Atlantic Richfield Co.*[388] The majority also concluded that the claim was not preempted by the workers' compensation law, which bars the great majority of employee claims against one's employer in return for the employer's contributions to the workers' compensation system.[389]

In *Moncharsh v. Heily & Blasé* (1992) 3 Cal.4th 1, the Court established a foundational precedent for California arbitration law. *Moncharsh* involved an arbitration arising from the departure of an attorney from a law firm, leading to the firm's loss of several clients. Reviewing the history of arbitration in California, the Court concluded that such agreements are most often motivated by the wish for finality and cost savings, and that such interests would be impaired or lost entirely by broad-based review in court. Accordingly, in an opinion by Chief Justice Lucas, the Court held that the courts could not review arbitrators' decisions for errors of fact or law, even when the error appears on

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386 *Id.* at pp. 536–538.

387 Egelko, *The Lucas Years, 1987–1996*, *supra*, at p. 549.

388 *Gantt,* 1 Cal.4th at pp. 1095–1097.

389 *Id.* at pp. 1097–1101.

the face of the award and causes substantial injustice to the parties. Justice Kennard filed a partial dissent, joined by Justice Mosk, arguing that courts should be able to review an error of law causing substantial injustice.

In 1992, the Court decided fifty-two civil cases and fifty-eight criminal cases. Thirty-three of the criminal cases involved the death penalty; the Court affirmed the judgment in twenty-four cases and affirmed in part nine times.

In 1993, the Court decided forty-six civil cases and fifty criminal cases. Seventeen of the criminal cases were death penalty judgments; the Court affirmed sixteen and reversed in part one. Although the civil and criminal dockets were almost evenly divided in terms of cases, the Court wrote nearly double the number of pages in criminal than in civil majority opinions (800 to 1,520), possibly due to the greater number of issues raised in death penalty appeals.

Justice Edward Panelli retired effective January 31, 1994. According to the Associated Press, Panelli's final year on the Court "may have been his most productive."[390] On April 13, 1994, with Panelli's seat still not filled, the *San Francisco Examiner* reported on the candidates evaluated by the State Bar for possible appointment. Three future justices were on that list—Kathryn Werdegar, Ming Chin, and Janice Rogers Brown.[391] On May 3, 1994, Governor Pete Wilson announced his nominee: Kathryn Werdegar, who was first in her class at law school. The Governor said that Werdegar "is a brilliant legal scholar who knows both substantive law and legal procedure. Kathryn Werdegar has the extraordinary ability, a very rare one, to make complex legal issues clear."[392]

In 1994, for the first time in the decade, the Court decided more civil than criminal cases—fifty-one to forty-one. Seven of the Court's criminal cases were death penalty appeals, and the Court affirmed in all seven. Moreover, the lag time in death penalty cases was more than cut in half—1,981.43 days. Civil cases averaged almost exactly a year from the grant of review to oral argument—364.84 days. Non-death criminal cases averaged 442.39 days.

In 1995, the Court took an important step forward in California gender equity law with Justice George's opinion in *Warfield v. Peninsula Golf & Country Club* (1995) 10 Cal.4th 594. In *Warfield,* the female plaintiff was awarded the couple's club membership in a divorce.[393] Nevertheless, the club board

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[390] *Fresno Bee*, Jan. 31, 1994, p. 29.

[391] *San Francisco Examiner*, Apr. 13, 1994, p. 22.

[392] *San Francisco Examiner*, May 3, 1994, p. 1.

[393] *Warfield*, 10 Cal.4th at p. 605.

terminated her membership in accordance with its bylaws.[394] The issue was whether the club was a "business establishment" subject to the Unruh Civil Rights Act.[395] Noting that the club was an important source of business contacts to the plaintiff and derived significant income, thereby enabling it to keep fees lower from payments by nonmembers for goods and services, the majority concluded that the club was a business establishment within the meaning of the Act and reversed the judgment against the plaintiff.[396]

On November 13, 1995, Justice Armand Arabian announced his retirement. Arabian, who had been a paratrooper as a young man, continued parachute jumping as a hobby for many years, although he told reporters upon his retirement that he had stopped by that time. Nevertheless, he described his retirement announcement in parachuters' language: "Now, the time has come when . . . I must step up and out, flying with the wind to the new and challenging drop zones of tomorrow."[397]

In 1995, the Court decided fifty-seven civil cases and forty-nine criminal cases. Fifteen of the criminal cases involved death penalty judgments; the Court affirmed thirteen of these and reversed in part two of the cases. Lag times on death penalty cases crept up again. For the year, the average time from certification of the record to oral argument at the Supreme Court was 2,534.93 days—just short of seven years; but again, the fact that the State Public Defender's Office was overwhelmed with its responsibility of handling both death penalty appeals and habeas petitions contributed to the delay. (By the end of his term, Governor Wilson's administration had developed a proposal to speed the processing of death penalty appeals by accelerating the completion of the reporter's transcript in those cases and by transferring responsibility for death penalty habeas petitions to a new entity, ultimately named the Habeas Corpus Resource Center,[398] thereby relieving the Public Defender of the responsibility for habeas petitions so that he or she could focus on processing the death penalty appeals.)

On January 25, 1996, Governor Wilson named his nominee to take the seat of Justice Armand Arabian: Justice Ming Chin of the First District Court of Appeal. Justice Chin's appointment drew "broad and enthusiastic praise." A frequent commentator on the Court said: "He is a scholar. I think his opinions show real thoughtful reflection. I think he will be very independent. I expect

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394 *Id.*

395 *Id.* at p. 614.

396 *Id.* at pp. 621–622, 630.

397 *San Francisco Examiner*, Nov. 14, 1995, p. 3.

398 See Sen. Bill No. 513 (1997–1998 Reg. Sess.); Gov. Code §§ 68660-68664.

him to find himself right in the middle of the court" ideologically. During his time on the Court of Appeal, Chin had written opinions on multiple cutting-edge issues, including DNA evidence, surrogate parenting, and pollution insurance.[399]

In the spring of 1996, the Supreme Court decided a major case about the intersection between the Free Exercise clause and the nation's changing societal mores. In *Smith v. Fair Employment and Housing Comm'n* (1996) 12 Cal.4th 1143, the plaintiffs had filed a claim under the Fair Employment and Housing Act, alleging that the landlord defendant had declined to rent to them on religious grounds because they were unmarried. The Fair Employment and Housing Commission's decision was for the plaintiffs; the Court of Appeal reversed; but in an opinion by Justice Werdegar, the Supreme Court sided with the plaintiffs.[400] The Supreme Court rejected the defendant's Free Exercise claim based on the U.S. Supreme Court's rationale in *Employment Division v. Smith*, concluding that because the defendant could invest her money in something other than rental property, no substantial burden on Free Exercise rights had been shown.[401]

THE GEORGE COURT TAKES CENTER STAGE

Chief Justice Malcolm Lucas announced during his State of the Judiciary speech at the State Bar Convention that he would retire from the Court in May 1996.[402] On March 28, 1996, Governor Wilson nominated Justice Ronald George as Chief Justice Lucas's successor. "Justice George has proven to be a stellar Justice," Wilson observed. "That comes as no surprise to those of us who already respected his talents as an outstanding attorney, a superb teacher of the law, and a valiant defender of the rights of the accused and the rights of victims."[403]

During that same news conference, Wilson nominated his candidate to take Justice George's seat as associate justice: Justice Janice Rogers Brown. Justice Brown's nomination was controversial because although the State Bar Commission on Judicial Nomination Evaluation said that she was an "exceptional lawyer who is intelligent, insightful and decisive" and "a role model for many," the Commission had concluded that her eighteen-month stint on the Court of Appeal for the Third District—her first judicial experience—

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[399] *Ukiah Daily Journal*, Jan. 26, 1996, p. 1.

[400] *Smith*, 12 Cal.4th at p. 1150.

[401] *Id.* at p. 1170.

[402] *Daily Press,* Oct. 1, 1995, p. 5.

[403] *San Luis Obispo County Telegram-Tribune*, Mar. 29, 1996, p. A-3.

was insufficient to qualify her for a Supreme Court seat. Governor Wilson responded: "I emphatically disagree."[404]

The Court decided thirty-one civil cases and forty-one criminal cases in 1996. Eight of the criminal cases were death penalty matters; the Court affirmed in six and reversed in part two of them.

In 1997—the first full year of the George Court—in *Engalla v. Permanente Medical Group, Inc.* (1997) 15 Cal.4th 951, the Supreme Court addressed the circumstances in which a court may deny a motion to compel arbitration based either upon the petitioner's fraud in inducing the agreement or a waiver of the right to arbitrate. There, beginning in 1986, the decedent had raised complaints consistent with respiratory disease at the defendant's hospital. The hospital repeatedly gave him inhalation medication but failed to perform diagnostic tests that would have detected cancer until 1991—by which time the cancer was inoperable.[405] The decedent and his family filed a demand for arbitration, but what followed was one delay after another by the hospital system. According to the opinion, this was typical: The hospital system only managed to retain a neutral arbitrator within the sixty days provided in the arbitration agreement in 1 percent of all cases. The average delay was 674 days.[406] A neutral arbitrator was finally retained one day before the decedent's death.[407] The California high court held that there was sufficient evidence to support the trial court's findings that the hospital engaged in fraudulent conduct justifying a denial of its petition to compel arbitration and remanded for resolution of further questions of fact.[408]

In 1997, the Court decided fifty civil cases and forty-four criminal cases. The Court decided fourteen death penalty cases, affirming ten, reversing in part three and reversing entirely one case. The death penalty docket sped up just a bit, with an average of 2,744.14 days from the certification of the record to oral argument. Civil cases were still taking nearly a year—342.02 days from grant of review to argument. Criminal non-death-penalty cases were nearly as slow: 331.86 days.

In 1998, the Supreme Court addressed the issue of whether employees who alleged they had been discharged due to a residual disability following a work-related injury were limited to workers' compensation claims. In *City of Moorpark v. Superior Court* (1998) 18 Cal.4th 1143, the plaintiff filed claims

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404 *Fresno Bee*, Mar. 29, 1996, p. 3.

405 *Engalla,* 15 Cal.4th at p. 961.

406 *Id.* at pp. 963–967.

407 *Id.* at p. 967.

408 *Id.* at pp. 960, 976, 978.

for FEHA violations and common law wrongful discharge following her termination after knee surgery.[409] The Court reasoned that since workers' compensation exclusivity did not bar claims for sexual or racial discrimination, it likewise did not bar claims for disability discrimination following an at-work injury.[410] The Court further held that disability discrimination involved a "substantial and fundamental" interest; accordingly, plaintiffs were also free to state a claim for wrongful discharge in violation of public policy.[411]

In 1998, the Court decided fifty-four civil cases and forty-five criminal cases. There were thirteen death penalty cases, and the Court affirmed eleven, reversed in part one and reversed entirely in another case. Death penalty cases sped up a bit, averaging 2,339.23 days, but civil cases slowed, averaging 387.57 days from the grant of review to argument.

In the following year, Chief Justice George wrote an important opinion broadly affirming the public's access to court proceedings. *NBC Subsidiary (KNBC-TV), Inc. v. Superior Court* (1999) 20 Cal.4th 1178 arose from a civil trial involving two prominent figures from the entertainment industry. The trial court issued broad orders excluding the public and press from all proceedings held outside the presence of the jury and sealing the transcripts of all such proceedings.[412] The Court held that the First Amendment's right of access extended to civil proceedings and that this right could only be overridden if the judge found that (i) an overriding interest supported closure; (ii) there was a substantial probability that the interest would be prejudiced absent closure; (iii) the proposed closure was narrowly tailored to serve that overriding interest; and (iv) there was no less restrictive means of achieving that interest.[413]

In 1999, the Court decided fifty-two civil cases and forty-eight criminal cases. The Court decided six death penalty cases, affirming all six.

In *Armendariz v. Foundation Health Psychcare Servs.* (2000) 24 Cal.4th 83, the Court addressed a key question for the future of employee/employer claims—whether an employee may be compelled, as a condition of employment, to agree to arbitrate antidiscrimination claims under the Fair Employment and Housing Act. In an opinion by Justice Mosk, the Court held that the answer was yes, so long as the arbitration permits the employee to vindicate his or her statutory rights.[414] The Court further held that to be enforceable, an arbitrator's

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[409] *City of Moorpark*, 18 Cal.4th at pp. 1148–1149.

[410] *Id.* at p. 1153.

[411] *Id.* at pp. 1160–1161.

[412] *NBC Subsidiary*, 20 Cal.4th at p. 1181.

[413] *Id.* at pp. 1181–1182, 1212.

[414] *Armendariz*, 24 Cal.4th at p. 90.

decision must include at least minimal findings of fact and conclusions of law, and that the agreement cannot impose any costs and fees on the employee that the employee could not be compelled to pay in court.[415]

In 2000, the Court decided forty-nine civil cases and fifty-five criminal cases. Fifteen of the Court's criminal cases were death penalty matters; the Court affirmed fourteen of them and reversed in part one. The average lag time for death penalty cases was 2,747.2 days, nearly a year shorter than the previous year.

On June 19, 2001, Justice Stanley Mosk died unexpectedly. The longest-serving member in the Court's history, Justice Mosk was in his chambers working all day on the very day before his death. According to the *Los Angeles Times,* Mosk wrote 1,688 opinions during his 38-year tenure on the Supreme Court: 727 majority opinions, 570 dissents, and 391 concurrences. Chief Justice George issued the following statement: "Stanley Mosk was a giant in the law. His legacy will continue to serve the people of California for many years. We at the court will miss his wisdom and his wealth of experience."[416]

A noteworthy case in 2001 was *Merrill v. Navegar* (2001) 26 Cal.4th 465, mostly for Justice Werdegar's dissent. That case arose out of the 1993 shooting rampage at 101 California Street in downtown San Francisco. The majority had held that the plaintiff's negligence claim against the manufacturer was barred by the provisions of Civil Code section 1714.4, subdivision (a), which forbade claims against gun manufacturers based on a risk-benefit theory. However, Justice Werdegar argued that the majority opinion misunderstood the nature of the plaintiff's claim, which was not that the gun itself was defective, but rather that the manufacturer had been negligent by marketing the weapon to the general public—which had no legitimate need for it—rather than to the military and police units only.[417]

A mere few months later, Justice Werdegar wrote another noteworthy dissent in *Golden Gateway Center v. Golden Gateway Tenants Association* (2001) 26 Cal.4th 1013. There, the plurality held that the defendant had no constitutional right to distribute a newsletter in a privately owned complex because (1) no state action was involved, and (2) the complex was not generally open to the public. In doing so, the majority effectively confined the landmark decision in *Robins v. Pruneyard Shopping Center* (1979) 23 Cal.3d 899, to its facts.[418]

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[415] *Id.* at pp. 107, 111.

[416] *Los Angeles Times*, Jun. 20, 2001, pp. 1, 16.

[417] *Merrill*, 26 Cal.4th at p. 493.

[418] *Golden Gateway Center*, 26 Cal.4th at p. 1016.

But Justice Werdegar dissented,[419] joined by Justice Kennard and Justice Pro Tem Joan Dempsey Klein of the Second Appellate District, who was sitting by designation, arguing that California's Free Speech clause was plainly *not* limited to state action, and that the reasoning of *Robins* was not limited to property generally open to the public.[420]

On September 26, 2001, Governor Gray Davis announced his nomination to replace Justice Mosk: U.S. District Judge Carlos Moreno. Prior to his appointment, Judge Moreno had served as a judge in the California state courts, and for three-and-a-half years as a judge on the U.S. District Court. Governor Davis praised Moreno's record as "second to none." And Judge Moreno responded: "I can think of few if any greater honors that can be bestowed on a citizen of this state."[421]

Even without a full court in year 2001, the George Court decided forty-eight civil cases and fifty-eight criminal cases. There were eleven death penalty cases; the Court affirmed in ten and reversed in part one.

In 2002, in *Pavlovich v. Superior Court* (2002) 29 Cal.4th 262, the Court faced one of the earliest cases wrestling with the legal implications of a then-emerging technology: the internet. In that case, the defendant maintained a static website—essentially an online bulletin board with no interactive features.[422] In October 1999, he allegedly posted the source code for something called DeCSS, which was designed to enable decryption of DVDs, including those containing motion pictures.[423] Unsurprisingly, he was sued by the DVD Copy Control Association in California; however, the defendant had no apparent contact with California.[424] In an opinion by Justice Brown, the majority reviewed the history in the lower courts of the "effects test" established by *Calder v. Jones* (1984) 465 U.S. 783. The majority concluded that the mere knowledge that a defendant's conduct is likely to cause harm in California or harm industries largely located in California is insufficient by itself to establish jurisdiction.[425] Justice Baxter dissented, joined by Chief Justice George and Justice Chin.[426]

For the year 2002, the Court decided forty-eight civil and seventy-one criminal cases. Fourteen of those criminal cases were death penalty matters,

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[419] *Id.* at pp. 1043–1060.

[420] *Id.* at pp. 1046–1047.

[421] *Victorville Daily Press*, Sep. 27, 2001, p. 4.

[422] *Pavlovich*, 29 Cal.4th at 267.

[423] *Id.*

[424] *Id.* at p. 266.

[425] *Id.* at p. 278.

[426] *Id.* at pp. 279–299.

and the Court affirmed eleven of them and reversed, in part, three of them. Not surprisingly, that meant that the Court filed considerably more work product in criminal matters—2,253 pages of majority opinions—than in civil cases, where there were "only" 974 pages.

The Court's docket also sped up a bit, with death penalty cases taking 3,183.71 days from certification of the record to oral argument. Civil cases averaged 435.1 days, and non-death penalty criminal cases averaged 406.82 days.

As for amicus traffic, 2002 was the rare year in which more filers favored respondents (1.46 per civil case) than appellants (1.42). And it was an unusually busy year on the criminal side, with forty-nine amicus briefs being filed.

For 2003, the Court decided forty-four civil cases and sixty-three criminal cases. Twenty cases involved death sentences: The Court affirmed fifteen, reversed in part four judgments, and reversed entirely one. The death penalty docket also moved slightly faster, averaging 2,924.4 days from certification of the record to oral argument. Civil cases and non-death criminal cases averaged 442.66 days and 551.95 days, respectively.

In 2004, the Supreme Court decided the first of several landmark cases involving the rights of same-sex married couples: *Lockyer v. City and County of San Francisco* (2004) 33 Cal.4th 1055. In that case, on February 10, 2004, then-Mayor of San Francisco, Gavin Newsom, sent a letter to the County Clerk, stating that he had concluded that the California Constitution barred discrimination against LGBT+ applicants for marriage licenses. Based on his conclusion, Newsom directed the clerk to amend the relevant forms to be consistent with gender neutrality.[427] A little more than two weeks later, the state Attorney General filed a petition for a writ of mandate with the Supreme Court asking that the Court halt the issuance of same-sex marriage licenses.[428] In an opinion by Chief Justice George, the Court held that "a local public official, charged with the ministerial duty of enforcing a statute, generally does not have the authority, in the absence of a judicial determination of unconstitutionality, to refuse to enforce the statute on the basis of the official's view that it is unconstitutional."[429] The Court emphasized the potential for chaos if local officials were empowered to effectively cancel state laws with which they disagreed.[430]

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[427] *Lockyer*, 33 Cal.4th at pp. 1069–1070.

[428] *Id.* at p. 1072.

[429] *Id.* at p. 1082.

[430] *Id.* at pp. 1067–1068.

In that same year, the Court decided fifty-three civil cases and seventy-three criminal cases. Twenty-one of the criminal cases involved death penalties, the Court affirming nineteen and reversing two in part. In a departure from the usual trend, but like 2002, amici for respondents outnumbered appellants' amici in 2004: 1.77 per civil case for respondents, 1.58 for appellants. Nineteen amicus briefs were filed in criminal cases.

On December 9, 2005, Governor Arnold Schwarzenegger announced his choice to take Justice Janice Rogers Brown's seat on the Court following her confirmation as judge on the District of Columbia Circuit: Justice Carol Corrigan of the Court of Appeal's First District. Governor Schwarzenegger said of Corrigan:[431]

> She is a brilliant jurist, and for the past 12 years has done a magnificent job on the First District Court of Appeal . . . Justice Corrigan is careful, thoughtful, quick-witted and brings a deliberate, detail-oriented approach to the law. She will bring honor to California's high court and serve the people with dignity and integrity.

In *Elisa B. v. Superior Court* (2005) 37 Cal.4th 108, the Court decided yet another emerging issue in LGBTQ+ relations: the support obligations of a lesbian partner who supports her partner's artificial insemination, receives the resulting twin children into her home, and holds them out as her own.[432] The majority wrote, "We perceive no reason why both parents of a child cannot be women."[433] The Court held that because the partner received the children into her home and held them out as her own—and because the remaining partner was at present unable to support the children—the partner would be conclusively construed as the children's parent.[434]

In 2005, the Court decided fifty-one civil cases and sixty-one criminal cases. Twenty-six of the criminal cases involved death penalties, with twenty-three affirmed and three reversed in part. Amicus traffic ticked up, as appellants averaged 2.22 briefs per civil case and respondents averaged 2.04. There were an additional twenty-eight amicus briefs filed in criminal cases.

In the spring of 2006, the Court decided an important case about the intersection between discrimination law and the entertainment industry, *Lyle v. Warner Brothers Television Productions* (2006) 38 Cal.4th 264. In that case, plaintiff was hired as an assistant to the comedy writers of the popular television show

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[431] *The Signal*, Dec. 10, 2005, p. 8.

[432] *Elisa B.,* 37 Cal.4th at p. 113.

[433] *Id.* at p. 119.

[434] *Id.* at p. 125.

Friends. She was warned before she began working that given the themes of the show, she would be listening to sexual jokes and discussions and transcribing similar jokes and dialogue. Following her termination, she sued the production company and various individuals, alleging that the discussions constituted sexual discrimination under Fair Employment and Housing Act.[435] In an opinion by Justice Baxter, the Court held that given that plaintiff worked in a creative workplace focused on generating scripts for the television show, no reasonable trier of fact could find that the language at issue constituted sexual harassment directed at plaintiff. To the extent that certain comments were made about women other than plaintiff, the Court held that they were not sufficiently severe or pervasive to create a hostile work environment.[436]

In 2006, the Court's docket was evenly balanced at fifty-three civil cases and fifty-three criminal cases. There were nineteen death penalty cases, of which fourteen were affirmed and five were reversed in part. The death penalty docket sped up a bit, with cases taking an average of 3,089.42 days from certification to oral argument.

In 2007, the Court decided an interesting First Amendment case: *Balboa Island Village Inn v. Lemen* (2007) 40 Cal.4th 1141. There, the plaintiff Inn and the individual defendant owned competing businesses in Newport Beach, California. After the defendant bought a cottage across an alley from the plaintiff Inn, the defendant began videotaping and harassing customers of the plaintiff Inn, calling plaintiff's customers, employees, and the owners various names. After a trial, the court entered an injunction that prohibited the defendant from making certain enumerated statements about the plaintiff and its business. The question before the Supreme Court was whether the injunction was a prior restraint that interfered with the defendant's free speech rights.[437]

In an opinion by Justice Moreno, the Court pointed out that the protection of the First Amendment is not all-encompassing: the defamatory or libelous speech at issue was of such slight value that it was not protected. The Court held that while certain aspects of the injunction were somewhat overbroad, the defendant's First Amendment rights would not be infringed by an injunction limited to barring statements found at trial to be defamatory.[438]

In 2007, the Court decided fifty-six civil cases and sixty-one criminal cases. Twenty-three cases involved death penalty judgments: nineteen were affirmed

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[435] *Lyle*, 38 Cal.4th at pp. 271–272.

[436] *Id.* at p. 272.

[437] *Balboa Island Village*, 40 Cal.4th at pp. 1144–1146.

[438] *Id.* at pp. 1147–1148.

and four were reversed in part. Lag times in death penalty cases were further down slightly to 2,758.3 days (although this was still seven-and-a-half years).

In 2008, the Court decided yet another landmark case involving LGBTQ+ rights: *In re Marriage Cases* (2008) 43 Cal.4th 757. In an opinion by Chief Justice George, the Court struck down the statutory mandate that marriage was limited to the union of people of different genders. The Court held that the right to marry the person of one's choice is guaranteed by the California Constitution. In doing so, the Court invoked its 1948 decision in *Perez v. Sharp*,[439] which struck down California's ban on interracial marriage.[440] The Court rejected the notion that offering all of the same privileges as marriage but attaching a different name, such as a "domestic partnership," was sufficient, since such a "compromise" denied the plaintiffs equal dignity and respect.[441] The Court held that limiting marriage to opposite-sex unions failed both elements of the equal protection test: Specifically, the desire to maintain the historic view of marriage was not a compelling state interest, and the restriction was not necessary.[442]

For the year 2008, the Court decided forty civil cases and sixty-six criminal cases. Twenty-six cases were automatic death penalty appeals, and the Court affirmed twenty, reversed in part five, and reversed completely one.

The following year, in May 2009, the Court handed down decisions in two controversial cases: *In re Tobacco II Cases* and *Strauss v. Horton*.

In re Tobacco II Cases (2009) 46 Cal.4th 298 required the Court to determine the impact of Proposition 64, which had narrowed standing to sue under the state's Unfair Competition Law to those with an identifiable loss or injury, in an enormous class action against tobacco companies. The plaintiffs' complaint alleged that the defendants had conducted "a decades-long campaign of deceptive advertising and misleading statements about the addictive nature of nicotine and the relationship between tobacco use and disease."[443] The Court concluded that "standing requirements are applicable only to the class representatives"[444] and went on to say that while the plaintiffs would be required to prove actual reliance on fraudulent statements, this did not require an "unrealistic degree of specificity" of reliance on particular advertisements or statements when the practice at issue was a fraudulent advertising campaign.[445]

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[439] *Perez v. Sharp*, 32 Cal.2d 711 (1948).

[440] *In re Marriage Cases,* 43 Cal.4th at p. 811.

[441] *Id.* at p. 783.

[442] *Id.* at p. 784.

[443] *In re Tobacco II Cases,* 46 Cal.4th at p. 306.

[444] *Id.*

[445] *Id.*

Strauss v. Horton (2009) 46 Cal.4th 364 was a sequel to *In re Marriage Cases* (which was a sequel of sorts to *Lockyer v. City and County of San Francisco*). By way of background, *In re Marriage Cases* was itself a thoroughly controversial decision in some circles, and accordingly, a movement arose to amend the California Constitution to specifically overturn that decision. In November 2008, the measure—Proposition 8—narrowly passed. *Strauss* raised several constitutional objections to Proposition 8. But the central question was whether Proposition 8 was a mere amendment to the Constitution, meaning that it could be validly adopted by voter initiative, or a revision to the Constitution, which could not be.[446]

The Court emphasized that Proposition 8 had not narrowed citizens' privacy or equal protection rights under the state Constitution, which were central to *In re Marriage Cases*. Rather, it simply reserved the official designation of "marriage" for opposite-sex unions. Given that understanding, the Court held that Proposition 8 was a lawful amendment to, rather than an unconstitutional revision of, the Constitution (the latter of which cannot be effectuated by an initiative measure).[447] Finally, the Court held that Proposition 8 did not apply retroactively, meaning that all marriages performed between *In re Marriage Cases* and *Strauss* remained valid under California law.[448]

Justice Moreno filed a concurring and dissenting opinion, arguing that an initiative "requiring discrimination against a minority group on the basis of a suspect classification strikes at the core of the promise of equality that underlies our California Constitution." Justice Moreno concluded that such a "drastic and far-reaching change in the nature and operation of our governmental structure" certainly constituted a "revision" rather than an "amendment."[449]

For the year 2009, the Court decided forty-four civil cases and sixty-one criminal cases. The Court decided twenty-five death penalty appeals, affirming the judgment in twenty, reversing in part three cases, and reversing entirely two cases.

In 2010, in *International Society for Krishna Consciousness of California v. City of Los Angeles* (2010) 48 Cal.4th 446, the Court once again faced the intersection of free speech and public forum access, which had been at the center of *Golden Gateway Center v. Golden Gateway Tenants Association* and *Robins v. Pruneyard Shopping Center.*

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[446] *Id.* at p. 386.

[447] *Id.* at p. 388.

[448] *Id.* at p. 392.

[449] *Strauss*, 46 Cal.4th at pp. 483–484.

By way of background, in 1997, the City of Los Angeles had enacted an ordinance prohibiting persons from soliciting funds at the Los Angeles International Airport (known as LAX). A trial court subsequently entered an injunction on the grounds that the ordinance violated the free speech clause of the California Constitution.[450] On appeal to the Ninth Circuit, the circuit court certified a question to the California Supreme Court: Was LAX a public forum under the free speech clause of the state Constitution?[451] While the appeal was pending, the state Supreme Court decided *Los Angeles Alliance for Survival v. City of Los Angeles* (2000) 22 Cal.4th 352, 357, which held that a regulation directed at the public solicitation for the immediate donation of funds was neither content based nor constitutionally suspect under the California Constitution, and should instead be evaluated under the intermediate level of scrutiny of time, place, and manner regulations.[452]

The Court ultimately concluded that regardless of whether LAX was a public forum, the ordinance was a valid time, place, and manner regulation within the meaning of the free speech clause, because soliciting the immediate donation of funds from passersby was a much greater intrusion than merely handing out literature that the recipient was free to read at a later time (or not at all).[453] Given that the peak periods of congestion varied depending on the arrival and departure times of flights, the total ban on solicitation of funds was narrowly tailored to achieve the desired end.[454]

On July 14, 2010, Chief Justice Ronald George announced that he would retire on January 2, 2011. *The Los Angeles Times* opined: "George wasn't perfect in leading the court through the crucial 14-year period that ends with his tenure, but it's hard to imagine someone who could have done better."[455]

On July 21, 2010, Governor Arnold Schwarzenegger announced his nomination for George's successor: Justice Tani Cantil-Sakauye of the Third District Court of Appeal. According to the Governor, "Justice Tani Cantil-Sakauye has a distinguished history of public service and understands that the role of a justice is not to create law but to independently and fairly interpret and administer the law." The nominee responded, "It is a privilege and a tremendous honor to have the opportunity to serve as Chief Justice of the California Supreme Court. I deeply respect the inspirational and visionary

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[450] *International Society*, 48 Cal.4th at p. 452.

[451] *Id.* at pp. 449–450.

[452] *Id.* at p. 452.

[453] *Id.* at pp. 450, 455, 459.

[454] *Id.* at p. 460.

[455] *Los Angeles Times,* Jul. 16, 2010, p. 15.

work of Chief Justice Ronald George and hope to build upon it."[456]

As Chief Justice George's tenure drew to a close, *The Los Angeles Times* reported that he had drafted two endings to his majority opinion in *In re Marriage Cases*—one recognizing the right of all Californians to marry and one not. But when he polled the Court, he found that the associate justices were split 3-3. It was up to him.[457] As noted above, the Chief Justice opted for the version recognizing the broader right to marry.

"He was the most extraordinary leader of the Supreme Court in modern history," said Treasurer Bill Lockyer. "Incredibly effective," said state Senate Leader Darrell Steinberg. "He is not a partisan, and he doesn't go out of his way to poke you in the eye. He is a pretty darn good country politician." *The Los Angeles Times* concluded that with his majority opinion in *In re Marriage Cases,* George "left his most enduring stamp on the law and California history."[458]

Retiring Chief Justice George gave a lengthy series of oral history interviews, beginning on May 26, 2011. In his oral history, the Chief Justice explained how petition conferences work:

> The central staffs prepare memoranda summarizing the thorough analysis of the petition and a recommended disposition . . . We go through the cases, which are divided into an A list and a B list. The B list is a nondiscussion agenda, or "consent agenda," which can be elevated to the A list for discussion at the request of any one justice. But if there is no such request, we usually deny review without any discussion. The A list involves dozens of cases, individually discussed and voted upon by each justice in order of seniority.[459]

The Chief Justice also explained that sometimes amicus briefs were crucial in pushing a petition over the line into a grant:

> Our basic function in granting review was to focus on cases with widespread ramifications. In that situation, the filing of an *amicus curiae* brief could sometimes cast light on the potential significance of an issue. If a petition is filed by a party arguing that the case presents a substantial issue—but added to that showing are one or more briefs of *amici curiae* showing that, from the standpoint of, let's say, a given industry or trade group or employee group, many more individuals and entities would be affected by the decision than just the named parties to the lawsuit—that might very

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456 *Modesto Bee,* Jul. 22, 2010, p. A5.

457 *Los Angeles Times,* Dec. 30, 2010, p. 1.

458 *Id.* at p. 9.

459 George and McCreery, Chief: The Quest for Justice in California (2013), p. 236.

> well make the difference in persuading the court that the issue presented by the petition is in fact a substantial one and therefore merits review.[460]

The Chief Justice next explained the process by which the Court arrived at its opinions:

> After the briefs came in, the assigned justice would prepare and circulate a calendar memo to his or her colleagues. Under our practices, ideally within 15 days of that circulating, the six other justices were to circulate a "P.R." or preliminary response indicating anything from checking off a box, "I concur," to one saying "I concur with reservations," setting those forth, or "I disagree" or "I will dissent," sometimes relating dissenting views at great length in several pages of single-spaced typewritten comments. Then, when those responses would all be in, the author of the majority calendar memo would have the opportunity to put out a responsive memorandum . . . indicating how he or she would or would not accommodate the various reservations or suggestions. Sometimes one or more wholly new revised calendar memos would be circulating, inviting a new round of P.R.s. It was only when four or more of the justices were pointed in basically the same direction that I would inquire whether the justices were ready to calendar the case for oral argument.[461]

The Chief Justice's view of the significance of oral argument contrasted sharply with many other observers, including Justice Edward Panelli[462] and long-time staff attorney Peter Belton.[463] The Chief observed:

> I knew then, and I know even better today, that it's quite dangerous to make predictions about how a court is going to rule based upon the oral arguments . . . Questions, whether hypothetical or not, are not always a good clue as to how that particular justice may be thinking about the case.[464]

THE CANTIL-SAKAUYE COURT TAKES FORM

Tani Cantil-Sakauye was sworn into office as the 28th Chief Justice of California on January 3, 2011.

During the first week of January 2011—as Chief Justice Cantil-Sakauye took her seat and almost simultaneously with Chief Justice George's retirement—Associate Justice Carlos Moreno announced his decision to retire.

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460 *Id.* at p. 339.

461 *Id.* at p. 340.

462 *Oral History of Edward A. Panelli*, *supra*, p. 568.

463 LaBerge, *Peter Belton Oral History*, *supra*, pp. 1, 23-29.

464 George and McCreery, Chief, *supra*, p. 53.

The *Oakland Tribune* cited Moreno's commuting between his home in Los Angeles and the Court's sessions in San Francisco as a factor in his decision. "I felt with so much transition in the air, the chief justice leaving, the change in administrations, I started looking at my own career and what else I'd like to do. It seemed exciting to try something new."[465]

On May 25, 2011, after an extended Republican filibuster, Berkeley law professor Goodwin Liu asked President Obama to withdraw his nomination for a seat on the Ninth Circuit.[466] And two months after his Ninth Circuit nomination was withdrawn, Governor Jerry Brown nominated Professor Liu to take Justice Moreno's seat. Governor Brown called Liu "an extraordinary man and a distinguished legal scholar." In a statement, Liu said he was "deeply honored" by the Governor's nomination.[467] Liu's nomination was confirmed by the Commission on Judicial Appointments on August 31, 2011.[468]

Perry v. Brown (2011) 52 Cal.4th 1116 brought the hot-button issue of same-sex marriage once again to the Court. *Perry* arose from a federal court constitutional challenge to Proposition 8, the voter-adopted initiative that had overruled the Court's decision in *In re Marriage Cases* and reinstated the state-law ban on same-sex marriage. The federal district court had allowed proponents of Proposition 8 to intervene in the action to defend its validity when both the Governor and the Attorney General declined to defend the California law. The district court issued a lengthy decision striking down the initiative, but when the matter was appealed to the Ninth Circuit, the federal appellate court first called for briefs on the proponents' standing and then certified the question to the California Supreme Court regarding whether the proponents had standing under state law to defend their initiative.[469]

The Court concluded that although the question of standing was ultimately one of federal law, federal courts had looked to state law to determine who the state had authorized to assert its interests in the federal courts.[470] The Court unanimously held that under article II, section 8 of the California Constitution and the relevant provisions of the state Elections Code, the official proponents of a voter-approved initiative are authorized to assert the state's interest in the measure's validity.[471] Theodore Olson and David Boies, the attorneys leading

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465 *Oakland Tribune*, Jan. 7, 2011, pp. 1, 11.

466 *Merced Sun-Star*, May 26, 2011, p. 3.

467 *Philadelphia Inquirer*, Jul. 27, 2011, p. A06.

468 *Fresno Bee*, Sep. 1, 2011, p. A7.

469 *Perry*, 52 Cal.4th at p. 1131.

470 *Id.* at pp. 1133–1135.

471 *Id.* at pp. 1152, 1165.

the attack on Proposition 8, said: "This frees up the Ninth Circuit to go ahead and decide the constitutional questions on the merits: the due process and equal protection rights of gay and lesbian citizens in California."[472]

For the year 2011, the state Supreme Court decided thirty-three civil cases and fifty-one criminal cases. Just over half of the criminal docket—twenty-six cases—were death penalty appeals, and the Court affirmed twenty-three of them, reversed two in part, and reversed one in full. The Court's death penalty docket got a full year shorter, with an average lag time of 2,940.62 days from certification of the record to oral argument. And civil cases moved about three months more quickly, averaging 477.42 days from the grant of review to oral argument. Only non-death criminal cases slowed down, averaging 636.56 days from the grant of review to argument. Twenty-five of the civil decisions and thirty-seven of the criminal decisions were unanimous.

In 2012, the Court addressed the limitations involved in applying traditional tort theory to recreational activities. *Nalwa v. Cedar Fair, L.P.* (2012) 55 Cal.4th 1148 involved a plaintiff who broke her wrist while riding a bumper-car ride at an amusement park. The trial court entered judgment for the defendant based upon the doctrine of primary assumption of risk, but the Court of Appeal had reversed, finding the bumper car rides too "benign" to be considered a sport.[473] However, in an opinion by Justice Werdegar, the Court concluded that the policy behind the primary assumption of risk doctrine applied to activities involving physical recreation, whether they were considered "sports" or not.[474]

In 2012, the Court decided twenty-six civil cases and seventy-seven criminal cases—nineteen cases more than the prior year. The Court decided twenty-five death penalty cases, affirming eighteen, reversing six in part, and reversing one case in its entirety. Nineteen of the Court's civil case decisions and sixty-two of the criminal decisions were unanimous, which may explain the Court's ability to increase its volume.

In 2013, *Kurwa v. Kislinger* (2013) 57 Cal.4th 1097 raised a fundamental question regarding the parties' capacity to control the appealability of judgments. *Kurwa* involved claims for breach of fiduciary duty and competing cross claims for defamation. The resulting judgment disposed of the fiduciary duty claims with prejudice, and the parties agreed to dismiss the remaining claims without prejudice with mutual waivers of the applicable statutes of

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[472] *The Bulletin*, Nov. 18, 2011, p. 21.

[473] *Nalwa*, 55 Cal.4th at p. 1153.

[474] *Id.*

limitations.[475] In an opinion by Justice Werdegar, the Court held that it was not free to adopt whatever rule of appealability best balanced trial and appellate efficiency, given that California law provided no case-by-case efficiency exception to the one-final judgment rule.[476] Accordingly, the Court held that the judgment was not final and appealable and that review was available only through a petition for writ of mandate.[477]

For the year 2013, the Court decided thirty-two civil cases and fifty criminal cases. Eighteen of the Court's decisions arose out of death penalty appeals, with affirmances in seventeen of them and a partial reversal in one. That year, death penalty cases averaged more than ten years from certification of the record to oral argument.

On February 11, 2014, Justice Joyce Kennard, the longest-serving current Justice of the Court, announced that she would retire effective April 5. Governor Brown observed, "The state and its people have been very well served by Justice Kennard," and added, "Her independence and intellectual fortitude have left a lasting mark on the Court." The *Tulare Advance-Register* described Kennard's questioning style at oral argument: "In her tenure on the court, she became famous for interjecting questions during oral arguments, often turning them into lengthy speeches before pointing her finger at a lawyer and demanding an answer."[478]

On June 18, 2014, Justice Marvin Baxter announced his retirement after more than twenty-four years on the Court, observing, "It is a great honor to have served on the state's high court since 1991." He explained that he wanted to spend more time with his wife of fifty-one years and the rest of his family. "I will miss his sage advice and counsel," lamented Chief Justice Tani Cantil-Sakauye.[479] "His quiet yet thoughtful demeanor served as a steady influence during some troublesome times that I experienced in the governor's office," said former Governor George Deukmejian in a statement, adding: "His endless efforts resulted in well-established recommendations that I grew to rely upon."[480]

In 2014, in *Beacon Residential Community Association v. Skidmore, Owings & Merrill* (2014) 59 Cal.4th 568, the Court considered the scope of an architect's duty of due care to future residents in the homes that the architect had designed. In an opinion by Justice Liu, the Court held that an architect owes a duty of care to

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475 *Kurwa,* 57 Cal.4th at p. 1100.

476 *Id.* at p. 1107.

477 *Id.* at pp. 1100, 1105, 1108.

478 *Tulare Advance-Register*, Feb. 12, 2014, p. 11.

479 *Fresno Bee*, Jun. 19, 2014, p. A6.

480 *Modesto Bee,* Jun. 19, 2014, p. A3.

future homeowners in the design of a residential building where the architect is the principal architect for the project.[481] The Court commented: "A liability rule that places the onus on home buyers to employ their own architects to fully investigate the structure and design of each home they might be interested in purchasing" was "unrealistic."[482]

On July 22, 2014, Governor Jerry Brown nominated Professor Mariano-Florentino Cuéllar as Justice Marvin Baxter's successor. In a statement, Governor Brown observed, "Tino Cuéllar is a renowned scholar who has . . . made significant contributions to both political science and the law. His vast knowledge and even temperament will—without question—add further luster to our highest court."[483]

Four months later, on November 24, 2014, Governor Brown nominated Leondra Kruger to succeed Justice Kennard. "Leondra Kruger is a distinguished lawyer and uncommon student of the law," Governor Brown said in announcing the nomination. "She has won the respect of eminent jurists, scholars and practitioners alike."[484]

For the year 2014, the Court decided twenty-three civil cases and fifty-five criminal cases. Twenty-three of those criminal cases were death penalty appeals, of which the Court affirmed fourteen, reversed in part eight, and reversed one in its entirety. Death penalty lag times remained over ten years.

In 2015, in *Iskanian v. CLS Transportation Los Angeles* (2015) 59 Cal.4th 348, the Court addressed an issue that had arisen repeatedly in recent years—the interplay between the Federal Arbitration Act and California's robust state-law protections for employees and consumers. In *Iskanian,* the plaintiff had filed a class action seeking back pay for overtime and meal and rest periods, notwithstanding his having earlier signed an arbitration agreement that expressly waived any class proceedings.[485] The Court held that its earlier precedent declining to enforce such waivers had been overturned by recent precedent from the United States Supreme Court interpreting the Federal Arbitration Act.[486] However, the Court held that claims under the Private Attorneys General Act ("PAGA")—a type of *qui tam* action authorized by state law regarding claims brought on behalf of the state—were not preempted by

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[481] *Beacon Residential,* 59 Cal.4th at pp. 571, 581.

[482] *Id.* at p. 585.

[483] *Fresno Bee*, Jul. 23, 2014, p. A10.

[484] *Sacramento Bee*, Nov. 25, 2014, p. A8.

[485] *Iskanian,* 59 Cal.4th at p. 359.

[486] *Id.* at p. 360.

the Federal Arbitration Act.[487]

For the year 2015, the Court decided thirty-two civil cases and forty-four criminal cases. Seventeen of those criminal cases involved death sentences, for which the Court affirmed nine and reversed eight in part. Death penalty cases sped up a bit, although they still averaged over ten years from certification of the record to oral argument. Most of the Court's decisions were unanimous—twenty-eight of the civil matters and thirty-four of the criminal cases.

Twice in 2016, the Court faced an issue that arises regularly in death penalty practice: the defendant's right to insist upon representing himself and the nature of the defendant's plans should a court grant the defendant's motion to represent himself pursuant to *Faretta v. California* (1975) 422 U.S. 806.

People v. Burgener (2016) 1 Cal.5th 461 had been up and down between the trial and the appellate courts repeatedly. In the final appeal, the question was whether a defendant had a constitutional right to insist upon representing himself for the hearing on the automatic posttrial motion to modify a death penalty verdict under Penal Code section 190.4, subdivision (e). The defendant challenged the granting of his motion to represent himself on the grounds that his request was equivocal and that the trial court gave him an inadequate warning of the dangers involved.[488] In a majority opinion by Justice Liu, the Court held that there was no bar to granting a defendant's motion to represent himself in connection with a hearing under Penal Code section 190.4, subdivision (e) in connection with his seeking relief from the death sentence.[489]

In *People v. Mickel* (2016) 2 Cal.5th 181, the defendant argued that the trial court had erred in allowing him to represent himself because he was incompetent to do so, and again for failing to terminate his self-representation at the penalty phase. In an opinion by Justice Cuéllar, the Court held that "the critical question" was not "whether a self-represented defendant meets the standards of an attorney, or even whether a defendant is capable of conducting an effective defense."[490] The Court concluded that defendant's decision to present no defense "was a valid exercise of his right to control his defense."[491]

In 2016, the Court decided thirty-six civil cases and fifty-two criminal cases. Twenty-four cases involved death penalty judgments. Of these, fourteen were affirmed, eight were reversed in part and two were reversed outright.

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487 *Id.* at pp. 360, 382.

488 *Burgener*, 1 Cal.5th at p. 465.

489 *Id.* at p. 472.

490 *Mickel*, 2 Cal.5th at 206.

491 *Id.* at p. 209.

The California voters faced two competing ballot initiatives in November 2016: Proposition 62 would repeal the death penalty and automatically resentence all defendants to life without parole, and Proposition 66, the Death Penalty Reform and Savings Act, made sweeping changes to death penalty appeals, including a tight deadline for the litigation. The vote was a photo finish: Proposition 62 was defeated 46.9 to 53.1 percent and Proposition 66 passed 51.1 to 48.9 percent.

In *Briggs v. Brown* (2017) 3 Cal.5th 808, opponents of Proposition 66 challenged the Act on four grounds: (1) that it violated the single-subject rule; (2) that it interfered with the Supreme Court's jurisdiction to hear original petitions for habeas corpus; (3) that it violated equal protection by treating capital prisoners differently from others with respect to successive habeas corpus petitions; and (4) that it ran afoul of the separation of powers doctrine by impairing the ability to resolve capital appeals and habeas petitions.

But *Briggs* is mostly notable for the dissent of Justice Cuéllar. Justice Cuéllar was openly skeptical of the notion that the electorate would have passed Proposition 66 if they had been told that the five-year time limit was merely a gentle suggestion rather than a hard deadline. Justice Cuéllar wrote that in "interpreting" the deadline:

> the majority disregards the electorate's clear purpose in enacting Proposition 66 and fails to promote forthright deliberation. It distorts our statutory and constitutional jurisprudence, and—by insisting the mandate be treated as both a mere "exhortation" yet one "not empty" of legal meaning—leaves in its wake grave uncertainty about the rules and standards the Judicial Council is supposed to adopt to render meaningful that exhortation.[492]

Justice Cuéllar explained that "all of the parties agreed that Proposition 66 'requires' or 'directs' state courts to complete the automatic appeal and review of the initial state habeas corpus petition within five years, and that the five-year deadline is—and was intended to be—enforceable through a petition for writ of mandate."[493] In the face of that unanimous understanding, he argued that the majority's "gentle suggestion" interpretation was untenable.

On March 8, 2017, Justice Kathryn Werdegar announced her forthcoming retirement. "It has not been an easy decision," Justice Werdegar lamented, but she wanted to "expand my life a little bit, reconnect with friends, do a lot more

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[492] *Briggs*, 3 Cal.5th at 873.

[493] *Id.* at pp. 879–880.

hiking, more piano, more time with family and just smell the roses."[494]

Justice Werdegar gave a wide-ranging oral history interview following her retirement. That interview included a story of one "hazing" ritual for new justices:[495]

> When we go to the Sacramento courthouse, on the ceiling there they have these little recessed impressions, and they all have a little round flower in the middle of them, rosettes, except there's one that doesn't. The tradition that occurs is every new justice is challenged when we take the bench in Sacramento, to find the one little square that's missing its little flower in the center. So during oral argument there's the new justice with his or her head swiveling to look on the ceiling, but the twist is that where the newest justice sits is the one seat where you can't see it.

Like a great many appellate justices, Justice Werdegar spoke highly of appellate specialists:[496] "[O]f course now it's not a complete specialty, but the attorneys that are before us are the appellate branch of their firm or they have a completely appellate practice. We benefit from that. We can tell."

Justice Werdegar reported that the Court's conferences had a new "vibe" with the turnover in personnel in recent years: "Actually, conferences are more . . . people seem more engaged, and there are more questions being asked. When you've worked with the same group for years . . . perhaps there isn't a motivation to have so much discussion. Now we are all new personalities interacting, and I would say there's a fresh energy."[497]

Justice Werdegar also commented that the Court's patterns had shifted with respect to granting review of unpublished opinions: "Further, the belief that we won't grant review of opinions that are unpublished no longer has the credence that it once did . . . we'll see that an opinion is unpublished but there is a trend of appellate opinions that are conflicting with a published opinion, so we will grant the petition."[498]

In 2017, the Court's docket was split down the middle: forty-two civil cases and forty-two criminal cases. The Court decided eleven death penalty appeals, affirming nine judgments and reversing in part two. In the year of *Briggs v. Brown* and the new five-year limit on death penalty appeals, death cases averaged 10.7 years from certification of the record to oral argument—3,903.73 days. But of

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494 *Los Angeles Times,* Mar. 13, 2017, p. A1.

495 McCreery and Werdegar, *Oral History of Justice Kathryn Mickle Werdegar* (2017) 12 Cal. Legal Hist., p. 249.

496 *Id.* at p. 255.

497 *Id.* at p. 388.

498 *Id.* at pp. 393–394.

course, those cases had already been pending before *Briggs*, and the statistics do not account for requests for extensions by overworked death penalty counsel or the number of issues. Civil cases averaged 639.12 days from the grant of review to argument. Non-death criminal cases averaged 1,891.55 days from grant to argument.

In 2018, the Court took up several important issues in partnership and bankruptcy law triggered by one of the most shocking events of 2008: the bankruptcy of the venerable law firm Heller Ehrman. According to the Court's opinion in *Heller Ehrman LLP v. Davis Wright Tremaine LLP* (2018) 4 Cal.4th 467, Heller's dissolution plan included a provision known as a *Jewel* waiver. That provision waived any rights and claims that Heller might have had to seek payment of legal fees generated after the departure date of any lawyer or group of lawyers to other employment with respect to non-contingency matters.[499] However, the bankruptcy administrator filed adversary proceedings against law firms to which former equity partners had moved, alleging that the *Jewel* waiver was a fraudulent transfer of Heller's rights.[500]

In an opinion by Justice Cuéllar (complete with a first-line quotation from Shakespeare), the Supreme Court held that a dissolved law firm has no property interest in legal matters handled on an hourly basis, and therefore, no property interest in the profits generated by former partners' work on such matters following the dissolution.[501] The Court found that the limited nature of the interest accorded to the dissolved law firm protected the clients' choice of counsel by allowing them to choose new law firms unburdened by the reach of the dissolved firm.[502] Furthermore, any hope that the dissolved firm may have had to continue working on unfinished hourly fee matters was necessarily speculative, not rising to the level of a property interest, because of the client's right to discharge its counsel at any time, with or without cause.[503]

In November, one of the longest vacancies in the Court's history finally ended with Governor Jerry Brown's nomination of his senior advisor, Joshua Groban, to the seat on the Court vacated a year earlier by Justice Werdegar. "Josh Groban has vast knowledge of the law and sound and practical judgment," the Governor enthused in a statement. "He'll be a strong addition to California's highest court." Like the Governor's three previous nominees, Groban had never been a judge and responded, "I am truly humbled by this

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[499] *Heller*, 4 Cal.4th at pp. 471–472.

[500] *Id.* at p. 472.

[501] *Id.* at p. 471.

[502] *Id.* at p. 473.

[503] *Id.* at p. 478.

nomination and, if confirmed, I look forward to working alongside the highest court's truly exemplary jurists."[504]

For the year 2018, the Court decided thirty-three civil cases and fifty criminal cases. Twenty-one of the criminal matters were death penalty appeals; the Court affirmed sixteen judgments and reversed in part five. The year 2018 was a rarity for the amicus practice: More briefs were filed supporting civil respondents (2.27) than were filed favoring appellants (2 per case). Another thirty amicus briefs were filed in criminal cases.

In 2019, in *Patterson v. Padilla* (2019) 8 Cal.5th 220, the Supreme Court considered an important question raised by the upcoming 2020 election: Did Donald Trump's refusal to release his tax returns—the first Presidential candidate in many years to do so—disqualify him from the 2020 primary ballot?

The Presidential Tax Transparency and Accountability Act—Elections Code section 6880—provided that no candidates could be listed by the Secretary of State on the primary ballot for president who had failed to file tax returns for the past five years with the Secretary of State.[505] In an opinion by Chief Justice Cantil-Sakauye, the Court held that Article II, section 5(c) of the California Constitution required all recognized candidates for the presidency to be on the California primary ballot, regardless of whether they had disclosed their tax returns.[506]

In 2019, the Court decided thirty-four civil cases and forty-one criminal cases. The Court decided nineteen death penalty cases, affirming in thirteen and reversing six in part. By 2019, the issuance of death penalty majority opinions had grown to an average of nearly thirteen years from certification of the record to oral argument, but again, this could result from applications for extensions by overworked defense counsel, the length of the record, and the number of issues addressed in the briefs.

On January 15, 2020, Justice Ming Chin announced that he would retire effective August 31, 2020, ending nearly twenty-five years on the Court. Chief Justice Cantil-Sakauye called Chin's loss to the Court "incalculable." She observed that "he has been a valuable mentor who took me under his wing when I first became Chief Justice . . . Before he joined the bench, he spent years performing at the very highest levels of the legal professions and he is an accomplished teacher and lecturer." Among Justice Chin's administrative contributions to the Court was his work helping the Court embrace technology

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[504] *Sacramento Bee,* Nov. 15, 2018, p. A7.

[505] *Patterson*, 8 Cal.5th at 223.

[506] *Id.* at p. 242.

to expand public access.[507]

In *K.J. v. Los Angeles Unified School Dist.* (2020) 8 Cal.5th 875, the Court addressed one of the most crucial moments in California state-law appellate practice: getting the Notice of Appeal right. In that case, the plaintiff's attorney had been cited for contempt and sanctioned for allegedly interfering in an examination by placing questions about the details of the sexual assault at issue off limits.[508] The sanctions order was appealed, but the notice of appeal listed only the plaintiff as the appealing party.[509] The Court of Appeal issued a "suggestive *Palma* notice"—an order strongly suggesting that the trial court should vacate its order without further proceedings. The trial court vacated the contempt, but specifically left in place a further $16,111 sanctions award that it had imposed while the contempt order was stayed.[510] In an opinion by Justice Groban, the Court held that appellate courts are not categorically precluded from construing such a notice of appeal to include the attorney as the appealing party given that (1) the notice of appeal designated the sanctions order alone as the basis for the appeal; (2) the sanctions order had no effect on the rights of the client; (3) the attorney had extensively litigated the matter below; and (4) the respondent did not suggest that it had been misled or prejudiced.[511]

Another case during that term, *People v. Miles* (2020) 9 Cal.5th 513, is noteworthy for the eloquent dissent by Justice Liu. In *Miles,* an African American defendant was sentenced to death for raping and murdering a white woman.[512] The prosecutor removed every black juror who had not already been excused for cause, and only one of the alternate jurors was black.[513] In *Miles,* jurors were asked during voir dire whether they were upset by the verdict in the O.J. Simpson murder case. Justice Liu commented that exercising strikes based on the Simpson verdict "seems like playing with fire."[514] He noted that at the time jury selection took place, a practice of striking jurors who said they were not upset by the Simpson verdict would have resulted in the disproportionate removal of black jurors.[515] Comparative juror analysis also supported an inference of pretext, according to Justice Liu.[516] Justice Liu

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507 *Los Angeles Times*, Jan. 16, 2020, p. B4.

508 *K.J.,* 8 Cal.5th at pp. 878–879.

509 *Id.* at p. 881.

510 *Id.* at pp. 879–880.

511 *Id.* at p. 878.

512 *Miles*, 9 Cal.5th at p. 606.

513 *Id.*

514 *Id.* at p. 613.

515 *Id.* at p. 614.

516 *Id.*

concluded by noting that while the Supreme Court had not found a *Batson-Wheeler* error involving the peremptory strike of a black juror in more than thirty years, it was plain that Miles's conviction should have been reversed.[517]

On October 5, 2020, Governor Gavin Newsom announced his first nomination to the Supreme Court: his judicial appointments secretary and a former state and federal court judge, Martin Jenkins. Jenkins came to the Court with extensive judicial experience, having served as a state trial court judge, a federal trial court judge from 1997 to 2008, and an Associate Justice on the California Court of Appeal from 2008 until his retirement to join Newsom's administration. Governor Newsom said that Jenkins had built a reputation of "fortitude and fairness" and that he was a man of "inner strength, grace and compassion." "Justice Martin Jenkins has the right experience at the right time in our state's history," observed the Governor.[518] Justice Jenkins was unanimously confirmed on November 11, 2020.[519]

For the year 2020, the Court decided twenty-nine civil cases and forty-two criminal cases. Sixteen of the criminal cases were death penalty matters, in which the Court affirmed a dozen, reversed in part three, and reversed entirely once. Of course, 2020 was largely a story of dealing with COVID lockdowns. One curious impact: the Court's civil majority opinions got longer, averaging 27.82 pages before the lockdown began and 36.06 thereafter.

The main impact of the pandemic seems to have been on the Court's oral arguments, which featured a considerably less "hot" bench than ordinarily. Before the Court shut down, it averaged 24.18 questions to appellants and 23.27 questions to respondents per civil case. After the pandemic shut life down, the Court averaged 11.75 questions to appellants and 11.25 questions to respondents.

In 2021, the Supreme Court's decision in *People v. McDaniel* (2021) 12 Cal.5th 97 brought back echoes of the death penalty disputes of 1986. In an opinion by Justice Liu, the Court unanimously affirmed a death penalty judgment. But Justice Liu filed a concurrence (to his own opinion), concluding:

> In sum, the 20-year arc of the high court's Sixth Amendment jurisprudence raises serious questions about the constitutionality of California's death penalty scheme. There is a world of difference between a unanimous jury finding of an aggravating circumstance and the smorgasbord approach

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517 *Id.* at pp. 616, 617.

518 *Sacramento Bee*, Oct. 6, 2020, p. A1.

519 *Los Angeles Times*, Nov. 11, 2020, p. B3.

> that our capital sentencing scheme allows. Given the stakes for capital defendants, the prosecution, and the justice system, I urge this court, as well as other responsible officials sworn to uphold the Constitution, to revisit this issue at an appropriate time.[520]

On September 16, 2021, Justice Mariano-Florentino Cuéllar surprised observers by announcing that he was leaving the Court to become the new president of the Carnegie Endowment for International Peace. "I have been fortunate to serve the people of California for nearly seven years on our highest court—a distinction I could not have imagined when I first arrived here as a high school student in the Imperial Valley," said Justice Cuéllar in a statement.[521] According to *The Los Angeles Times,* "Cuéllar had a disarming way of asking incisive questions and perking up the conversation," during his tenure as a member of the Obama administration. "He had so much humility that people weren't scared of him."[522]

For the year 2021, the Court decided twenty-one civil cases and thirty-four criminal cases. The Court decided fifteen death penalty cases, affirming the judgment in eleven cases, reversing in part three judgments, and reversing completely one case.

This year also saw a sky-high unanimity rate; concurring and dissenting opinions were rare. Amicus practice slowed down a bit, as the Court received an average of 1.91 briefs per appellant and 1.67 per respondent in civil cases. In contrast, there was a spike in amicus briefs in criminal cases, with seventy-two being filed, which included fifty for appellants, nineteen for respondents, and three favoring neither side.

On February 15, 2022, Governor Newsom announced his nominee to succeed Justice Cuéllar on the Supreme Court: Justice Patricia Guerrero of the Fourth District Court of Appeal. "Her extraordinary journey and nomination to serve as the first Latina justice on the bench of our state's highest court is an inspiration to all of us and a testament to the California Dream's promise of opportunity for all to thrive, regardless of background or zip code," said Newsom in a statement. "With her extensive experience handling complex litigation matters, intellectual rigor and commitment to fairness and equality, Justice Guerrero . . . will make an excellent addition to our state's highest court," added retired Justice Carlos Moreno.[523]

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[520] *McDaniel*, 12 Cal.5th at p. 176.

[521] *Santa Maria Times*, Sep. 17, 2021, p. A2.

[522] *Los Angeles Times*, Sep. 17, 2021, p. B3.

[523] *Napa Valley Register*, Feb. 16, 2022, p. A4.

In 2022, the Court addressed a situation which not infrequently arises in civil tort practices arising out of suburban living: the scope of the recreational use immunity and the "express invitation" exception to it. *Hoffman v. Young* (2022) 13 Cal.5th 1257 was a majority opinion by Justice Corrigan: "Under Civil Code section 846, landowners generally owe no duty of care to keep their property safe for others who may enter or use it for recreational purposes. There is an exception to that statutory negation of duty, however, when a landowner expressly invites someone onto the property." The question there was whether the exception applied when the invitation was extended by a live-at-home child without the knowledge or permission of the owners.[524] The trial court had held that the invitation could only come from the landowners—the adult parents themselves. But the Court of Appeal held that the child had an implied agency to invite guests onto the land. Taking a common sense approach, the Supreme Court disagreed with both courts:[525] "Though we agree that landowners can authorize nonowners to expressly invite others onto their property, we reject the proposition that a landowner necessarily does so by allowing a child to live on the property and failing to prohibit the child from extending the invitation."[526] The court remanded the matter to the Court of Appeal for it to address the plaintiff's argument that the court had erred by denying her motion for a new trial.

For the year 2022, as California continued to recover from the pandemic, the Court decided only nineteen civil cases. It decided thirty-two criminal cases, of which fourteen were death penalty cases. In the death penalty cases, the Court affirmed ten judgments and reversed in part 4 judgments. Eighteen civil decisions and twenty-three criminal decisions were unanimous.

The sole dissent in a civil case was written by the Chief Justice. However, Justice Liu wrote seven dissents in criminal cases, followed by Justices Kruger and Groban with two each. Amicus practice remained relatively busy for appellants on the civil side with an average of two briefs per case, but for respondents, briefing dropped quite low, averaging only 0.84 briefs per case. Only thirteen amicus briefs were filed in criminal cases.

THE GUERRERO COURT BEGINS

On July 27, 2022, Chief Justice Cantil-Sakauye announced that she would not seek reelection when her term concluded in January 2023. Governor Newsom said that the Chief Justice had "steered our state's courts through

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[524] *Hoffman*, 13 Cal.5th at p. 1262.

[525] *Id.* at p. 1276.

[526] *Id.* at p. 1273.

times of great challenge and opportunity, championing important reforms to make our justice system fairer and more transparent, and expanding equal access to justice for all Californians." The Governor called the Chief "a fierce defender of access to the courts" and "a leading voice for bail reform, calling out its disproportionate impacts on low-income people."[527]

Only two weeks after the Chief Justice's announcement, Governor Newsom announced his choice for the next Chief Justice of California: the newest Associate Justice, Patricia Guerrero. Said the Governor: "Justice Guerrero has established herself as a widely respected jurist with a formidable intellect and command of law and deep commitment to equal justice and public service."[528] On the same day, Newsom nominated Judge Kelli Evans of the Alameda County Superior Court to take Guerrero's seat as an associate justice. A former civil rights attorney and civil division attorney at the U.S. Department of Justice, Evans served as Special Assistant to the Attorney General at the California Department of Justice before becoming Newsom's Chief Deputy Legal Affairs Secretary. Natasha Minsker of Smart Justice California called Evans's nomination a "really big deal."[529]

The year 2023 had some noteworthy cases, and one in particular involved California's continuing vulnerability to wildfires. In the fall of 2019, the Pacific Gas & Electric Company had conducted a series of emergency power shutoffs to reduce the risk of wildfires during extreme weather conditions. The plaintiff in *Gantner v. PG&E Corp.* (2023) 15 Cal.5th 396 alleged that decades of PG&E's negligence in maintaining the power grid in the first place had made the shutoffs necessary.[530] In a unanimous opinion by Justice Liu, the Court noted that after the 2019 shutoffs, the Public Utilities Commission ("PUC") had conducted an investigation and found multiple violations of its regulatory regime, fining PG&E $106 million.[531] The Court concluded that the plaintiff's claim inevitably interfered with "a broad and continuing supervisory or regulatory program" of the PUC by creating a "parallel review process" that if successful would require findings in tension with PUC guidelines.[532] Accordingly, the Court held that the plaintiff's remedy lay before the PUC, not in Court.[533] PG&E said in a statement that its "most important responsibility is the safety of our customers and the communities we serve." The company

527 *Los Angeles Times*, Jul. 28, 2022, p. B1.

528 *Hanford Sentinel*, Aug. 11, 2022, p. A3.

529 *San Francisco Examiner*, Aug. 14, 2022, p. A2.

530 *Gantner*, 15 Cal.5th at p. 400.

531 *Id.* at p. 404.

532 *Id.* at pp. 405, 410.

533 *Id.* at p. 412.

added, "We know that losing power significantly disrupts people's lives." Gantner's attorneys said, however, that it was a "sad day for Californians," as the Court's opinion "leaves consumers footing the bill" for shutoffs, "no matter how negligent PG&E is in maintaining its electric grid and no matter how much damage it causes to its customers."[534]

For the year 2023, the Court decided twenty-four civil cases and twenty-eight criminal cases. With Governor Newsom having declared a moratorium on the death penalty during his term, however, the death penalty docket slowed to a trickle: the Court decided only three cases, affirming two and reversing one. The lag time from certification of the record to oral argument in death penalty cases got a bit shorter, but for a variety of reasons, was still nearly thirteen years—4,709.33 days. Civil cases averaged 622.21 days from the grant of review to decision—roughly the same as the prior year. Non-death criminal cases averaged 542.08 days. All twenty-four of the Court's civil decisions were unanimous, as were twenty-five of the criminal decisions. Fourteen of the civil cases involved reversals, either in whole or in part, and twenty-one of the criminal decisions were reversals.

Not surprisingly given the sky-high unanimity rate, the Court's writing in 2023 consisted almost entirely of majority opinions. There were no concurrences or dissents in civil cases. Amicus traffic remained heavy, as the Court received an average of 2.68 briefs per civil case supporting appellants and 1.84 for respondents. Another twenty-three amici were filed in criminal cases.

In 2024, in *People v. Lamb* (2024) 16 Cal.5th 400, the Court considered the impact of video evidence in a criminal case. The jury had convicted the defendant of the murder of a gang member and a police officer. The jury was shown two Fox news videos discussing a white supremacist gang called Public Enemy Number 1 ("PEN1").[535] According to the videos, PEN1 was positioning itself as a criminal force inside prison walls and making inroads into organized crime.[536] The defendant argued that the videos were irrelevant and unduly prejudicial. In an opinion by Justice Evans, the Court held that the probative value of the videos in establishing the defendant's motive was not substantially outweighed by the prejudice from the sensational nature of the videos.[537] Observing that Evidence Code section 352 """speaks in terms of *undue* prejudice,""" the Court concluded that the jury could permissibly infer

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[534] *Los Angeles Times*, Nov. 21, 2023, p. B1.

[535] *Lamb*, 16 Cal.5th at pp. 411, 425.

[536] *Id.* at pp. 421, 422.

[537] *Id.* at pp. 422–423.

defendant's familiarity with the videos and in establishing motive.[538] In any event, the Court held that there was strong evidence of the defendant's guilt, and thus the admission of the videos was harmless under any standard.[539]

For the year 2024, the Court decided thirty-five civil cases and twenty-three criminal cases. Given Governor Newsom's determination to sign no death certificates, the death penalty docket slowed to nearly nothing—five cases, four affirmed, one reversed in part.

Chief Justice Guerrero and Justices Evans, Kruger, and Liu led the Court with six majority opinions apiece in civil cases. The Chief Justice led on the criminal side with six majority opinions. Amicus traffic declined a bit; the Court received 1.71 amicus briefs per appellant in civil cases and 1.6 per respondent. And twenty-nine amicus briefs were filed in criminal cases.

CONCLUSION

The story of the California Supreme Court is the story of California—the law of water rights, debates over immigration, racial tensions, explosive population growth, and the development of California as the agricultural breadbasket of the nation. The California Supreme Court has considered it all. It's also a story of villains—David Terry, Hugh Murray, the Workingmen's Party, Abraham Ruef, and Eugene Schmitz. And it's a story of heroes—indeed, of giants—Archy Lee, Yick Wo, Roger Traynor, Donald Wright, Phil Gibson, Ronald George, and Matt Tobriner. In short, for 175 years, the California Supreme Court has been the preeminent state Supreme Court in America.[540]

[538] *Id.* at p. 424.

[539] *Id.* at p. 427.

[540] Johnson, History of the Supreme Court Justices of California (1963) vol. 1, p. 100.

DAVID G. DALIN*

Jewish Justices of the California Supreme Court:

From Gold Rush Days to the Present

Jews have played an historically important role as judges in California going back to the dawn of California as a state in 1848. As of this writing, a total of seven have served as justices in the California Supreme Court—Henry A. Lyons, Solomon Heydenfeldt, Marcus C. Sloss, Mathew O. Tobriner, Stanley Mosk, Joseph Grodin, and Joshua P. Groban, the last of whom shares his name with a famous entertainer and sits on the Court to this day. Also worth mentioning as a Jewish contributor to California's highest courts is Bernard E. Witkin, a legal scholar who became the preeminent authority on California law and whose writings became indispensable to its practitioners.

Mostly active in state politics, several of these men were extremely active in their Jewish communities. Almost all came from the liberal side of the political spectrum, which was not always an advantage to their careers. Some served only short periods and made a relatively small impact, making their reputations in practice and business off the Court rather than on it, while others served many years with great distinction and became giants in their field.

Henry A. Lyons (1809–1872) and Solomon Heydenfeldt (1816–1890)

The least well-known Jews who served on the California Supreme Court are likely to be these first two, who were the earliest going back to the time of the first 1849 California Constitution. That Constitution called for three members of the State Supreme Court, and remarkably these two men served

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on it briefly at the same time in 1852. Both were men who had made careers in Southern cities and who were drawn West by the lure of the Gold Rush.

Henry A. Lyons's parents, Solomon and Rebecca Lyons, were French Jews who migrated to America at the turn of the nineteenth century and settled in Philadelphia, where baby Henry was born in 1809. In the 1830s, the Lyons family moved to Louisiana, where the then-grown Henry first began to practice law.

Henry Lyons quickly achieved social prominence in the heart of the old South. In 1840, at age thirty-one, he married Eliza Pirrie, the twice-widowed daughter of the owner of the celebrated Oakley Plantation, which the Pirrie family friend, the renowned John James Audubon, described as one of the continent's most prolific bird sanctuaries.[1]

The discovery of gold in California intrigued the young Lyons. Despite his comfortable existence in Louisiana, and the wherewithal to make frequent travels to Paris and Rome, he decided to leave the South and make the journey West, which he did by way of the Isthmus of Panama. Like a good many other Southerners of the day who were attracted to California, he settled in the town of Sonora (in Tuolumne County), not far from San Francisco. There he set up a thriving law practice and became active in local politics. In 1849, he ran for the new state's first legislature but ended up defeated in his first race for elective office.[2]

However, later in 1849, Lyons was elected by the new California legislature for a four-year term on the state's first Supreme Court, receiving the second highest vote. When Chief Justice S. C. Hastings's two-year term ended in 1852, Henry Lyons succeeded him as Chief Justice. When Solomon Heydenfeldt was elected to the Court in early 1852, two Jews for the first time briefly served together on the state's highest court. Chief Justice Lyons, however, only served for three months before resigning, because he considered the salary set by the new state to be too small to support a family.

Though the first (and only) Jewish chief justice in the history of California's Supreme Court, Lyons made little contribution to California's jurisprudence. He wrote only eleven opinions during his two years and three months on the Court—nine as an associate justice and two as chief justice. The first and only notable judicial opinion written by Justice Lyons—the third decision produced by the new Supreme Court—involved a forcible ouster of a landowner. Wrote Lyons: "When a party is in quiet and peaceable possession of lands, the law will not sanction any invasion of his rights by force."[3]

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1 Stanley Mosk, "A Majority of the California Supreme Court," *Western States Jewish Historical Quarterly* 8, no. 3 (April 1976): 225.

2 Mosk, "A Majority of the California Supreme Court."

3 *Ladd v. Stevenson*, 1 Cal. 18 (1850).

After resigning from the Court, Lyons gave up the practice of law, devoting himself primarily to business ventures and real estate investments in San Francisco. In San Francisco, Lyons bought an opulent Victorian home on Rincon Hill, then a fashionable area of the city, and accumulated a sizeable fortune in real estate.[4]

As for his Jewish identity, it is not known whether Justice Lyons formally converted to Christianity, but he ceased to publicly identify as Jewish and never entered a synagogue after his marriage to Eliza Pirrie at the age of thirty-one. Throughout his years in San Francisco, he was never active in Jewish affairs. His funeral services in 1872 were conducted in Trinity Episcopal Church on Post Street in San Francisco.[5]

Other notable facets of Lyons's biography are that he left an estate of about half a million dollars when he died in 1872, an enormous amount of money for that period. An ardent Southern sympathizer, Lyons returned to Louisiana in 1860 and remained there until the end of the Civil War, after which he returned to California.

Solomon Heydenfeldt, the second Jewish man to serve on the California Supreme Court, was a much more brilliant legal scholar than Henry Lyons and left an indelible impression on California law. He was also active in local Jewish affairs. He served on the Court for five years, from 1852 to 1857. Heydenfeldt was born in Charleston, South Carolina, in 1816, the son of Jacob and Esther Desiree Heydenfeldt. His mother was a DePass, from a celebrated family of Jewish lineage originating in Bordeaux; his father came to America from Silesia. His family was identified with the Sephardic community for generations. Heydenfeldt's sister was the first wife of Dr. Abraham Jacobi of New York, and his brother Elcan was a lawyer and politician in Alabama and later California, where he also moved.[6]

Although Heydenfeldt went to college in Pennsylvania, where he studied Latin, Greek, and mathematics, he did not graduate. Instead, he returned to Charleston where he studied law in the offices of Henry De Saussure, son of the celebrated chancellor of South Carolina.[7] In 1837, at the age of twenty-one, he moved to Montgomery, Alabama, and was admitted to the bar in that state. Like Lyons, he also became active in local politics. In December 1842, at a session of the Alabama legislature, an election was held to fill a vacancy

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4 Mosk, "A Majority of the California Supreme Court," 226.

5 Mosk, "A Majority of the California Supreme Court," 227.

6 Albert M. Friedenberg, "Solomon Heydenfeldt: A Jewish Jurist in Alabama and California," *Publications of the American Jewish Historical Society* 8 (1902): 129.

7 Friedenberg, "Solomon Heydenfeldt," 130.

in the office of county judge for Mobile, "one of the best paying offices of the State," for which Heydenfeldt was an unsuccessful candidate.[8] However, the run provided him with valuable experience and contacts.

In 1850, beckoned by the California Gold Rush, Heydenfeldt moved to California, practicing law in San Francisco, where he opened an office in San Francisco's old City Hall.[9] He quickly developed a prosperous civil practice and was recognized as a community leader in both professional legal circles and in San Francisco's growing Jewish community.[10]

It would seem phenomenal today, but after having been in the state for only one year, Heydenfeldt was a serious contender for a United States Senate seat to succeed John C. Fremont, who in 1856 would emerge as the new Republican Party's first candidate for the presidency. The first state legislature after California's admission into the Union met in San Jose in 1851 and proceeded to elect a senator. The legislature was equally divided between the Democrats and the Whigs, while Fremont became a candidate to succeed himself. Although Heydenfeldt became the candidate of the legislature's Democratic caucus, opposition to Heydenfeldt developed even among the Democrats because of his Southern background and outspoken Southern sympathies. (In 1860, he would support Breckinridge in his campaign against Lincoln.) After 142 ballots no candidate received a majority vote, and the Legislature adjourned until the following year, when a compromise candidate was chosen.[11]

All was not lost however, and Heydenfeldt's Southern roots did not prevent him from pursuing other offices. It had been assumed that Heydenfeldt would be a candidate for the Senate seat in 1852 but given his stellar background in law, in late 1851 the Democratic Party nominated him for the Supreme Court. He was elected that November over his Whig opponent, a popular Sacramento district judge. The salary for a California Supreme Court Justice at this time was set at $10,000 a year.[12]

As a State Supreme Court Justice, Heydenfeldt was conspicuously successful in his five years on the court and was remarkably productive. He wrote in all forty-five judicial opinions. While most of his decisions dealt with complex legal issues, he is perhaps best remembered today for an 1855 example of simple pragmatic justice, in a case known as *Robinson v. Pioche*.[13]

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[8] Friedenberg, "Solomon Heydenfeldt," 130.

[9] Friedenberg, "Solomon Heydenfeldt," 131.

[10] Mosk, "A Majority of the California Supreme Court," 227.

[11] Mosk, "A Majority of the California Supreme Court," 228.

[12] Friedenberg, "Solomon Heydenfeldt," 132.

[13] *Robinson v. Pioche, Bayerque & Co.*, 5 Cal. 460 (1855).

The plaintiff had fallen into an uncovered hole in the sidewalk in front of the defendants' premises. The trial judge had instructed the jury that if the plaintiff had been intoxicated at the time of the accident, he could not recover damages. Wrong, said Justice Heydenfeldt: If the defendants were at fault in leaving an uncovered hole, the intoxication of the plaintiff could not excuse them. He wrote succinctly: "A drunken man is as much entitled to a safe street, as a sober one, and much more in need of it."[14]

The most controversial of Heydenfeldt's judicial opinions, and probably the most damaging to his legacy, was in the case of *People v. Hall*, an appealed murder case in which the Supreme Court established in 1854 that Chinese Americans and Chinese immigrants had no rights to testify against white citizens. This reflected the racism and anti-Chinese sentiment common in early California and enshrined into law at the time. The ruling effectively freed Hall, a white man, who had been convicted and sentenced to death in 1853 for the murder of Ling Sing, a Chinese miner in Nevada County, based on the testimony of three Chinese witnesses.[15] George Hall appealed the verdict, arguing that the testimony of the Chinese witnesses should not be accepted and that the section of California law that barred the use of testimony by blacks, mulattoes, and Indians against whites, should also be extended to banning the testimony of Chinese. The California Supreme Court, in a majority opinion delivered by Chief Justice Hugh Murray, decided for Hall and Justice Heydenfeldt went along with it.

This case has been described as "containing some of the most offensive racial rhetoric to be found in the annals of California appellate jurisprudence."[16] It preceded in infamy the Dred Scott case decided by the U.S. Supreme Court three years later.[17] In support of its decision to include Chinese people within the class prohibited from giving evidence in favor of or against a white man, the Supreme Court in its majority opinion stated the following about Chinese people: "The same legal rule which would permit them to testify, would admit them to all the equal rights of citizenship, and we might soon see them at the polls, in the jury box, upon the bench, and in our legislative halls."[18]

A California state law passed in 1873, sixteen years after Solomon Heydenfeldt resigned from the Supreme Court, invalidated all testimony laws,

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[14] *Robinson v. Pioche*; and Mosk, "A Majority of the California Supreme Court," 228.

[15] *People v. Hall*, 4 Cal. 399 (1854).

[16] Michael Traynor, "The Infamous Case of *People v. Hall* (1854): An Odious Symbol of Its Time," *California Supreme Court Historical Society Newsletter* (2017), p. 2.

[17] *Dred Scott v. Sandford*, 60 U.S. 393 (1857).

[18] *People v. Hall*, 4 Cal. 399, 404–05 (1854).

and thus overrode the decision in *People v. Hall*.

In 1857, Heydenfeldt realized that he could not support his family and dependents on his judicial salary, and he resigned from the high court. He resumed private law practice, in a firm that specialized in mining law. He prospered financially and acquired considerable real estate property over the years.

Heydenfeldt, like Justice Henry Lyons, was an outspoken Southern sympathizer. In 1860, Heydenfeldt supported the Southern Democratic candidate Breckenridge in his campaign against Abraham Lincoln. Thus, when during the Civil War a Test Oath Act was adopted requiring an oath of loyalty to the Union, Heydenfeldt felt that in good conscience he could not swear to the oath. Also, as a result of his decision not to swear to the loyalty oath, he was removed from his position on the Board of Trustees of the California State Library for being "disloyal" to the Union.[19] Thus, he withdrew from his law firm and from practice in the courts. Instead, he became a business adviser to many large corporations and wealthy businessman and in so doing accumulated a substantial fortune.

A generous philanthropist, Heydenfeldt gave away vast sums of his fortune to innumerable charities, Jewish and non-Jewish alike. His special interest was the kindergarten movement. Together with Julius Jacobs, he was the founder of the first kindergarten in San Francisco, and with Rabbi Felix Adler of New York, the founder of the Ethical Culture Movement, he pioneered a national campaign to establish and fund kindergartens.[20]

The legal historian Oscar T. Shuck, in his 1901 book on the California bench and bar, described Justice Heydenfeldt in this way:

> In person he was diminutive, with small hands and feet, dark hair and complexion, a kind eye, well-shaped and finely chiseled features. His weight was suited to his stature, and he possessed distinguished dignity of manner. A man universally esteemed, he yet held himself aloof from the people. He was not a man of the masses. We once heard him on the stump addressing a multitude of the unterrified. He was out of place. He disliked all gloss and glitter, and tinsel and was void of arrogance and affection. He knew sorrow, bore the burden of care, and was thrown amid all the snares of pioneer adventure, yet he kept the mood and habit of the philosopher.[21]

After leaving the Supreme Court in 1857, Heydenfeldt's private law practice gave him the historic opportunity to vindicate the legal right of

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[19] *Marin County Journal*, March 26, 1864.

[20] *Marin County Journal*, 230.

[21] Mosk, "A Majority of the California Supreme Court," 230.

California Jews to work on Sunday. Throughout the 1850s, Jewish merchants, for whom Sunday was not a religious holiday, were expected to not compete with Christian merchants and work on Sunday, the Christian Sabbath. As early as 1851, Protestant churchmen began to call for state government legislation to legally prohibit Jewish merchants from working on Sunday. Many Californians would have been happy to close their businesses on Sunday. For the vast Christian majority of California, Sunday was the natural day of rest, and thus a law forbidding business during that time was of no great consequence. By 1858, popular support for a Sunday closing law had increased throughout the state. In the California Assembly's legislative debate over the law, all members of the Assembly were aware that such a law would burden only the state's Jews, whose religion did not require resting on Sunday. In one such discussion, Assembly Speaker William W. Stow went as far as to declare that he had "no sympathy with the Jews," who were "a class of people who only came here to make money and leave as soon as they effected their object." Regarding the Sunday closing law, the Jewish preference for the Saturday Sabbath was irrelevant to Stowe as the Jews "ought to respect the laws and opinions of the majority."[22]

In April 1858, an important Sunday closing law, "An Act for the better observance of the Sabbath," directed specifically against the state's Jews, was enacted by the California legislature, forbidding the keeping open of any store, workshop, or other business, and the sale of any goods, wares, or merchandise "on the Christian Sabbath or Sunday."[23] Almost immediately after the Sunday closing law was enacted, the California Supreme Court was given an opportunity to review the statute's constitutionality. The California Supreme Court, in the case of *Ex Parte Newman*, issued what is believed the be the only nineteenth-century case in the United States that overturned a law designed to protect the observance of Sunday, regarded as the Christian Sabbath. In so doing, the court overturned the conviction of Sacramento Jewish merchant Morris Newman (described in the case as an Israelite) who had been arrested by a justice of the peace and imprisoned for keeping his tailor shop open and selling clothing on a Sunday, and for refusing to pay the fine for violating the law.

As Heydenfeldt, Newman's attorney and then a prominent Jewish communal leader in San Francisco successfully argued, Newman's desire to break California's Sunday closing law stemmed from this religious faith

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22 Jeremy Zeitlin, "What's Sunday All About? The Rise and Fall of California's Sunday Closing Law," *California Legal History* (2012), p. 3.

23 Zeitlin, "What's Sunday All About?," p. 3; and Arnold Roth, "Sunday "Blue Laws" and the California State Supreme Court," *Southern California Quarterly* 55, no. 1 (Spring 1973): 44.

and affiliation. As a religiously observant Jew, Newman (like his attorney Heydenfeldt) followed Jewish religious tradition and celebrated the Sabbath on Saturday. Because Newman's religion required him to refrain from work on Saturday, "he chose to flaunt the Sunday closing law and keep his shop open on the day of rest demanded by the state."[24]

Heydenfeldt emphasized the Sunday closing law's burden on Newman's freedom of religion in challenging the constitutionality of the law before the California Supreme Court. In the case of *Ex Parte Newman*, Heydenfeldt successfully contended that the Sunday closing law conflicted with article 1, section 4 of the California Constitution that guaranteed that individual rights to "free exercise and enjoyment of religious profession and worship, without discrimination or preference shall be forever allowed in the state."[25] Heydenfeldt's victory in the case of *Ex Parte Newman* is considered to have been the highlight of his distinguished career in private law practice.

Heydenfeldt died in San Francisco in 1890 and left an estate of about $300,000.

Changes in the California Supreme Court

Article VI of California's first Constitution, drafted in 1849, had provided for a Supreme Court consisting of a Chief Justice and two associate justices. By 1862, however, the state's growth had prompted a reorganization of the judiciary. Article VI of the California Constitution was amended in that year to expand the categories of cases the court could hear, increase the number of Supreme Court justices from three to five, and extend the terms of office for justices from six to ten years.

Marcus C. Sloss (1869–1958)

Marcus C. Sloss, who was appointed to the Court in 1906, was the fiftieth justice and the third Jewish justice to serve on the California Supreme Court. Justice Marcus Sloss (known to his family and friends as "Max") came from one of San Francisco's most prominent and wealthy pioneer Jewish families. Born in 1869, Max Sloss was the son of Louis and Sarah (Greenbaum) Sloss. Louis Sloss, who had been born in Bavaria, emigrated to the Unites States in 1848 shortly after the discovery of gold just north of San Francisco, and the beginning of the California Gold Rush. The next year, Louis and Sarah headed west on a wagon train, and settled in Sacramento, California. In 1861, the Sloss family moved to San Francisco, where Louis founded Louis Sloss and

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[24] Zeitlin, "What's Sunday All About?," p. 1.

[25] Zeitlin, "What's Sunday All About?," p. 1.

Company, later named the Alaska Commercial Company, and sold supplies to the miners prospecting for gold.

Business took a turn for the better when on March 30, 1867, the United States bought Alaska from Russia for $7,200,000, a move so severely and publicly criticized that it was nicknamed "Seward's Folly" after the Secretary of State who had negotiated the purchase. In the years following the sale of Alaska to the United States in 1867, the Alaska Commercial Company made a huge fortune for Louis Sloss, his partner Louis Gerstle, and their families. The new Alaskan territory included the Pribilof Islands in the Bering Sea—the site of the annual mating and breeding of hundreds of thousands of fur seals. For twenty years the Alaskan Commercial Company was the largest buyer of sealskins and other Alaska furs, essential in the days before central heating: rare sea otter skins, mink, muskrat, ermine, lynx, beaver, and fox. They also imported sables from Russian Siberia, walrus ivory, and whalebone. The Alaskan Commercial Company expanded their lucrative trade by sending fifty-pound chests of China tea to Alaska.[26]

By the time of Louis Sloss's death in 1902, he and his partner Lewis Gerstle were two of the wealthiest Jewish merchants and philanthropists in San Francisco. Sloss served as a Regent of the University of California from 1885 until his death, the first Jew to serve in this position.

In 1886, his son Max Sloss, who would go on to join California's Supreme Court, entered Harvard University, from which he graduated magna cum laude and was elected to Phi Beta Kappa. He then studied at Harvard Law School, the first San Francisco Jew to do so, from which he graduated with honors in 1893. After graduation, he returned to San Francisco and joined the prominent law firm of Chickering, Thomas and Gregory, many of whose major clients were his father's companies. Max Sloss soon became a partner. In November 1900, with the strong encouragement and financial support of his father, who was a power in California Republican politics,[27] Sloss was elected judge of the San Francisco Superior Court.

Early in 1906, Sloss received a call from California Governor George C. Pardee offering him a seat on the California Supreme Court. Sloss was only thirty-six years old at the time of this appointment, one of the youngest justices to ever serve on the California Supreme Court. The press across the state complimented the governor on his selection of a man of "spotless integrity,"

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[26] Irena Narell, *Our City: The Jews of San Francisco* (Howell North Books, 1981), 87–95.

[27] Narell, *Our City*, 205.

"sound judgment," and "sternly righteous decisions," who "possessed the confidence of the bar."[28]

Max Sloss was a judge who, according to his son Frank, wrote 583 careful, lucid opinions and participated in more than 1,800 other cases[29] that dealt with every facet of state law. In his judicial opinions, Judge Sloss was a gifted legal stylist, who greatly appreciated and admired the epigrams of Supreme Court Justice Oliver Wendell Holmes, Jr., and the literary elegance of Benjamin Cardozo, then the Chief Judge of the New York Court of Appeals[30] who later in 1932 would be appointed to the U.S. Supreme Court.

Justice Sloss was one of the three liberals on the seven-member State Supreme Court. His tenure on the Court spanned liberal Governor Hiram Johnson's two administrations. Several of Judge Sloss's most famous judicial opinions became landmarks in California labor and water rights laws. Judge Sloss upheld the passage of the eight-hour working day for women championed by, among others, Hiram Johnson and Louis D. Brandeis. In the historic Supreme Court case of *Constitutionality of the Workman's Compensation Act—Western Indemnity Co. v. Pillsbury*,[31] he wrote the judicial opinion approving the validity of the Workman's Compensation Act despite a contrary decision by the New York Court of Appeals, the most prominent and influential state court in the country.

California Governor Hiram Johnson and other progressive advocates of workman's compensation were delighted with Justice Sloss's decision, which became one of the most important legal rulings of the progressive era. One of Sloss's other notable opinions, that of *Title Insurance and Trust Co. v. California Development Co.*, was used by Prof. Zechariah Cafee, Jr. of Harvard Law School to "stimulate the mental processes of generations of students."[32]

In 1910, Justice Sloss had been reelected to a twelve-year term on the Supreme Court but chose to resign in 1919 at the age of fifty. The Sloss resignation and return to private law practice was prompted by a financial disaster involving the Sloss family business enterprises. For years, his judicial salary had been supplemented by income from shares in the Alaska Commercial Company and other Sloss family enterprises. Then, an investment by his brothers and brother-in-law in the Northern Electric Company, an interurban

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[28] Narell, *Our City*, 205.

[29] Frank H. Sloss, "M. C. Sloss and the California Supreme Court," *California Law Review* 46, no. 5 (December 1958): 719.

[30] Sloss, "M. C. Sloss and the California Supreme Court," 720.

[31] Sloss, "M. C. Sloss and the California Supreme Court," 728–29.

[32] Sloss, "M. C. Sloss and the California Supreme Court," 729–31; and Narell, *Our City*, 206.

electric system in the Sacramento Valley, substantially brought down the Sloss family income, leaving Justice Sloss with insufficient income to support his family. With his children getting ready for college, Sloss realized that he could no longer count on an independent income to supplement his judicial salary, and he decided to return to private law practice.

For the next twenty-five years, Max Sloss practiced law, in partnership with two of his sons who had also graduated from Harvard Law School, while devoting much time to leadership in civic affairs as well as leadership in the San Francisco Jewish community. A specialist in water law and a celebrated labor arbitrator, Sloss was often called as a consultant to other lawyers on an appellate level and twice appeared before the United States Supreme Court. In 1933, Sloss headed the Citizens' Emergency Relief Commission created because of the Great Depression. During World War II, he was chair of the National War Labor Board's regional advisory committee. In active practice for twenty-five years after his retirement from the Supreme Court, he continued to come to the office daily until his final illness at age eighty-seven.

Sloss was a member of the American Law Institute and a longtime governor of both the California State Bar and the San Francisco Bar, an officer of the San Francisco Public Library and for thirty years, from 1920 to 1950, a trustee of Stanford University. The Stanford University Law School faculty lounge bears Sloss's name.

Devoted to Jewish charity work, Max Sloss served as president of the Pacific Hebrew Orphan Society for ten years, a director of Mount Zion Hospital, a long-time leader of the American Jewish Committee, and a member of the Board of Governors of the Federation of Jewish Charities. In 1910, when thirteen San Francisco Jewish communal agencies came under one umbrella—the Federation of Jewish Charities—Justice Sloss was elected its first president, a position he held for several years.

Justice Sloss's wife, Hattie Hecht Sloss, played an even more influential role in San Francisco's Jewish communal and charity work then did her husband. Over the years, "she established a long record of personal accomplishments and public service."[33] Hattie Sloss, who was born and raised in Boston, met Max when he was a student at Harvard Law School. They married in 1899. Her distinguished career in San Francisco Jewish philanthropy and public service was launched shortly after the couple's Boston wedding. A founder of San Francisco's National Council of Jewish Women, the first president of San Francisco Women's Zionist organization, Hadassah, an active board member

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33 Narell, *Our City*, 211.

of Temple Emanu-El, and a founder of the state's Social Welfare Commission, as well as of the San Francisco Symphony and Opera Associations, "she could juggle a dozen hats simultaneously."[34] When Hattie was nearly sixty-five, "she embarked on a radio career and for fifteen years conducted a lively weekly broadcast, "Know Your Symphony," an extemporaneous introduction to great music. Long-term president of the Browning Society, she compiled an authoritative anthology of Victorian poetry. In 1940 she became the first woman in the United States to head a federal grand jury.[35] In the case of Justice Max Sloss, both husband and wife achieved notable careers.

Mathew O. Tobriner (1904–1982)

Matthew O. Tobriner, the fourth Jewish justice to serve on the California Supreme Court and among the most eminent, was born in San Francisco in 1904. Tobriner was educated at Lowell High School, where he was a member of the famed Lowell Forensic Society, the country's oldest high school debate team, of which future U.S. Supreme Court Justice Stephen G. Breyer would be a member twenty years later. After graduating from Stanford University in 1924, from which he received B.A. and M.A. degrees, Tobriner graduated from Harvard Law School in 1927, and subsequently was awarded a Doctor of Juridical Science degree from the University of California at Berkeley in 1932.

After graduating from law school, Tobriner entered private law practice, where he specialized in labor law, representing the American Federation of Labor and other labor unions for over twenty-five years. During his years in private practice, Tobriner was active in Democratic Party politics, playing an active part in formulating and implementing the policies of FDR's New Deal. In 1948, he was state vice-chair of President Harry Truman's reelection campaign. In May 1950, he was Northern California chair of the campaign of Congresswoman Helen Gahagan Douglas for the United States Senate. This race she famously lost to Congressman Richard M. Nixon, who accused Douglas of being a Communist.[36] Nixon's victory in this race was, of course, his major step on the road to the vice presidency and subsequently to the White House. During these years Tobriner became a friend and close political ally of Edmund G. "Pat" Brown, the Democrat Party's state attorney general who in 1958 was elected governor of California. This relationship had dividends.

In 1959, the California governor appointed Tobriner as an associate justice of the California Court of Appeals for the First District. And in 1962,

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34 Narell, *Our City*, 211.

35 Narell, *Our City*, 211.

36 "Tobriner to Help Douglas Campaign," *Madera Tribune*, May 4, 1950.

Governor Brown elevated Tobriner to Associate Justice of the Supreme Court, where he served until his retirement in 1982.

During his twenty-year tenure on the California Supreme Court, Justice Tobriner was a leader of the Court's liberal majority and notable for several decisions he authored in the areas of constitutional law, civil rights, and other related areas. An unabashed liberal and judicial activist throughout his judicial career, Tobriner believed that the courts must reflect changes in society. "If that's why I am a liberal," he once told a questioner, "Then I'm proud."[37] He believed, as he often stated, that judges must accommodate the law to an ever-changing society. His political stance won acclaim from liberals, and his carefully written judicial opinions won praise from scholars.

For example, Tobriner played a key role in extending the free use of hallucinogens in certain religious ceremonies. In 1964, Tobriner wrote the majority opinion in the case of *People v. Woody*, overturning a conviction for peyote use by a Native American Church member on First Amendment grounds. Weighing the asserted compelling state interest in controlling drug use with the Free Exercise Clause, Tobriner found that the balance favored constitutional protection of the peyote use and practice, stating:

> The right to free religious expression embodies a precious heritage of our history. In a mass society, which presses at every point toward conformity, the protection of self-expression, however unique, of the individual and the group becomes ever more important. The varied current of the subcultures that flow into the mainstream of our national life give it depth and beauty. We preserve a greater value than an ancient tradition when we protect the rights of the Indians who honestly practiced an old religion in using peyote one night at a meeting in a desert hogan near Needles, California.[38]

Tobriner was also forward-looking in LGBT matters. In 1966, [39] Justice Tobriner explained in *Morrison v. State Board of Education* that gay teachers are entitled to employment in public schools absent a "showing that an individual's homosexuality renders him unfit for the job from which he has been excluded."[40]

In 1976, Tobriner wrote the majority decision in the case of *Tarasoff v. Regents of the University of California*, in which the Supreme Court of California held that mental health professionals have a duty to protect individuals who

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[37] "California Supreme Court Justice Mathew Tobriner Dead at 78," *UPI*, April 7, 1982.

[38] *People v. Woody*, 394 P.2d 813 (Cal. 1964).

[39] *Tarasoff v. Regents of the University of California*, 17 Cal.3d 425, 551, P.2d 334, 131 Cal. Rptr. 14 (1976).

[40] *Morrison v. State Board of Education*, 1 Cal.3d 214 (1966).

are being threatened with bodily harm by a patient. Justice Tobriner famously wrote, "the confidential character of patient-psychotherapist communications must yield to the extent that disclosure is essential to avert danger to others. The protective privilege ends where the public peril begins."[41]

Tobriner also played his part in the sexual revolution of the 1960s and 1970s. In 1976, he authored the majority opinion in the landmark case of *Marvin v. Marvin*, which held that implied contracts may be found in nonmarital relationships. In other words, unmarried couples could assert the same rights as married couples to share earnings or property accumulated while they were living together. Thus, if a couple lives together for a substantial amount of time, one of the parties may be required to make payments to the other upon the dissolution of the relationship—commonly called "palimony." This landmark judicial decision authored by Tobriner, requiring payment by one member of an unmarried couple, entered the term "palimony" into legal discourse.

As Tobriner wrote in his decision, "The fact that a man and a woman live together without marriage, and engage in a sexual relationship, does not in itself invalidate agreements between them relating to their earnings, property or expenses."[42]

The famous Miranda rights also began in Tobriner's courtroom. Tobriner's 1965 opinion in the case of *People v. Dorado*,[43] ruling that a person accused of a crime must be advised by the police of a right to remain silent and to obtain counsel, blazed the trail that the U.S. Supreme Court was to follow in its landmark decision in the 1966 case of *Miranda v. Arizona*.[44]

Several years later, Tobriner wrote the California Supreme Court's majority opinion that criminal suspects are entitled to a lawyer at police lineups before they are formally charged. This ruling, like many others of the court, extended a defendant's right to counsel beyond the requirements set down by the U.S. Supreme Court.[45]

Tobriner achieved perhaps his greatest fame over the issue of affirmative action, as the author of the only dissenting opinion in the well-known Allan Bakke case. In the controversial decision, Justice Tobriner was the lone dissenter in the court's landmark 1976 decision upholding the contention of a

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41 *Tarasoff v. Regents of the University of California*.

42 "Retired Justice Tobriner, 78, Dies in San Francisco," *Los Angeles Times*, April 8, 1972; this case is discussed in considerable detail in Elizabeth H. Pleck's book *Not Just Roommates: Cohabitation After the Sexual Revolution* (University of Chicago Press, 2012), 153.

43 *People v. Dorado*, 62 Cal.2d 338, 42 Cal. Rptr. 169, 398 P.2d 361 (Cal. 1965).

44 *Miranda v. Arizona*, 384 U.S. 436 (1966).

45 "Tobriner: A Formidable Record," Los Angeles Times, December 17, 1981, p. F10.

white medical school applicant that he had unfairly been denied admission to the University of California Medical School at Davis, in favor of less qualified minority group applicants. Every other member of the Court opposed direct quotas, but not Tobriner. To Tobriner, the racial classifications that the UC Davis Medical School used to ensure that minorities made up a fixed 16 percent quota of admissions were not "invidious" but rather were "benign"—and thus constitutionally acceptable.[46]

The U.S. Supreme Court upheld the California high court's ruling, but Tobriner was not entirely rebuffed. The U.S. Supreme Court also granted Tobriner's contention that race could be considered as one of many other factors in deciding college admissions. Throughout his judicial career, Tobriner remained a strong proponent of affirmative action overall.[47]

In another vigorously argued issue during his last year on the court, Justice Tobriner wrote a notable majority opinion that required the state of California to pay for abortions sought by low-income women under the Medi-Cal program.[48]

During his twenty-year tenure on the California Supreme Court, several of Justice Tobriner's law clerks became renowned. These included Jerry Brown, the son of Governor Pat Brown, who had appointed Tobriner to the Court in 1962 and who was still governor when the younger Brown clerked for Tobriner. Jerry Brown would later serve as governor of California from 1975 to 1983, as attorney general of California from 2007 to 2011, and then again as governor from 2011 to 2019.

Another of Tobriner's law clerks, Laurence Tribe, served as a law clerk for U.S. Supreme Court Justice Potter Stewart after completing his clerkship with Justice Tobriner in 1967, and in 1968 was appointed to the Harvard Law School faculty, where he taught for over fifty years until his retirement in 2021. Tribe, who is considered to have been the preeminent constitutional law authority in the country, received tenure at the age of thirty in 1972, the youngest tenured faculty member in the history of Harvard Law School, and argued thirty-six cases before the United States Supreme Court. Among his many books and articles on constitutional law, Tribe is best known for his widely cited *Treatise of American Constitutional Law*, first published in 1978, which is considered to be the most influential book ever published in the field. He has also been ubiquitous as a commentator on legal affairs appearing on cable television.

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[46] *Bakke v. Regents of the University of California*, 18 Cal.3d 34, 132 Cal. Rptr. 680, 553 P.2d 1152 (1976).

[47] "Tobriner: A Formidable Record," p. F10; and Philip Hager, "Tobriner to Retire from State High Court," *Los Angeles Times*, December 15, 1981, p. A6.

[48] "Tobriner: A Formidable Record"; and Philip Hager, "Tobriner to Retire from State High Court," p. A6.

In a historic ranking of California's Supreme Court justices in 1979 by eighteen legal experts, ranging from liberal to conservative, Mathew Tobriner was overwhelmingly ranked as the most able member of the Court. Some ranked him as among the all-time great members of the Court.[49] Professor Laurence Tribe, the influential authority on constitutional law at Harvard Law School, has called him "the nation's most outstanding state court judge,"[50] an assessment with which many other legal scholars would agree.

In both professional and personal terms, Justice Tobriner has often been praised as an incomparable judge and exceptional human being, whose judicial decisions have influenced and shaped California law for many decades. But as Rose Elizabeth Bird, a close friend of Tobriner and Chief Justice of the California Supreme Court during the last years of Justice Tobriner's tenure has noted, as noteworthy as his achievements as a judge and legal scholar, and his enormous contributions to California law and legal history were, "they do not begin to take the full measure of the man. That measure lies in the quality of his spirit, and it was there that Mat Tobriner was unique."[51] As Chief Justice Bird remarked at the time of Tobriner's death in 1982, "Justice Tobriner was a man of uncommon grace. He was unselfish and forgiving. He believed deeply in the ultimate goodness of everyone. There was a harmony to his life that sprang from his sensitivity to both the abstractions of the law and the needs of people. He saw life as a delicate balancing of order and liberty, mercy and justice, passion, and compassion."[52]

As Harvard Law School professor Laurence Tribe also reflected after Justice Tobriner's death,

> While his passions ran only to causes and cases—to principles but not the parties—his compassion was altogether human, personal, and particular. To write of the disadvantaged and their rights was for Mat no exercise in abstraction; it was an expression of his inner self. A man of station, even privilege, he clearly felt more than almost anyone else I have ever known what it must mean to be powerless and dispossessed. It showed in the way he treated those who worked for him, or for his court, no less than in the way he treated those who argued before him and those they represented—or failed to represent. Of all the people I have ever met, only

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[49] "Experts Rank Tobriner as Most Able Justice," *Los Angeles Times*, July 29, 1979.

[50] Laurence H. Tribe, "Remembering Mathew Tobriner," *California Law Review* 70 (1982): 876–77.

[51] Rose Elizabeth Bird, "Justice Mathew O. Tobriner—A Man of Uncommon Grace," *California Legal Review* 70 (1982): 871.

[52] Bird, "Justice Mathew O. Tobriner."

> my own father seemed to me as totally gentle, as wholly without guile, as completely unmarred by meanness.[53]

Like Supreme Court Justice Max Sloss before him, Justice Tobriner was active in the San Francisco Jewish community. A member of Temple Emanu-El, San Francisco's largest synagogue, Tobriner was also, like Sloss, an active member of San Franciso's Concordia-Argonaut Club, the prestigious Jewish club founded by Levi Straus and others in the nineteenth century when Jews were not accepted as members of the city's exclusive gentile clubs. Tobriner presided over many of the city's Jewish charities and was sought after as the officiator at the wedding ceremonies of leaders of the Jewish community. Notable among these, Justice Tobriner officiated at the much-publicized wedding of Barbara Branstein, descendant of two of San Francisco's most illustrious pioneer Jewish families, both the Haas (Levi Strauss) and Branstein (MJB coffee) families, at the historic Haas-Lilienthal House in San Francisco.

Stanley Mosk (1912–2001)

The fifth Jewish justice of the California Supreme Court, Stanley Mosk, a lifelong Democrat and self-described liberal, was appointed to the California Supreme Court by Governor Edmund G. "Pat" Brown in 1964. He served there until his death in 2001, a thirty-seven-year tenure that made him the longest-serving Supreme Court justice in California history. Upon his appointment in 1964, for the first time since the Gold Rush days of the 1850s, two Jewish justices—Tobriner and now Mosk—served on the state Supreme Court simultaneously. During his tenure, when he wrote landmark decisions on civil rights, free speech, and criminal justice, Mosk wrote 1,500 judicial opinions, another record in California legal history.[54] As California's state attorney general during the late 1950s and early 1960s, he established the office's civil rights division and helped to persuade the Professional Golfers Association to drop its "whites only" rule.[55]

When Mosk graduated from the University of Chicago in 1933, it was possible to use the last year of a bachelor's degree as the first year of a three-year law degree program.[56] After earning his law degree in 1935, Mosk opened a solo law practice.

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53 Tribe, "Remembering Mathew Tobriner."

54 "Stanley Mosk: Justice on Calif. Supreme Court," *Washington Post*, June 21, 2001, p. C1.

55 "Stanley Mosk."

56 Jacqueline R. Braitman and Gerald F. Uelman, *Stanley Mosk: A Life in the Center of California Politics and Justice* (McFarland & Co., 2012), 23.

While practicing law, Mosk occasionally assisted Democratic politician Culbert Olson. When Olsen was elected governor of California in 1938, Mosk was appointed his executive secretary and legal adviser the following year. Mosk handled Governor Olsen's pardon of labor activist Tom Mooney, "ending a quest for justice that bounced back and forth between the California Supreme Court and the United States Supreme Court for many years."[57] After Olson lost the 1942 election to Republican Earl Warren, Olson made a lame-duck appointment of Mosk to the Los Angeles County Superior Court. At the age of thirty-one, Mosk became the youngest justice in the state.[58]

Judge Mosk's rulings on the Superior Court bench included many noteworthy cases. Several of Justice Mosk's decisions preceded similar rulings by the U.S. Supreme Court. Two years before the Supreme Court struck down racially restrictive housing covenants in the historic case of *Shelley v. Kraemer* in 1947,[59] Judge Mosk upheld the transfer of a Hancock Park home to a black man, ruling that a racially restrictive covenant was unconstitutional.

In the 1950s, Judge Mosk presided over the high-profile trial of a law student accused of murdering the wealthy Bel Air matron who had hired him as a houseboy.[60] John Crooker was convicted and sentenced to death by Judge Mosk. Eight years before the U.S. Supreme Court's (historic) *Miranda v. Arizona* decision,[61] in *Crooker v. California* the Supreme Court rejected Crooker's claim that his confession should have been suppressed because police did not advise him of his constitutional rights.[62] In a five-to-four decision, the Superior Court ruled that anyone who made it through the first year at Southwestern Law School should know what his constitutional rights were.[63] Crooker's death sentence was the first one commuted by Governor Pat Brown. Governor Brown later said that the main reason he commuted Crooker's death sentence was a note from Stanley Mosk, saying he would not object to a commutation of the death sentence to life imprisonment. Crooker was later released on parole and became a model citizen. In later years Justice Mosk wrote of the "great delight" he felt when he received an annual Christmas card from John Crooker.[64]

In 1958, Stanley Mosk ran for attorney general of California against a formidable Republican opponent, Patrick Hillings, who was a protégé of

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[57] Gerald F. Uelman, "Tribute to Justice Stanley Mosk," *Albany Law Review* 65, no. 4 (2002): 857.

[58] "Olson Has Number of Appointments to Make," *San Bernadino Sun*, November 12, 1942, p. 5; and "L.A. Judges Named," *San Bernardino Sun,* January 3, 1943, p. 12.

[59] *Shelley v. Kraemer*, 334 U.S. 1 (1948).

[60] *People v. Crooker*, 303 P.2d 753, 755 (Cal. 1956).

[61] *Miranda v. Arizona*, 384 U.S. 436 (1966).

[62] *Crooker v. California*, 357 U.S., 433, 434 (1958).

[63] *Crooker v. California*, 440–41.

[64] Uelman, "Tribute to Stanley Mosk," 9.

Richard M. Nixon. Hillings had actually succeeded Nixon in the House of Representatives when Nixon won election to the Senate in 1950. In his race for attorney general, Mosk received the most votes for the post not only in the State of California but in the entire United States, defeating Hillings by 1,135,000 votes. In his 1958 attorney-general victory, Mosk became the first Jew elected to statewide office in California since the days of the Gold Rush.[65]

During his six-year tenure as attorney general, Mosk established both constitutional and consumers' rights sections within the state's Department of Justice, actively defended civil rights, and restored the enforcement of California's antitrust law. Another of Mosk's notable achievements as attorney general was his successful battle to integrate the Los Angeles Open Golf Tournament and change PGA bylaws to allow black golfers to compete. Thus, as one legal scholar has noted, "it could be said that Tiger Woods is part of Justice Mosk's legacy of justice!"[66]

During the 1950s, Attorney General Mosk was selected as a Democratic Party National Committeeman from California, so Mosk's position became especially important in national politics. In the 1960 presidential race between Kennedy and Nixon, in which California was a key battleground state, Mosk developed a warm friendship with Kennedy, for whom he actively campaigned. Kennedy visited California frequently in 1960, and whenever he came, he was accompanied on the campaign trail by Mosk. The Mosks held fundraisers for Kennedy, and Mosk, it was said, "always attractive to women, held his own in the presence of the handsome and charismatic Kennedy." One of Mosk's friends sent a note after one fundraiser, saying, "It was a joy to see you and Mrs. Mosk at the Kennedy reception," then adding that his wife, "confided in me that she thought our Attorney General had a lot more personality than the honored guest!"[67]

Mosk's turn at the California Supreme Court came in 1964, when Governor Pat Brown appointed Attorney General Mosk to it, beginning his thirty-seven-year tenure that broke the Court's record for longevity. Mosk's term was not only long but indicative of great versatility. While legal scholars celebrate many great judges for their influence in one field of law or another, Stanley Mosk was a master of every legal field. Like others before him, he was also prescient. Many of his most notable judicial opinions anticipated and inspired later decisions by the U.S. Supreme Court. In *People v. Wheeler*, in 1978,

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[65] Braitman and Uelman, *Stanley Mosk*, 85, 87.

[66] Braitman and Uelman, *Stanley Mosk*, 10.

[67] Braitman and Uelman, *Stanley Mosk*, 112.

for example, Justice Mosk ruled to ban racial discrimination in jury selection, eight years before the U.S. Supreme Court made the same judicial decision.[68]

Mosk's most notable and controversial opinion was in the historic case of *Bakke v. Regents of the University of California*. During the 1970s, few issues generated more widespread legal debate or more difficult legal problems than that of the idea of special preference for "minority groups" in higher education. In the mid-1970s the various complex issues in the theory and practice of preferential treatment and what was known in some quarters as "reverse discrimination" and in others as "affirmative action" in university admissions were focused dramatically on the decision of the California Supreme Court in the case of Allan Bakke and his applications to medical school.[69]

In 1973 and again in 1974 Bakke, a white, thirty-six-year-old civil engineer from San Francisco, had applied for admission to the medical school on the Davis campus of the University of California. Both times he had been rejected. And yet, during those same years the university had accepted "minority group" students, who were less qualified than Bakke, under a special program that applied separate standards of admissions for them.

Following his second rejection by the University of California at Davis, Bakke filed suit against the university, claiming that he was denied admission only because he was white and that the special admission program for minorities violated the U.S. and California constitutions. In March of 1976, the case was argued before the Supreme Court of California. It was widely assumed that because the California Supreme Court was commonly thought to be the most liberal appellate court in the country, that it would necessarily rule against Bakke and in favor of the UC Davis Medical School's special admission program for minorities. However, on September 16, 1976, in a six-to-one majority decision written by Justice Mosk, the California Supreme Court ruled that the medical school's special admissions program for minorities was unconstitutional, should be abolished, and subsequently Bakke should be admitted to the Davis medical school.[70]

Mosk's majority opinion focused on the rights of Allan Bakke as an individual. Directly addressing Bakke's claim that he was excluded because he was white, and that the special admissions program was unconstitutional for that reason, Mosk wrote:

It is plain that the special admissions program denies admission to

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[68] *People v. Wheeler*, 22 Cal.3d 258 (1978).

[69] John Bunzel, "Bakke vs. University of California," *Commentary*, March 1977.

[70] Bunzel, "Bakke."

> some white applicants solely because of their race. Of the one hundred admission opportunities available in each year's class, sixteen are set aside for disadvantaged minorities, and the committee admits applicants who fall into this category until these sixteen places are filled. Since the pool of applicants available in any year is limited, it is obvious that this procedure may result in acceptance of minority students whose qualifications for medical study, under the standards adopted by the University itself, are inferior to those of some white applicants who are rejected.

From this perspective, Justice Mosk found the special admissions program impossible to distinguish from the hated "quota" systems that limited the admission of minorities in the past: While a program can be damned by semantics, it is difficult to avoid considering the University's scheme as a form of education quota system, benevolent in concept perhaps, but a revival of quotas nevertheless. "No college admissions policy in history has been so thoroughly discredited in contemporary times as the use of racial percentages." Mosk wrote.[71] Peter Belton, Mosk's principal staff attorney, attributed Mosk's views in the Bakke case to the Justice's "personal experience of being Jewish," and being himself a member of a group subjected to the hated quota system.[72]

Another burning issue of the day in the 1970s was the prevalence of cults or pseudo-churches that took advantage of or otherwise harmed their members. There were charges that such cults "brainwashed" their victims and stories of frantic parents who employed certain persons who claimed that they could "deprogram" their children. In the case of *Molko v. Holy Spirit Ass'n for the Unification of World Christianity*, the California Supreme Court held in 1988 that religious organizations may be sued for fraud and intentional infliction of emotional distress when they use deception to cause candidates for recruitment to unwittingly expose themselves to brainwashing techniques. It also ruled that the members of the Unification Church who recruited Molko had lied by denying any religious connection to their recruitment pitch and, when they gained his trust, brainwashed him. In the majority opinion written by Justice Mosk regarding tactics religious groups use to attract followers, the Court found that any burden on the free exercise of religion was outweighed by the state's interest in protecting against "fraudulent induction of unconsenting individuals into an atmosphere of coercive persuasion" because many people exposed to brainwashing techniques without their knowledge or consent would develop serious and sometimes irreversible physical and psychiatric disorders up to and including schizophrenia, self-mutilation, and suicide. In Mosk's

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71 Braitman and Uelmen, *Justice Stanley Mosk*, 166–67.

72 Braitman and Uelmen, *Justice Stanley Mosk*, 167.

opinion, the Court also held that the plaintiffs, when church members, "were incapable of exercising their own will."[73]

Law Professor R. Kent Greenwalt argued against the California Supreme Court's decision, saying that the religious individuals often subject themselves to conditions that may be psychologically harmful, that the defendants did know the identity of the religious group that they were joining, and that courts might rule differently if a more established religion (he uses the Catholic Church as an example) were involved.[74]

As to the development of his own career, in the mid-1970s Stanley Mosk was second in seniority on the Supreme Court and had long hoped that when there would be a new Democratic governor, he would be appointed Chief Justice. But when Jerry Brown was elected governor in 1974, he first appointed his trusted legal adviser Rose Elizabeth Bird to the post of state Secretary of Agriculture, and then in February 1977 Brown appointed Bird Chief Justice of the Supreme Court. This was a big disappointment to Mosk, who was very bitter about it and would never be close to Chief Justice Bird. In a 1998 oral history interview, Mosk said that while Bird was a bright and articulate lawyer, she was a "terrible administrator" (one of the Chief Justice's major responsibilities). Mosk also claimed Bird required associate justices to make appointments to talk to her for any reason,[75] which no other Chief Justice had ever done.

In the mid-1980s, a political crisis arose because the justices of the Supreme Court were deemed to be too liberal, allegedly because they were declining to issue or enforce the death penalty. This was at a time when California politics was moving into a more conservative phase. In 1986, Justice Mosk survived the recall election that swept Chief Justice Rose Bird and two other liberal justices, Joseph Grodin and Cruz Reynoso, from the Court. The justices who took their place cleared the way for the first conservative majority on the California Supreme Court in thirty years. At the time of his death in 2001, Justice Mosk was the only liberal on the seven-member Supreme Court.

In dedicating the 1999 volume of the *Albany Law Review* State Constitutional Commentary to Justice Mosk, the editor of the volume recited the pantheon of great state court judges: Tobriner, Traynor, Cardozo, Fuld, Holmes, Shaw, Cooley, Vanderbilt, and then concluded: "No one currently sitting on one

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[73] *Molko v. Holy Spirit Assn.*, 46 Cal.3d 1092 (1988).

[74] R. Kent Greenwalt, "Coercion and Religious Exercises," in *Challenges to Religious Liberty in the Twenty-First Century*, ed. Gerard V. Bradley (Cambridge University Press, 2012), 54–57.

[75] Hon. Stanley Mosk, *Oral History Interview* (Berkeley: California State Archives Regional Oral History Office, 1998), 54–55.

of America's state benches is more deserving and more likely to be named alongside them than Stanley Mosk."[76]

More than any other California Jewish Supreme Court Justice, Stanley Mosk was a leader of the Jewish community—in his case the Los Angeles Jewish community. In the months after the end of World War II, Mosk began to immerse himself in the affairs of the Jewish community. Mosk spoke at an emergency conference promoting direct relief to Jews in Poland on behalf of the American Federation for Polish Jews Committee. His never-ending round of Jewish appearances and speeches led to leadership positions in the Anti-Defamation League of B'nai B'rith and the Jewish Federation, and to his heading up fundraising drives on behalf of war-torn Yugoslavia, European Jewry, and Israel. Mosk served as a toastmaster to raise funds for several Jewish causes, especially notably as chair of the American Jewish Congress's salute to Free France at the Los Angeles Philharmonic, attended by more than two thousand people.[77] During the late 1940s and 1950s, Mosk became "a vocal and visible force in Los Angeles Jewish circles," and from 1951 to 1957 served as president of the Vista Del Mar Child-Care Service, formerly the Jewish Orphans' Home of Southern California.[78]

From 1956 to 1957, Mosk was also Chairman of the Board of the Los Angeles Jewish Federation, on which he continued to play a leadership role throughout much of his career. The Jewish Federation of Greater Los Angeles was and still is the largest Jewish nonprofit in the Los Angeles area. It identifies and funds social service, educational, and humanitarian needs locally, in Israel, and around the world. Through a network of agencies and programs, the Federation helps alleviate Jewish poverty, provides emergency relief, and supports the greater Los Angeles community. A list of Los Angeles's most influential Jewish professionals include many with whom Stanley Mosk was allied over his lifetime, most of them recognizing Stanley Mosk as the titular head of the diverse Jewish community of Los Angeles.[79]

In addition to his non-Court activities, as his biographers have noted, Mosk had "an almost obsessive preoccupation with sports,"[80] especially baseball. Indeed, more than any other Supreme Court Justice in California history, Stanley Mosk was a lifelong avid baseball fan. As Peter Belton, the senior attorney on Justice Mosk's staff, has noted, "at 5:04 p.m., on October 17,

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[76] Vincent Martin Bonventre, "Editor's Foreword," *Albany Law Review* 62 (1999).

[77] Braitman and Uelman, *Justice Stanley Mosk*, 65.

[78] Braitman and Uelman, *Justice Stanley Mosk*, 76–77.

[79] Braitman and Uelman, *Justice Stanley Mosk*, 78.

[80] Braitman and Uelman, *Justice Stanley Mosk*, 18–19.

1989, when the Loma Prieta earthquake struck, Justice Mosk was sitting in the stands at Candlestick Park waiting for the third game of the 1989 World Series to begin, and he was disappointed when the game was called for such a minor inconvenience as 7.1 on the Richter scale."[81] Also, one little known fact about Justice Mosk's career is that he once thought seriously about applying for the job of commissioner of baseball. Unfortunately for baseball, but fortunately for the Supreme Court, he decided not to apply. There was precedent, of course, in the commanding figure of Judge Kenesaw Mountain Landis, who after seventeen years as a federal district judge, served for twenty-three years as the first commissioner of baseball.[82]

Justice Mosk's son, Richard, followed in his father's footsteps, pursuing a legal career. He graduated from Stanford University, where he earned three athletic letters, and then Harvard Law School. He served as a member of the staff of the Warren Commission[83] and as a law clerk to his father's former colleague, California Supreme Court Justice Mathew Tobriner.

While a litigation partner in the Los Angeles law firm of Mitchell, Silberberg and Knupp, Richard Mosk played a prominent role in civic and judicial life. He was a United States appointed judge on the Iran–United States Claims Tribunal when it was formed in 1981, a chair of the Los Angeles County Commission on Judicial Procedures, a member of the board of directors of the Los Angeles County Law Library, of the California Museum of Science and Industry, and of the Christopher Commission that investigated the Los Angeles Police Department in 1991. In October 2001, Richard Mosk was appointed an associate justice of the California Courts of Appeal, Second District, by California Governor Gray Davis, where he served until his death in 2016.[84]

Joseph Grodin (1930–2025)

Joseph Grodin, the sixth Jewish justice to serve on the California Supreme Court, was born in Oakland, California in 1930. His father had immigrated from Lithuania, where his own father and grandfather had been rabbis.[85] Grodin received his B.A. degree with honors from the University of California at Berkeley in 1951 and his J.D. degree cum laude from Yale Law School in 1954. While a

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[81] Peter Belton, "Honoring the Record Service of Justice Stanley Mosk, California Supreme Court," *Albany Law Review* 65, no. 4 (2002): 28.

[82] Belton, "Honoring the Record Service of Justice Stanley Mosk," 28.

[83] Richard M. Mosk, "Truth Was Our Only Client," *Stanford Magazine*, November–December 2013.

[84] "Richard M. Mosk Dies at 76: California Court of Appeals Justice and Warren Commission Staffer," *Los Angeles Times*, April 20, 2016.

[85] "Joseph R. Grodin, Professor of Law and California Supreme Court Justice," *Oral History Interview*, conducted by Leah McGarrigle (Berkeley: Regional Oral History Office, The Bancroft Library, University of California, 2004), p. 1.

senior in high school, Grodin had become involved in a student group called the Western States Jewish Youth Conference. As part of its educational activities, after graduation he attended a six-week summer program in Jewish history and leadership at the Brandeis Camp in Southern California. As Grodin would later recall, "Israel had just recently become a state, and Brandeis Camp had a pro-Israel, pro-Zionist flavor to it," with which he felt especially comfortable; as he wrote, "being identified with Israel was a great thing."[86] While on the Supreme Court, and later in his career, Grodin (like Stanley Mosk) was a Jewish leader publicly committed to the State of Israel.

After graduating from Berkeley, Grodin had intended to enroll in a Ph.D. program in political economy at Harvard, and after that to go to law school. But his parents suggested that he first meet with a family friend, Monroe Freedman, who was a prominent attorney in San Francisco. When Freedman heard that Grodin was interested in labor law and history, he suggested that Grodin meet with his good friend Matthew Tobriner, another eminent San Francisco attorney who specialized in labor law. At their meeting, as Grodin would later recall, Tobriner advised him that instead of going to graduate school at Harvard, "you ought to go to law school and you ought to study labor law. Then you ought to come here after your first year and we'll put you to work" in our firm.[87] In a decision that would change his life, Grodin followed Tobriner's advice, applied to and entered Yale Law School. He spent his summers as an intern in San Francisco in the Tobriner law firm and upon graduation from Yale Law, began practicing law in the firm on a full-time basis. Until Tobriner's death in 1982, he remained Grodin's mentor and close friend throughout Grodin's own distinguished legal and judicial career that would culminate in Grodin's appointment to the California Supreme Court, shortly before Tobriner's own retirement from it.

After graduating from Yale Law School, Grodin traveled to England on a Fulbright grant, where he earned a Ph.D. in labor law and labor relations from the London School of Economics. Returning to San Francisco, he practiced law full-time in the Tobriner firm, specializing in labor law and working pro bono in a variety of civil rights and civil liberties cases. His prominent clients included labor union boss David Dubinsky.

Between 1972 and 1979, Grodin taught labor law part-time at the University of California, Hastings College of Law, and served as a member of the California Agricultural Labor Relations Board. The Board had been

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[86] "Joseph R. Grodin," *Oral History Interview*, p. 17.

[87] "Joseph R. Grodin," *Oral History Interview*, p. 19.

created in 1975 at the urging of California Secretary of Agriculture Rose Bird, who would subsequently serve as Chief Justice of the California Supreme Court, to help farm workers unionize and bargain with California growers. Grodin was described as the intellectual leader of the Board, which was the first of its kind in the nation and was tasked with resolving high-profile conflicts between agricultural growers and workers.

Grodin had been appointed to the agricultural board by California Governor Jerry Brown, also a Yale Law School graduate who had been a law clerk for Justice Tobriner, who had strongly recommended Grodin's appointment. In July 1979, Brown appointed Grodin to the California Court of Appeals, and in 1981 Brown elevated Grodin to presiding over the court. In 1981, while serving as presiding justice, Grodin authored a landmark judicial decision in the case of *Pugh v. See's Candy*.[88]

The defendant employer in this case, See's Candies, Inc., was in the business of manufacturing fresh candy at its plants in Los Angeles and South San Francisco and marketing the candy through its own retail outlets. After thirty-two years of employment with See's, in which he worked his way up the corporate ladder from dishwasher to vice-president in charge of production and member of the company's board of directors, Wayne Pugh was fired without any stated reason.

There seemed to be no justification for this action. In 1971, when Pugh had been promoted to vice-president in charge of production and placed upon the board of directors of See's Northern California subsidiary, the promotions had come "in recognition of his accomplishments." In 1972, he had received a gold watch from See's "in appreciation of 31 years of loyal service." Yet in June 1973, without any prior warning, Pugh received a letter from Charles Huggins, the president of See's, notifying Pugh that "I have decided that your services are no longer required by See's Candies." The letter contained no reason for Pugh's firing, no statement of "good cause." Pugh's termination was subsequently announced to the candy manufacturing industry in a letter which, once again, stated no reason. During the entire period of his employment, there had been no formal or written criticism of Pugh's work. No complaints were ever raised at the company's annual meetings, and he was never denied a raise or bonus. He received no notice that there was a problem that needed correction, nor any warning that any disciplinary action was being contemplated.

As a result of all this, Wayne Pugh sued See's, claiming that his job of thirty-two years had been terminated without good cause. Grodin's landmark

88 *Pugh v. See's Candies*, 116 Cal. App. 3d 311 (1981).

decision in support of the plaintiff in *Pugh v. See's Candies, Inc.*, which was Grodin's best-known and most influential judicial opinion, established the legal principal central to labor law that a contract of employment may contain an implied-in-fact promise that the employee could be terminated only for good cause.[89]

In December 1982, Brown appointed Grodin to the California Supreme Court, where Grodin served together with Chief Justice Rose Bird as one of the most vocal members of the Court's liberal majority. With the Grodin appointment, Democratic Governor Jerry Brown had appointed all but two of the High Court's justices, a record for any governor in recent California history. Yet Grodin's tenure on the Supreme Court was one of the shortest of any Jewish justice on the Court, because during those years liberals in California politics were becoming increasingly unpopular.

A mechanism existed for dissatisfied voters to remove those members of the Court with whom they disagreed. Under the state's procedures, the Governor appointed justices but the Governor's was not the only opinion that counted. A California Supreme Court Justice had to be confirmed by the electorate in the first election for governor after their appointment. This procedure ultimately became Justice Grodin's and others' downfall. The death penalty in particular became a key issue of disagreement among the electorate, though there were others. Grodin and others were basically voted out of office for being too liberal.

While on the Court, Grodin compiled a solid ultra-liberal record, voting mostly with Chief Justice Rose Bird. He, together with Justice Bird, was a vocal and consistent opponent of the death penalty, despite the fact the death penalty was increasingly popular amongst California voters. When the Court abolished the death penalty in the case of *People v. Anderson* (1972), the electorate restored it with the popular California Proposition 17 (1972) and expanded it with California Proposition 7 (1978). While the court upheld Proposition 17, Chief Justice Rose Bird and Justice Tobriner dissented.[90]

On various death penalty cases, Justice Grodin followed his mentor Justice Tobriner, in stringently opposing the death penalty. Chief Justice Bird, a former public defender, voted to reverse every single one of the more than sixty death penalty cases she heard. In these decisions, she was usually joined by Justice Grodin and Justice Cruz Reynoso. In 1982, she also dissented from allowing a victims' rights amendment to the state constitution, Proposition 8, to even

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89 Joseph Grodin judicial opinion in case of *Pugh v. See's Candies*, 116 Cal. App. 3d 311 (1981), 1–5.

90 *People v. Frierson*, 599 P.2d 587, 25 Cal.3d 142, 158 Cal. Rptr. 281 (1979).

appear on the ballot.[91] After Proposition 8 passed, Justice Grodin dissented along with Chief Justice Bird when a bare majority of the Supreme Court upheld the proposition.[92] Grodin joined Chief Justice Bird and the Court's liberal majority when it granted the American Federation of Labor's 1984 original petition to block a balanced budget amendment proposition from appearing on the ballot.[93]

From the time of Grodin's appointment to the bench in December 1982 until 1986, the liberal majority on the Court, which always included Chief Justice Bird, Justice Grodin, and Justice Cruz Reynoso, was frequently attacked for its various judicial rulings in general as being "partisan" and "overly political."[94]

As we have seen, California Supreme Court justices must be confirmed by the electorate at the first election for governor after their appointment. No incumbent governor had been defeated since 1926.[95] Nonetheless, Chief Justice Rose Bird was almost defeated in the 1978 general election when only 51.7 percent of voters supported her.

In 1982, newly elected Republican Governor George Deukmejian, who as Attorney General had voted to approve Joseph Grodin's appointment to both the state Appeals Court and Supreme Court, supported a Republican movement to remove Bird, Grodin, and the other liberal justices from the Court, based primarily on their judicial rulings regarding redistricting, tax reform, ballot propositions, and especially the death penalty. Capitalizing on moral panic over California's crack epidemic, and the California electorate's intense dislike of California Governor Jerry Brown, Governor Deukmejian began a campaign to recall "Jerry's Justices," including Bird and Grodin, by labeling them soft on crime, and overly political in their liberal judicial rulings.

At the same time, California prosecutors joined Deukmejian's campaign, publicizing the fact that there had been zero executions since the electorate restored the death penalty in 1978, and published a white paper attacking the liberal justices appointed by Jerry Brown as biased in favor of criminal defendants.

Grodin, who had served as California treasurer of Eugene McCarthy's presidential campaign in 1968, was considered, together with Chief Justice

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[91] *Brosnahan v. Brown*, 651 P.2d 274, 32 Cal.3d 236, 186 Cal. Rptr. 30 (1982).

[92] *People v. Castro*, 696 P.2d 111, 38 Cal.3d 301, 211 Cal. Rptr. 719 (1985).

[93] *American Federation of Labor v. Eu*, 686 P.2d 609, 36 Cal.3d 687, 206 Cal. Rptr. 89 (1984).

[94] Bill Blum, "Toward a Radical Middle, Has a Great Court Become Mediocre?," *ABA Journal*, January 1991, p. 52.

[95] Gerald F. Uelmen, *Symposium: California Judicial Retention Elections, Santa Clara Law Review* 28 (1988): 333.

Rose Bird, one of the two most liberal justices on the California Court. Republican opponents outspent him. He also became hugely unpopular because of a campaign of negative television attack ads highlighting the victims in murder sentences he had overturned. Grodin was thus removed by the California electorate at his first retention election in 1986.[96] Grodin, who needed 50 percent of the vote to remain on the Court, was supported by only 43.4 percent of the voters, while Justice Cruz Reynozo was supported by 39.8 percent, and Chief Justice Rose Bird by 33.8 percent. Governor Deukmejian, who had won reelection in a surprise 61 percent to 37 percent landslide, was now able to appoint a conservative majority of the court.

After his defeat, Grodin returned to being a law professor at UC Hastings, where he continued to teach until his retirement in 2005. At the same time, he wrote several scholarly books on labor law as well as a memoir of his four years as a State Supreme Court Justice. He also wrote extensively about the need to abolish judicial retention elections. A hiking enthusiast, he coauthored with his daughter a book about hiking in the California Sierra Mountains.

Having had one of the shortest tenures of any of the twentieth-century Jewish justices on the California Supreme Court, Grodin's most enduring legacy was as a law professor and a legal scholar specializing in labor law.

Joshua P. Groban (1973–)

The most recent Jewish California Supreme Court Justice is Joshua P. Groban, who was born in 1973 and appointed to the California Supreme Court by Governor Jerry Brown in November 2018. He grew up in San Diego, where his father was a physician in private practice and later at the Veterans Administration and the University of California San Diego hospital. His father had grown up in the Jewish community of Bensonhurst, Brooklyn, where he learned to speak both Yiddish and English. According to Justice Groban, when a couple of times a year an elderly patient was admitted to the hospital in San Diego who felt more comfortable speaking Yiddish than English, the elder Dr. Groban would be called on to translate.[97]

Groban's mother, who was a member of the Del Mar City Council, also had a job as a social worker for Jewish Family Services of the San Diego Jewish Federation. Groban's parents were members of San Diego's Temple Beth Am, where Groban became a Bar Mitzvah.

[96] Bob Gelko, "New Era for High Court Following Defeat of Three Justices," *Associated Press*, November 5, 1986.

[97] Telephone Interview with California Supreme Court Justice Joshua Groban, September 24, 2024.

Groban received his B.A. degree with honors and distinction from Stanford University in 1995, and his law degree from Harvard Law School in 1998, where he graduated cum laude. In his time as a student at Harvard, Groban took an advanced seminar with Professor Laurence Tribe, with whom he wrote his senior thesis on the First Amendment implications of compelled speech as a form of punishment in the criminal justice system.[98] Groban considered Tribe to be his law school mentor.

Groban began his legal career as a law clerk to U.S. District Judge William C. Conner in the Southern District of New York from 1998 to 1999. He was in private practice with Paul, Weiss, Rifkind, Wharton, and Garrison in New York City from 1999 to 2005, and with Munger, Tolles and Olson in Los Angeles from 2005 to 2010. Groban served as counsel to Brown's campaign for governor of California in the 2010 California gubernatorial election. Upon Brown's victory, Groban served in his administration as a senior adviser to the governor, advising him on state judicial appointments, litigation, and state legislative issues.[99] Groban advised Governor Brown on the appointment of over six hundred judges, and received several awards from bar groups for his work on judicial appointments. As Governor Brown's judicial appointments adviser, Groban helped the Brown administration strongly increase the number of minority and LGBTQ judges in the California courts. As Brown's senior adviser, Groban also served as an informal liaison to the Jewish community in California, so he had opportunities to meet with Jewish leaders throughout the state, and the Israeli consuls general in Los Angeles and San Francisco.[100] During this time, Groban also taught State Appellate Practice at the UCLA School of Law. When Groban was named by Governor Brown to the Supreme Court in December 2018, the three-member state Commission on Judicial Appointments unanimously confirmed Groban's appointment after a short hearing in which there was no opposition.

One of Justice Groban's best known and most cited judicial opinions was in *Boermeester v. Ainsley Carry*, in which the California Supreme Court sided with the University of Southern California in a major student misconduct case. The Supreme Court ruled that private California colleges, like USC, do not have to give students accused of sexual misconduct or intimate partner violence the opportunity to cross-examine their accusers during live hearings. The case centered on a football player who was expelled from USC in 2017 after

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98 Telephone Interview with California Supreme Court Justice Joshua Groban, September 24, 2024.

99 Dan Moran, "With Supreme Court Pic, Brown and Dems Eye Another Kind of Majority," *Santa Cruz Sentinel*, November 18, 2018.

100 Telephone Interview with California Supreme Court Joshua Groban, September 24, 2024.

officials determined that he had violated the campus policy against intimate partner violence. Groban's judicial opinion reversed a 2020 California Court of Appeals court decision holding that Boermeester was wrongfully denied the opportunity for a live hearing to cross-examine his accuser. Accused students, wrote Groban, have "no absolute right to a live hearing" where they can cross-examine their accusers. Justice Groban wrote in his opinion that colleges must provide accused students with meaningful opportunities to respond to allegations before they are disciplined. However, he wrote, they also need to balance those obligations with ensuring that the process does not retraumatize accusers or dissuade victims from reporting sexual misconduct or intimate partner violence.[101]

"It is therefore appropriate," wrote Groban, "to give private universities broad discretion in formulating their disciplinary processes to ensure that they not only provide the accused student a meaningful opportunity to be heard but also embolden victims to report incidents of sexual misconduct or intimate partner violence."[102]

Another notable case, according to Justice Groban, was *People v. Brown*,[103] in which the Court held that a statute permitting conviction for "murder by poison" could not be applied to a young mother whose baby had died after drinking breast milk tainted by drugs that the mother had ingested. The Court held that "to prove first degree murder by means of poison, the prosecution must show the defendant deliberately gave the victim poison with the intent to kill the victim or inflict injury likely to cause death." With Groban's opinion, the Supreme Court reversed the defendant's conviction of the first-degree murder of her newborn daughter by poison. Thus, a young woman was spared from spending her life in prison.[104]

In his first five years on the Supreme Court, Justice Groban wrote twelve majority opinions in civil cases. Justice Groban has written only one dissent in a civil case—a workers' compensation case in 2020.

Justice Groban also wrote twenty-one majority opinions in criminal cases, seven of which were death penalty cases.[105]

Groban's appointment in 2018 gave the seven-member Supreme Court a

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[101] Natalie Schwartz, "California's Top Court Sides with USC in Student Misconduct Case," *Los Angeles Times*, August 2, 2023.

[102] Schwartz, "California's Top Court Sides with USC."

[103] *People v. Brown*, 14 Cal.5th 530 (2023).

[104] Telephone Interview with California Supreme Court Joshua Groban, September 24, 2024.

[105] Kirk Jenkins, "Reviewing the Tenure of Justice Joshua Groban," *California Supreme Court Review*, March 5, 2022, p. 7.G.

majority of Democratic appointees for the first time in decades. And as was the case with Governor Jerry Brown's other three appointees on the state Supreme Court, Groban had no previous judicial experience before his appointment.[106]

Groban's appointment to the Court was widely praised by judges and legal scholars alike. California Court of Appeals Justice Arthur Gilbert said Groban "will bring scholarship, practicality and respect for the rule of law to his decisions." Gilbert also said the appointment reflected "the diversity that makes our Supreme Court reflective of the society it serves," noting that the last Jewish justice was Stanley Mosk, who died in 2001, and that Brown's other appointments included the first Asian American justice, and the second Latino and woman on the Court.[107]

After his appointment, Groban authored many opinions in which the Court vindicated the rights of the disadvantaged. In addition to the decisions discussed above, he (1) authored an opinion upholding a law prohibiting minors under the age of sixteen from being transferred to adult court (*People v. Cooper*, 14 Cal.5th 735 (2023)); (2) wrote an opinion allowing criminal defendants to be resentenced in cases where the trial court did not clearly indicate at the time of the original sentencing that it understood that the court was permitted to sentence the defendant to a lower sentence (*People v. Salazar*, 15 Cal.5th 416 (2023)); and (3) authored an opinion holding that a youth who had fled El Salvador without his parents to escape gang violence was entitled to have the lower court make certain findings that would assist him in seeking lawful permanent residence in the United States (*Guardianship of Saul H.*, 13 Cal.5th 827 (2022)).

Finally, in July 2020, Groban joined his colleagues in lowering the passing score for the California bar exam, a victory for law school deans who had long hoped the change would raise the number of Black and Latino people practicing law.[108] Thus Groban, a member of a once marginalized and persecuted group, was helping open the door to other marginalized groups to enter the legal profession.

Bernard E. Witkin (1904–1995)

In surveying those Jews who have served on the California Supreme Court throughout its history, there is one figure who was not actually a justice or indeed a judge of any kind but who made such an outstanding contribution to

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[106] Maura Dolan, "Newest Supreme Court Nominee Is Confirmed," *Los Angeles Times*, December 22, 2018.

[107] Dolan, "Newest Supreme Court Nominee Is Confirmed."

[108] Maura Dolan, "Easing Path to Pass Bar May Aid Diversity; State Supreme Court's Action on Exam Could Produce More Black and Latino Lawyers," *Los Angeles Times*, July 26, 2020.

the workings of the Court and to California law in general that he deserves to be mentioned.

Bernard E. Witkin, a California legal scholar who was considered to be the preeminent authority on California law, and the world's bestselling author of nonfiction legal books,[109] is best remembered as the author of the monumental 32-volume law treatise, *Summary of California Law*,[110] which came to be known as "Witkin," condensing and explaining all the legal rules of the state. This work, and others which he authored, came to have an immense and enduring impact on California law. The main California State Law Library in Sacramento is named after Witkin, as is the Alameda County Law Library. As Witkin's biographer has noted, although "Witkin was never a judge, never held elected office, was never a professor, and except for a short time after graduation, never practiced law," he "arguably had the greatest positive influence on law in California of any person."[111]

Witkin was born in Mt. Holyoke, Massachusetts, and moved with his parents Albert and Paulina, who were Russian-Jewish immigrants from Mogilev, Belarus, to San Francisco in 1909.[112] After receiving his B.A. degree from UC Berkeley, Witkin attended Berkeley's Boalt Hall Law School, graduating in 1928. While at law school, Witkin created an outline of notes for all his courses to help him study for the California bar exam and began selling carbon copies of his outlines to fellow law students.

After graduating from law school, Witkin worked briefly for a law firm in San Francisco, then as a law clerk for the California Supreme Court and began teaching a bar review class while continuing to develop and sell his course outlines.[113] In 1936, Witkin developed his outlines into a lengthy hardcover book arranged by subject matter. The current version, the twelfth edition, fills thirteen volumes.[114] Witkin was also the author of three other major legal treatises, *California Procedure*, *California Evidence*, and together with 2nd District Court of Appeal Justice Norman Epstein, *California Criminal Law*.

Another of Witkin's notable books is his three-volume set *California Criminal Procedure.* As Herbert L. Packer noted in the *Stanford Law Review*, Witkin "is to be

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[109] Myrna Oliver, "Bernard Witkin, Expert on California Law Dies," *Los Angeles Times*, December 28, 1995.

[110] John R. Wierzbicki, "A Lawyer by Accident: Bernie Witkin's Early Life and Career," *California Supreme Court Historical Society Review* (Fall/Winter 2020), p. 27.

[111] Wierzbicki, "A Lawyer by Accident."

[112] Wierzbicki, "A Lawyer by Accident," p. 29; and John R. Wierzbicki, Email to David G. Dalin, October 12, 2024.

[113] Harriet Chiang, "Obituary—Bernard E. Witkin," *San Francisco Gate*, January 12, 1996; and Oliver, "Bernard Witkin."

[114] Email from retired Justice George Nicholson, editor-in-chief of *California Legal History*, to the author, March 9, 2024.

particularly commended for his painstaking coverage of important substantive areas outside the California Penal Code, notably motor vehicle offenses and narcotics offenses. These crimes bulk large in the work product of the criminal process; they deserve, but do not often get, detailed treatment in books on the criminal law."[115]

Overall, it is said that Witkin's books "are the mainstay of law libraries throughout California and are cited in nearly every legal opinion by a California court."[116] Witkin's treatises on California law have been cited by California courts in more than fourteen thousand published decisions.[117] By the time of Witkin's death, at the age of ninety-one in 1995, any California law office of significant size had a Witkin library, as did all public law libraries in the state.

What is the background of this remarkable figure? During the 1920s, Witkin was active in political reform politics, publicly campaigning for the progressive candidate Robert LaFollette in the 1924 presidential election, and was also an advocate of legal reform, by playing an active role in the campaign to establish a municipal court in San Francisco. He, together with California Supreme Court Justice Mathew Tobriner, who Witkin had known when both had been university debate opponents, Witkin at UC Berkeley and Tobriner at Stanford University, and future California Governor Edmund G. Brown, were members of the campaign's speaker's bureau.[118]

Witkin was never appointed to a judgeship even though he was considered for one on several occasions. Newspaper accounts portrayed him as a potential nominee for a judgeship, as did the *Independent Journal* of San Rafael, after the death of Justice Jesse W. Carter in 1959.[119]

Though not himself a Supreme Court justice, Witkin effectively did all the writing for one. Between 1930 and 1939, Witkin, while serving as a law clerk to California Supreme Court Justice William Langdon, wrote all of Justice Langdon's judicial opinions and legal memoranda for the Court. This was not unusual because in that era law clerks wrote most of the judicial opinions for the justices they served.

In 1940, Witkin became the California Reporter of Decisions. In that role, Witkin standardized the rules of appellate practice and wrote the California Style Manual. In 1977, Witkin published his Manual on Appellate Court

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[115] Herbert L. Packer, Review of Bernard E. Witkin, *California Criminal Law*, three-volume set (Bender-Moss Co., 1963. vii + 868 pages), in *Stanford Law Review*, July 1964, p. 1143.

[116] Packer, Review of *California Criminal Law*.

[117] Wierzbicki, "A Lawyer by Accident," p. 27.

[118] Wierzbicki, "A Lawyer by Accident," p. 31.

[119] Wierzbicki, "A Lawyer by Accident," p. 31.

Opinions, which is still used by all of California's 105 appellate and 7 supreme court justices.

Witkin also served as an influential member of the California Judicial Council for more than thirty years. When he died in 1995, William Vickrey, administrative director of the California courts, called Witkin "the heart, mind and soul of the California justice system."[120] After Witkin's death, the California Supreme Court held a memorial for him—the first memorial ever for someone who was never a justice or staff member of the Court.[121]

Conclusion

As Jews, the historical experience of having been part of a marginalized, persecuted group was often expressed in service on the California Supreme Court by being much to the liberal side of the spectrum, helping what were seen as disadvantaged groups. This can very much be seen in the careers of Marcus C. Sloss, Mathew O. Tobriner, Stanley Mosk, Joseph Grodin (who effectively lost his seat on the California Supreme Court for being perceived as too liberal), and Joshua P. Groban.

As we have seen, Jews served on the highest levels of the California legal system from the Gold Rush days of the 1850s to the present day. Heydenfeldt and Lyons were among the early Jewish settlers lured to California by the Gold Rush. Marcus Sloss was the youngest justice ever appointed to the Court and in a distinguished career wrote several opinions that became landmarks in California labor and water rights law. Mathew O. Tobriner was ranked as one of the greatest all-time members of the Court and served as a mentor to many distinguished legal figures who came after him. The Hastings College of Law holds an annual lecture named in Tobriner's honor and the Legal Aid Society, which he once headed, gives an annual "Mathew O. Tobriner Public Service Award."

Stanley Mosk, who served for thirty-seven years, was the longest-serving justice in the history of the California Supreme Court. The Stanley Mosk Courthouse in Los Angeles houses the County Superior Court, and the Stanley Mosk Library and Courts Building can be found on the Capitol Mall in Sacramento.

Joseph Grodin made a name for himself in labor law before losing his seat in a retention election for being seen as too liberal. Joshua P. Groban has taken action to increase racial and ethnic diversity on the Court and in the state's law schools.

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[120] Oliver, "Bernard Witkin."

[121] Wierzbicki, "A Lawyer by Accident," p. 27.

It can thus be seen that the contribution of Jews to the California Supreme Court has been substantial and even, in some cases, transformative.

I would like to express my deep appreciation to each of the following individuals, whose sharing of their thoughts and general encouragements have helped make this a better article: Justice George W. Nicholson, Justice Joshua P. Groban, Laurence H. Tribe, Jonathan D. Sarna, John F. Rothmann, John R. Wierzbicki, and especially Miriam Sanua Dalin.

Jewish Justices of the California Supreme Court

(All photographs courtesy of the California Judicial Center Library, Special Collections & Archives)

Chief Justice Henry Lyons, 1849–1852

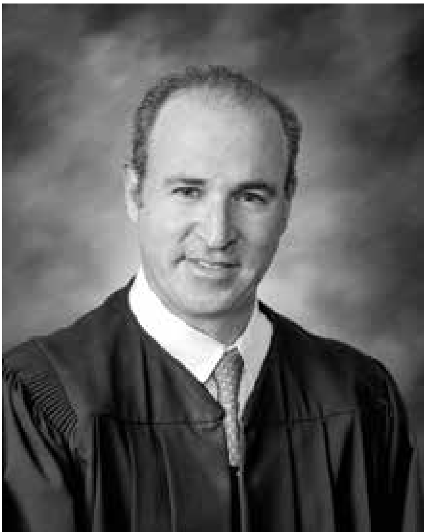
Solomon Heydenfeldt, 1852–1857

Marcus C. Sloss, 1906–1919

Mathew O. Tobriner, 1962–1982

Stanley Mosk, 1964–2001

Joseph Grodin, 1982–1986



Joshua P. Groban, 2018–present

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TIMOTHY SANDEFUR*

The Declaration of Independence in California:

A Tortured History

INTRODUCTION

Abraham Lincoln once said that the basic principle of the Declaration of Independence—equal liberty for all, regardless of their racial ancestry—is "a standard maxim" which should be "constantly looked to, constantly labored for, and even though never perfectly attained, constantly approximated, and thereby constantly spreading and deepening its influence, and augmenting the happiness and value of life to all people of all colors everywhere."[1] But California's experience with the Declaration's principles has been strained. While early Californians prized its idea of self-government, they failed to acknowledge the underlying principle of equality, and in fact engaged in shocking degrees of official bigotry well into the twentieth century. The "spreading and deepening" of the Declaration's influence in the Golden State has been slow, indeed. Not until the 1990s would Californians proclaim in their fundamental law that government discrimination based on race was intolerable—and even after that, the state has persisted in its discriminatory conduct. This article gives an overview of the Golden State's long-delayed reckoning with the principle that "all men are created equal."

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[1] Abraham Lincoln, Speech at Springfield, Ill., June 26, 1857, *in* 2 Collected Works of Abraham Lincoln 406 (Roy B. Basler ed., 1953).

I
THE DECLARATION IN PRE-STATEHOOD CALIFORNIA

A. The Declaration and Its Mores

When in 1776 the Second Continental Congress proclaimed that the American colonies were no longer part of Britain but were free and independent states, North America's West Coast was still a distant frontier to most Europeans. In what would become San Francisco, a Spanish missionary named José Joaquin Moraga had just built a modest structure that would eventually become Mission Dolores, and further north, Russian traders were staking out outposts for fur trading. Governed by Spain until 1821, and then by Mexico until its war with the United States in 1848, California would have no connection with the American Revolution's legacy until the middle of the nineteenth century. Certainly, the Spanish pioneers of early California had little concern with what was happening on the far side of the continent.

Nor did the Declaration make much impression on the Spanish-speaking world at the time. As Professor Joaquim Oltra notes, it was little known and rarely translated into Spanish until the middle of the nineteenth century, despite the fact that Spain contributed toward the colonial rebellion as part of the French-American alliance.[2] Part of this, Oltra argues, is due to the vast philosophical gulf between the politics of the Catholic empire and the Protestant classical liberalism of the American revolutionaries. As late as 1865, a translator in Madrid who sought to render the Declaration into Spanish was stymied by the term "self-government," and left it in English, while adding an explanatory footnote.[3] By that time, California had already gone through the tremendous social and political upheavals of the Gold Rush and statehood.

That's not to say the Declaration's principles were unknown in Spanish America. On the contrary, the principles to which the Declaration refers, especially those regarding the equal rights of mankind, are timeless, and they made their appearance in Spain well over a century before American independence. In the 1533 bull *Sublimas Deus,* Pope Paul III pronounced that "Indians are truly men and . . . are by no means to be deprived of their liberty or the possession of their property, even though they are outside the faith of Jesus Christ."[4] This declaration, unfortunately, did not resolve the question of whether the Spanish empire could enslave the native population of the

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[2] Joaquim Oltra, *Jefferson's Declaration of Independence in the Spanish Political Tradition*, 85 J. Amer. Hist. 1370 (1999).

[3] Antonio Angulo Heredia, Estudios sobre Los Estados-Unidos de América 20 (1865).

[4] Quoted in Lewis Hanke, All Mankind is One: A Study of the Disputation between Bartolomé de las Casas and Juan Ginés de Sepúlveda in 1550 on the Intellectual and Religious Capacity of the American Indians 21 (1974).

New World. Thus, two decades later, the theologian Juan Ginés de Sepúlveda argued that indigenous Americans were not fully human—they were more like monkeys than men, he said—and therefore were naturally destined for slavery. To this, the monk Bartolomé de las Casas replied with an impassioned argument that they were "not . . . like brute animals," but "clever and most capable of reasoning," and therefore should be treated with decency.[5] "This argument by Las Casas," writes Professor Larry Arnhart, "can be seen today as one of the first statements of the modern conception of human rights—that all human beings have natural rights by virtue of their universal human nature."[6] But the debate appears to have ended without clear resolution, and it did little to prevent the Spanish from enslaving Native Americans.[7]

One scholar who would have had a difficult time imagining the Declaration's principles spreading to California was Alexis de Tocqueville. In *Democracy in America*, he argued that South America—by which he meant political societies originating with Spanish settlement and reflecting Spanish colonial *mores*—"cannot maintain a democracy."[8] That was not because of Catholicism (he was himself Catholic), but because of political culture. "In order to profit by past experience," he wrote, "a democracy must already have reached a certain degree of civilization and enlightenment"—which he believed Spanish America had not attained.[9] For that reason, "the new nations of South America [are] convulsed by one revolution after another," so that "society [there] is floundering at the bottom of an abyss from which its own efforts cannot drag it. . . . The people dwelling in this beautiful half continent seem obdurately determined to tear out each others' guts. . . . I am tempted to believe that for them despotism would be a blessing."[10]

That was an extreme statement, but consistent with Tocqueville's broader belief that a society's cultural and social attitudes are more important than its political institutions. Foremost among the *mores* that enabled democracy

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5 Hanke, All Mankind is One 84, 102.

6 Larry Arnhart, *Strauss, Slavery, and Darwinian Natural Right*, Darwinian Conservatism, Feb. 4, 2015.

7 Las Casas on one occasion urged the King to replace Native slaves with African slaves, instead. This did not represent his belief that the enslavement of Africans was philosophically acceptable whereas the enslavement of Native Americans was not; Las Casas simply thought Africans were more resistant to the European diseases that killed off the Native Americans, and he later repudiated his endorsement of African slavery. Lawrence A. Clayton, Bartholomé de Las Casas: A Biography 136 (2012). American defenders of slavery, however, would later omit this latter point. In 1821, John Quincy Adams recorded in his diary a conversation with a pro-slavery intellectual who argued that "the Negro Slave-trade itself was the child of Humanity"—that is, of humane motives—and traced it back to Las Casas, who, the man said, "contriv[ed] [it] . . . to mitigate the condition of the American Indians." 1 David Waldstreicher, ed., John Quincy Adams: Diaries 486 (2017).

8 Alexis de Tocqueville, Democracy in America 306 (George Lawrence trans., J. P. Mayer ed., Harper Perennial 1969) (1835).

9 *Id.* at 225.

10 *Id.* at 226.

to thrive in the United States were the principle of "self-interest properly understood"—that is, a reflective sense of ethical egoism—and a profound sense of political taboo, largely attributable to religion.[11] "If the spirit of the Americans were free of all impediment, one would soon find them among the boldest innovators," he wrote. "But American revolutionaries are obliged ostensibly to profess a certain respect for Christian morality and equity, and that does not allow them easily to break the laws when those are opposed to the execution of their designs. . . . Thus while the law allows the American people to do everything, there are things which religion prevents them from imagining and forbids them to dare."[12] In other words, social *mores* helped hold back the tyranny of the majority while at the same time channeling enormous energies into what is now called "civil society": the many private clubs and organizations that the Americans were constantly creating to address social problems or promote new public projects. Tocqueville appears to have believed that these qualities had not sufficiently developed in the Spanish-American countries of the New World, and consequently doomed democratic reform there.

Only a decade after Tocqueville wrote these words, however, the unprecedented flood of immigrants into California after the discovery of gold would inaugurate an experiment in the creation of political society, one led by a people who—in at least some general sense—purported to subscribe to the Declaration of Independence's doctrines, but who in practice were extremely slow to embrace its principles to the fullest.

B. Self-Government or Tyranny of the Majority?

To appreciate how the Declaration's legacy played out in California, one must first recall the political philosophy it articulates. Rooted in the ideas of seventeenth-century English Whigs, especially John Locke, the Declaration starts with the proposition that "all men are created equal," meaning that no mature adult is inherently entitled to govern another. Whatever the differences in their knowledge, skills, and capacities, all are inherently self-responsible beings, who cannot avoid choosing and refusing, and are ultimately the ones with the most to lose from making bad choices, and the most to gain from making wise ones. No matter how much they try, they cannot escape this self-responsibility. Consequently, they also must have the freedom to make the operative choices in their lives. People, after all, cannot be held responsible for actions unless they have the freedom to choose those actions. This is what it means to be endowed with the inalienable right to liberty. And because

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[11] *Id.* at 525–28.

[12] *Id.* at 292.

every human being is subject to these same principles, they ultimately cannot escape responsibility for their own lives and are "equal" in the sense that none is entitled to control the choices of another.

This means that anyone purporting to govern must *ask* the governed for permission to govern—i.e., consent. It also means that political society exists not to enrich those in power or to achieve glory for the nation or the race, but to protect the rights of those who create the government—especially their right to property, which in classical liberal political philosophy is the "first among equals" of human rights. (All rights are effectively explicable as forms of property: a person's right to free speech or freedom of religion arise from the individual's "ownership" of his ideas and beliefs, for example.[13])

Most significantly, all people have the right to "pursue happiness," which means the right to take the steps necessary to flourish. Along with such rights as religious freedom or the freedom to marry and raise children—all central to the pursuit of happiness—this right also includes the right to exert one's efforts to acquire wealth to provide for oneself and one's family. The phrase "pursuit of happiness" appears in Locke's writings but originated in the ideas of such ancient philosophers as Aristotle, Epicurus, and Cicero, who thought the purpose of life was the maximization of one's natural gifts, and/or the avoidance of pain so as to achieve a sense of tranquility. Government at its best enforces the rule of law, and guarantees justice, not by redistributing wealth, but by remedying or punishing injuries, so that people can survive and thrive on their own.

The unprecedented influx of population into California in 1849 presented the newcomers with some unique social challenges and created a sort of natural experiment in political philosophy. The American West, in fact, was the closest humanity has ever come to a real-life state of nature situation hypothesized by Lockean political philosophy. And the results of that experiment were mixed, indeed.

Locke had predicted that in a state of nature, people would establish authoritative institutions to preserve their lives, liberties, and estates, and the miners did just that. As legal historian Andrea McDowell has recently shown,[14] the Forty-Niners quickly established forms of social order out of anarchy—typically through the institution of the camp meeting, in which miners collectively addressed problems about ownership or the operation of settlements. They also met to resolve disputes in something resembling criminal

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[13] *See, e.g.,* James Madison, *Property* (1792), *reprinted in* Madison: Writings 515–18 (Jack Rakove, ed., 1999).

[14] Andrea G. McDowell, We The Miners: Self-Government in the California Gold Rush (2022).

trials. They established mining codes, and if disputes arose, they would be sent to arbitration; and if that failed, to the camp meeting. This, writes McDowell, was a "quintessentially American" resolution of the problem of social order.[15] In fact, leaders back in Washington largely chose to leave the Forty-Niners to their own devices in this respect. Missouri Senator Thomas Hart Benton, whose son-in-law John C. Frémont was a prominent California figure, told Californians in 1848 that they must establish their own institutions: "Having no lawful government, nor lawful officers, you can get none except by your own act; you can have none that can have authority over you except by your own consent. Its sanction must be in the will of the majority. I recommend you to meet in convention—to provide for a cheap and simple government—and take care of yourselves until congress can provide for you."[16]

McDowell shows that Californians did proceed to create remarkably robust self-governing institutions. Yet these institutions lacked some elements vital to the Lockean conception—or, perhaps more accurately, vital to the American Revolutionary conception—of self-government. These *de facto* governments had few protections for minority rights; although there were crude forms of due process, there was no appellate process, no checks and balances, and no federalism. As a result, self-governing mining camps tended toward the tyranny of the majority, and that especially meant the tyranny of the white majority against Mexicans, Chinese, and other racial groups viewed as inferior. In some respects, the autonomy of California mining camps vindicated Tocqueville's views—as McDowell writes, "the American tradition—almost a habit—of democratic self-government . . . meant that a random assembly of miners at a new diggings could draft and pass a mining code for themselves in a matter of hours. In this sense, cultural norms facilitated the creation of institutions and presented a manageable number of options for the rules themselves."[17] But on the other hand, where Lockean liberalism sees democracy as a merely *instrumental* good—as a means of securing individual rights—the lack of institutional protections for individual rights meant that unpopular minorities were unlikely to receive any protection from this system, or even any dignity.

The self-government of California's mining camps in this respect more resembles that of ancient Greek city-states than the constitutional mechanisms we typically associate with the American regime. Chauvinistic, hostile toward the wealthy minority, and lacking any meaningful sense of privacy, camp

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15 *Id.* at 84.

16 Grace E. Tower, Sentiment in California for American Government and Admission into the Union 41–42 (1927).

17 *Id.* at 72.

government "took direct democracy to its extreme."[18] The result, as James Madison would have predicted, was that they had no cure for the mischiefs of faction.[19] What's more, just as the ancient Greek *polis* regarded outsiders as aliens without rights, so the mining camps disregarded the Lockean principle of equality for those not viewed as belonging to the community, particularly members of racial minorities. Race, as it would turn out, would remain one of the most contentious issues in California for most of its history—reflecting a massive failure of the Golden State's population to embrace the full implications of the Declaration of Independence.

II
SLAVERY AND THE DECLARATION IN WESTERN REVOLUTIONS

It was already obvious when the Declaration was written that chattel slavery stood in direct conflict with its principles. Its authors were remarkably candid about the fact, and it is no surprise that the world's first antislavery society was founded in Philadelphia in 1775. But while the American founders recognized that slavery was incompatible with the nation's basic creed, they believed it was already fading away. In 1777, Vermont became the first state to ban slavery. In the years that followed other states adopted laws gradually eliminating it—Pennsylvania in 1780; Rhode Island and Connecticut in 1784; New York in 1799; New Jersey in 1804. Massachusetts's Supreme Court declared slavery unconstitutional in 1783. Meanwhile, scholars such as Adam Smith were arguing that slavery was economically wasteful. An optimist could easily believe that slavery would be abolished entirely within a generation. Jefferson had good reason to say in 1826 that "all eyes are opened or are opening to the rights of man."[20]

What he and his colleagues did not anticipate was a reactionary movement that, beginning in the 1830s, characterized slavery as a "positive good," instead of an evil, and demanded its expansion, rather than its eradication. This movement made such headway that by the middle of that decade, Southern leaders were willing to openly denounce the Declaration's principle of equality and to claim that the Revolution had not actually been premised on classical liberal principles but was instead intended to vindicate the autonomy of the colonies as collective entities. "States' rights" doctrine was well-named—it eschewed the rights of the individual, and emphasized the purported rights of state governments themselves, instead.

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[18] *Id.* at 101.

[19] *See* THE FEDERALIST No. 10 at 57–65 (J. Cooke ed. 1961) (James Madison).

[20] Letter from Thomas Jefferson to Roger Weightman (June 24, 1826), *in* JEFFERSON: WRITINGS 1517 (Merrill Peterson ed., 1984).

Part of the pro-slavery program was to spread slavery westward, to ensure that it did not become cordoned off into a distinct segment of the country where it might eventually be outvoted in Congress by representatives of the states that would eventually be carved out of the Louisiana Purchase and other western lands. In the thirty years before the American Civil War, much attention would be devoted to efforts by antislavery leaders to restrict slavery to the American southeast—and efforts by proslavery leaders to break out of these limitations. And one of the most important fronts in this slavery cold war was Texas.

During the first decades of the century, Americans migrated into the area that was still governed by Mexico. That country had abolished slavery in Texas, but American slaveowners saw an opportunity to spread the "peculiar institution" westward into the poorly administered Mexican territory. That is not to say that the Texas Revolution of 1836 was principally centered on slavery. On the contrary, as historian Daniel Walker Howe explains, that revolution "broke out over economic and constitutional issues not very different from those that provoked the American Revolution sixty years earlier."[21] Freedom of religion was not recognized under Mexican law, or the right to trial by jury, and along with burdensome taxation, the government dictated to farmers what crops they could grow. When the American settler Stephen Austin submitted a petition for redress to the government, he was arrested and sent to prison for a year and a half. Meanwhile, Mexican president Antonio López de Santa Anna—who proudly imitated Napoleon Bonaparte—repudiated the national constitution and proclaimed himself dictator. He then proceeded to stamp out rebellions against his rule with striking cruelty. In Zacatecas, his troops killed thousands before he allowed them to pillage the capital city. For himself, he confiscated silver from the local mine, distributing the profits to his friends. In short, by the mid-1830s, Mexico was a failed state, with rebellions breaking out periodically throughout the realm. Some regions tried to break off from the country, including one abortive declaration of independence in Alta California in 1836.[22] There can be no denying that Santa Anna was a tyrant. Thus, when in March 1836 a group of Mexican natives and American settlers proclaimed Texas an independent republic, they had plentiful historical and philosophical justification for doing so.

Their declaration was consciously modeled on the 1776 Declaration—but it contained striking differences. It began with the premise that the

[21] Daniel Walker Howe, What Hath God Wrought? 661 (2007).

[22] J. M. Guinn, History of the State of California 102–03 (1906).

people have a right to rebel against a government that "cease[s] to protect the lives, liberty and property of the people, from whom its legitimate powers are derived, and for the advancement of whose happiness it was instituted, and so far from being a guarantee for the enjoyment of those inestimable and inalienable rights, becomes an instrument in the hands of evil rulers for their oppression."[23] This language implicitly assumes and explicitly echoes, many of the American Declaration's principles: that government exists to preserve individual rights, thereby to secure the people's capacity to pursue happiness, and that when it systematically violates those rights, the people may justly overthrow it. The Texas Declaration went on to specify grievances, including Santa Anna's overthrowing of the Mexican constitution, the jailing of Stephen Austin while trying to petition for redress, and the "anarchy" resulting from the malfeasance and disarray of Mexico's government. Slavery played no role in the Texas Declaration—at least, not explicitly.

But while it is unfair to characterize the Texas Revolution as a proslavery rebellion, what is most striking about the Texas Declaration, as Akhil Amar notes, is "what it did *not* say."[24] It was silent about slavery—even though the revolutionaries planned to reintroduce it if Texas were to become an independent republic—and it made no mention of the equality principle of the American Declaration. On the contrary, it identified "the first law of nature" as "the right of self-preservation."[25]

This was a subtle but revealing difference, because according to the Lockean theory of the American Declaration, the first law of nature is *equality*, not self-preservation. In his *Second Treatise,* Locke had explained by quoting the sixteenth-century Anglican priest Richard Hooker. "Those things which are equal, must needs all have one measure," Hooker wrote. "If I cannot but wish to receive good, even as much at every man's hands, as any man can wish unto his own soul, how should I look to have any part of my desire herein satisfied, unless myself be careful to satisfy the like desire, which is undoubtedly in other men, being of one and the same nature?"[26] The American Declaration views this basic equality—not mere self-preservation—as the political axiom. This was an important distinction to those who, like many proslavery intellectuals, thought the self-preservation of the white race required the enslavement of the black race.

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[23] THE BOOK OF TEXAS 359 (Holland Thompson ed., 1929).

[24] AKHIL REED AMAR, BORN EQUAL: REMAKING AMERICA'S CONSTITUTION 1840–1920 at 218 (2025).

[25] BOOK OF TEXAS, *supra* note 23 at 359.

[26] John Locke, *Second Treatise of Civil Government* § 5 *reprinted in* TWO TREATISES OF CIVIL GOVERNMENT 310 (Peter Laslett, rev. ed., 1963).

More precisely, the emphasis on "self-preservation" reflected a shift away from classical liberalism and toward classical republicanism: a philosophy that downplayed the importance of individual rights and emphasized instead collective concerns about the stability of the state. The arch-prophet of this reactionary idea in the United States was South Carolina Senator John C. Calhoun, who expressly rejected the Lockean theory and argued instead that society as a whole possessed all rights and decided for itself which individuals to give these rights to. In Calhoun's proto-Hegelian theory, sovereignty was not the function of a contractual relationship, but a vaguely understood function of the spirit of the race; what the Germans would later call the *volkgeist*. The ideological fracturing of the early nineteenth century, which would culminate in the U.S. Civil War, can be characterized as a division between the classical liberalism focused on individual rights and the classical republicanism focused on "state rights," and which saw self-preservation *of the group* as government's primary purpose.

This explains another notable omission in the Texas Declaration: rather than speaking of "all men," as the 1776 Declaration did, the Texas Declaration spoke of "the Anglo-American population," contrasting their sufferings with those of "the Mexican people" who (allegedly) had "acquiesced in the destruction of their liberty" and were therefore "incapable of self-government" and "unfit to be free."[27] Once again, the contrast with the 1776 Declaration is striking. While the latter's authors would not have denied that a people who surrender their freedoms are unsuited for liberty, they made no such imputations against their British or Canadian brethren, despite the fact that by 1776, these cousins had spurned over a decade's worth of efforts at persuasion by leaders of the Thirteen Colonies.[28] On the contrary, the American Declaration acknowledged that "mankind" have different "opinions," and that different peoples have the right (within limits) to establish whatever governments "shall seem most likely to effect their safety and happiness."[29]

Still another important distinction was the American Declaration's emphasis on the "long train of abuses" that alone can justify revolution. This again echoed Locke, who insisted that revolutions are not justified based on "every little mismanagement in public affairs," or even "great mistakes" by rulers.[30] By 1776, that train of abuses stretched back a dozen years to

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[27] Book of Texas, *supra* note 23 at 360.

[28] The Continental Congress had, for example, addressed multiple communications to the Quebecois, unsuccessfully trying to persuade them to join the rebellion against Britain. Yet the Americans never pronounced the French Canadians incapable of self-government or unworthy of liberty.

[29] 1 Stat. 1 (1776).

[30] Laslett, ed., *Two Treatises*, 460, 463.

the change in colonial policy inaugurated by the Sugar Act of 1764. The Texas Declaration, by contrast, was issued after nothing like so long an effort at peaceful resolution. Where the authors of the 1776 Declaration could justly claim to have demonstrated "patient sufferance"—the colonial conflict with Parliament dating back even to the seventeenth century—the Texan Revolutionaries could point to only about fifteen years' worth of settlement on Mexican land, and Santa Anna had risen to power only four years before the Texan Declaration.

While the independent Texas Republic was not primarily created to preserve slavery, it was quickly seized on for that purpose by proslavery politicians who sought to expand the "southern way of life" to the West. In 1845, Texas was annexed to the United States as the 28th state, with a constitution allowing slavery. A year later, Iowa was admitted as a non-slave state, thus preserving the balance of free and slave states that prevailed for many years in the Senate—but setting a precedent that eventually would be seized upon by advocates of slavery's spread.

It was in this context that California, too, declared itself independent of Mexico. The Texas revolt was just one of what became a series of mid-nineteenth century "filibustering" enterprises—clandestine efforts at territorial expansion whereby an infiltrating population would provoke a domestic (or seemingly domestic) revolt, followed by a request for annexation. The success in Texas led to a similar undertaking in California only a year later, when the federal government sent forces to California in hopes of finding a pretext for conflict with Mexico. Widely (and correctly) perceived as too weak, ineffectual, and corrupt to exert meaningful sovereignty over the region, Mexico was a prime target.

American desires for California were growing—again, not principally out of a desire to expand slavery, which was generally considered unsuitable to California's climate, but due to its rich natural resources, access to the Pacific and, considering the weakness of Mexico's government, its seeming availability. When the Mexican government did respond, it did so in a haphazard and extreme manner—which alienated the growing number of settlers in the West and lent credibility to the charge of oppressiveness.

Mexican leaders realized that American infiltration presented a serious risk, and some sought to constrain the immigrant population. But Americans spun this as further oppression. When rumors circulated in April 1846 that California governor José Castro had pronounced that all sales of land to foreigners in Alta California—what is now the U.S. state—would be "null and

void" unless the purchasers became Mexican citizens, and further that foreign citizens would be "expelled whenever the country might find it convenient," they reacted violently.[31] The source of these rumors is unknown; a few decades later historian Hubert Howe Bancroft said they were "forged" in order to manipulate the Americans into a rebellion they otherwise would have had no interest in.[32] But however that may be, these rumors coincided with the Polk Administration's decision to send soldiers across the Rio Grande into southern Texas, as part of a premeditated scheme to provoke a response from Mexico, which would offer a pretext for seizing territory. At that moment, a group of Americans in Sonoma County announced that California, too, was an independent republic.

Hoisting a flag featuring a star and the image of a grizzly bear, they issued a proclamation on June 14 that became the closest thing the Californians ever had to a declaration of independence. The purpose of this little rebellion, settler William Ide declared, was to "defend" those who had been

> invited to this country by a promise of lands on which to settle themselves and families who were also promised a "republican government," who, when having arrived in California were denied even the privilege of buying or renting lands of their friends, who instead of being allowed to participate in or being protected by a "republican government" were oppressed by a "military despotism," who were even threatened, by "proclamation" from the chief officer of the aforesaid despotism, with extermination if they would not depart out of the country, leaving all of their property, their arms and beasts of burden, and thus deprived of the means of flight or defense.[33]

Ide's declaration crudely but concisely recapitulated some of the theory of the American Declaration. People had been invited to settle in California by a promise of equal laws, particularly respecting the right of property, whereby settlers would enjoy a freedom of opportunity denied them elsewhere. In other words, government was a kind of contract, and its violation by the government warranted rebellion. The Mexican government's arbitrary threat to the immigrants—or what was believed to be such a threat—was thus a violation of the basic rights of the inhabitants. Such cruelty and arbitrariness justified the people in rising up and establishing new government.

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31 Bud Hastings, The U.S.-Mexican War: A Complete Chronology 91 (2014).

32 Hubert Howe Bancroft, *History of California 1846–1848* (1874), *reprinted in* 22 The Works of Hubert Howe Bancroft 82 (San Francisco: The History Company, 1886). *See also* John Bidwell, *Reminiscences of the Conquest* 16 Overland Monthly (2nd ser.) 561 (1890) (casting doubt on the rumor).

33 Hunt Janin & Ursula Carson, The California Campaigns of the U.S.-Mexican War 1846–1848 at 94–95 (2015).

The Bear Flag declaration went on to accuse the Mexican government of "seiz[ing] upon the property of the Missions for its individual aggrandizement"—a reference to the Decree for the Secularization of the Missions of the California (the Secularization Act) of 1833, by which Mexico's Congress confiscated the Franciscan Order's property. The Bear Flag declaration also condemned Mexico for its "enormous exactions on goods imported into this country"—that is, tariffs, which the Mexican government imposed with great extravagance, heavily taxing or entirely prohibiting the importation of tobacco, cotton, and wax. These taxes, wrote historian Bancroft, "[fell] lightly on the rich and heavily on the poor. Nearly two months' wages every year had to go to pay for the cotton cloth worn by the Indian laborer and his family."[34]

In opposition to these outrages, the Bear Flag declaration pledged the rebels' devotion to "the maintenance of good order and equal rights," and to the "establish[ment] and perpetuat[ion of] a 'Republican Government' which shall secure to all: civil and religious liberty; which shall detect and punish crime; which shall encourage industry, virtue and literature; which shall leave unshackled by fetters, commerce, agriculture, and mechanism." These passages echoed the American Declaration's denunciation of British rule for its illegality and violation of rights such as property and trade. Most noticeably, the Bear Flag declaration asserted that "[for] a government to be prosperous and happyfying [*sic*] in its tendency [it] must originate with its people who are friendly to its existence." This reference to prosperity and happiness echoed the American Declaration's pledge of "safety and happiness."

Although the purported Bear Flag Republic lasted only weeks before California fell under United States authority—and in the wake of the Mexican-American War, became an American state—it was clear that the Declaration's principles had reached the Pacific Coast, albeit in an imperfect form. Notably lacking was the proposition of equality on which the American Declaration was based. The Bear Flag declaration's assertion that a just government must be based on the "friendl[iness]" of the people to it—that is, the consent of the governed—was the closest that it came to the American Declaration's assertion that all government is premised on the inherent equality of individuals in terms of their rights. Between the classical republicanism of the Texas Declaration and the classical liberalism of the American Declaration, the Bear Flag declaration seemed to attempt a middle course.

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34 Hubert Howe Bancroft, *History of Mexico* (1883), *reprinted in* 14 BANCROFT, *supra* note 32 at 546.

III
EQUALITY IN THE CALIFORNIA CONSTITUTION

A. The First Constitution

The doctrine of equal rights was finally pronounced in the state's 1849 Constitution, which opened with the words—borrowed from the Virginia Declaration of Rights of 1776—"[a]ll men are by nature free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety and happiness."[35] Yet by that time, the slavery issue was becoming ever more contentious, and the authors of California's first constitution struggled to get a handle on the debates over equality and liberty then wracking the nation as a whole. Two related issues revealed the mixed sensibilities of the California framers with respect to equality: whether to ban slavery, and whether to ban free blacks from entering the state.

The latter had first been done in Missouri in 1820, provoking furious debate over whether such a prohibition violated the federal Constitution's Privileges and Immunities Clause.[36] That debate was finally settled in a bizarre, even illusory compromise whereby Congress accepted the Missouri ban, but only on the condition that it not be interpreted in such a way as to violate the Clause—a sparkling example of *petitio principii* that was "close enough for government work." While that oil-and-water mixture swirled, Western states followed Missouri's lead, seeking to ban black immigrants in order to preserve what they saw as the purity of European culture. Oregon, for example, banned both slavery and black people in its 1857 Constitution, employing a euphemistic phrase that would become standard fare for the debates to follow: "the Legislative Assembly shall have power to restrain, and regulate the immigration to this State of persons not qualified to become citizens of the United States."[37]

The idea of banning nonwhites created a dilemma for some delegates at California's 1849 Convention. On September 19, Sacramento Delegate Morton McCarver introduced a proposal to "prohibit free persons of color from immigrating to and settling in this state."[38] They were "idle in their habits," he declared; "difficult to be governed by the laws, thriftless, and

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[35] Cal. Const. of 1849 art. I § 1.

[36] U.S. Const. art. IV § 2.

[37] Or. Const. of 1857 art. I § 31.

[38] Report of the Debates in the Convention of California on the Formation of the State Constitution 137 (J. Ross Browne, ed., 1850).

uneducated."[39] But McCarver also expressed fear that Southern slaveholders seeking to rid themselves of slavery—as many in Dixie claimed they wanted to do—would take advantage of the Western territories by bringing enslaved people into the area and liberating them there. "I believe large numbers will be brought here and thrown upon the community in a short time," McCarver claimed, "unless we take urgent measures."[40]

McCarver also feared that white laborers would not stand for black emigrés "to compete with them in working the mines."[41] There had already been plentiful interethnic violence in the mining districts, and "[i]t is the duty of the Legislature to provide against these collisions."[42] Forbidding black immigration was therefore "as essential to the prosperity of this country as the prohibition of slavery."[43] Delegate Robert Semple of Sonoma, too, feared the economic consequences of black immigration. Although California's black population was then small enough to not present a danger, he asserted their numbers would grow "immensely" if "emancipated slaves—not free negroes—not freemen—but emancipated slaves, directly from the slave States, are permitted to be introduced."[44] Semple, too, feared that slave masters would bring their charges to California, then promise to emancipate them if they worked at cut-rate wages for a certain time. This would result in "an immense and overwhelming population of negroes, who have never been freemen; who have never been accustomed to provide for themselves," and who would therefore either become a burden on the community or a criminal underclass.[45]

But San Jose delegate Kimball Dimmick spoke passionately against the proposal. The new bill of rights, he pointed out, declared the equal rights of all human beings, and yet "[n]ow it is proposed to do what . . .? [T]o say that a certain class of Americans born in the United States—their forefathers born there for many generations—shall be excluded from entering this Territory at all . . . ! What will be said of our Constitution if we assert one thing in our bill of rights . . . and then exclude a class speaking our own language, born and brought up in the United States, acquainted with our customs and calculated to make useful citizens[?]"[46] The convention had a rare opportunity, Dimmick observed: "[t]he spirit of freedom is inspiring mankind throughout the world

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39 *Id.*

40 *Id.*

41 *Id.* at 138.

42 *Id.*

43 *Id.*

44 *Id.*

45 *Id.*

46 *Id.* at 141.

to throw off the shackles of despotic systems of government. Let it not be said that we, the first great republican State on the borders of the Pacific . . . have attempted to arrest the progress of human freedom."[47]

Sacramento's Lansford Hastings offered an unusual answer. "[I]t is a fundamental declaration made by us in our bill of rights, or whether made by us or not it is true, that all men are free and entitled to certain rights, privileges, and immunities. If this ever reaches the ears of the African race, it occurs to me that they will conceive this country to be a very favorable asylum for the oppressed; especially when they find that upon that broad principle we have added another, that neither slavery nor involuntary servitude shall ever be allowed in this State." Yet if the Constitution were to include the prohibition McCarver proposed, these immigrants would be "met at our portals and told that they are coming to the wrong place. . . . It is true we [said all men are free and independent] but we did not mean it."[48] Hastings was opposed to such hypocrisy. His solution, however, was striking: it would be better, he concluded, *to remove the statement of freedom and equality from the bill of rights entirely*. "I think they had better be introduced as slaves," he concluded.[49]

Another delegate, Henry Tefft of San Luis Obispo, also feared economic competition with black workers. "[N]egro labor, whether slave or free, when opposed to white labor, degrades it," he claimed.

> That is the ground upon which I oppose the introduction of this class of persons. It is said that we have declared in our Constitution, and should adhere to that declaration, that all men are by nature free and independent, entitled to certain inalienable rights. Most assuredly I believe that to be so. . . . But does it follow that we are to allow certain objectionable classes of men to emigrate here and settle in California. . . . [T]he declaration means no more or less than this: they are free to remain at home; but they are not free to come here and degrade white labor—free to disturb the social and political harmony of the state.[50]

Black immigrants, Tefft insisted, would lay the foundation for a "monopoly" of labor, because they would "set to work under the direction of capitalists." Competition for jobs would drive down wages and ensure that "[t]he profits of the mines would go into the pockets of single individuals"—that is, the

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[47] *Id.*

[48] *Id.* at 141–42.

[49] *Id.* at 142.

[50] *Id.* at 143–44.

managers whose profits would increase due to the lower cost of labor.[51] The real inconsistency, according to Tefft, was to declare that all men are created equal "and then deny our own white citizens the privilege of laboring" by forcing them to compete against black immigrants.[52] In any event, blacks were "ignorant, wretched, and depraved." Astoundingly, Tefft insisted "I have no prejudice against the negro because of his color"—he just thought all black people were "too depraved to be governed by ordinary laws."[53]

To arguments like this, San Francisco's Edward Gilbert had an apt reply. "If you insert in your Constitution such a provision or anything like it, you will be guilty of a great injustice—you will do a great wrong, sir—a wrong to the principles of liberal and enlightened freedom."[54] After all, "[y]ou have said in the beginning of your bill of rights that all men are by nature free and independent and have certain inalienable rights," yet after doing this, and banning slavery outright, "you say a free negro shall not enter its boundaries. Is it because he is a criminal? No, sir—it is simply because he is black. Well might it be said in the words of the revolutionary writer: 'You would be free, yet you know not how to be just.'"[55]

After lengthy debates, the Convention at last rejected the proposal to exclude all blacks from the state, by a remarkably lopsided vote.[56] Still, this rejection resulted more from the practical concern that Congress might reject a constitution with such provisions in it, than from a commitment to the principles of equal liberty. California entered the union in September 1850 with a constitution that did not ban free black Americans—or Asians or Hispanics—from entering the state. Instead, it proclaimed that "foreigners who are, or who may hereafter become *bone-fine* residents of this State, shall enjoy the same rights in respect to the possession, enjoyment, and inheritance of property, as native-born citizens."[57] In a climate in which classical republicanism was beating out the classical liberalism of the American founding, California's initial constitution was remarkable for its relative fairness. Yet the arguments revealed the degree to which the principles of the Declaration were contested in the run-up to the Civil War.

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[51] *Id.* at 144.

[52] *Id.*

[53] *Id.*

[54] *Id.* at 149.

[55] *Id.* Gilbert was quoting the French Revolutionary Abbé Sièyes.

[56] *See* ROBERT F. HEIZER & ALLAN J. ALMQUIST, THE OTHER CALIFORNIANS 117–19 (1971).

[57] CAL. CONST. of 1850 art. I § 17. Voting rights, of course, were still limited based on race, although the constitution extended this right both to "white male citizen[s] of the United States" and to "white male citizen[s] of Mexico" who "elected to become" U.S. citizens. *Id.* art. II § 1.

B. The Second Constitution

Things went differently at the state's second constitutional convention, which began its work thirty years later. Called together in the midst of a severe economic depression, the Convention was the brainchild of the Workingmen's Party, a coalition of labor groups that believed the state's economic and cultural woes were the consequence of Chinese immigration. An outgrowth of the Workingmen's Party of the United States, which was itself a successor to the International Workingmen's Association founded in part by Karl Marx himself, the California Workingmen's Party would be best characterized as a Fascist, rather than Communist organization, given its nationalistic emphasis. However that may be, the Party managed to trigger a call for a new constitutional convention that opened in March 1878 with the express purpose of excluding the Chinese from the state by whatever means were necessary.

Chinese and other Asian immigrants had begun arriving in California in the 1840s to work in the gold fields, and had remained to construct the railroads, fish in the Pacific, and build communities for themselves and their families up and down the coast. Their work ethic astonished white Californians, and their capacity to survive even dire poverty, with a single-minded focus on productivity and the preservation of their way of life, drew the suspicion of many Europeans. Mark Twain, who lived in Nevada and California during this time, explained to his East Coast readers that the Chinese

> are quiet, peaceable, tractable, free from drunkenness, and they are as industrious as the day is long. A disorderly Chinaman is rare, and a lazy one does not exist. So long as a Chinaman has strength to use his hands he needs no support from anybody; white men often complain of want of work, but a Chinaman offers no such complaint; he always manages to find something to do. . . . No California *gentleman* or *lady* ever abuses or oppresses a Chinaman, under any circumstances, an explanation that seems to be much needed in the east. Only the scum of the population do it—they and their children; they, and, naturally and consistently, the policemen and politicians, likewise, for these are the dust-licking pimps and slaves of the scum, there as well as elsewhere in America.[58]

The Golden State's treatment of Asians is the closest California came to the institution of slavery. As historian Jean Pfaelzer detailed in her 2007 book *Driven Out*, race riots became a routine fact of life in the late nineteenth century. "The term *expulsion* doesn't fully represent the rage and violence of these purges," she notes. "What occurred along the Pacific coast, from the

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[58] Mark Twain, Roughing It 391–97 (1872).

gold rush through the turn of the century, was ethnic cleansing."[59] But the war against Asians was not limited to lynching and rioting; the state's courts also participated, ignoring the principles of the Declaration of Independence and both creating and affirming various forms of segregation.

Perhaps the most astounding of these came in 1854, when the state Supreme Court ruled in *People v. Hall*[60] that the Chinese qualified as "Indians" for purposes of a state law that forbade Indians from testifying against a white man in any criminal trial. Columbus, the court reasoned, had thought he was in China when he landed in the New World, and had used the word "Indian" to describe the land. Therefore, the word "Indian" encompassed "Asiatics" in general.[61] A decade and a half later, after the federal Constitution was amended to prohibit states from depriving people of equal protection or abridging the privileges or immunities of citizenship, the court remained intransigent. The laws prohibiting the Chinese from testifying in court were a state matter, it declared, and none of the federal government's business. Indeed, the justices added, if they thought the Fourteenth Amendment rendered such discriminatory laws unconstitutional, "we should regard [the Fourteenth Amendment] as we would a law apparently legalizing murder or robbery," and would search for "some construction" of the Amendment that would allow the state to continue discriminating with impunity.[62]

Of course, in practical terms, being barred from testifying in court rendered white violence against the Chinese legal, because any witnesses to an assault on a Chinese person were likely to be Chinese also, and thus unable to testify against the perpetrator. "Any white man can swear a Chinaman's life away in the courts," wrote Twain, "but no Chinaman can testify against a white man. . . . As I write, news comes that in broad daylight in San Francisco, some boys have stoned an inoffensive Chinaman to death, and that although a large crowd witnessed the shameful deed, no one interfered."[63]

Where the 1849 Constitutional Convention completed its work in two months, the 1878–79 convention lasted for nearly a year, and its debates reflected a far more disunited state. Besides the Workingmen, the delegates ranged from Communists to ex-Confederates to classical liberals in the Jeffersonian mold. The delegates were also far more likely to be attorneys—their debates are studded with references to court decisions, especially the

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[59] Jean Pfaelzer, Driven Out: The Forgotten War Against Chinese Americans at xxix (2007).

[60] 4 Cal. 399 (1854).

[61] *See id.* at 400.

[62] People v. Brady, 40 Cal. 198, 220–21 (1870).

[63] Twain, *supra* note 58 at 391.

then-recent *Munn v. Illinois*,[64] which greatly expanded the states' authority to regulate private businesses. On the issue of Chinese immigration, however, the members were almost unanimous. They imposed a wide variety of restrictions on the employment of Chinese laborers, and for the same reasons that the 1849 delegates had sought to restrict the immigration of black Americans from the East: to prevent legitimate economic competition. The Chinese immigrant, said one delegate,

> is a sinewy, shriveled human creature, whose muscles are as iron, whose sinews are like thongs, whose nerves are like steel wires, with a stomach case lined with brass; a creature who can toil sixteen hours of the twenty-four; who can live and grow fat on the refuse of any American laborer's table. . . . To compete with the Chinese our people must give up their homes, abandon the family altar, tear down their schoolhouses, blot out their civilization, and adopt the Chinese mode of life. If the white man is to compete with the Chinaman he must adopt a cheaper style of dress, he must inure himself to the cold, he must labor in the night; sleep shall not come to his pillow until the midnight bell tolls the solemn hour. He must arise at the first gray streaks of dawn and at his work. Then what shall be his food? No longer the savory meats, the pure, white bread made by willing hands. No! He must live as the Chinaman lives; work as the beast works; there can be no recreation, no rest, nothing but toil.[65]

Only one delegate at the Convention, Sonoma County's Charles V. Stuart, had the courage to speak in defense of the Chinese. In two impassioned speeches, he insisted that Chinese immigrants were hardworking and upstanding members of the community, who had "buil[t] our railroads, clear[ed] our farms . . . [and] plant[ed] our vineyards."[66] The persecution of the Chinese, cried Stuart, was "an act that would shock all humane men throughout the world, both Christian and Pagan"—indeed, an act so brutal that "[y]ou can trace down the stream of time and through all savage life, with all its cruelties, and its slavery, and fail to find its equal or parallel for injustice, treachery, and ingratitude."[67] Stuart's heroic effort to defend Chinese rights fell on deaf ears, however.[68] The Convention approved the anti-Chinese provisions, most of which were eventually declared unconstitutional by federal courts.

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[64] 94 U.S. (4 Otto) 113 (1876).

[65] 1 Debates and Proceedings of the Constitutional Convention of the State of California 633 (1880).

[66] 3 *id.* at 1238.

[67] *Id.*

[68] *See* Timothy Sandefur, *Charles v. Stuart: A Solitary Voice at California's Constitutional Convention* (Jan. 29, 2008), abstract available at SSRN: https://ssrn.com/abstract=1088544.

But a revealing exchange took place on October 29, 1878, when the convention was discussing the bill of rights to be included in the new Constitution. Beginning with the now-standard phraseology "all men are by nature free and independent, and have certain inalienable rights, among which are enjoying and defending life and liberty . . ." etc., one delegate proposed to change the word "men" to "persons." Admitting that everyone knew "men" meant "persons" in the original, he thought it worthwhile to "say precisely what we mean."[69] After a brief exchange, this proposal was rejected—but was immediately followed by an interjection by delegate Charles Carroll O'Donnell, a proud Workingman who boasted of being "the inaugurator of the Anti-Coolie [i.e., anti-Chinese] crusade."[70] O'Donnell moved that the phrase be amended "by inserting after the word 'men' in the first lines, the words, 'who are capable of becoming citizens of the United States.'"[71]

"Ineligible for citizenship" was a code-phrase for Chinese, who were held ineligible for American citizenship in *In re Ah Yup*, decided in April 1878.[72] Federal law had offered limited naturalization to "free white persons" beginning in 1802, and reiterated that point in 1875—long before the Chinese Exclusion Act of 1882—and the phrase "not qualified to become citizens" had been successfully adopted by the Oregon Constitution in 1857.[73] Thus, when O'Donnell proposed his amendment to the Lockean principle of equality, he was literally recommending that the state Constitution proclaim that all people *except the Chinese* are created free and equal. When his motion was seconded, the chairman ordered the proposed amendment read aloud: "The Secretary read: 'All men who are capable of becoming citizens of the United States, are by nature free and independent' [Laughter]."[74] The motion failed, but the message was clear.

The story of California's dismal treatment of Asians hardly ends there. While many of the racist elements of the 1879 Constitution were declared invalid by federal courts,[75] the state continued to discriminate against Chinese and Japanese immigrants, most notably under the Alien Land Law, which forbade Asians from owning land in the state.[76] That act remained on the books

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69 1 Debates and Proceedings, *supra* note 65 at 232.

70 Biographical Sketches: Delegates to the Convention to Frame a New Constitution 50 (1878).

71 1 Debates and Proceedings, *supra* note 65 at 232.

72 *In re* Ah Yup, 1 F. Cas. 223, 223 (C.C.D. Cal. 1878).

73 22 Stat. 58 (1882).

74 1 Debates and Proceedings, *supra* note 65 at 232.

75 *See, e.g., In re* Tiburcio Parrott, 1 F. 481 (C.C.D. Cal. 1880).

76 The Alien Land Law, also known as the Webb-Haney Act, was adopted in 1913. *See* 1913 Cal. Stat. 206 (Ch. 113). It was superseded by a ballot initiative at the 1920 election. *See* 1921 Cal. Stats. lxxxiii.

until 1952, when it was finally declared unconstitutional.[77] Yet even then, the California Supreme Court spent no time discussing the equality principle in detail. It was not until 2000, in the case of *Hi-Voltage Wire Works v. San Jose* that that court offered its most detailed commentary on the Declaration and its relationship to federal and state constitutional law.[78]

C. Constitutional Equality at Last

While California was never a slave state, it was in some ways a reluctant member of the Union when the Civil War came. Indeed, sympathies for the South ran so high that the state legislature adopted a law allowing the southern counties to form their own state if they so chose.[79] U.S. Army Captain Winfield Scott Hancock, stationed in Los Angeles, was so alarmed at the ubiquity of pro-Confederate attitudes that he stationed guards around government property to prevent sabotage and instructed his wife to go about armed.[80] A few months later, the Placerville *Mountain Democrat* published an editorial denouncing Republicans for "appeal[ing] to the declaration of American Independence" and "triumphantly assert[ing] 'that all men are created equal,'" because "'the equality of mankind' as Republicans understand it" was "a fallacy" that had been "long since exploded."[81]

As we have seen, the equality principle was largely ignored in California even in the years following the Civil War, although the targets of white hostility were principally Asians and Hispanics. Forms of discrimination, including school segregation, remained a fact of life in California until the latter half of the twentieth century.[82] Even after a federal court declared that "'[t]he equal protection of the laws' pertaining to the public school system in California is not provided by furnishing in separate schools the same technical facilities," it still persisted.[83] Almost a decade after *Brown v. Board of Education*,[84] the state Supreme Court ruled in *Jackson v. Pasadena City School District* that a black child

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77 *See* Sei Fujii v. State, 38 Cal. 2d 718 (1952).

78 24 Cal. 4th 537 (2000).

79 An Act Granting Consent of the Legislature to the Formation of a Different Government for the Southern Counties of This State, Apr. 18, 1859. 1859 Cal. Stat. 310.

80 Glenna Matthews: The Golden State in the Civil War 86 (2012).

81 *They Falsify the Record*, Mountain Democrat, Sept. 12, 1860 at 2.

82 In *Wysinger v. Crookshank*, 82 Cal. 588 (1890), the state Supreme Court held that school segregation was constitutional, but that state statute had not provided for it except in the cases of Asians and Native Americans. *See also* Piper v. Big Pine Sch. Dist. of Inyo Cnty., 193 Cal. 664, 671 (1924) ("it is now finally settled that it is not in violation of the organic law of the state or nation, under the authority of a statute so providing, to require Indian children or others in whom racial differences exist, to attend separate schools, provided such schools are equal in every substantial respect with those furnished for children of the white race.").

83 Mendez v. Westminster Sch. Dist. of Orange Cnty., 64 F. Supp. 544, 549 (S.D. Cal. 1946), *aff'd sub nom.* Westminster Sch. Dist. of Orange Cnty. v. Mendez, 161 F.2d 774 (9th Cir. 1947).

84 347 U.S. 483 (1954).

who wanted to transfer to Eliot Junior High School in Altadena could not be barred on the basis of his race.[85] Yet even here, the court declined to rest its decision on the principle of equality articulated in the Declaration and in the state's bill of rights.

In fact, even the *Brown* decision itself declined to focus on this basic principle. Rather than endorsing the axiom of equality derived from the Declaration, and so well expressed in Justice Harlan's celebrated *Plessy v. Ferguson* dissent ("Our constitution is color-blind, and neither knows nor tolerates classes among citizens"[86]) the *Brown* decision based its rejection of *Plessy*'s separate-but-equal doctrine on the theory that racial segregation had come over time to "generate[] a feeling of inferiority as to their status in the community that may affect [the] hearts and minds" of black Americans.[87] Going out of its way *not* to endorse the equality principle,[88] the *Brown* decision was anchored exclusively in the social and economic circumstances of "public education in . . . its full development and its present place in American life."[89] The consequence, naturally, that if racial discrimination could be shown at some future point *not* to generate a feeling of inferiority, or to affect a realm of life *less* important in "its present place in American life," it could survive constitutional scrutiny under *Brown*.

That became clear in *Jackson*, when the California Supreme Court elaborated on *Brown*'s rationale. School segregation is unconstitutional, it said, "[b]ecause of intangible considerations relating to the ability to learn and exchange views with other students. . . . The separation of children from others of similar age and qualifications solely because of race may produce a feeling of inferiority which can never be removed and which has a tendency to retard their motivation to learn and their mental development."[90] Logically enough, this rationale led the court to remark that government *should* engage in racial balancing in order to engineer proportionate representation in school populations:

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[85] 59 Cal. 2d 876 (1963). Eliot is this author's own *alma mater.*

[86] 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).

[87] *Brown*, 347 U.S. at 494.

[88] Most striking was the bizarre rationale by which the *Brown* Court rejected the idea that the Fourteenth Amendment was intended to eradicate segregation. The Court considered "the views of proponents *and opponents* of the Amendment," and decided that the historical record was "inconclusive" because while the amendment's "proponents . . . undoubtedly intended [it] to remove all legal distinctions among [the races] . . . [the amendment's] *opponents*, just as certainly, were antagonistic" to this principle and "wished [the amendment] to have the most limited effect." *Id.* at 489 (emphasis added). The Court never explained why the views of the amendment's *opponents*—who *lost* the debate—should count for anything, let alone should be treated as equivalent to the views of the amendment's authors and supporters.

[89] *Id.* at 492.

[90] *Jackson*, 59 Cal. 2d at 880.

> So long as large numbers of Negroes live in segregated areas, school authorities will be confronted with difficult problems in providing Negro children with the kind of education they are entitled to have. Residential segregation is in itself an evil which tends to frustrate the youth in the area and to cause antisocial attitudes and behavior. Where such segregation exists *it is not enough for a school board to refrain* from affirmative discriminatory conduct. The harmful influence on the children will be reflected and intensified in the classroom if school attendance is determined on a geographic basis without corrective measures. The right to an equal opportunity for education and the harmful consequences of segregation *require that school boards take steps*, insofar as reasonably feasible, *to alleviate racial imbalance* in schools *regardless of its cause*.[91]

This was, naturally, a recipe for government race-balancing programs that would go on indefinitely. Along with decisions such as *Price v. Civil Service Commission*[92] and *DeRonde v. Regents*,[93] it meant a repudiation of the colorblindness principle, and the endorsement of the idea that government may select employees, contractors, or students—and perhaps take even more coercive measures—based on race as long as "it believes" that this "will best achieve fairness and balance,"[94] or will "break down old patterns of racial segregation and hierarchy."[95]

This development was paralleled by an unedifying series of federal rulings that carved out room for the government to discriminate in favor of some people—and consequently against others—based on race. In *Regents of Univ. of California v. Bakke*,[96] the Supreme Court was divided over the constitutionality of a decision by the state's preeminent university to discriminate against white applicants in admissions. The resulting opinion was fractured, leading court-watchers to conclude that the Court had upheld the constitutionality of such discrimination so long as the race of applicants was treated (in Justice Lewis Powell's words) as "simply one element—to be weighed fairly against other elements—in the selection process."[97] Some argued that the illegitimacy of this "one element" would inevitably taint the entire admissions process, but Powell tried to assure readers that the government would act in "good faith," and would refrain from "professing to employ a facially nondiscriminatory

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91 *Id.* at 881–82 (emphasis added).

92 26 Cal. 3d 1 (1980).

93 28 Cal. 3d 875 (1981).

94 *Deronde*, 28 Cal. 3d at 891.

95 *Price*, 26 Cal. 3d at 274.

96 438 U.S. 265 (1978).

97 *Id.* at 318 (Op. of Powell, J.).

admissions policy" while in fact operating "the functional equivalent of a quota system."[98] But in reality, that was precisely what they did.

The race-balancing theory of *Jackson* and similar cases ran into two inescapable problems. First, such "patterns" of "hierarchy"[99] can never be eradicated once and for all, given the dynamic nature of human life, meaning that the Procrustean task of "remedial" race-balancing can never end. Even *ex hypothesi*, discriminating against group A today in order to help group B can only be justified up to the *exact* moment when their advantages are *precisely* balanced (whatever that might mean)—yet the likelihood that race preferences will cease at that instant, without tipping over into "excessive" discrimination against group A (which will have to be "remediated" in the future by discrimination in the opposite direction) is infinitesimally small, even ignoring for the moment the fact that these groups are not hermetically sealed or even reasonably discernible, and that there are far more than just two racial groups who would have to be balanced in this theory.[100] Second, it is positively unjust to discriminate against innocent individuals on the grounds that their ancestors or other members of the same ethnic group received unjust favoritism in the past. Inflicting injustices on the children for the sins of their fathers is a recipe for perpetual injustices.

The primary victims of California's institutional race preferences were, of course, Asians.[101] Viewed as "overrepresented" in the state's educational institutions—due to the large number of Asians who outscored all competitors in academic tests[102]—California universities engaged in racial balancing in order to "diversify" the student body by penalizing highly qualified Asian applicants. Even President Bill Clinton expressed the fear that if universities looked only at the qualifications of applicants, they would "fill their entire freshman classes with nothing but Asian Americans."[103]

Amidst this ongoing, rationalized discrimination, Californians in 1996 voted overwhelmingly to amend their constitution by adopting the California Civil Rights Initiative, which declared simply that "[t]he state shall not discriminate against, or grant preferential treatment to, any individual or group

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98 *Id.* at 318–19 (Op. of Powell, J.).

99 *Price*, 26 Cal. 3d at 274.

100 *See* David E. Bernstein, Classified: The Untold Story of Racial Classification in America (2022) (detailing how government's racial categories are so poorly defined as to be effectively arbitrary).

101 This common knowledge would be spectacularly vindicated in *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181 (2023).

102 *See, e.g.*, Joshua Grossman et al., *The Disparate Impacts of College Admissions Policies on Asian American Applicants*, 14 Nature Scientific Reports 4449 (2024) ("Asian American applicants had 28% lower odds of ultimately attending an Ivy 11 school than white applicants with similar academic and extracurricular qualifications.").

103 Leo Rennert, *Clinton Hones Stand on Affirmative Action*, San Francisco Examiner, Apr. 7, 1995, at 1.

on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting."[104] Advocates of the initiative were quite clear that they were drawing on the Declaration's equality principle. "By enacting Proposition 209," wrote Professor Lucas Morel, "Californians teach the nation that racial identity has no part to play in the protection they receive from their common government. . . . [I]t is a lesson . . . as the Declaration of Independence."[105] "[F]rom the Declaration of Independence, to the ratification of the Fourteenth Amendment," wrote Robert Alt of the Center for Individual Rights, "the proper goal of civil rights policy was clear: equal protection of the laws. In contrast, classifying individuals and distributing benefits on the basis of race and gender deviates from this goal and violates equal protection."[106] For advocates of affirmative action, wrote Professor Michael Lynch, "[e]quality no longer means, in the ringing words of the Declaration of Independence, that 'all men are created equal. . . .' [I]t now means that racial and ethnic groups have an entitlement to proportional representation in America's most sought after institutions."[107]

Amazingly, champions of race preferences sought to persuade federal courts that Proposition 209's ban on racial discrimination was itself unconstitutional. In *Coalition for Economic Equity v. Wilson*,[108] they claimed that prohibiting the government from granting preferences in contracting or admissions based on race was unconstitutional under the so-called *Hunter/Seattle* doctrine, a legal principle which holds that an attempt to alter the "political process" in order to prevent a disfavored group from obtaining benefits can itself be a form of discrimination.[109] Whatever the merits of this theory, the Ninth Circuit found that it did not apply in a manner that would have resulted in the self-contradictory rule that the Equal Protection Clause somehow forbids the government from forswearing racial discrimination. "The Fourteenth Amendment," wrote the court, "does not require what it barely permits."[110] Thus Proposition 209 took effect—in words, at least.

What actually followed was a form of "massive resistance" in which local governments simply defied the state Constitution or sought clever ways to

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104 Cal. Const. art. I § 31.

105 Lucas Morel, *Prop. 209: Relearning the Lesson of Equality*, Ashbrook.org, Sept. 1, 1997.

106 Robert D. Alt, *Toward Equal Protection: A Review of Affirmative Action*, 36 Washburn L.J. 179, 182–83 (1997).

107 Michael W. Lynch, *Affirmative Action at the University of California*, 11 Notre Dame J.L. Ethics & Pub. Pol'y 139, 155 (1997).

108 946 F. Supp. 1480 (N.D. CA. 1996), *vacated,* 122 F.3d 692 (9th Cir. 1997).

109 The principle, named for the cases of *Hunter v. Erickson*, 393 U.S. 385 (1969), and *Washington v. Seattle School Dist. No. 1*, 458 U.S. 457 (1982), was reviewed in detail in *Schuette v. Coal. to Defend Affirmative Action, Integration & Immigrant Rts. & Fight for Equal. by Any Means Necessary (BAMN),* 572 U.S. 291 (2014), in which a majority of the Court sharply criticized the doctrine, but failed to muster a majority to actually overturn *Hunter* or *Seattle*.

110 *Wilson*, 122 F.3d at 709.

continue discriminating notwithstanding the ban.[111] In *Hi-Voltage*, the case itself concerned a San Jose ordinance giving favorable treatment to public contractors based on race and sex. Specifically, it required contractors to prove that they had attempted to hire subcontracting firms that were owned by members of racial minority groups (or by women) in order for the contractor to be eligible for a public works contract.[112] When Hi-Voltage sought to bid on a contract in which it would use its own employees rather than subcontractors, its bid was deemed nonresponsive, and it sued to challenge the program under the Civil Rights Initiative. Shockingly, the state's attorney general appeared as an amicus curiae in *opposition* to Hi-Voltage.[113] And to this day, the state government has never attempted to enforce the Initiative, leaving that task entirely to private litigants.[114]

Written by Justice Janice Rogers Brown, herself the daughter of an Alabama sharecropper who grew up during the civil rights era, the *Hi-Voltage* decision began—as no California Supreme Court decision ever had[115]—by quoting the Declaration's basic premise: "The United States was founded on the principle that 'all men are created equal.'"[116] Acknowledging the judiciary's role in violating this principle, the court embraced the "'color-blind' jurisprudence" that Justice Harlan had presaged in his *Plessy* dissent, and that embodied the Declaration's principle most clearly.[117] As for legal precedents allowing for race preferences as a form of "balancing," they had represented a wrong-way turn that had led the state far from the original constitutional principle of equality: "Having once validated consideration of race, the United States Supreme Court struggled to articulate a principled, consistent standard," Brown wrote.[118] As a result, what had begun as an effort to protect the "individual right of equal opportunity" had "fundamental[ly] shift[ed]" into a nonstop program of discriminating in order to achieve "proportional

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[111] This included such cases as *Crawford v. Huntington Beach Union High Sch. Dist.*, 121 Cal. Rptr. 2d 96 (Cal. App. 2002); *Connerly v. State Pers. Bd.*, 112 Cal. Rptr. 2d 5 (Cal. App. 2001); and *Coral Constr., Inc. v. City & Cnty. of San Francisco*, 50 Cal. 4th 315 (2010), among others.

[112] *See Hi-Voltage*, 24 Cal. 4th at 543.

[113] *See* Brief Amicus Curiae of California, Hi-Voltage Wire Works v. City of San Jose, 2000 WL 34019273 (Jan. 13, 2000).

[114] Foremost among which is my former employer, the Pacific Legal Foundation, which represented the plaintiff in *Hi-Voltage*.

[115] In *Perez v. Lippold*, 32 Cal. 2d 711 (1948), the court declared the state's anti-miscegenation law unconstitutional under the Due Process of Law Clause of the Fourteenth Amendment. In a concurring opinion, Justice Jesse Carter wrote that the opinion was "in harmony with the declarations contained in the Declaration of Independence which are guaranteed by the Bill of Rights and the Fourteenth Amendment." *Id.* at 732 (Carter, J., concurring).

[116] *Hi-Voltage*, 24 Cal. 4th at 545.

[117] *Id.* at 544.

[118] *Id.* at 554.

group representation."[119] The 1996 Civil Rights Act represented a decision to return to "the philosophy that '[h]owever it is rationalized, a preference to any group constitutes inherent inequality.'"[120]

Yet while the court embraced the equality principle in *Hi-Voltage*, state and local officials continued to resist it—and still do—leading to a seemingly endless series of lawsuits challenging race preferences.[121] Indeed, in 2020, champions of race preferences attempted to repeal the Initiative, through Proposition 16. That effort failed by a lopsided 57% to 42% vote. Undeterred, however, pro-preference forces tried again, proposing Assembly Constitutional Amendment 7 in 2024, which would have amended the Civil Rights Initiative to only ban "harmful" discrimination—as if all discrimination were not harmful. Among other things, this amendment would have changed the Initiative from saying "the state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race" to read "the state shall not *harmfully* discriminate against, or grant preferential treatment to, any individual or group on the basis of race."[122] It was a fitting echo of Charles Carroll O'Donnell's attempt at the 1879 convention to change "all men are created equal" to read "all men who are capable of becoming citizens of the United States are created equal.'"[123] This proposed amendment, however, died in committee.

Yet the effort to continue racially discriminating still continues in some circles. Indeed, in what may be called by now a perverse California tradition, when the U.S. Supreme Court took up the legality of such preferences in *Students for Fair Admissions v. Harvard* in 2023,[124] both the state and its university system filed briefs supporting such preferences and traducing the state constitution's ban on them. And even after the Court found such preferences unlawful, prominent California figures such as Erwin Chemerinsky, Dean of the Law School at U.C. Berkeley, insisted that they would continue to follow these illegal discriminatory admissions practices regardless ("If ever I'm deposed, I'm going to deny I said this to you," he added.[125]) The state's longstanding

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[119] *Id.* at 555, 558.

[120] *Id.* at 561 (quoting *Price v. Civ. Serv. Comm'n of Sacramento Cnty.*, 26 Cal. 3d 257, 299 (1980) (Mosk, J., dissenting)). Justice Stanley Mosk, whose writings the court quoted here and throughout the *Hi-Voltage* decision, stands out as an exemplary spokesman for the principle of color-blindness. Mosk—who served on the California Supreme Court from 1964 to 2001—a quarter of the state's entire history—was a New Deal Democrat but split with other liberal justices who endorsed affirmative action and remained a lifelong believer in the colorblind constitution.

[121] *See, e.g.*, Californians for Equal Rights Foundation v. City of Alameda (Ct. App. 1st Div. A167472, Mar. 20, 2024) (challenging Alameda County race preferences for public contracting).

[122] ACA 7 (2024).

[123] *See supra* text accompanying notes 75–76.

[124] 600 U.S. 181 (2024).

[125] Alexander Hall, *Dean Caught Saying Berkeley Law Uses "Unstated Affirmative Action": "I'm Going to Deny I Said This*," Fox News, June 30, 2023.

hostility toward the Declaration's principle of equality remains as alive as ever.

CONCLUSION

In his fragmentary poem "A Promise to California," Walt Whitman—democracy's greatest poet—pledged to the state: "soon I travel toward you, to remain, / to teach robust American love, / For I know very well that I and robust love belong among you, / inland, and along the Western sea. . . ."[126] The "robust American love" of which he spoke was the principle of equality announced in the Declaration of Independence:[127] the universality of liberty and opportunity of which he spoke when he said that America's greatness lay not in the "grandeurs of the past," but in the spread of freedom to all mankind.[128] There were some, he acknowledged, who regarded this idea as nothing more than a dream—a foolish notion to which no realistic person would subscribe. But his answer was simple:

> Is it a dream?
> Nay, but the lack of it the dream.
> And, failing it, life's lore and wealth a dream,
> And all the world a dream.[129]

The principles of the Declaration—the idea that all people have basic rights that government must respect, regardless of the color of their skin—have struggled for acceptance in California's constitutional history. Even the outstanding achievement of the California Civil Rights Initiative has not entirely laid to rest efforts by the government to benefit some and burden others based on their ancestry.[130] Yet that principle does "belong among you," and although the journey will never fully end, it will be realized.

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[126] Walt Whitman, *A Promise to California* (1867), *reprinted in* THE COMPLETE POEMS OF WALT WHITMAN 121 (David Rogers, ed. 1995).

[127] *See, e.g.*, George Saintsbury, *Leaves of Grass* (1874), *reprinted in* WALT WHITMAN AND THE WORLD 32 (Gay Wilson Allen & Ed Folsom, eds., 1995) ("It would be a great mistake to suppose that sexual passion occupies the chief place in Whitman's estimation. There is according to him something above it, something which in any ecstasies he fails not to realize, something which seems more intimately connected in his mind with the welfare of mankind, and the promotion of his ideal republic. This is what he calls 'robust American love.'").

[128] Walt Whitman, *Song of the Universal* (1881), *reprinted in* COMPLETE POEMS, *supra* note 126 at 210.

[129] *Id.* at 211.

[130] Indeed, two separate ballot initiative campaigns to weaken the California Civil Rights Initiative were defeated in recent years: Proposition 16 in 2020 and Assembly Constitutional Amendment 7 in 2024. *See* Mikhail Zinshteyn, *The Effort to Bring Back Affirmative Action in Limited Form Is Dead*, CalMatters, June 25, 2024.

Is That All There Is?

A précis to Arthur Gilbert, "The Fire Next . . ." and Gary Greene, "We Shall Return: Music, Loss, and Resilience After the Fires"

I remember when I was a very little girl
Our house caught on fire
I'll never forget the look on my father's face
As he gathered me up in his arms
And raced through the burning building onto the pavement
And I stood there shivering in my pajamas
And watched the whole world go up in flames
And when it was all over I said to myself
Is that all there is to a fire?

Is that all there is?

—*Mike Stoller and Jerry Leiber*

"Is That All There Is?"[1] is pertinent to the raging fires earlier this year that engulfed the homes and businesses of so many people in the Los Angeles basin, leaving all of them wrought with confusion and uncertainty about whether they would ever be able to rebuild their homes and reconstruct their lives.

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1 The song "Is That All There Is?" was inspired by Thomas Mann's 1896 short story, "Disillusionment." The song was written by Mike Stoller and Jerry Leiber and arranged by Randy Newman. It took a while before it was noticed in 1969 by Peggy Lee, an American jazz and popular music singer, songwriter, and actress, whose career spanned seven decades. She recorded it and "Is That All There Is?" became an immediate hit.

An aerial photograph of the destruction and desolation wrought by the Los Angeles fire in Pacific Palisades in January 2025. Even a quick look at this photograph suggests strongly that it is likely the thousands of people who lived there and lost their homes and businesses intuitively shared a common lament, "Is that all there is?" (Photo courtesy of West Coast Aerial Photography.)

The loss of the home of Presiding Justice Arthur Gilbert and his wife, Barbara, was troubling because he intended to retire this year after a half century on the bench. For the Gilberts, and thousands of others in the basin, the fires changed everything. It shouldn't be surprising they wondered, "is that all there is," as they pondered their vast losses and those of their friends and neighbors.

"The Gilberts lost all their possessions," according to Gary Greene, "including Art's cherished Fazioli . . . one of the world's finest grand pianos. It had a powerful and rich sound with a wide dynamic range, from the softest pianissimo to the most powerful fortissimo."[2]

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2 Fazioli pianos are remarkable and very expensive musical works of art; for more, go to Fazioli Pianos; Fazioli Piano History; and Legacy of Paolo Fazioli.

As was Art's piano, the Gilbert home was unique. It was designed and built by Art's late boyhood friend who became an architect, Richard Appel. It was used regularly for rehearsals of Maestro Gary Greene's Big Band of Barristers and for his Jazz Quartet. Art was a talented and highly skilled pianist. He was Greene's lead pianist for his Big Band and Jazz Quartet. Barbara is a fine vocalist and regularly sings with Greene's Jazz Quartet.

According to Greene,

> Our Big Band and Jazz Quartet rehearsed in the Gilbert home since I founded the band thirteen years ago. His piano was one of the finest I ever heard. It's truly sad. Several of my other musicians lost their homes, including Justice Helen Bendix, Court of Appeal, Second Appellate District, Division One (the Pacific Palisades fire). She was only able to save her violin and viola. My bassoon player, Ted Ancona, lost his home in Altadena (the Eaton fire). He is not an attorney but played with us as a substitute; his son John Ancona is an attorney who played with us until he moved to San Francisco. My trombone player, Marc Sallus, Esq., a partner in Oldman, Sallus & Gold, LLP, lost his home in the Palisades fire along with members of my chorus and my choral piano accompanist, Linda Kaye, a paralegal. Those who lost their homes were among the first to let me know that they wanted rehearsals and concerts to continue. At post-fire rehearsals, several of my members—Justice Gilbert, Justice Bendix, Marc Sallus, and Nicholas Allis (also a lawyer)—each said how important the rehearsal was to them after losing everything. A friend loaned Marc Sallus a trombone as his was destroyed in the Palisades fire. Music helps, and I am arranging several volunteer performances for the community. We worked hard together on our first and successfully performed our sixteenth anniversary at Walt Disney Concert Hall on June 28, 2025.

Less than two months later, Justice Gilbert suffered a medical emergency. He wrote a friend, "This is remarkable. Why? I had a stroke, a real one, albeit a small one a week ago, with a brain scan to prove it. Of course it had to be on the right side. I could not write or play the piano for a week. Slowly, the right-side started working. No one would know I had this condition. I faked it well and was able to play. Right was still weak but improving. Just call me Job.

Good-bye to the court this year. Loved every minute of it. Your friend, still standing, Arthur."

Justice Gilbert at the keyboard playing smoothly and without a hitch during a gathering at which he and his combo appeared in August 2025 following his stroke. (Photo courtesy of the LA Lawyers Philharmonic.)

What was known by the end of January 2025

Data related to judges, their courts, and staff was and remains difficult to acquire. However, some data was available early on and appears below.

State Courts

Three state appellate justices, fourteen state trial judges, and sixteen judicial staff members lost their homes. Several other state judges and staff members were evacuated but did not lose their homes, although some homes remain uninhabitable, temporarily or permanently. Chief Justice Guerrero says that California's Judicial Council is coordinating with the Los Angeles

courts to determine how they can best help those who have been impacted, and the courts are working as expeditiously as possible to do so.

Federal Courts

So far as is known at present, five federal judges and six federal court staff members lost their homes. In total, forty-three of the federal court's approximately 590 employees have suffered lost homes, evacuations, power failures, or other impacts. This is only one recent example of the need for planned judicial resilience in both state and federal courts after the natural disasters that often occur in California. "The judges affected include both active and senior district judges, as well as bankruptcy and magistrate judges, who have had their homes burn down or be badly damaged. Some judges 'have literally lost their entire wardrobe' and don't have the means to come into work, while others have relocated and are able to continue working, Karth said."[3]

The following two articles, the first by Justice Arthur Gilbert, "The Fire Next . . ." and the second by Maestro Gary Greene, "We Shall Return: Music, Loss, and Resilience After the Fires," discuss the inspiration and resilience they and their friends and orchestral peers found in themselves in the aftermath of the Los Angeles fires in January 2025. Together, they all rose above "is that all there is."

Addendum

The man accused of intentionally igniting the devastating Palisades fire, which killed a dozen people, has been indicted on three felony charges and faces the prospect of up to 45 years in prison, authorities said.

Jonathan Rinderknecht, 29, was arrested Oct. 7 and charged with destruction of property by means of fire for allegedly starting a blaze in Temescal Canyon on New Year's Day that went on to become the most destructive wildfire in Los Angeles history.

On Wednesday, Rinderknecht was indicted by a federal grand jury and charged with two additional felonies—one count of arson affecting property used in interstate commerce and one count of timber set afire, according to the U.S. Department of Justice.

The Palisades fire scorched 23,400 acres—an area roughly 1.5 times the size of Manhattan—and leveled more than 6,800 structures.

Clara Harter, "Man Accused of Maliciously Igniting Palisades Fire Faces New Charges, up to 45 Years in Prison," *Los Angeles Times* (October 15, 2025).

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[3] Suzanne Monyak, "Five Federal Judges Lose Homes in Southern California Wildfires," *Bloomberg Law*, January 13, 2024.

ARTHUR GILBERT*

The Fire Next …

Pardon the unfinished title, and apologies to James Baldwin. His book, "The Fire Next Time," is Baldwin's profound work on race relations in America. It is a call to learn from the past to have a better, harmonious future. My wife Barbara and I are working toward that goal after the Palisades Fire destroyed our home, the place where for years the Big Band of Barristers rehearsed. This article stems from a request to write about how music is a factor in that goal.

I am what they call the band's key man. That means I play the piano. Barbara sings at occasional concerts with the band and with a jazz quintet comprised of musicians from the band. Barbara and I have much in common. We came from musical families. Her father studied piano at Julliard. My father played the piano with a jazz combo and a band in Chicago in the twenties. My cousin, the family genealogist, told me our grandfather on my mother's side was the principal flautist in the New York Symphony, later to become the New York Philharmonic.

The fire took from us all our possessions including our music. By music I mean not just the sheets of music, the records and CDs, the concert grand piano, but the room where for years the entire Big Band of Barristers rehearsed under Gary Greene's direction. And now all that remains are the memories of the rehearsals.

When I was around twelve or thirteen, my father took me to Sardi's, a jazz club in Hollywood, to hear the legendary Art Tatum. I stood next to the piano and watched and listened to the genius produce runs and chords that made the piano sound like a full orchestra. Rachmaninoff and Horowitz, two of the great classical pianists of the twentieth century, listened to Tatum, awestruck. Me too. It was at that moment, though I could not formulate the thoughts in my young brain, that I knew I should go to law school.

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* Arthur Gilbert is presiding justice, Court of Appeal, Second Appellate District, Division Six, State of California. He has been a judge for a half century. He is a concert pianist and is the lead pianist with the Los Angeles Lawyers Philharmonic Orchestra and Big Band of Barristers.

While in high school, I wrote a jazz column for a slick magazine called the *Junior Journal* and interviewed then-famous artists such as trumpet great Shorty Rogers and drummer Chico Hamilton, who headed an ensemble of cello, flute, bass, and drums. Sometimes Shorty played the fluegelhorn, a larger brass horn that produces a more mellow tone than a trumpet. In my article I referred to it as a trumpet with a thyroid condition. I guess that was a bit of foreshadowing. Shorty cracked up.

I wanted to be a jazz musician and a writer. As a young man I called the Thelonius Monk tune, "Epistrophe," "Apostrophe." It was a joke and my way of saying I wanted both worlds. To avoid starving to death, I went to law school. During the decade I practiced law, I attended a party where there was a palm reader. She carefully examined the lines in my hand and announced with absolute conviction that I would have many of my works published. Little did I know at the time that most of my published work would be in Cal. App. 3d, 4th, and 5th, not to mention a few dozen articles and hundreds of columns for the *Daily Journal*. So, I became a writer. But I kept my dream of becoming a musician by playing occasional gigs and joining Gary Greene's Big Band of Barristers as one of its founding members.

The fire took things away and things are . . . only things. The combination of some things—paintings, music, and the piano—create an ambiance that is unique to the individual. And that is impossible to recreate.

Fire is a force, both creative and destructive. Without it, we would not have a civilization. Who wants to eat raw steak?

Music survives and heals. I don't need a concert grand to continue to play. In fact, I was a little embarrassed having such a magnificent instrument. For now, I have a state-of-the-art digital piano in the condominium where we live for the time being. The thousands of others who have suffered the impersonal and random onslaught of the fire have their ways of coping with their losses. I still play the piano and Barbara sings. We listen to music and attend concerts. We conquer the fire by keeping what it could not take away from us.

An overhead view of the LA Lawyers Philharmonic and Legal Voices 16th Anniversary Concert held at the Walt Disney Concert Center on Saturday, June 28, 2025. Please note this is after all the January 2025 LA fires had died down and left widespread devastation throughout the region. (Photo courtesy of the LA Lawyers Philharmonic.)

LA Lawyers Philharmonic Founder-Conductor Gary S. Greene's Big Band of Barristers rehearsing at the Gilbert home that was destroyed on January 7, 2025, by the Pacific Palisades fire. (Photo taken by Michael Kohan and used with his permission.)

Justice Gilbert received the June Lockhart Humanitarian Award (the "Junie") at the LA Lawyers Philharmonic's 16th Anniversary on Saturday, June 28, 2025. (Photo courtesy of the LA Lawyers Philharmonic.)

On the left is Helen B. Kim, Esq. (solo pianist with the LA Lawyers Philharmonic) and on the right is Justice Helen Bendix (Associate Principal Violist with the LA Lawyers Philharmonic). Justice Bendix hosted many rehearsals with members of the LA Lawyers Philharmonic in her home that was destroyed in the Pacific Palisades fire. (Photo courtesy of the LA Lawyers Philharmonic.)

Presiding Justice Arthur Gilbert, Chief Justice Patricia Guerrero, and LA Lawyers Philharmonic Founder-Conductor Gary S. Greene, Esq. (Photo taken by Michael Kohan and used with his permission.)

Actor/musician Hal Linden rehearsing with LA Lawyers Philharmonic Founder-Conductor Gary S. Greene's Big Band of Barristers at the Gilbert home that was destroyed on January 7, 2025, by the Pacific Palisades fire. (Photo taken by Michael Kohan and used with his permission.)

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GARY S. GREENE*

"We Shall Return":

Music, Loss, and Resilience After the Fires

Dedication: As I completed writing this article, I heard the sad news that my dear friend Selma Moidel Smith passed away. Selma was an attorney when few women entered the profession, a composer and musician when most professional orchestras did not allow women, the first woman editor-in-chief of California Legal History and an honorary member of the Los Angeles Lawyers Philharmonic. She touched the lives of so many. We will miss her deeply.

January 7, 2025, was a devastating day. It was on that day that the Pacific Palisades and Eaton fires erupted in Los Angeles County, claiming twenty-eight lives and destroying more than 16,000 structures. The fires upended the lives of thousands, touching people of every race, religion, culture—and profession. Among those impacted were lawyers and judges who are also members of the Los Angeles Lawyers Philharmonic, Legal Voices, and Gary Greene, Esq. & His Big Band of Barristers.

As 2025 began, our musical groups were immersed in preparing for beautiful spring concerts, meeting weekly to rehearse. Then suddenly the fires stopped the music. Yet remarkably, the first members to ask about resuming rehearsals were those who had suffered the greatest losses. "When is our next rehearsal?" they asked. Music, for them, wasn't a luxury—it was a lifeline. Some musicians fled their homes with nothing but their instruments. Others lost everything, including their instruments. Still, within two weeks, borrowing where necessary, we were making music again.

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* Gary S. Greene has been 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 Junior Philharmonic Orchestra, the acclaimed young people's symphony founded in 1937 by his late uncle, Maestro Ernst Katz.

Justice Arthur Gilbert: A Home of Music Lost

The Honorable **Arthur Gilbert**, Presiding Justice of the California Court of Appeal, Second District, Division Six, is not only a distinguished jurist but also the key man of our big band. When I first met him about fifteen years ago, we discussed creating a first rank big band composed of lawyers and judges. It would consist of seventeen members and myself as the band leader. It would be modeled after the famous big bands of the 1930s and 1940s that were led by Glenn Miller, Tommy Dorsey, Duke Ellington, Benny Goodman, Artie Shaw, and others. Justice Gilbert liked the idea and agreed to be our piano player. He and his wife Barbara offered their home as the rehearsal venue for the band. The Gilberts hosted every band rehearsal at their house from May 17, 2012, until the day it burned down—January 7, 2025.

On that devastating day in 2025, the Gilberts lost their home and all their possessions including the justice's cherished Fazioli . . . one of the world's finest pianos. It had a powerful and rich sound with a wide dynamic range, from the softest pianissimo to the most powerful fortissimo. When the band rehearsed, the sounds emanating from the Gilbert home attracted neighbors who stopped by to listen. Visitors included actresses June Lockhart and Diane Keaton. The music brought life to the neighborhood. All that ended on January 7, 2025. There was no longer a home, no personal effects, no Fazioli and no place for the band to meet and play music. How does one cope with such a loss?

In Justice Gilbert's own words:

> The fire, not content to take our music, our recordings, our CDs, our piano, and the set of drums I kept at the house, it also took the special place where the Big Band of Barristers rehearsed Tuesday nights, 7:00 P.M. This was the meeting place where all the musicians were at home. Show up, no formalities. The lawyer musicians came from work with their instruments to where they made music.
>
> Beforehand, we rolled up the Persian rug and pulled it to the side. We set up the folding chairs and music stands under which we placed newspapers to collect the spit that periodically spilled when the brass players emptied their valves. To produce a sound that captivates also involves what I call, for lack of a better term, earthiness. This is akin to the opposite reaction to every action.
>
> If only to play again, with our musical entourage. Gary found a place and several weeks after the conflagration we met for a rehearsal. It was different. In place of my concert grand was a digital keyboard with a passable sound system. I was so inspired that despite limited practice, my

> "chops," (jazz term for technique) were relatively good. We played and during that rehearsal, for the first time since our loss, I felt joy and a sense of peace of mind. At the end of the rehearsal, I spontaneously proclaimed to my fellow musicians, "We Shall Return!" They cheered. The plans I approved for our hoped-for rebuilt home provide for a large room for the piano and the band to once again rehearse.
>
> I continually tell myself, "Who are we to complain?" Thousands of people are in a similar predicament, all trying to plan for an uncertain future. Solace is elusive, but I have found the certain palliative: music.

Music is truly the essence of life. Both the performer and the listener are taken to another world where they are free from the "trials and tribulations" of a hectic lifestyle. Justice Gilbert's dual passions for the courtroom and the concert hall serve as an inspiration, reminding us of the harmony that can be achieved when we blend our professional pursuits with our creative passions, and even more so when coping with a devastating loss.

Justice Helen Bendix: Music Amid the Ashes

The Honorable **Helen Bendix**, Associate Justice of the California Court of Appeal, Second District, Division One, is a long-time associate principal violist in the LA Lawyers Philharmonic. Her home in the Pacific Palisades was also lost in the fire. She escaped with only her musical instruments.

In her words:

> The only things I took when I evacuated from my home of forty years were my violins and violas. This is symbolic of the importance of music to recovery after losing everything. Playing in orchestras and chamber music provided normalcy in an upside-down world. I focused on my blessings—my family, my friends, my job, and my music. The fire does not define me. These blessings do.
>
> Justice Bendix later welcomed our musicians to rehearse and perform in her new home, continuing to uplift the community through music.

Marc L. Sallus: Recovery Through Community

Marc L. Sallus, Esq., a partner at Oldman, Sallus & Gold, LLP, plays trombone in both my Big Band of Barristers and the LA Lawyers Philharmonic. He is also a sponsor of our musical groups. His Pacific Palisades home, which had hosted concerts overlooking the ocean, was reduced to ashes. He lost everything—including a collection of instruments passed down through generations.

Even as the fires raged, Marc called me to say he had borrowed a trombone and was ready to rehearse. Later, he generously offered his new home as a rehearsal space.

He shared:

> I've performed since age six—voice, piano, trumpet, trombone, baritone. I lost every instrument, including the family piano. It hit hard. But friends stepped in. One sent me a baritone. Another, a trombone stand. Someone lent me a trombone. Music and my fellow musicians helped me begin to heal. I've since acquired a new trombone and piano. Though I mourn what I lost, I've been lifted by the kindness of friends.

Nicholas Allis: The Power of Singing

Nicholas Allis, Esq., a member of our Legal Voices chorus, also lost his home of twenty-five years in the fires. He and his wife escaped with only their dog, their cars, and the clothes they were wearing.

Reflecting on those chaotic days, Nick said:

> We stayed in motels and with friends, constantly rushing around. One day, I told my children, "Let's not allow stress to define us. Let's be calm and happy despite the losses."
>
> Singing helped me rise above the trauma. It's a reality different from the chaos—relaxed, communicative, creative. Singing with others creates connection. I once read that when members of a chorus sing together, their brainwaves synchronize. I wasn't surprised. Thank you to Legal Voices and my church choir for lifting me up.

Other Stories of Resilience

Linda Kaye, our Legal Voices piano accompanist, lost her home and her piano.

Ted Ancona, a bassoonist in the LA Lawyers Philharmonic, lost his home in the Eaton (Altadena) Fire—but escaped with his instrument.

We did everything we could to help musicians replace lost instruments. Despite profound losses, every affected member returned for rehearsals and performed with us at our 16th Anniversary Concert Extraordinaire at Walt Disney Concert Hall on June 28, 2025. It was a triumphant, emotional performance—one that proved the indomitable power of music.

Music: The Soul's Solace

Music is the essence of life. For both performer and listener, it provides escape, solace, and connection. It lifts us beyond the burdens of daily life—especially in the wake of devastating loss.

Justice Gilbert's passion for both the courtroom and the concert hall reminds us of the harmony that can be achieved when we blend our professional lives with our creative passions. The hundreds of musicians who've performed with us agree: in today's complex world, music is more than a pastime—it is a vital antidote. It heals. It inspires. It sustains.

And, as long as we have music in our busy lives in the legal profession, **we shall return.**

★ ★ ★

A Potpourri of Criminal Justice News and History

A précis to six articles by Leonard Kienzle, Nancy O'Malley, John Wesley Hawk Stoller, Jeffrey Seaman and Paul H. Robinson, Tom Hogan, and Terry McHale

First among the six articles is Leonard Kienzle's "One Hundred Years of the Alameda County All-Star Prosecutors." It is the cover story for this edition of *California Legal History*. Kienzle is a script writer. In his article, he tells us something about each of six former members of the Alameda County District Attorney's Office by purporting separately to "sell" each to a producer in the hopes of making a play, a television show, or movie. Obviously, Kienzle's is an atypical legal story, but interesting for several reasons—most notably, the significance of his six subjects.

In evaluating the format for producing the cover art for this year's journal depicting the six distinguished former members of the Office, renowned artist and lawyer, Terry Flanigan, settled on a style he explains: "The cover art is a perfect example of an illustration. Having been given the elements of a story, I had to visualize how to convey the Idea, six individuals and their relationships to a building, the Alameda County Courthouse in downtown Oakland. Because the law, the past, and a story are a common connection, an early twentieth-century newspaper format seemed like a good candidate, along with its use of encapsulated portraits and monotone cepia coloring. The circle of circles surrounding the Mother Ship (that is, the courthouse), painted in watercolor, provided the answer."[1]

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[1] Flanigan did the art for the cover without charge. He has done similar legal projects through the years, also without charge. He is very generous with his talent.

Former U.S. Chief Justice Earl Warren is most prominently depicted on the cover at the center top. He is flanked on the left by former U.S. Attorney General Edwin Meese III, and on the right by former Associate Justice Ming Chin of the California Supreme Court. All three men are legal legends; each having left an immense imprint on the law. Across the bottom are three distinguished legal luminaries; each still making an indelible mark on the law—left to right, Associate Justices Carol Corrigan and Martin Jenkins of the California Supreme Court, and Kamala Harris, former San Francisco District Attorney, California Attorney General, U.S. Senator, U.S. Vice President, and recent candidate for President. All six legal luminaries distinguished themselves before leaving the office to serve California and the nation even more broadly.

Earl Warren was posthumously honored with the Presidential Medal of Freedom in1981 by President Jimmy Carter. Journalist Jim Newton chronicled the large and enduring impact Warren had on America.[2]

Edwin Meese III was honored with the Presidential Medal of Freedom in 2019 by President Donald J. Trump. Law professors Steven Calabresi and Gary Lawson assert Meese is "the most influential person ever to hold the office of U.S. attorney general."[3]

> One of the most important speeches of the Reagan presidency was not delivered by the Great Communicator himself. In the summer of 1985, Edwin Meese III—confirmed a few months earlier as the Reagan administration's second attorney general—appeared at the American Bar Association's annual meeting. There he declared that under his leadership, the Department of Justice would "resurrect the original meaning of constitutional provisions and statutes as the only reliable guide for judgment." As Steven Gow Calabresi and Gary Lawson argue in *The Meese Revolution: The Making of a Constitutional Moment*, this address proved to be the clarion call for a movement that reformed the federal judiciary, an accomplishment that rates among the most significant conservative victories of the past half century. Calabresi and Lawson show that Meese served many important roles in his long career, but his influence in

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[2] *Justice for All: Earl Warren and the Nation He Made* (2006). Supreme and appellate justices attending an Appellate Court Institute in 2006 heard Newton speak on Warren. All who attended received a copy of his book.

[3] *The Meese Revolution: The Making of a Constitutional Moment* (Encounter Books, 2024). Also see the *Heritage Guide to the Constitution*, 3rd ed. (Regnery, 2025), with a foreword by Meese. Steven Calabresi, "The Meese Revolution: The Making of a Constitutional Moment," *Reason*, December 9, 2024. Meese also wrote a foreword to the second edition in 2014. The first edition was actually authored by Meese in 2005. Finally, see Law Professor Josh Blackman, "This Constitution Day, Celebrate the Triumph of Originalism," *Reason*, September 17, 2025.

bringing what we now know as originalism into the legal mainstream was his greatest accomplishment.[4]

Ming Chin established a distinguished and impactful record as prosecutor, trial lawyer, and judge, his final twenty-four years on the California Supreme Court. He was nominated to serve on the state high court by Governor Pete Wilson in January 1996 and confirmed by the California Commission on Judicial Appointments in March 1996. In all, he spent sixty years in the law. After graduating from Hastings College of the Law (now UC Law), San Francisco, he was commissioned a Captain in the United States Army, and in 1969 was awarded both a Commendation Medal and Bronze Star for his meritorious service in the Vietnam War. Chin's oral history appears elsewhere in this journal.

Carol Corrigan was nominated to serve on the California Supreme Court by Governor Arnold Schwarzenegger in December 2005 and confirmed by the California Commission on Judicial Appointments in January 2006. She sits on the state high court to this day. High points of her career in the Alameda County District Attorney's Office are chronicled in Nancy O'Malley's article, "The Remarkable Women of the Alameda County District Attorney's Office," which also appears below.

Martin Jenkins was nominated to serve on the California Supreme Court by Governor Gavin Newsom in October 2020 and confirmed by the California Commission on Judicial Appointments in November 2020. Justice Jenkins replaced Justice Chin who retired. Remarkably, he's been appointed to four different judgeships by Republicans and Democrats. A pair of Republican governors appointed him to state judgeships before Democratic President Bill Clinton made him a federal judge in 1998. He was Governor Newsom's Judicial Appointments Secretary when nominated to serve on the state high court.

Kamala Harris is a unique person. When District Attorney Jack Meehan hired her in 1990, neither he nor anyone else in the office, least of all Harris herself, would have ever imagined what lay ahead for her in law and in politics. She was hired just out of law school as a deputy district attorney in Alameda County. For four years, she handled cases involving the full range of crimes, misdemeanors and felonies. She credits her experience in Alameda County as an important foundation for her legal and political careers that soon began to unfold. For the next several years, she served on the California Unemployment Insurance Appeals Board

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4 Christopher J. Scalia, "The Indispensable Originalist," *Commentary*, December 2024.

and later the California Medical Assistance Commission. In February 1998, San Francisco District Attorney Terence Hallinan recruited Harris as an assistant district attorney. In August 2000, she went to work for San Francisco City Attorney Luise Renne. In 2002, Harris ran for and was elected District Attorney of San Francisco. In 2006, she ran for and won reelection. In 2010, Harris ran for and was elected State Attorney General. In 2014, she ran for and won reelection. In 2016, she ran for and was elected to replace U.S. Senator Barbara Boxer when the latter chose not to seek reelection. Harris resigned as State Attorney General in 2017 to assume her seat as a U.S. Senator. In 2020, she was selected by former U.S. Vice President Joe Biden, the Democratic nominee for president, to be his vice-presidential running mate. They won in November 2020. In 2024, Harris was nominated to succeed President Biden as the Democratic nominee for president. She lost in November.[5]

Remarkable female prosecutors and criminal defenders

The people who prosecute and defend criminal cases daily labor in anonymity, often into the night and on weekends, to handle unimagined workloads. Prosecutors usually have widespread public support. They are tireless in their efforts to protect the public and protect the rights of the victims of crime and their families. Criminal defense lawyers rarely have any public support. They represent their clients, some charged with grisly crimes that defy credulity, with energy and devotion, even when guilt is obvious. Their personal stories are rarely told. The role of women, as prosecutors and criminal defenders, remains largely untold. This is especially true of the early women prosecutors and criminal defenders. Two articles appear below, one each on early women prosecutors and early women public defenders.[6] The first, by former Alameda County District Attorney Nancy O'Malley, "The Remarkable Women of the Alameda County District Attorney's Office," tells the story of the early female prosecutors and how immensely their numbers have grown in recent decades. The second, by Supervising Assistant Public Defender in the Sacramento County Public Defender's Office John Wesley Hawk Stoller, "Women Who Shaped Public Defense, A Love Letter," tells the story of early women criminal defenders

[5] This paragraph comes from Nancy O'Malley's article, "The Remarkable Women of the Alameda County District Attorney's Office," which also appears below.

[6] These two groups of public officials are primarily represented in Sacramento by three organizations, the California District Attorneys Association (CDAA), the California Public Defenders Association (CPDA), and the California Attorneys for Criminal Justice (CACJ). While, on the defense side, the focus is on early female public defenders, there are many female attorneys in private practice who deal with criminal defense. Perhaps someone from CACJ will submit an article dealing with groundbreaking female criminal defense lawyers in private practice.

and how one of them waged a sustained campaign to credit and adequately fund governmental public defender offices. She prevailed in achieving her primary goal but failed in achieving adequate funding for those offices. Neither prosecutor nor public defender offices are adequately funded.

Getting away with murder and rape

Jeffrey Seaman and Paul H. Robinson base their article, "What Justice? Confronting the Criminal Justice System's Biggest Problem" on their book, *Confronting Failures of Justice: Getting Away with Murder and Rape* (Rowman & Littlefield, 2024). The authors expose the tragic truth that most murderers, rapists, and other serious criminals escape justice, a horrifying fact that has gone largely unexamined until their book. Their article examines this problem and considers new directions for criminal justice reform. Paul Robinson is the Colin S. Diver Professor of Law at the University of Pennsylvania and one of the world's leading criminal law scholars. A prolific writer and lecturer, Robinson has published more than 150 scholarly articles in virtually all the top law reviews, lectured in more than 100 cities in 34 states and 27 countries, and had his writings appear in fifteen languages. Jeffrey Seaman is a researcher and writer on the criminal justice system who has published numerous articles in law reviews and magazines. He holds a master's in behavioral science and is a Levy Scholar at the University of Pennsylvania Law School. Muhammad Sarahne also coauthored the book. He holds several degrees—SJD, LLM, LLB—and is an attorney in the Criminal Department of the State Attorney's Office in Israel, representing the state in criminal matters before the Israeli Supreme Court. He previously worked as a prosecutor in the Economic Crime Department and was an assistant to the Israeli Deputy Attorney General (Criminal). He is an adjunct teacher at the Law School of the Hebrew University of Jerusalem and has published several articles in American and British law reviews.

Tom Hogan is an assistant professor of law at South Texas College of Law Houston. He previously served as a federal prosecutor and elected district attorney, as well as working as a criminal defense lawyer at major law firms representing Fortune 500 companies and individual defendants. His piece, "Confronting Failures of Justice: Getting Away with Murder and Rape," is a balanced and fair book review that explains why *Confronting Failures of Justice: Getting Away with Murder and Rape* should be read by every public official in the nation.

Hogan concluded that

> *Confronting Failures of Justice* is a book that should be read by scholars and ordinary citizens. The tragedy of a book like this is that it will be ignored by politicians, activists, and members of the mainstream media who regard it

> as a collection of inconvenient truths best swept under the rug. The players in the American criminal justice system with actual skin in the game—crime victims, police, prosecutors, defense lawyers, honest judges, and people who live in communities devastated by criminals—will recognize the integrity of this scholarly work. Robinson and his fellow authors are the proverbial *vox clamantis in deserto*, and we should hope that somebody is listening.

Until our nation's political leaders—local, state, and federal—and civic leaders take the administration of criminal justice seriously and deal with it systematically, honestly, and adequately fund it every year, crime and violence will continue to disrupt, if not destroy the lives of millions of citizens daily, especially those in inner cities. The public, especially the victims of crime and their families, as well as the accuseds of crime and their families, deserve better. Cardozo said it best almost a century ago in his sage admonition in *Snyder v. Mass.*, 291 U.S. 97, 122 (1934), "But justice, though due the accused, is due the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true."

Art and lawyers

> Perhaps because we are busy with our law practices, artistic endeavors are often put on the back burner while we concern ourselves with helping others. Neglecting our artistic side might hurt us more than we know. If we pursued that artistic side, we might actually benefit as lawyers. As said by Leonardo da Vinci, "Art is never finished, only abandoned."
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> While one does not ordinarily think of Albert Einstein as an artist, he obviously considered himself one: "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." Ralph Waldo Emerson agreed, when he said, "In art the hand can never execute anything higher than the heart can inspire."
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> Oscar Wilde also had strong opinions about the importance of art, "Art is the most intense mode of individualism that the world has known. (But then again, he also noted that "One should either be a work of art, or wear a work of art.")[7]

Art has been a part of Terry Flanigan's life since long before he became a lawyer, and since. Terry McHale tells about Flanigan's life and times with

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[7] Donna Bader, "Art and Law: Is There a Connection? A Look at the Nexus of Law and Art, and the Works of Four Attorneys and a Judge Who Are Also Accomplished Artists," *Plaintiff*, April 2008, p. 1. This is a fine article. Every judge and lawyer should read it. Bader discusses how art entered and affected the lives of several lawyers. Donna Bader was a certified specialist in appellate law and was the editor of *Plaintiff* magazine.

flair and eloquence, in "An Intersection of Art and Law in the age of the Baby Boomer," the story of a lawyer and an artist who served the law for more than forty years, while intermingling art, often portraying important people and events that transformed law and the nation.

McHale is an artist, a skilled writer. He is also a veteran legislative advocate with the venerable Sacramento lobbying firm of Aaron Reed & Associates. He has interviewed and written stories about such interesting Californians as Clint Eastwood, California Assembly Speaker Willie Brown, Kareem Abdul Jabbar, Willie Mays, Congressman Gary Condit, State Senator John Burton, and California Governors Pete Wilson and Gray Davis. He is writing a new and original piece for the 2026 issue of *California Legal History* on Congressman Phil Burton and State Senator John Burton and their immense, decades-long impact on California law and politics.

McHale's subject here, Terry Flanigan, is not the only legal professional with an affinity and talent for art in the fashion Donna Bader describes in her article in *Plaintiff* magazine. Other such lawyers/artists are former Presiding Justice James A. Ardaiz and Associate Justice Rodney Davis. The two men were great lawyers who became great trial judges and appellate justices.

While Ardaiz and Davis authored hundreds of published appellate opinions, Ardaiz also wrote and published books, both nonfiction—*Hands Through Stone: How Clarence Ray Allen Masterminded Murder from Behind Folsom's Prison Walls* (Craven Street Books, 2012)—and fiction, including *Tears of Honor* (Pace Press, 2021).[8]

More of Ardaiz and Davis and their art, painting for Ardaiz and sculpting for Davis, are recounted in an article published in their law school magazine as noted in the next two paragraphs.[9]

> Although Jim Ardaiz '74 and the Rev. Rod Davis'74 did not know each other at UC Hastings, their similar career trajectories, first as prosecutors and then as judges, fueled a decades-long friendship that has extended beyond the courtroom to their mutual passion for art and their support of one another's professional and personal accomplishments.

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[8] *Tears of Honor* is a national award-winning book that tells a story based upon actual events torn from the pages of American history. A sweeping novel of history, war, and courage in the face of injustice, *Tears of Honor* depicts a dark time in American history when Japanese American soldiers fought against Nazi tyranny in Europe during World War II while their families remained imprisoned by the American government.

[9] "Parallel Lives: Two Former Prosecutors and Appellate Judges Reflect on Their Careers, Their Passion for the Arts, and Their Enduring Friendship," *UC Hastings*, Fall 2015, at p. 62.

The two men got to know one another after they both became appellate court justices in the late 1980s. Ardaiz spent 30 years on the bench, serving 16 years as the administrative presiding justice for the Fifth District Court of Appeal in Fresno. Davis was a judge for 27 years, 20 of which he spent as an associate justice on the Third District Court of Appeal in Sacramento.

There is another side to Davis: He is now an Episcopalian priest.[10]

Elsewhere in this journal you will find articles by Presiding Justice Arthur Gilbert and Maestro Gary Greene, Esq., both under a précis, "Is That All There Is?," and dealing with the impact of the Los Angeles fires of 2025. Their shared artistic passion is music: for Gilbert, the piano, and for Greene, the Big Band of Barristers and Los Angeles Lawyers Philharmonic and Legal Voices, a 100-person musical choir, all comprised of legal professionals, active or retired. Also see Arthur Gilbert, "Literature and Music—Keys to Judging, My Personal Journey: We Are More Than Our Professions"; Gary S. Greene, "Lawyers and Judges in Harmony"; and "Building an Icon: The Making of Walt Disney Concert Hall," all in *California Legal History*, California Supreme Court Historical Society (2024), at pp. 221, 237, and 253, respectively.

[10] Father Rod keynoted Sacramento's first Court-Clergy Conference in 2015 with his presentation of "Religion's Place in Judicial Decision-Making." Father Rod brought a unique voice to his talk. Before he was ordained, he served the law for more than thirty-five years, most of it as an assistant attorney general, a trial judge, and an appellate justice. See the related cover art, also by Terry Flanigan.

LEONARD KIENZLE*

One Hundred Years of the Alameda County All-Star Prosecutors**

Why would any layman want to explain the importance of a prosecutor's office to a bunch of lawyers and judges? How would a regular guy discover the profound prominence of a certain civic incubator of greatness five hundred miles away from his hometown and totally disconnected from any personal professional acquaintance? [12]

How the hell do you sell the history of any D.A.'s office to a Hollywood producer? Throw me a bone . . . give me a hint.

I've had a few different careers, blue and white collar. What connects me to this is, now this is going to be a stretch, but I'm kind of a movie guy. One of my passions is writing screenplays—before you ask, I'm not famous, in fact, I prefer as much anonymity as possible, as I take certain steps to protect my sanity and spirituality, but I've accomplished much quietly and behind the scenes. I consult with those that trust me and when they really need to get something done I get a call like a hitman, or better yet, a "cleaner." Someone who, after observing appropriate patterns, offers a solution to straighten out the mess. Maybe like a lawyer or a judge.

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* Born in San Bernardino, California, to a U.S. Marine and a school librarian, Leonard Kienzle has been a Southern Californian kid all his life. Many jobs satisfied his younger curiosity, from working as a carpenter, plumber, bartender, pizzeria manager, telephone/internet line installer, sub-rosa investigator, pool man, drug and alcohol counselor, and a few more. He's owned and operated successful businesses. He has freelanced for local newspapers and magazines, participated in several television and film productions in a variety of ways, written a few television pilots, and over ten feature screenplays. Some have been produced or optioned for production. As a family man and father of four, he has found that to be the most important aspect of his life and concentrates on maintaining balance and serenity when it comes to professional pursuits. Today, Leonard prefers the anonymity of a low profile and enjoys working as a consultant with producers providing content correction and story structure solutions.

** See related cover art by Terry Flanigan and explanation on inside front flap of cover.

Anyway, I've worked on projects you've heard of or seen, I've worked with people you'd recognize, but this is not about my credentials or qualifications. Just know I am very comfortable and happy with what I do and how things have turned out thus . . . maybe someday . . . they say timing is everything and there's something to that.

California crime can be frightening and riveting all at once. When Lindbergh's baby was kidnapped in New Jersey, you know back there they called that the trial of the century. But in California, especially in Southern California, criminal trials can depress and mesmerize at the same time. As a publicant, if I were dropped on a different planet in a galaxy far away and asked to explain the history of the L.A. D.A.'s office it would be well . . . we had the Manson Family, expertly handled by Vincent Bugliosi; his book, *Helter Skelter*, tells us so. We had the Rodney King riots, but I can't recall any of the lawyers—just the looting. Then, the O.J. Simpson case, started by the chase—and man, were there lawyers. Chris and Marcia replaced the first ones on the good guys' side; then we had F. Lee Bailey, Kardashian, Scheck, Dershowitz, and Johnny Cochran—a defensive all-star team. And not a little spectacle but much sizzle and pizzaz! "If the glove don't fit, then . . ." That one enthralled L.A. and the nation for months! But L.A. cares less about the actual cases—ironically, L.A. loves the stories. The public loves a good story, even one about crime and violence.

The Alameda County District Attorney's Office is not a story. I've learned that as I've been trying to pitch its importance. Storytellers understand traditional three-act structure. Most of us, from an elementary age, actually know what a story is—beginning, middle, end. A cat with a hat shows up on a rainy day, he and the kids mess up the house. They better straighten it out before mom gets home or else! They work together to get it done. Stories have good guys, bad guys, journeys, missions, resolutions, sad or happy endings, etc. . . . like a case, right? But if Alameda, the D.A.'s office, isn't a story what is it? Let's discover and explore together.

It started when I was playing golf with an accidental pairing. Turns out my partner, Greg Totten, was a former D.A. from a neighboring county of L.A. who, after retiring from a most successful career, is now CEO of the California D.A.'s Association. After a few holes of bogey bliss, I told him about a story I pitched about Gladys Towles Root. To me, she is the most successful defense attorney in the history of California.

In fact, an A-list actress (namedropping is unnecessary as the focus lies north) was most interested until we all discovered the market as well as

contemporary law schools have judged poor Gladys as undesirable subject matter. Look her up and you'll probably understand the fear of celebrating her accomplishments. It's sort of like rooting for Darth Vader in Star Wars. The guy was just doing the best he could in the environment in which he existed, and man did he thrive—and he also had the coolest costume. And Gladys certainly had cool costumes as well. But Darth is clearly the antagonist.

That's how Gladys is treated today, and I so disagree. When we put ourselves in her shoes, when she put them on, we can see she may have been the first legal Wonder Woman. She did the best for herself during the time she had. She was not part of an evil empire—although we will get to that. You story-aware folks know that's a bit of foreshadowing.

Back to the course, so Golfer Greg and I continued. He hadn't heard of Gladys but said he would look her up. (Elsewhere in this edition of *California Legal History*, veteran criminal defense attorney John Stoller tells more of Gladys's story and that of other early female criminal defense lawyers.)

Then competitively, he asked, "well, have you heard of the Alameda County District Attorney's Office?" *Well duh. It's an office in Alameda, right? Oakland. The Raiders. Evil Empire?* Actually, we all know the real evil empire is on the East Coast . . . the New York Yankees! You know the names—Lou Gehrig, Mickey Mantle, Yogi Berra, Joe DiMaggio, Reggie Jackson, Derek Jeter, Aaron Judge, Babe Ruth. And of course, many more.

He smiled, "do you know who comes from there?" No, I shook my head.

He went to putt so I had a chance to Google. This was 2024, so Pamela Price popped up. Oh boy . . . *a foreboding foreshadowing.*

Then he got back into the cart. To this day we still argue about whether he made the putt, but I do know he listed many noteworthy figures that were connected to the Alameda D.A.'s office—many, of course, I hadn't heard of, but the ones I did . . . whoa! And you know the names—Kamala Harris, Ed Meese, Earl Warren.

Presidential campaigns, presidential assassinations, presidential administrations . . . the office has produced greatness in its jurisdiction of course, but also at the state and national level. The Alameda County District Attorney's Office is the New York Yankees of prosecution offices.

So look, presumably you're a judge, lawyer, or some other sort of law-dog . . . I'm a writer. I'm not sure if other scribes realize this, but many judges and lawyers are among the best writers in the world. No doubt in my mind.

Legal writing requires a high level of clarity and precision while conveying complex legal ideas and arguments in a way that is understandable to jurors, litigants, journalists, and the public. This demands a strong command of history, the law, language, and careful word choice. Twain is credited with observing, "The difference between the right word and the almost right word is the difference between lightning and the lightning bug!" Judges and lawyers know that.

Judicial and legal writings of all stripes must be meticulously researched and prepared. AI is not ready for prime time. Good judges and lawyers pay close attention to detail, ensuring that every citation, word, phrase, and punctuation mark is correct and contributes to the document's overall meaning. They know simplicity, clarity, and a touch of subtle eloquence are indispensable to persuasiveness.

Judges and lawyers analyze vast amounts of information—statutes, regulations, case law, and contractual clauses—turning such into persuasive writings, whether drafting opinions, motions, briefs, or settlement proposals. They learn to construct arguments that are compelling and coherent, appealing to the logic of the reader.

That's kind of my job here, except I'm not here to argue. I'm also not here to be technical or accurate. This will be a bit more ethereal.

It'd be very difficult to put one hundred years of history of the Alameda County District Attorney's office into a three-act story structure. So, we're going to approach it as a series, or an anthology. We're going to try to pitch it to get the word out that one little public office in Northern California is an incubator of civic and legal greatness.

I drive into the parking garage and grab the ticket. Hope I don't forget to get it validated. The attendant tips his cap as I enter the underworld.

Upstairs, the receptionist greets me kindly, directing me to an office. It's going to be a good day.

So I sit down with the Producer and pitch my story.

"*There's this little girl, raised in foster homes in Ohio's juvenile justice system . . .*"

"Oh? Tragic family origin . . . I like."

"Not really, she kept running away from home and was arrested for activism and protesting and refused to return to the custody of her parents. At sixteen, she was awarded emancipation."

Then I hand to the Producer something:

Pamela Price is a civil rights attorney and activist with a long history of championing social justice causes. Her career has been marked by advocacy

for marginalized communities, criminal justice reform, and holding law enforcement accountable. She previously ran for Alameda County District Attorney in 2018 but lost. Her persistent efforts and reputation as a fierce advocate positioned her as a leading voice for reform-minded voters.

In 2022, Price ran again, this time capitalizing on widespread dissatisfaction with the status quo in criminal justice. She campaigned on a platform emphasizing accountability, reducing incarceration, addressing racial disparities, and reforming policing practices. Her campaign resonated with a growing segment of Alameda County residents seeking a departure from traditional tough-on-crime policies.

This election cycle saw a wave of progressive candidates across California and the nation. And Price's platform aligned with those broader movements advocating for criminal justice reform, police accountability, and equity. Many voters expressed frustration with the perceived failures of the criminal justice system, including perceived racial bias, use of excessive force, and mass incarceration. Price positioned herself as a candidate who would confront these systemic problems.

Price built a coalition of community organizations, activists, and voters whose priority was reform. Her campaign emphasized candor, community engagement, and a commitment to addressing causes of crime.

Her background as a civil rights lawyer with a history of fighting for vulnerable populations gave her credibility among supporters seeking a more equitable justice system. She narrowly beat a Black man, Terry Wiley, the chief assistant D.A. in Alameda County, thus becoming the first Black woman to serve as the Alameda County D.A.—a historic milestone that underscored her appeal to voters seeking change.

Pamela Price's supporters saw her as a transformative figure committed to justice, fairness, and systemic change. Praise centered around her dedication to reducing racial disparities in the system and their belief that her approach would lead to fairer prosecutions, fewer arrests for low-level offenses, and a focus on rehabilitation rather than punishment.

Many backed her efforts to hold law enforcement accountable, addressing perceived excessive use of force, peace officer misconduct, and systemic bias. They saw her as a leader who would foster trust between communities and the police.

Her platform included promises to eliminate bail for certain low-level offenses, promote alternatives to incarceration, and prioritize social services as a means of reducing crime, aligning with broader progressive ideals.

While many embraced Pamela Price, she also faced fierce opposition from various quarters. Critics and opponents raised concerns about her approach, motivations, and the consequences of her policies.

The primary criticism centered on her reform-oriented stance, with opponents arguing that her policies undermined public safety. Critics feared that reducing arrests for what Price called minor offenses and limiting a wide variety of prosecutions would embolden criminal elements and lead to increased lawlessness.

Many law enforcement officials, conservative groups, some civic leaders, and community groups, viewed her as too radical and inexperienced. They argued that her approach prioritized social justice over public safety and that her policies would hinder law enforcement effectiveness.

Less than two years into her term, Pamela Price was recalled by voters in November 2024. The recall effort, spearheaded by the group, "Save Alameda for Everyone" (SAFE), largely centered on accusations that her progressive policies were too lenient on criminals and contributed to an unprecedented increase in crime and violence within the county, particularly in Oakland.

The primary argument from recall supporters was that Price's criminal justice reforms, which included emphasizing alternatives to incarceration, charging juveniles as juveniles, and reducing the use of sentencing enhancements, led to a perception of "soft-on-crime" policies. Critics, including victims' families and law enforcement, argued that these approaches compromised public safety and did not deliver adequate justice for victims. Specific cases were highlighted where her office was criticized for pursuing lesser charges or not seeking harsher penalties.

Fueling the recall effort were several specific cases that drew significant public and media scrutiny. These included her office's handling of the fatal shooting of a 23-month-old baby, a home improvement store employee killed by a shoplifter, and a newlywed killed in a road rage incident. Opponents claimed Price's decisions in these cases demonstrated a lack of commitment to holding offenders fully accountable.

Price's tenure coincided with a surge in both violent and property crimes in Alameda County. While Price and her supporters argued that these crime trends were complex and not solely attributable to her policies, recall proponents directly linked the rise in crime to her "failed leadership" and progressive approach.

Many victims' families publicly expressed frustration with Price's office, claiming a lack of communication and candor regarding their cases, and a feeling that their concerns were not being adequately addressed.

All fourteen police unions in Alameda County and the Alameda County Prosecutors Association publicly endorsed the recall effort. This broad opposition from within the criminal justice system added significant weight to the recall campaign.

Price and her supporters consistently argued that the recall was a politically motivated attack orchestrated by special interest groups opposed to her reform agenda. They contended the recall was an attempt to roll back progressive criminal justice reforms and that she wasn't given enough time to implement her policies effectively. The ACLU of Northern California also opposed the recall, viewing it as part of a broader conservative strategy against progressive prosecutors.

Ultimately, the recall election held on November 5, 2024, saw voters recall Price by a significant margin of 62.9 percent to 37.1 percent—the first time a district attorney in Alameda County was successfully recalled.

I sip my coffee, waiting for the Producer's reaction. After a thoughtful pause,

"Too controversial."

I was prepared. Before the Producer finished reading the former, I had my assistant send me another file.

"Ok, how about a more universally liked hero?"

Intrigued, the Producer perused.

Nancy O'Malley cobbled a career in public service is deeply rooted in her commitment to justice and victim advocacy, a passion that ultimately led her to become the first woman District Attorney of Alameda County. Her nearly fourteen-year helm of one of California's largest prosecutorial offices was marked by a series of innovative programs, legislative achievements, and a steadfast dedication to protecting the most vulnerable members of society.

O'Malley grew up in a large Irish Catholic family in the Bay Area. Her father served as the District Attorney of Contra Costa County, significantly influencing her path into law. It was during her college years, volunteering at one of the first rape crisis centers in California, that O'Malley found her true calling. Witnessing firsthand the systemic injustices faced by victims of sexual assault and domestic violence, she became determined to challenge and change the prevailing paradigm within the criminal justice system.

She joined the Alameda County District Attorney's Office in 1984. For twenty-five years, she honed her skills as a prosecutor, building a formidable reputation for securing convictions in complex felony cases, particularly those involving sex crimes. Her dedication to victims' rights was evident throughout this period, laying the groundwork for her future leadership roles. Before her appointment as District Attorney, she served as the office's top deputy for a decade, gaining invaluable experience in managing a large prosecutorial agency.

In September 2009, Nancy O'Malley was appointed Alameda County District Attorney by the Board of Supervisors, stepping into the role vacated by the retiring Tom Orloff. This appointment was historic, making her the first woman to lead the office, an office once held by Chief Justice Earl Warren. She quickly sought and won election to a full four-year term in June 2010, running unopposed. She was reelected in 2014 and 2018, demonstrating strong public support for her vision and leadership. Her 2018 reelection, though contested, resulted in an overwhelming victory, reaffirming her mandate.

Championing Victims' Rights and Services

One of O'Malley's most enduring legacies is her unwavering commitment to victims. She consistently advocated for and implemented programs designed to provide comprehensive support and empowerment to those impacted by crime.

- *Alameda County Family Justice Center (ACFJC)*: A cornerstone of her victim services efforts, O'Malley founded the Alameda County Family Justice Center. This innovative "one-stop" community support center co-locates over thirty onsite and more than fifty offsite agencies and programs under one roof. It provides a wide range of services to individuals and families experiencing domestic violence, sexual assault, human trafficking, elder abuse, and child abuse. The ACFJC has served thousands of victims, received numerous awards for excellence, and stands as a national model for collaborative victim support.
- *Eliminating the Rape Kit Backlog*: O'Malley was a national leader in the movement to eliminate the backlog of untested forensic sexual assault kits ("rape kits"). She successfully advocated for more than $175 million in funding to address this critical problem in Alameda County, California, and across the nation, ensuring that victims' evidence was processed, and justice pursued.
- *Legislative Advocacy for Victims*: O'Malley played a pivotal role in drafting and advocating for numerous bills that became law in California. Her legislative contributions included measures to make courtrooms accessible for victims with physical and intellectual disabilities, enhance the rights

of sexual assault victims within the criminal justice system, and expand support available to crime victims statewide. She is credited with successfully advocating for over sixty-five bills enhancing victims' rights.

Combating Human Trafficking

O'Malley was and remains a recognized national expert in human trafficking, leading the charge for decades to combat this egregious crime.

- *Human Exploitation and Trafficking (H.E.A.T.) Unit and Watch Program*: Building on her earlier work, O'Malley created the H.E.A.T. Unit in 2005 (initially as H.E.A.T. Watch), the first of its kind in California and within a public prosecution office in the United States. This vertical prosecution unit brings together prosecutors, investigators, and victim advocates to address the needs of exploited individuals while vigorously prosecuting traffickers, from investigation to disposition. The program shifted law enforcement's approach, treating exploited minors as victims rather than criminal offenders.
- *H.E.A.T. Institute*: In 2015, O'Malley used funds from the prestigious James Irvine Foundation Leadership Award to launch the H.E.A.T. Institute, a research-based think tank dedicated to ending all forms of human trafficking in California.
- *Alameda County United Against Human Trafficking (AC United)*: She also established AC United, a community-wide advisory group and task force that brings together various stakeholders to build trusting relationships and provide comprehensive responses to human trafficking.
- *Labor Trafficking Unit*: Recognizing the growing problem, O'Malley also established a dedicated Labor Trafficking Unit in 2016 to address the exploitation of workers.

Progressive Approaches to Criminal Justice

While maintaining a strong focus on prosecuting serious crimes, O'Malley embraced progressive approaches to criminal justice, emphasizing alternatives to incarceration and addressing root causes of crime.

- *Collaborative Courts*: Alameda County, under O'Malley's leadership, developed more collaborative courts than any other county in California. These specialized courts, including Mentor Diversion, Veterans' Court, Early Intervention Court, Drug Court, and Behavioral Court, were designed to individualize care, engage individuals involved in crime, and provide different pathways for rehabilitation. More than 8,000 individuals participated in these programs during her tenure.

- *Bail Reform:* O'Malley's office led efforts in bail reform, working to ensure that individuals who did not pose a continued danger to the community were released while their cases were pending, rather than being incarcerated solely due to an inability to afford bail.
- *Justice Restoration Program (ACJRP)*: The Alameda County Justice Restoration Program was a unique initiative, the only prosecutor's office in the country to receive private funding through social impact bonds. This program focused on young adults involved in crime, shifting the paradigm from "hoping one doesn't fail" to "what does one need to succeed," emphasizing positive pathways and futures.
- *Restorative Justice*: In the juvenile justice system, O'Malley championed the use of restorative justice, incorporating the "Science of Hope" and linking youth with community-based organizations to provide positive pathways and reduce the number of youths in the system.

Other Significant Contributions

- *Environmental, Real Estate Fraud, Consumer Protection, and Insurance Fraud Divisions*: O'Malley maintained and strengthened these divisions, making them among the strongest in California, ensuring accountability for complex financial and environmental crimes.
- *Restitution for Victims*: Her office obtained restitution orders exceeding $130 million for victims of crime in Alameda County, demonstrating a commitment to helping victims recover financially for their losses due to crime.
- *Professional Recognition*: O'Malley received numerous awards throughout her career, including the American Bar Association's prestigious Margaret Brent Award for professional excellence and for advancing opportunities for women in the legal profession (she was the first prosecutor to receive this award). She also received the Congressional Victim Advocate Award and the James Irvine Foundation Leadership Award, among many others, recognizing her innovation and strong leadership.

Challenges and Legacy

O'Malley's tenure was not without its challenges. Like many district attorneys across the country, she faced scrutiny regarding police accountability cases. Notably, her office's decision not to file charges against a former BART officer involved in the shooting death of a passenger in 2009, and later against a Fremont police officer in a high-profile shooting, drew criticism and led to a recall effort that ultimately failed. These cases highlighted the complex and

often contentious nature of a district attorney's role in balancing public safety, prosecutorial discretion, and community demands for justice.

Despite these challenges, O'Malley's legacy is largely defined by her pioneering work in victim advocacy, her innovative approaches to combating human trafficking, and her efforts to implement progressive criminal justice reforms while maintaining a focus on public safety. She fostered a culture within the Alameda County District Attorney's Office that prioritized the dignity and respect of victims, seeking not only to prosecute offenders but also to provide pathways for recognition and recovery for those who had suffered at the hands of those she prosecuted.

O'Malley announced in May 2021 that she would not seek a fourth term, choosing to complete her term that ended in January 2023. Her retirement marked the end of an era for the Alameda County District Attorney's Office, paving the way for her successor, Pamela Price. O'Malley's thirty-nine years as a prosecutor, including nearly fourteen years as District Attorney, left an indelible mark on the office, shaping its approach to criminal justice and solidifying the office's reputation as a source of formidable advocacy for victims and visionary leadership in the legal field. Her contributions continue to influence prosecutorial practices and victim support services not only in Alameda County but across California and the nation.

I wait for the producer's reaction.

"Sounds like a real prosecutor."

I nod knowing we're about to put the deal in motion.

"There's not enough controversy."

"We're talking about the whole history of this office. About how these people helped shape American law in the last century and continue to do so."

A blank stare.

"The guy that did the Kennedy assassination investigation is involved. He's a big deal."

"We all know who did that."

Sips his smoothie,

"Got anything with sharks?"

I leave and go down the hall to my next meeting.

I give the next producer my first two files and after she scans, I give her a third:

Thomas "Tom" Orloff served as the twenty-eighth District Attorney of Alameda County from 1994 to 2009, capping a distinguished career that spanned nearly four decades in the prosecutor's office. Known for his steady leadership, commitment to integrity, and deep institutional knowledge, Orloff steered the office through a period of significant social and legal change, upholding a reputation as a "stand-up guy" even when faced with controversy.

Tom Orloff began his legal career in the Alameda County District Attorney's office in 1970, shortly after graduating from UC Law, Berkeley. His early years as a deputy district attorney were marked by involvement in high-profile cases, including the repeated prosecutions of Black Panther Party cofounder Huey Newton for the 1974 murder of a seventeen-year-old prostitute. Those cases ended in mistrials, but Orloff's tenacity in these complex trials showcased his prosecutorial skill. He tried a rustling case, a contemporary novelty. More seriously, he tried twenty-five murder cases before taking the head job.

In 1989, Orloff was named Chief Assistant District Attorney under then-D.A. Jack Meehan. This role solidified his standing as a key figure within the office and positioned him as a natural successor. When Meehan retired in 1994, he "anointed" Orloff as his replacement, and the Alameda County Board of Supervisors appointed him as the new District Attorney. Orloff subsequently ran unopposed for the position in 1994, and was reelected without opposition in 1998, 2002, and 2006, reflecting the broad confidence in his leadership.

Orloff's fifteen-year tenure as District Attorney, capping almost forty years in the office, was characterized by a focus on maintaining a strong track record of convictions, ensuring ethical conduct in prosecutions from start to finish, and largely avoiding the public limelight. He oversaw an office of approximately 150 prosecutors, *making it the eighth-largest district attorney's office in California.*

Key Prosecutorial Decisions and Challenges

- *Black Panther Prosecutions (Pre-D.A.)*: While this occurred before his D.A. tenure, Orloff's role in the highly publicized Huey Newton murder trials was a defining aspect of his early career. His strong statements after Newton's death in 1989, describing him as "no more than a thug," underscored his firm prosecutorial stance.
- *BART Transit Shooting (2009)*: One of the most "momentous decisions" of Orloff's career, and one that garnered international headlines, was his office's handling of the New Year's Day 2009 shooting of an unarmed BART train rider by a BART police officer. After a period of intense public scrutiny and pressure, Orloff charged the officer with murder on January 13, 2009. While some activists criticized him for taking too long to file

charges, others viewed it as a "prudent decision" made after the officer refused to give a statement. The decision to charge a police officer with murder for an on-duty homicide was reportedly the first such prosecution in California. However, Orloff declined to charge a second BART officer despite a petition with over 20,000 signatures.

- *Oakland Riders Police Abuse Case*: Orloff's office unsuccessfully prosecuted the "Oakland Riders" police abuse case, eventually dropping charges after two mistrials resulted from hung juries. This case, involving allegations of widespread police misconduct, was another significant challenge during his leadership.
- *Juror Exclusion Allegations (Later Scrutiny)*: Following Orloff's retirement, allegations of historical prosecutorial misconduct regarding juror selection practices emerged, particularly concerning the exclusion of Jewish and African American jurors in death penalty cases under previous administrations, including parts of his tenure. While Orloff denied knowledge of efforts to exclude Jewish jurors during a case in 1987 (before he was D.A. but during his time as chief assistant), and stated he was "unfamiliar with the details" of other cases, these allegations prompted later scrutiny by his successor, Pamela Price, who put a hold on all thirty-five of Alameda County's death sentences. Orloff publicly disagreed with Price's approach, stating there was a "whole legal process for assessing those issues" that she appeared to ignore.

Internal Office Culture and Leadership

Orloff was described as a leader of "great character and integrity" who encouraged his prosecutors to be judicious and focused on "doing the right thing for the right reason," rather than self-promotion. However, his tenure also faced internal challenges regarding office culture.

- *Sex Discrimination Lawsuit*: In 2007, a female prosecutor sued Orloff and the office for alleged systematic sex discrimination. Backers accused Orloff of making "disparaging, unwelcome and offensive remarks" about female prosecutors and barring her from senior staff meetings, hindering her promotion to assistant district attorney. While a judge eventually dismissed the case before trial, noting Orloff's history of promoting women to top spots (including Nancy O'Malley as his second-in-command), court records revealed past problems within the office. Orloff himself admitted, when he joined in the 1970s, the office was "like a guy's fraternity" with "quite a bit of drinking" and was "fairly raucous." He stated the culture "changed tremendously" since he was elected D.A.

Foundational Work for Future Initiatives

While Nancy O'Malley is largely credited with launching many of Alameda County's innovative victim-focused programs, some of these initiatives had their genesis or received crucial support during Orloff's leadership as D.A., or even before while he was chief assistant.

- *Family Justice Center (ACFJC)*: The Alameda County Family Justice Center, a cornerstone of victim support in the county, was opened in 2005 with the "blessing" of Orloff. This illustrated his support for comprehensive services for victims of domestic violence, sexual assault, and child abuse.
- *Specialized Prosecution Units*: While O'Malley expanded these, she credits her predecessors, including Orloff, with trusting her to begin the creation of specialized prosecution units for domestic violence, sexual assault, and human exploitation and trafficking (H.E.A.T.). This indicates Orloff's willingness to allow his chief assistant to innovate and address emerging crime problems.

Retirement and Legacy

On September 8, 2009, at sixty-six years old, Orloff announced his intention to retire. He cited a desire to spend more time with his family, particularly his one-year-old grandson. Orloff urged the Board of Supervisors to appoint his chief assistant, Nancy O'Malley, as his successor—a recommendation the board followed.

Tom Orloff's legacy in Alameda County is that of a consistent, experienced prosecutor who prioritized the effective functioning of his office and maintained a strong focus on traditional law enforcement. He navigated complex legal and social challenges, including high-profile police shootings, and oversaw an office that earned a stellar reputation in California and the nation.

She looks at me.

"What's the story?"

"Come on, this guy was involved in the Black Panther stuff, police shootings, office sex harassment stuff . . . audiences love that!"

She stares. Bored.

"Let me tell you about the heavyweights."

She shakes her head.

I walk down the hall.

In another office, I summarize what I've shared with the previous idiots when I realize

perhaps it's me that's been idiotic. Histories of tenures are boring. Well at least we got through the most recent contemporaries. I decide to try a different approach.

"Let me make my way to the Big Six from the Alameda D.A.'s office."

This producer seems interested.

For some reason, if you give someone a countdown number, especially a lower number, they tend to give their attention easier, knowing whatever they're in for will be over soon. It's a psychological timeclock that works well in pitching work.

I have her attention now. I start talking.

John J. "Jack" Meehan joined the office in 1960. He served as D.A. for thirteen years, 1981 to 1994. He was an inspired leader and truly great legal scholar, educator, and ethicist. For many years before and after he became D.A., senior staff prosecutors met in the law library of the office in the main courthouse in Oakland. The D.A. always attended. Absence was strongly frowned upon. These gatherings were for discussion of any evolving problems, but mostly for oral briefing of the week's advance sheets of the official case reports. Meehan ably did those briefings for many years.

These library meetings began before the advent of law and motion units in D.A. offices in California. Meehan soon formed one of the first in the state and enlisted the aid of two very fine "book lawyers," Alyce Rae Boker, one of only two women in the office at the time, and Tom Condit.

Meehan conceived, created, and edited *Point of View*, a monthly publication designed to educate prosecutors throughout California. Jack also created and hosted *Points and Authorities*, a weekly educational video series for California prosecutors. He inspired formation of a resource center in the office to produce and distribute timely and evolving criminal justice legal literature as well as audiovisual education and training programs to the office's several outlying offices and to the many law enforcement organizations within the county. Before long, district attorneys and law enforcement leaders in other counties asked to receive both written and audiovisual materials. From its outset, a quiet, creative genius, Don Ingraham, headed the center for many years.

Before he became D.A., Meehan tragically lost his daughter in a helicopter crash during a flight from Disneyland back to the airport for a flight home. The crash also claimed the lives of his parents and sister. He and his remaining family shared an abiding faith that carried them through this immense loss. Always a man of uncommon decency and humility, this tragedy greatly reinforced both qualities.

Unlike some prosecutors who may focus solely on convictions, Meehan emphasized the importance of justice for victims, fairness for defendants, and the overall well-being of the community. His calm, balanced approach earned him respect from law enforcement, civic leaders, and advocacy groups alike.

Meehan's commitment to community engagement was a hallmark of his tenure. Recognizing effective criminal justice policies require community trust, he made concerted efforts to foster dialogue with constituents. He participated in public forums, collaborated with neighborhood groups, and prioritized candor in his office's operations. Candor and humility helped bridge gaps between law enforcement and the public, promoting a sense of shared responsibility and mutual respect.

What truly made Meehan stand out was his openness to reform aimed at improving the administration of criminal justice. He understood that the system needed to evolve to better serve the ends of justice. Under his leadership, the office championed initiatives such as juvenile diversion programs, efforts to reduce racial disparities, and programs to support victims of crime. He believed in proactive approaches that prioritized prevention, rehabilitation, and fairness over purely punitive measures.

Meehan's compassion and focus on victims' rights distinguished him from many of his peers. He prioritized ensuring that victims received support, information, and a voice in the justice process. His office worked diligently to improve victim services, recognizing that restitution, recovery, and justice go together. This victim-centered approach helped foster a firm but compassionate and responsive criminal justice system.

Dang it. She's looking at her cell phone. I'm losing her.

He mentored Kamala Harris.

Piqued . . .

Yes, **Kamala Harris** started her career at the Alameda County District Attorney's Office. Starting in 1990, shortly after graduating from UC Law, San Francisco, Harris worked as a deputy district attorney in the office for seven years, gaining invaluable courtroom experience and developing a reputation as a diligent and ambitious prosecutor.

She handled a wide array of cases, including felonies, misdemeanors, and juvenile justice matters. She demonstrated a strong work ethic, attention to detail, and a firm commitment to justice. She was known for her meticulous case preparation and her ability to connect with victims and witnesses. She emphasized the importance of supporting victims of crime and ensuring they

felt heard and protected. She believed in balance in both prosecutions and law enforcement.

Harris's legal acumen and courtroom demeanor quickly earned her respect among colleagues. Her abilities to analyze complex cases and persuasive advocacy were evident. She showed an interest in addressing perceived systemic problems and providing fair, evenhanded treatment for everyone.

She believed in holding offenders accountable, while recognizing the importance of fairness, rehabilitation, and the broader social context of criminal behavior. She supported initiatives aimed at reducing recidivism and promoting alternatives to incarceration for nonviolent offenders, as she defined them. Her perspectives on the criminal justice system reflected a perception of disparities and a quest for balance and fairness.

Working in Alameda County provided Harris with invaluable experience and a platform to develop her prosecutorial philosophy. Her success in the D.A.'s office helped her build a reputation as a capable prosecutor, which contributed to her election as the District Attorney of San Francisco in 2003, California Attorney General in 2010 (reelected in 2014), and U.S. Senator in 2016.

And of course, from there, in 2020 she became the first Black woman to be vice president of the United States. Similarly, in 2024 she became the first Black woman to be nominated for president by one of the nation's two major political parties. In the latter role, it appears she spent upwards of $2 billion for her presidential campaign. For reference, it is reported Hillary Clinton's presidential campaign in 2016 spent $1.2 billion.

Harris rose rapidly from a rank-and-file deputy D.A. earning less than $100,000 a year to the national pinnacle in politics, all starting in Alameda County. Impressive.

The producer doesn't seem so.

"We know her story."

"But it's a good story."

"Yes. But we need something new."

"You know, the same summer we landed on the moon, the Manson family landed in L.A."

She waits.

Well, that same year . . .

D. Lowell Jensen was appointed Alameda County District Attorney in 1969. This was a period marked by growing concern over crime rates and an urgent need for effective law enforcement.

Jensen was a great trial lawyer. He was known for his vigorous prosecution of all categories of crime. He emphasized the importance of accountability *and* public safety.

He advocated for and implemented policies to improve the efficiency of prosecutions, utilized new technologies, and promoted better coordination among the many law enforcement agencies in the county.

Jensen prioritized community engagement and crime prevention. He believed that effective law enforcement extended beyond the courtroom and involved working with civic, education, and local government leaders.

One of Jensen's notable contributions was combating organized crime and drug trafficking, which were significant problems in Alameda County at the time. He worked closely with federal agencies to dismantle criminal networks and reduce drug-related violence.

Additionally, Jensen championed reforms aimed at improving the treatment of juvenile offenders and increasing the emphasis on rehabilitation. His efforts reflected a balanced approach to criminal justice—combining aggressive prosecution with proactive crime prevention.

Later, he became the Assistant Attorney General of the Criminal Division of the U.S. Department of Justice from 1981 to 1983, Associate Attorney General from 1983 to 1985, and Deputy Attorney General from 1985 to 1986. In 1987, he was briefly considered for FBI director but withdrew from consideration.

Finally, he was named by President Ronald Reagan in 1986 to become a federal judge on the U.S. District Court for the Northern District of California. He assumed senior status in 1997 and retired from the court in 2014.

"Sounds like another white male super . . . come on, all these guys play the same tune."

I agree. There is something common about good leadership. But it's not about gender or genetics. It seems like it is this office itself that breeds success. So, I tell her . . .

The same year Jensen was appointed D.A., one of his deputies, **Ming Chin**, abruptly left. There's no public reason given for Ming Chin's departure. He went into private practice for a few years but eventually made his way back into public service as a judge.

Chin's judicial journey began with his appointment in 1988 by Governor George Deukmejian to be a judge on the Alameda County Superior Court, where

he demonstrated a commitment to fair and impartial justice. His reputation for thoroughness, integrity, and scholarly insight led to his appointment as a justice by Governor Deukmejian in 1990 on the California Court of Appeal, First District. In 1994, Governor Pete Wilson named him presiding justice of that court. Finally, in 1996, Governor Wilson appointed him to the California Supreme Court, where he served until his retirement in 2021.

According to Merrill Balassone,

> Justice Chin's judicial career is one of many distinctions: son of immigrant farmworkers who rose to become the first Chinese American on the state high court; author of more than 350 majority opinions and 100 other separate opinions, including landmark cases on the use of DNA evidence; decorated Army veteran; and law professor. He is also a man of habit, his fellow Supreme Court justices recalled, including a tendency to discreetly pass a box of mints down the bench during oral argument. He added M&Ms to the stash on suggestion from a colleague. "My only regret was that I didn't ask for Belgian truffles," quipped Justice Goodwin Liu.

"Ming has been a fantastic colleague—smart, wise, visionary, passionate, articulate, and kind," said Chief Justice Tani Cantil-Sakauye. "He leaves a legacy of mentorship and inspiration to generations of students, lawyers, and judges. Ming is an iconic example of a jurist and public servant."

Justice Chin's role in shaping California law cannot be overstated. As a member of the highest court in the state, he helped interpret and uphold California's constitution, ensuring that laws align with state and federal constitutional principles. His judicial decisions have impacted countless lives, from individual litigants to large corporations, and have helped define California's legal identity.

"What are you, his P.R. guy?"

"Sounded like you wanted some balance? Trying to prove this office cares only about success. Whoever gets in there, seems to succeed."

"Prosecutors generally succeed, don't they?"

"Not just prosecutors, this office seems to produce greatness. People start there and move forward and beyond to greater things."

She's bored again.

"Look, that's one California Supreme Court Justice, right?"

She nods.

"Well . . ."

In 2005, Justice **Carol Corrigan** was appointed to the California Supreme Court by Governor Arnold Schwarzenegger, becoming the first woman from Northen California to serve on the state's highest court.

The mention of Schwarzenegger piques interest again. I continue . . .

She began as a deputy district attorney in Alameda County from 1975 to 1987. She then served as a judge on the Oakland Municipal Court from 1987 to 1991 and the Alameda County Superior Court from 1991 to 1994. Before joining the California Supreme Court, Corrigan was a justice on the California Court of Appeal from 1994 to 2006. She became a justice on the California Supreme Court in 2006. She is still there.

Her appointment to the high court was widely praised, underscoring her extensive experience, intellect, and commitment to justice. She has proven worthy of that praise.

As a Supreme Court justice, Corrigan played a crucial role in many landmark cases, often emphasizing the importance of individual rights, procedural fairness, and the judiciary's role in safeguarding constitutional principles. Her opinions reflect a careful balance between respecting precedent and changing circumstances.

Throughout her career, Corrigan has been a champion of opportunities for all within the bench and bar. She has mentored many young lawyers and judges, encouraging them to pursue justice with integrity and dedication.

Justice Corrigan is known for emphasizing fairness, candor, and the protection of individual liberties. She advocates for an accessible justice system, often highlighting the importance of ensuring that legal processes are fair and understandable to the public. In fact, she cochaired the panel that rewrote contemporary civil and criminal jury instructions in plain English.

"What language did they use before?"

I've lost her. Maybe was never found. So, I move on down the hall again.

After explaining to the next Suit the legacy of Alameda's D.A. office, and those that sprang from the desks, like Kamala Harris and the two California Supreme Court justices he was compelled to hear more. He also had a smoothie and told me I had his ears until he finished it as he was meeting his partner for lunch.

He gave me a time clock. Good move. I'm going to have to be quicker. Right to it . . .

Martin Jenkins started in 1980 as a law clerk at the Alameda County District Attorney's Office before becoming a deputy district attorney there a year later. He left there in 1983 to serve two years in the Civil Rights Division, U.S.

Department of Justice, before he returned to Oakland and his sick mother. For the next four years, he was in-house counsel to Pacific Bell. He was appointed to the Municipal Court in Oakland in 1989 by Governor Deukmejian and to the Alameda County Superior Court in 1992 where he served until 1997 when he was appointed by President Bill Clinton to be a judge on the U.S. District Court for the Northern District of California. Governor Schwarzenegger appointed him to the Court of Appeal, First District, in 2008. He served there until 2019 when he became Governor Gavin Newsom's judicial appointments secretary for a year before the governor named him to the California Supreme Court. Very few lawyers and judges have this breadth of distinguished judicial service.

The suit stares, picks up his smoothie and sips fast.

Jenkins was the fifth African American person, the third African American man, and the first openly gay justice to serve on the court.

The suit slows, while setting the smoothie back down to the desk.

Nothing has worked so far, maybe the following will resonate.

Edwin Meese III, commonly known as Ed Meese, was born on December 2, 1931, in Oakland, California. He received his bachelor's degree from Yale in 1953 and his law degree from UC Law, Berkeley, in 1958. During law school, he took a two-year leave to serve as an artillery officer in the Army, fulfilling his active-duty commitment and eventually retiring as a colonel in the United States Army Reserve.

After graduating from law school, Mr. Meese joined the Oakland District Attorney's office serving as a deputy district attorney for Alameda County until 1967.

I interrupt my own story after remembering something . . .

"Interestingly, his boss, ***Frank Coakley****, was a true reformer, while a hardnosed prosecutor. He was friends with J. Edgar Hoover. He helped found the National District Attorneys Association and the California District Attorneys Association. I heard he was big into forensics and promoted new methods. He also stopped investigators from beating confessions out of suspects." He hired most of the prosecutors in this story. He presided over a system whereby a top prosecutor from his office chaired a statewide committee representing all fifty-eight county prosecutors, the fifty-eight county sheriffs, and hundreds of city police chiefs. That top prosecutor spent each annual state legislative session in the state capital providing legal advocacy for California's prosecutors and peace officers. Ed Meese served as the top prosecutor for a time. That system led by the Alameda County District Attorney's Office endured for decades before ending when the duty was assumed by the California District Attorneys Association in 1976.*

He puts down the smoothie he was about to sip again from, "But that makes for good stories."

"Yeah, but I guess it had to end at some point. The '60's, them times were a-changin'."

We both smile.

"Also, Coakley's cousin is the one credited for the saying, 'there are no atheists in foxholes.'"

"Really?"

"I guess he was a priest in the military. He died as a World War II prisoner of war in the Philippines."

"Now that's a story."

We both nod.

"Back to Ed Meese, reputable scholars suggest he is the person most responsible for the rise of constitutional originalism, which treats the text and original meaning of the Constitution rather than the policy fads of the moment as authoritative law."

Beginning in 1967 he worked in various capacities for California Governor Reagan—secretary on clemency and criminal justice, an executive assistant, chief of staff, and a senior advisor on domestic and criminal justice policy.

His tenure as a key adviser to President Ronald Reagan and his role in shaping conservative policies during the late twentieth century have cemented his legacy as a pivotal figure in American history.

When Ronald Reagan was elected President of the United States in 1980, Meese's national prominence exploded when the president appointed him to be presidential counselor, with a Cabinet-level ranking. Meese served in that role in the White House from 1981 to 1985 and influenced foreign, domestic, and legal policies as well as judicial appointments. In regard to judicial appointments, his role involved identifying and vetting federal judicial nominees and helping shape the administration's approach to constitutional and legal matters.

In 1985, President Reagan appointed Meese to be Attorney General of the United States, a position he held until 1988. As Attorney General, Meese was known for his strong stance against crime, his efforts to restore law and order, and his advocacy for conservative policies on drug enforcement and criminal justice. His tenure was marked by a commitment to tough-on-crime policies and a focus on restoring confidence in the justice system amid rising crime rates.

Among Meese's other notable contributions as Attorney General were his support for increased funding for law enforcement and a tough stance on illegal drug trafficking and possession. He emphasized law and order, traditional

moral values, and a skepticism of criminal justice reform measures that he believed would undermine societal stability.

After stepping down as Attorney General in 1988, Meese continued to be an influential voice in conservative legal, judicial, and political circles. His writings and speeches emphasized the importance of an originalist interpretation of the Constitution, vigorous protection of individual liberties, and the quest for limited government—views that continue to widely influence conservative legal thought.

If Ronald Reagan had a sidekick, it was definitely Ed Meese. Like Reagan, in his later years Meese lived the life of an authentic and selfless public servant. To this day, in his nineties he is the enduring embodiment of the Reagan Revolution. Acknowledging Meese's genuine kindness and humbleness of heart, Ronald Reagan once said, "If Ed Meese is not a good man, there are no good men."

When Reagan nominated Meese as Attorney General, he stated that "Ed is not only my trusted Counselor, he is also a person whose life and experience reflect a profound commitment to the law and a consistent dedication to the improvement of our justice system."

"And it all started in the Alameda County D.A.'s office."

The suit nods.

"That office really IS impressive," as he takes his last sip of smoothie and walks me out of the office.

At my last stop, my last chance—I share the big one.

"So there's this giant wooden desk, which nobody can seem to tell me where it is exactly, but it was commissioned around 1925 . . .

The guy is interested.

"Do you know what Masons are?"

He nods, "The secret society dudes."

"Yes! While looking around for this desk, I find some Masonic literature available to the public." I share with the newly intrigued:

What Becomes a Mason?

In 1954, a unanimous ruling of *Brown v. Board of Education* ends segregation in schools. In March of 1963, Ernesto Miranda was arrested for kidnapping and rape in Arizona. In November 1963, Lee Harvey Oswald was arrested for the assassination of President John F. Kennedy in Texas.

What connects these three monumental moments to a man born in Los Angeles, California? A Mason? A Grandmaster? His family moved north to Oakland. That man joined the Alameda County District Attorney's office in 1920. Within five years, he was promoted and appointed District Attorney where he served until 1939 after being elected state attorney general.

He was also a Freemason. And in 1935, was promoted and elected Grand Master of Masons in California.

In 1942, 1946, and 1950, he was elected governor of California. And is the only one to be elected for three terms in a row.

In 1953, he was appointed Chief Justice by President Dwight D. Eisenhower. In 1954, he wrote the unanimous opinion rendered by the U.S. Supreme Court in *Brown v. Board of Education*, ending segregation in schools.

In 1963, he led a commission that included future president Gerald R. Ford (also a Mason) that investigated the assassination of President John Kennedy; finding that Lee Harvey Oswald acted alone.

In 1966, he oversaw another major case known to virtually everyone. It involved Ernesto Miranda's appeal that established warnings against self-incrimination, or *Miranda Rights*, for any citizen in the country upon arrest.

This man put bad guys away for years while in the Alameda County District Attorney's Office, was the state's top legal and law officer, led the state through a decade of prosperity and helped the country to become fairer and more just, despite his involvement in the World War II internment of Americans of Japanese descent. What a man. And remember, he was a Mason. Remember, at some point he asked a friend how to become one. Also remember, Earl Warren didn't stop there.

"Where did you get this," he asks.

"I can't tell you."

"Wow, secret handshakes and all?"

I nod and give more . . .

Earl Warren was a prominent American jurist, politician, and statesman whose legacy significantly shaped the course of American legal history in the twentieth century. Warren's life was marked by a trajectory from humble beginnings to becoming one of the most influential Chief Justices of the United States Supreme Court. Journalist Jim Warren captured the life of this distinguished gentleman in the title of his book, *Earl Warren and the Nation He Made*.

HONK! HONK! BEEP!

The parking lot attendant, who's been intently listening to my story bids, shakes out of it.

"Sorry bro, you're blocking the gate."

It's confirmed with a line of cars behind me.

I pull out the parking ticket—I forgot to get it validated.

Driving into the sunset, I smile, thinking about . . .

Of course, none of that pitching happened. You and I are smart enough to know there really isn't a good movie idea regarding the entire legacy of the Alameda County District Attorney's Office.

You're also educated enough in your craft to not need complete biographies of some of these historic figures, especially Earl Warren. I mean does anybody need any more information on Babe Ruth? In the legal profession, Ed Meese is not far behind. Both Warren and Meese received the Presidential Medal of Freedom.

More to the point, could there ever be a story capturing the entire, soaring nature of the New York Yankees? I don't think so. The best we could do is to tell about certain individuals and accomplishments, specific eras, and connect to some of the spirit of the Yankee organization. The Yankees have produced recordholders in most categories of baseball history, and the team has the most championships in all the major professional sports.

That seems to be the case with the District Attorney's office of Alameda County. So many important people from different times and circumstances have worked in that office and many have recorded historically significant accomplishments.

The Alameda D.A.'s office has so far produced three members of the California Supreme Court, District Attorneys for other major cities, Attorneys General of California, a multi-termed Governor, an Attorney General of the United States, a Vice President of the United States, and a Chief Justice of the United States Supreme Court.

My friend was right; members of the Alameda County District Attorney's Office comprise an all-star team. It has been so for more than a century.

★ ★ ★

NANCY E. O'MALLEY[*]

The Remarkable Women of The Alameda County District Attorney's Office

Alameda County and its citizens are blessed with one of the finest district attorney's offices in the nation (the "Office"). From its formation in 1853 until the present, it has been staffed with ethical, able, and hardworking lawyers and leaders. Like most law offices in the beginning, public and private, those staffs were men. The Office's stellar reputation, high work ethic, and national leadership began in earnest when Earl Warren was appointed in 1925 by the Alameda County Board of Supervisors to be district attorney. Warren later became state attorney general, governor, and chief justice of the United States.

Warren hired the Office's first woman in 1934, Cecil Mossbacher. She quickly became an inspiring and determined prosecutor who later became the first woman on the Alameda County Superior Court. Mossbacher was appointed in 1951 by Governor Warren.[1] Thereafter, the Office began to change, slowly at first, but as the decades rolled by, it achieved a very different makeup, although still filled with ethical, able, and hardworking lawyers.

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[*] Nancy E. O'Malley served in the Alameda County District Attorney's Office for 39 years, including 15 years as a trial prosecutor, 10 years as chief assistant district attorney, and 14 years as elected district attorney. She retired from the district attorney's office in January 2023. She is a nationally recognized leader in the victims' rights movement. She has written and advocated for more than 65 bills enhancing victims' rights that have become law in California. O'Malley has played important leadership and lawmaking roles in California and throughout the nation, particularly in matters of dealing with sexual assault, mandatory testing of forensic sexual assault kits, human trafficking, violence against women, and other significant victims' rights legislation. She received numerous awards for her work, including the Congressional Victim Advocate Award, the Margaret Brent Leadership Award from the American Bar Association, and many statewide awards. She previously wrote for *California Legal History* in 2023, "Victims' Rights in California: A Historical Perspective to Modern Day."

[1] While in the Office, Mossbacher served without pay as an advisor to the California Commission on Criminal Law and Procedure. She carried a heavy load in research and drafting of a complete overhaul of the state penal code. She sought aid and advice of judges, prosecutors, and defenders. Her draft was carefully reviewed and approved by the Commission, enacted by the legislature, and signed into law by the governor. It was supported by district attorneys, sheriffs, and police chiefs statewide. It was viewed at the time as one of the most advanced codes of criminal law and procedure in the nation. (J. Frank Coakley, *For the People, Sixty Years of Fighting for Law & Order* (1992), at p. 137.)

By 2025, there were 152 prosecutors in Alameda County. Eighty-four were male (55%) and 68 were female (45%). Of the 33 assistant district attorneys in leadership, 17 were male prosecutors and 16 were female. The staff of the Alameda County District Attorney's Office represents the rich diversity of Alameda County and America. Every prosecutor, male or female, follows the same rotation: misdemeanor trials, preliminary hearings, felony trials, followed by other specific assignments based entirely on experience and legal acumen.

Former Alameda County women prosecutors have reached the heights, in the Office and beyond, in law and politics. On the bench, as judges—trial, appellate, and supreme court—they have excelled. Similarly, in politics, they have achieved great distinction in California and Washington, DC.

It did not happen by chance. It took district attorneys with vision, wisdom, commitment to constitutional governance and, especially, devotion to equality in and before the law. The 2025 numbers noted above of men and women in the Alameda County District Attorney's Office is the culmination of inspired and sustained leadership and humility.

In the following pages, the story is told of how this all began and unfolded through the decades.

In the Beginning

The Alameda County District Attorney's Office was formed in 1853. The first district attorney, William H. Combs, was appointed by the Alameda County Board of Supervisors. He served from 1853 to 1854. The Office has since been seen as a leader in many areas of law and politics.

Warren joined the Office as a deputy district attorney in 1920. As noted, he was appointed district attorney in 1925. In 1938, he was elected state attorney general (1939–1942) and state governor (1943–1953). In 1953, after the untimely death of Chief Justice Fred Vinson, President Dwight D. Eisenhower appointed him chief justice of the United States (1953–1969). He was promptly confirmed by the United States senate the following year. He and the high court, which quickly became known as the Warren court, presided over countless significant landmark decisions dealing with civil rights and criminal law and procedure.

As noted, the first woman to serve as a deputy district attorney in the Office was Cecil Mosbacher. Born in 1898, after graduating from college she attended the University of California, Boalt Hall School of Law (now UC Law Berkeley) along with classmate Earl Warren. After completing law school, Warren brought her into the Office.

In 1951, Mosbacher was appointed by Governor Warren as the first woman superior court judge in Alameda County. She was also the court's first woman to serve as presiding judge of the superior court, from 1960 to 1962.

Earl Warren set the standards of excellence, and each of his successors upheld the inspired leadership of the Office at local, state, and national levels. Kimm Walton researched and compiled a 1999 book, *America's Greatest Places to Work with a Law Degree*.[2] It identified the Alameda County District Attorney's Office and the Manhattan District Attorney's Office as the two best prosecutor offices in the country. Most knowledgeable observers agreed and still do.

For decades, most attorneys in the Office were male. By the 1960s, women were recruited and hired as prosecutors. Not being bound by civil service rules, the Office had and continues to have the authority to focus exclusively on and hire ethical, talented, and hardworking attorneys—both male and female—to carry forth the great work, stellar reputation, commitment to truthful prosecution, forward-thinking initiatives, and commitment to honesty, service, and community.

Following the stellar career of Mosbacher, Alys Rae Boker and Marie Collins were hired by District Attorney J. Frank Coakley. Coakley served in that role from 1947 to 1969.

Boker was considered a true legal scholar. When the Office's first Law & Motion Division was created by then–Assistant District Attorney John "Jack" Meehan, Boker was hand-picked by him to serve in that Division.

As a testament to Boker's legal acumen, and as one of the few women prosecutors in Alameda County at the time, Boker was specifically selected to work with Meehan in the Law & Motion Division. She had the respect of the Office's prosecutors and the many judges before whom she appeared. She was recognized for her extraordinary skills in research, eloquent memoranda and briefs, and keen understanding of criminal procedure and law.

Boker was also recruited to serve as an instructor for other county prosecutors offices and gatherings of prosecutors across California. After one such assignment, Boker wrote a letter to (now) retired Court of Appeals Justice George Nicholson. At the time, Nicholson had retired from the Alameda County District Attorney's Office and was serving as the executive director of

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[2] Walton, now deceased, received her BS degree in accounting as well as her JD in law from Case Western Reserve University. She was an accomplished writer, renowned motivational lecturer, and humorist. She has been widely echoed by legal observers and by those who have served in the Office.

the newly formed California District Attorney's Office.[3]

In the letter, Boker expressed her joy and gratitude for the role of teaching other prosecutor offices about Law & Motion, particularly search and seizure law, throughout the state. She modeled and inspired other county prosecutors to understand the critical role of a specialized unit—Law & Motion.[4]

Sadly, Nicholson received the letter after Boker passed away.[5] She left a legacy of excellence and helped create the protocol that virtually all county prosecutors continue to follow.[6]

D. Lowell Jensen joined the Office as a deputy district attorney in 1955. He served in that role until 1966 when he was promoted to assistant district attorney by Coakley. Jensen distinguished himself in part when he successfully secured a federal grant to develop DALITE (District Attorney's Automated Legal Information System), a case management software program that is still in operation today, with significant upgrading and updating, under my leadership.

Jensen became district attorney in 1969 by appointment of the Alameda County Board of Supervisors. While in leadership, Jensen began a culture change by recognizing the impact of crime on victims of those crimes and responding professionally and proactively to it. He started a victim-witness assistance program; he created surveys for victims and witnesses to provide feedback on their experiences.

During his remarkable tenure as district attorney, Jensen introduced many "firsts" that were ultimately replicated across the country. His victim-witness assistance program was the first in the country. He created a community survey

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[3] For more than a half century, Alameda County deputy district attorneys, sent by the county's district attorney, chaired a statewide prosecutor and law enforcement committee in Sacramento. Those deputy prosecutors appeared on behalf of the statewide committee to propose, support, and oppose legislation. Mossbacher served in that role for a time. That process endured until 1976 when Jensen ended it and authorized Nicholson and the California District Attorneys Association to assume that duty. Nicholson recruited Thomas Condit to handle it, day to day. Condit was a very fine lawyer and excellent legal writer. He served in Meehan's Law & Motion Division until his move to Sacramento.

[4] Boker and Carol Corrigan, now an associate justice on the California Supreme Court, coauthored a law journal article, "Making the Constable Culpable: A Proposal for Modification of the Exclusionary Rule," *Hastings Law Journal* 27 (1976): 1291, responding to Cardozo's question in *People v. Defore*, 242 N.Y. 13, 21 (1926), cert. den., *Defore v. New York*, 279 U.S. 657 (1926).

[5] "Search Warrants Expert, Boker, Dies," *Prosecutor's Brief*, 49 (Sept.–Nov. 1977).

[6] Only the large county prosecutor offices among the state's 58 counties could afford to designate one or more prosecutors to handle law and motion matters exclusively. Inspired by Meehan, Boker, Condit, and a Los Angeles prosecutor doing similar work, Nicholson and the California District Attorneys Association sought and acquired a federal grant to operate a law and motion unit in Sacramento by which all the 40 plus smaller county prosecutors could ask for help. Boker's untimely death was a daily reminder to everyone involved to do their best with this critical function. She, more than anyone, was the true catalyst for the project.

to understand how he and the Office could better engage with and protect the community, from which he created policies.[7]

He was also instrumental in accelerating the process of hiring women to work alongside men as prosecutors and as victim advocates.

Significantly, Jensen's management team consisted of 10 assistant district attorneys, of which one was a woman, Maureen Lenahan. After Jensen's departure, John J. "Jack" Meehan became district attorney in 1981 by appointment of the Alameda County Board of Supervisors.

In 1981, after Ronald Reagan became president, he appointed former Alameda County Deputy District Attorney Edwin Meese as presidential counselor with cabinet-level status and, in 1986, attorney general of the United States. With Attorney General Meese, nearly 20 members of the Alameda County District Attorney's Office went to Washington, DC, as well.

Jensen also left for Washington, DC, in 1981. He was appointed to serve as the assistant attorney general of the Criminal Division of the United States Department of Justice from 1981 to 1983. From 1983 to 1985, he served as the United States associate attorney general and, from 1985 to 1986, as the Unites States deputy attorney general when he was nominated by President Reagan to serve on the United States District Court in Oakland. He has since taken senior status and fully retired in 2014. Jensen always saw himself as a trial lawyer, although he was brilliant on law and procedure, and the trial court bench is where he wanted to serve.

Deputy District Attorney Lois Haight Herrington also left the Office and relocated to Washington, DC, along with several other members of the office, including Corrigan. Corrigan worked closely with Herrington, as did another

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[7] Jensen's visionary leadership in recognizing the plight and anonymity of victims of crime and their families inspired a revolution in criminal law and procedure, and led to substantial statutory and constitutional reforms, in California and throughout the nation. For the full story, *see* Paul Cassell, "Keynote Address for the 2025 University of the Pacific Law Review Symposium: The Crime Victims' Rights Movement: Historical Foundations, Modern Ascendancy, and Future Aspirations," *University of Pacific Law Review* 56, no. 3, (2025): 387. Cassell is a former federal district court judge and now the Ronald N. Boyce Presidential Professor of Criminal Law and University Distinguished Professor of Law at the S. J. Quinney College of Law at the University of Utah. *Also see* Nancy E. O'Malley and Harold Boscovich, "Victims' Rights in California: A Historical Perspective to Modern Day," *California Legal History*, at p. 91; in the same publication, George Nicholson, "The Roots of America's Crime Victims' Legal Rights Movement, 1975–2023: A Personal Retrospective and Memoir," at p. 115. These three articles provide a comprehensive overview of the Alameda County District Attorney's Office roots and evolution of the statutory and constitutional rights of the victims of crime and their families. Jensen's inspiration carried into academia and helped to catalyze adoption of a constitutional right to safe, secure, and peaceful campuses for students and staffs of public and private schools, K-12, community colleges, colleges, universities, and graduate schools. For more, *see* George Nicholson, "Campus Crime and Violence, and the Right to Safe Schools," Defense Comment, Association of Defense Counsel of Northern California and Nevada (Summer 2018).

former Alameda County deputy district attorney, William McGuinness. Herrington was chair of President Reagan's Task Force on the Victims of Crime. Corrigan and McGuiness were members of the staff. They all worked diligently together on the task force and its groundbreaking *Final Report* in 1982.[8] Working closely with Meese, their shared work facilitated formation of the Office of Victims of Crime, United States Department of Justice.

The Alameda County District Attorney's Office swiftly accelerated into an inspiring role model for other prosecutor offices, not just in California, but across the United States.

Manifestly, President Reagan paid great attention to the skill and experience of all the former members of the Alameda County District Attorney's Office in his determined quest to aid victims of crime and their families. The success of their efforts quite literally changed the way America responded to and supported the formerly forgotten victims of crime and their families. Part of their shared assignment was to determine why victims of crime were reluctant to engage with law enforcement and prosecutors' offices. Among the reasons was the way victims of crime were formerly treated in the administration of justice.

Herrington and her colleagues exceeded all expectations. Her team created a remarkable survey that brought to light several areas of failure in the criminal justice system: negative attitudes, poor judgment, fears, lack of skill in professionals, and adverse judgment by law enforcement, prosecutors, judges, defense attorneys, and jurors.

They found victims of crime did not feel supported, believed, or cared for, which was a primary basis for their reluctance to come to court. Due to this honest, thorough, and revealing survey and her own visionary work, Herrington was appointed by President Reagan to create and serve as the director of the first federal agency to deal specifically with victims of crime and their families, the Office of Victims of Crime referenced above. With that came federal legislation—the Victims of Crime Act.[9]

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[8] *See* the President's Task Force on Victims of Crime, *Final Report, December 1982*. Governor George Deukmejian emulated President Reagan's crime victims' leadership by forming a similar task force that issued its final report in 1988, *Final Report*, State Task Force on Victims' Rights. Robert H. Philobosian, former District Attorney of Los Angeles County, was chair. Sacramento trial judge Alice A. Lytle was a member of the task force and played a key role in its important work.

[9] Upon their later return to California, Herrington, Corrigan, and McGuiness became judges. Herrington wanted to be on the trial court and was appointed to the Superior Court of Contra Costa County in 1993 by Governor Pete Wilson. Corrigan went through the judicial chairs before being named to the state supreme court by Governor Schwarzenegger in 2006. McGuiness also went through the judicial chairs before being named by Governor Gray Davis to be administrative presiding justice of the Court of Appeal, First Appellate District.

Quite literally, strong, formidable women prosecutors from the Alameda County District Attorney's Office led a national charge to define, construct, and improve the systems created to protect and serve victims of crime and witnesses to crime across America. Their work and their influence have continued throughout the United States, and particularly in California, where county prosecutors and their offices continue to serve as leaders in victims' rights.

The Alameda County District Attorney's Office was one of the first three agencies across the country to receive grant funding, from which the victim-witness assistance program was launched decades ago and headed for almost a half century by Harold Boscovich, a former inspector in the Office.

When Corrigan returned to California, she rejoined the Office. Meehan assigned her to be the director of recruitment and training. Corrigan was a formidable leader and impressive woman prosecutor, who showed strength and integrity to those with whom she interacted and recommended for hire. She was the first woman to hold that very significant assignment.

Corrigan was responsible for who would be hired as prosecutors. Her duties included interviewing and recommending potential candidates to Meehan. If he agreed, practicing attorneys were hired as deputy district attorneys. It was Corrigan who determined in the first instance the suitability of potential prosecutor candidates to serve in the Office. She was also responsible for training attorneys working in the Office.

Corrigan oversaw the law clerk program, a highly competitive undertaking for which hundreds of law students applied. Eight to 12 law students are selected annually to participate in a 12-week program in the Office between their second and third years of law school. Over 10 weeks, law clerks have the chance to try at least one case and argue motions while supervised by a deputy district attorney and to participate in legal training. From this pool of experienced law clerks, Corrigan recruited, interviewed, and trained law students to become deputy district attorneys. Once again, the district attorney made the final call on whether to hire any of them.

Corrigan was also a professor at Hastings College of the Law (now the University of California Law San Francisco).

Nancy O'Malley, Ann Diem, Angela Backers, and many more were inspired by Corrigan, helping to lead the charge of women prosecutors in the Alameda County District Attorney's Office.

Hiring women prosecutors in Alameda County had two distinctions. It led prosecutor offices across California in two significant ways, by (1)

modeling increased hiring of women into deputy district attorney positions; and (2) making no distinction between male and female attorney assignments, including promotions.

As the Alameda County District Attorney's Office goes, there go other California prosecutors' offices.

The district attorney also was assigned to create a new division, the Family Support Division.

The Family Support Division was the first of its kind in California and perhaps the nation. It served as a model for California. During Lenahan's tenure, Alameda County's Department of Child Support Services was the recipient of four statewide performance awards from the California Department of Child Support. The County was ranked first among large counties in establishing paternity for children, collecting child support payments, and collecting past due payments. Lenahan became a Superior Court Judge in 1986.

In those early years, Lenahan was joined by Alice Sullivan, a senior trial deputy district attorney. They were joined by Carol Fickenscher, who served as a deputy district attorney. Governor Jerry Brown appointed Sullivan to the Alameda County Superior Court bench in 1981, where she served until her retirement in 1988.

As time went on, the Office hired more women, a notable number of whom left the Office to join the bench. Most impressively, Carol Corrigan was nominated by Governor Arnold Schwarzenneger in December 2005 to serve as an associate justice on the California Supreme Court. She was confirmed by the California Commission on Judicial Appointments in January 2006.

Three women became associate justices on the California Court of Appeals—Carol Corrigan, by Governor Pete Wilson in 1994 (a 12-year stopover on her way to the state supreme court in 2006); Joanne Parrilli, by Governor Wilson in 1995; and Sandra Margulies, by Governor Gray Davis in 2002. All were confirmed by the California Commission on Judicial Nominations.

By 1984, more women were hired by the Office as deputy district attorneys. Remarkably, in some other prosecutors' offices, women deputy district attorneys were relegated to prosecuting lesser crimes, such as misdemeanors or low-level felony crimes.

By the late 1980s and early 1990s, women were being promoted to significant leadership positions, a rarity among other prosecutors' offices in California.

Assistant District Attorney Sandy Quist served 28 years in the Office. She was considered one of the most impressive, thorough, and effective assistant

prosecutors the Office has ever seen. She held one of the office's top positions, running various departments over the years, researching cases, charging hundreds of dangerous criminals and doing it all with professionalism, grace, and patience.

Senior Trial Deputy District Attorney Joan Cartwright, an African American woman, was assigned to prosecute sexual assault cases, which are considered some of the most challenging cases to investigate and prosecute. She was a model for many other women to be assigned to significant cases.

Senior Trial Deputy District Attorney Ann Diem joined the Office in 1983. Diem had a stellar trial career, handling some of the most difficult felony cases, as well as demonstrating strong administrative skills. She was later assigned to head recruitment and development.

Senior Trial Deputy District Attorney Angela Backers was a strong prosecutor who quickly advanced in the Office. She handled hundreds of felony cases and was eventually assigned to the Capital Litigation Unit, handling the most horrific, violent murder cases. She distinguished herself as a strong crime victims advocate, often staying in touch with deceased victims' families.

The tides were changing in the Office. Senior Trial District Attorney Sandy Quist became head of the Law & Motion Division. As earlier noted, Lenahan created and oversaw the very successful California Family Support Division. Skilled women prosecutors were assigned in growing numbers to the Capital Litigation Unit.

When Meehan hired Kamala Harris in 1990, neither he nor anyone else in the office, least of all Harris herself, would have ever imagined what lay ahead for her in law and in politics. She was hired just out of law school as a deputy district attorney. For four years, she handled cases involving the full range of crimes, misdemeanors, and felonies. She credits her experience in Alameda County as an important foundation for her legal and political careers that soon began to unfold. For the next several years, she served on the California Unemployment Insurance Appeals Board and later the California Medical Assistance Commission. In February 1998, San Francisco district attorney Terence Hallinan recruited Harris as an assistant district attorney. In August 2000, she took a job at San Francisco City Hall, working for city attorney Louise Renne. In 2002, Harris ran for and was elected district attorney of San Francisco. In 2006, she ran for and won reelection. In 2010, Harris ran for and was elected state attorney general. In 2014, she ran for and won reelection. In 2016, she ran for and was elected to replace U.S. Senator Barbara Boxer when the latter chose not to seek reelection. Harris resigned as state attorney general

in 2017 to assume her seat as a U.S. senator. In 2020, she was selected by former U.S. Vice President Joe Biden, the Democratic nominee for president, to be his vice-presidential running mate. They won in November 2020. In 2024, Harris was nominated to succeed President Biden as the Democratic nominee for president. She lost in November.

Meehan's successor, Tom Orloff, hired another future legal star, Shara Beltramo. She served as a deputy district attorney in the Office from 2004 until 2018, with a short interruption, a two-year stint in private practice in 2016–2017. In December 2022, Governor Gavin Newsome appointed her to serve on the Contra Costa County Superior Court.

Specially trained women and men were managing and serving in units created to handle vulnerable crime victims' cases, including sexual assault, child abuse, domestic violence, and human trafficking. As more women of strength, skill, and professionalism joined the Office, more women were promoted into leadership and mentorship.

The Office continued to expand the broadly held view of it as a model. That is not to say there was no noticeable competition or resentment if a woman received a particular trial assignment over a male, or that a woman was promoted over a male counterpart. But as time moved on such resentments were mitigated as the Office became more integrated, efficient, and resourceful. It was considered not just a great place to work but a desirable place in which to be a prosecutor, whether male or female, even with all the immense stressors of trial work.

Under the leadership of Thomas Orloff, as chief assistant and then district attorney, more women were hired and assigned to significant committees, to trial teams and divisions dealing with misdemeanors, felonies, and major crimes. There was no distinction between the male and female prosecutors as the rotations of assignments were made.

O'Malley was assigned as assistant branch head of Oakland, the largest branch office and as that office's team leader of the felony preliminary hearing team. She was also given the authority to create special units to handle complicated domestic violence cases.

With the increase in skilled female attorneys between 1984 and 2023, and greater and better balance between male and female prosecutors, the Alameda County District Attorney's Office sustained the growth of its legacy of excellence and innovation. Highlighting a small sampling of success and gender equality, the Office received significant grants that allowed more growth:

- Federal funding allowed the Family Justice Center to be created. In its early years, it was rated as one of the top 20 centers in the nation;
- The Mental Health Unit, led by Assistant District Attorney L. D. Louis—a very skilled, smart, and knowledgeable female prosecutor—became a model for the state;
- The critical DNA Project is managed by District Attorney Colleen Clark. She graduated with a degree in biology, criminal justice, and chemistry, and is also an excellent trial attorney;
- Fraud units are managed by women prosecutors; and
- Branch offices are managed by women prosecutors.

While he headed the Office, Orloff mitigated barriers and in 1999 he appointed O'Malley to serve as chief assistant district attorney. In 2009, the Alameda County Board of Supervisors appointed her district attorney, the first woman to hold the office. O'Malley's leadership was not a "one-off." In 2025, Ursula Jones Dickson, an African American woman, was appointed district attorney of Alameda County.[10]

Tremendous progress has been made in creating equality in attorney staffing.

As noted at the outset of this article, a substantial balancing has taken place over the decades by the Office. Thus, by 2025, there were 152 prosecutors in Alameda County. Eighty-four were male (55%) and 68 were female (45%). Of the 33 assistant district attorneys in leadership, 17 were male prosecutors and 16 were female. Every attorney, male or female follows the same rotation: misdemeanor trials, preliminary hearings, felony trials, followed by other specific assignments based entirely on experience and legal acumen.

Conclusion

Former Alameda County women prosecutors have reached the heights, in the Office, and beyond, in law and politics. On the bench, as judges—trial, appellate, and supreme court—they have excelled. Similarly, in politics they have achieved great distinction in Sacramento, throughout California, and Washington, DC.

It did not happen by chance. It took district attorneys with vision, wisdom, commitment to constitutional governance, and especially, devotion to equality in and before the law. It also took determined and skilled women lawyers

[10] O'Malley retired as Alameda County District Attorney in January 2023. In the November 2022 general election, Pamela Price was elected to replace O'Malley. Price was recalled in 2024. Tyler Katzenberger and Eric He, "Pamela Price Ousted as Alameda DA in Latest Loss for California Progressives," *Politico*, November 8, 2024.

who aspired to be prosecutors. The 2025 numbers noted above of men and women in the Alameda County District Attorney's Office is the culmination of inspired and sustained leadership and humility.

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JOHN WESLEY HAWK STOLLER*

The Women Who Shaped Public Defense:

A Love Letter

If we were to inquire of wisdom through her sages and statesmen; of morality through her poets and preachers, and of sympathy through her orators and actors, what were the duty of the State toward those accused of crime, they would unite with a common voice in declaring that the citizens of a State are far more vitally interested in saving an innocent man from unmerited punishment than in the conviction of a guilty one. The common conscience of men, the great heart of the people, the law itself in its presumption of innocence and requiring twelve men to convict, all join in the fundamental idea that the protection of the innocent is far more important to the State than the prosecution of the guilty. Not only is the defense of the innocent important to the State, but it is an act that appeals to the better feelings and nobler impulses of men. It is the act that makes heroes, whom patriots praise and of whom poets sing.

—Clara Shortridge Foltz, Public Defender[1]

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1 "Rights of Persons Accused of Crime," Aug. 8, 1893, Hall of Columbus, Memorial Art Palace, General Committee of The World's Congress Auxiliary on Jurisprudence and Law Reform, The Woman's Branch of the World's Congress Auxiliary of the World's Columbian Exposition, Chicago, Illinois. The speech has been reprinted numerous times. This article will quote from the ALBANY LAW JOURNAL: *Public Defenders—Rights of Persons Accused of Crime—Abuses Now Existing*, 48 ALB. L.J. 248 (1893) [*World's Fair Speech*].

This article draws heavily from the excellent work of Prof. Barbara Babcock. Babcock's writings on women in the law are legion. (See Barbara Babcock, *Alma Mater: Clara Foltz and Hastings College of the Law*, 21 HASTINGS WOMEN'S L.J. 99 (2010); Barbara Allen Babcock, *Inventing the Public Defender*, 43 AM. CRIM. L. REV. 1267 (2006); Barbara Allen Babcock, *Foreword: A Real Revolution*, 49 U. KAN. L. REV. 719 (2001); Barbara Allen Babcock, *Women Defenders in the West*, 1 NEV. L.J. 1 (2001); Barbara Allen Babcock, *A Place in the Palladium: Women's Rights and Jury Service*, 61 U. CIN. L. REV. 1139, 1166–69 (1993); Barbara Allen Babcock, *Commentary, Western Women Lawyers*, 45 STAN. L. REV. 2179 (1993); Barbara Allen Babcock, *Clara Shortridge Foltz: Constitution-Maker*, 66 IND. L.J. 849 (1991); Barbara Allen Babcock, *Reconstructing the Person: The Case of Clara Shortridge Foltz*, 12 BIOGRAPHY 5 (1989); Barbara Allen Babcock, *Clara Shortridge Foltz: "First Woman,"* 30 ARIZ. L. REV. 673 (1988), reprinted with new introduction in 28 VAL. U. L. REV. 1231 (1994).)

In our modern folklore, the criminal defense attorney is typically male. When portrayed at their best, they are a solemn and thoughtful archetype in the mold of Atticus Finch. In other forms, they are a harried antihero with a heart of gold, like Bob Odenkirk's Saul Goodman. You only need to look at our founding fathers to see celebrations of male criminal defense attorneys. The first formally recorded murder trial in our nation was handled by Alexander Hamilton, who was known for handling criminal defense matters pro bono.[2] Or consider John Adams's infamous pro bono defense of British soldiers charged for the Boston Massacre.[3] Even the fun ones are male, à la Joe Pesci's famous portrayal in *My Cousin Vinny*. And then at their worst, the public defender is portrayed as a schlep in an ill-fitting suit with too little time and little wick left in the candle. Rarely, though, is the public defender portrayed as female. But it is to women that it owes its creation.

Decades before Justice Hugo Black would author *Gideon v. Wainwright*, women led the way in creating the public defense concept we have today—it is their spirit that breathed life into the institution, taking it from capricious charity to zealous, defiant advocacy. This article traces the careers, efforts, and contributions of three of those women in different eras. First, the founder. Clara Shortridge Foltz. A person of such industry she bent California law to suit her. Then, Mabel Walker Willebrandt, whose principled beliefs led her to work as both a public defender and a prolific prosecutor. And finally, Chief Justice Rose Bird, whose resolution should be the envy of us all. There is no argument in this essay or cause put forth except maybe to say that public defense has the same spirit of defiance and justice inherited from feminism, suffragists, and women.[4] But, in truth, this is merely a chronicling act as an ode of thanks to these and other remarkable women.

Indigent Criminal Defense in the Nineteenth Century

Before 1900 indigent criminal defense was an arbitrary, ad hoc enterprise that rested more on the charity of men than principled adherence to constitutional protections.[5] Indeed, as immigration swelled the U.S. population in the nineteenth century, many of the elites and scholars turned to criminal law as a tool to assimilate and socialize the nation's newest citizens.[6] At the

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2 "The Courtroom Where It Happened: Hamilton as a Lawyer," *The American Law Institute*, Oct. 6, 2016. See also, *People v. Levi Weeks*, 1800, First Murder Trial in the United States for Which There Is a Formal Record.

3 The History of Lawyer Pro Bono Services, Roger Williams University, October 18, 2019.

4 I will leave such arguments to better writers than me.

5 Michael McConville and Chester L. Mirsky, *The Origins of the Indigent Defense System*, 15 NYU Rev. of Law & Social Change (1986–1987, Issue 4).

6 Norcross, *The Crime Problem*, 20 Yale L.J. 599, 599 (1911). Indeed, in response to reformers, Norcross called for fewer criminal protections, including the elimination of the Fifth Amendment protection against self-incrimination.

time, the court would assign counsel from the bar.[7] And so, indigent criminal defense was something of a *noblesse oblige* incumbent on being a lawyer; courts would appoint a member of the bar and attorneys could seek reimbursement from the county. And payment was far from guaranteed. Said another way, public defense was a charity—with the predictability and capriciousness that such would entail. As the California Supreme Court held in rejecting a motion for attorney's fees for a lawyer who represented two indigent persons accused of murder: "Such a promise, however, cannot be implied where it is the duty of the attorney to perform the services when called upon by the Court to do so. It is 'part of the general duty of counsel to render their professional services to persons accused of crime who are destitute of means, upon the appointment of the Court, when not inconsistent with their obligations to others.'"[8]

A 1919 report entitled *Justice and the Poor* authored for the influential Carnegie Foundation ultimately concluded that a court-assigned counsel procedure for the poor was "as a whole… a dismal failure, and that at times it… [was] worse than a failure."[9] Elite lawyers lacked any criminal defense experience, so were largely exempted from service. And while young attorneys would be willing to take cases to gain experience, critics remarked that their inexperience hurt their cases as often as they helped.[10] In sum, they were no match for professional prosecutors. As one commentator wrote, "However amusing to the bar the custom of assigning criminal defences to its most recent accessions may be, the proceeding on its face is unfair. With legal education as it is, the fledgling is little more qualified to defend than the prisoner is to conduct his own defense."[11]

The Founder—Or, "A female attorney's strange project"[12]

The story of the California public defender system begins in the 1870s with Clara Shortridge Foltz. Abandoned by her husband in her twenties, Foltz found herself a single mother of five children. Faced with becoming the sole breadwinner for a home before she even had the right to vote, Foltz decided to become a lawyer like her father. There was just one hiccup: California in 1878 did not permit women to be lawyers. And so, from the very beginning, Foltz forged a career standing up to power. She and another lawyer-suffragist

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[7] Parmelee, *Public Defense in Criminal Trials*, 1 J. Crim. L & Criminology, 735 (1910–1911).

[8] *Lamont v. Solano Co.*, 49 Cal. 158, 159 (1874), quoting *Rowe v. Yuba Co.* 17 Cal. 61 (1860).

[9] Reginald Smith, *Justice and the Poor*, The Carnegie Foundation (1919). As a result of Smith's book, the American Bar Association created the Special Committee on Legal Aid Work.

[10] Adelman, *In Defense of the Public Defender*, 5 J. Crim. L. & Criminology 494, 496 (1914–1915).

[11] Smith, *Justice and the Poor*, at 113.

[12] Opinion pieces of the day derided Foltz's proposal for institutionalized criminal defense. The *New York Times* called the idea "absurd" and a "female attorney's strange project." See Babcock, *Inventing the Public Defender*.

authored the "Woman Lawyer's Bill" to strike the phrase limiting the practice of law to "white male citizens."[13]

Getting the bill passed was not easy—the concept of female attorneys was widely ridiculed in society at the time. For instance, in response to her request to apprentice under him, a leading San Jose lawyer wrote, "My high regard for your parents and for you, who seem to have no right understanding of what you say you want to undertake, forbid encouraging you in so foolish a pursuit—wherein you would invite nothing but ridicule if not contempt. A woman's place is at home, unless it is as a teacher. If you would like a position in our public schools, I will be glad to recommend you, for I think you are well qualified."[14] And when it came to the bill itself, "opponents said they feared that a female lawyer's 'seductive and persuasive arts' would sway juries. When they were lawyers, women would next demand to become jurors and even judges. Others painted a picture of a female lawyer blushing and stammering when she had to cross-examine a witness on a sexual matter."[15]

But she persevered and personally lobbied for the bill. After an initial defeat, the assembly narrowly approved it (37-35) and sent it to the governor's desk. And when it looked like the governor would not sign it, she slipped past two guards and personally persuaded him to put pen to paper.[16] That same year, Foltz passed the bar exam after three hours of questioning—twice the norm—and became the first female attorney in California.[17] (Yes, back then one did not need to go to law school to become a lawyer.)

The fight was far from over. When she attempted to attend the newly formed Hastings College of the Law in 1879, the male students mocked her. As she once recounted in a speech, "The first day I had a bad cold and was forced to cough. To my astonishment every young man in the class was seized with a violent fit of coughing. You would have thought the whooping cough was a raging epidemic among the little fellows. If I turned a leaf in my notebook, every student in the class did likewise. If I moved my chair—hitch went every chair in the room."[18] The second day of class was no better. And on the third day, she and her good friend Laura de Force Gordon were informed that the

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[13] Babcock, *Clara Shortridge Foltz: "First Woman,"* reprinted with new introduction in 28 Val. U. L. Rev. 1231 (1994), at p. 1261 (discussing Foltz's oral bar examination and her unanimous certification).

[14] Barbara Babcock, *Woman Lawyer: The Trials of Clara Foltz* (2011).

[15] Cecilia Rasmussen, *Justice Prevails for State's First Female Attorney*, L.A. Times, Feb. 2, 2002.

[16] Barbara Babcock, *Woman Lawyer*, 22–30.

[17] Indeed, her Women's Lawyer Bill was something of a precursor to a constitutional amendment prohibiting employment discrimination authored by her and other suffragists (former Cal. Const., art. XX, § 18, renumbered art. I, § 8.)

[18] *Alma Mater: Clara Foltz and Hastings College of the Law*, 21 Hastings Women's L.J. 99, 103.

school had decided not to admit women.[19] And while no written explanation accompanied the rejection, the school's dean would say that the presence of a woman, particularly the *rustling skirts*, was bothering other students.[20] So, before even attending law school, Foltz waged a legal battle. She sued the school and ultimately the California Supreme Court held that she was entitled to be admitted as an attorney and study law.[21] Of course, it was something of a pyrrhic victory—the legal battle took too long, and the victory came too late. As a single mother of five, she had to start earning a living and left Hastings without graduating.[22]

As a woman lawyer without some type of "male benefactor," attracting paying clients was difficult. And so, her primary book of business was helping women divorce their husbands and representing indigent criminal defendants by court appointment. Which, again, received counsel on an ad hoc basis.

What Foltz saw in these courtrooms was far from justice. As she would later explain in a law review article, she observed rampant "judicial crimes" whose protean nature infected every segment. Whether it was abuses committed by overzealous, unchecked prosecutors, the incompetence of unpaid, untrained, inexperienced appointed counsel, or the predatory nature of some members of the private bar.[23] Foltz saw all of this firsthand, even winning one of the first cases granting a defendant a new trial for prosecutorial misconduct, *People v. Wells*.[24] For Foltz, prosecutors were unchecked and fell prey to their own "vanity of winning" and "fear of newspaper criticism."[25] And so, they could rationalize any behavior through the "assumption that the defendant is always guilty." The *Wells* case was no different—against Foltz was an experienced prosecutor who was determined to beat Foltz (by that time, seen as "the famous woman lawyer") and "[a]round and behind him, an army of police officers and detectives ready to do his bidding, and before him . . . a plastic judge with a large discretion often affected by newspapers."[26]

But even outside of egregious misconduct, Foltz faced constant ridicule in the courtroom. In 1889 or 1890, Foltz was appointed to represent a young

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19 *Id.*

20 *Id.*

21 *Foltz v. Hoge*, 54 Cal. 28, 33–35 (1879).

22 Readers may recall from their own "intro to law" classes that the modern ABA model of bar admission was not widespread until the mid-twentieth century. Legal education was still through apprenticeships at this time.

23 Foltz elaborated her arguments in two law review articles: Clara Foltz, *Duties of District Attorneys in Prosecutions*, Crim. Law Mag. & Rptr. 415 (1896) [hereinafter Foltz, *Duties*]; Clara Foltz, *Public Defenders*, 31 Am. L. Rev. 393 (1897) [hereinafter Foltz, *Public Defenders*].

24 *People v. Wells*, 100 Cal. 459 (1893).

25 Foltz, *Public Defenders*, at 396.

26 *World's Fair Speech*, at p. 248.

Italian immigrant charged with arson. The prosecuting attorney was Thaddeus Stonehill, a Confederate captain from the Civil War who went by "Colonel" in daily life.[27] The "Colonel" was quick to use Foltz's gender as part of his argument—demanding the jury ignore her because, "She is a woman!" and "cannot be expected to reason; God Almighty decreed her limitations, but you can reason, and you must use your reasoning faculties against this young woman." Foltz's response to the ad hominem was better: "If your Honor please and gentlemen of the jury: . . . Counsel opened his argument with the astounding revelation that I am a woman. It was a wonderful announcement—fit epigram for a god to have spoken. And yet, after this magnificent burst of blazing genius the sun does not appear to be darkened nor the moon paled by the contrast."[28] After dissecting the case, the jury returned an acquittal without leaving the box.

So, it was with this experience that Foltz delivered her famous address at the Chicago World's Fair. Her thesis was blunt: If we are to preserve and protect our justice system—a sense which requires that a person is presumed *innocent*—then, justice requires an adversary equal to the prosecutor.[29] After all, would an innocent man deserve something less? And so, in her speech she rejected the charity model of public defense and called on governments to create institutional public defender offices.[30]

After her speech, she would take the show on the road. First in New York, where she promoted a bill to provide for an elected public defender.[31] Lauded by some and sneered at by others, Foltz persevered.[32] By 1912, Foltz had personally introduced similar statutes in sixteen states, and a decade later her count reached thirty-two.[33] She is even credited with the creation of the first public defender's

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27 Babcock, *Western Women Lawyers*, 2185–2186.

28 *Id.*

29 Beliefs Foltz convinced the California Supreme Court to espouse in *Wells*, "It is too much the habit of prosecuting officers to assume beforehand that a defendant is guilty, and then expect to have the established rules of evidence twisted, and all the features of a fair trial distorted, in order to secure a conviction. If a defendant cannot be fairly convicted, he should not be convicted at all; and to hold otherwise would be to provide ways and means for the conviction of the innocent." (*People v. Wells*, 100 Cal. 459, 465 (1893).)

30 "For every public prosecutor there should be a public defender chosen in the same way and paid out of the same fund." (*World's Fair Speech*, at 249.)

31 See Babcock, *Inventing the Public Defender*, at p. 7, appendix, p. 49—note, this is a separately published edition of the same article appearing in the May 2006 edition of the American Criminal Law Review. While most of this article has used the publications pages, the appendix is not available therein. The appendix is available here: Appendix to *Inventing the Public Defender*.

32 Albany Law Journal called the proposal "a new and original idea," 200 newspapers "mentioned and explained" it, Harvard Law Review urged "consideration" (at least for big cities), while the New York Times sneered at "a female attorney's strange project." (Babcock, *Inventing the Public Defender*, at p. 1273, fns. 36, 37.)

33 *Id.*

office in Los Angeles.[34] California soon generalized the model: In 1921, the Legislature enacted a statute enabling the creation of the office.[35]

The Second Class

Before she became the most powerful woman in the federal government, Mabel Walker Willebrandt was Los Angeles County's first female public defender for women. Fresh out of the University of Southern California, she worked in the police courts representing women charged with prostitution, vagrancy, and other crimes against morals. Accounts describe her as representing more than 2,000 such cases.[36]

Where Foltz was an iconoclastic firebrand who fiercely bucked traditional norms, Willebrandt was something of a principled legal purist. As a recent biographical piece noted, "Her unwavering faith in human redemption made her a folk figure. A madam she defended asked for advice on 'going straight,' saying she wanted to buy a house and raise her sons in a respectable environment. Carefully checking her client's finances, Willebrandt advised her to keep at her profession for six more months—and then dipped into her own paycheck to help the woman make a new beginning."[37]

Foltz and Willebrandt took to the law in a similar way. In defending women accused of prostitution, she would call for the prosecution of the procurers of commercial sex; that is, the "johns," as well. And if not, would demand they testify during the proceedings.[38] While that seems obvious by today's standards, the early 1900s saw it differently. The male customer of a female prostitute was routinely freed while the woman was fined. So, making the john come to court and either face prosecution or testify was an act of defiance to the gendered enforcement. And when it came to testimony, a common tactic by prosecutors was to cast women as less—less rational, less honest, and (somehow?) dangerously cunning.[39]

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[34] Babcock, *Inventing the Public Defender*, at 1274–75 & fns. 33–38; Laurence A. Benner, *The California Public Defender: Its Origins, Evolution and Decline*, 5 CAL. LEGAL HIST. 173, 179–80 (2010).

[35] Benner, *The California Public Defender*, at 185–86; Stats 1921 ch 245 § 1 [enacting earlier version of Cal. Gov. Code, § 27700].

[36] *Mabel Walker Willebrandt: A Study of Power, Loyalty and Law*, 83 MICH. L. REV. 1057 (1985). *See also*, Cecilia Rasmussen, *The Pioneering Career of "Prohibition Portia,"* L.A. TIMES, July 2, 2000; "Mabel Walker Willebrandt," Encyclopedia Britannica (rev. Aug. 21, 2025).

[37] Rasmussen, *"Prohibition Portia."*

[38] *Book Review, Woman Lawyer*, 65 STAN. L. REV. at 402–03 (cataloging courtroom and press denigration of women's "reason" and honesty); Babcock, *Inventing the Public Defender*, at 1279–82.

[39] Foltz, *Public Defenders*, 31 AM. L. REV. at 395–97.

Consider for instance the prosecution of Maria Barbella (or "Barberi"[40]) for the murder of her partner, Domenico Cataldo.[41] The district attorney "hounded and abused" the immigrant defendant on the stand. After the thorough badgering, he turned to the jury "*man to man*," warning that acquittal would grant "every woman . . . who has an illicit relationship . . . the right to cut [a man's] throat with impunity."[42] The trial judge reinforced the gender cue, instructing the jurors to "do their duty as men." The jury answered this "call"—convicting her and sentencing her to death by the electric chair. Thankfully, the Court of Appeals later reversed, criticizing the circus of insinuation and invective.

While Willebrandt did not work on the case, she worked in the same environment that created such a conviction. And in such a climate, demanding equal consideration for the testimony of a woman held up to the testimony of a man was an act of defiance.

The Chief Justice

Decades after Foltz transcended barriers while caring for five children, women would still face a similar set of circumstances. Which takes us to our next figure, Chief Justice Rose Bird. Rose Bird grew up in poverty in New York, with her own mother struggling to care for three children after Bird's father left the family.[43] As she forged her career, she was a woman of many firsts—the first female clerk for the Nevada Supreme Court, the first female public defender in Santa Clara, the first woman Secretary of Agriculture, and the first woman on the California Supreme Court, and the first to lead it.[44] All while moonlighting as an adjunct-clinician at Stanford Law School.[45] Although she lived nearly a century after Foltz, we can see the same principled courage that characterized Foltz and other early female leaders.

Modern public defenders often see themselves as stalwart defenders of principled due process. Rose Bird embodied that trait and then some. Her rise at the Santa Clara Public Defender's office was quick, becoming the chief of

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[40] As Babcock explained, "Maria Barbella was a poor immigrant who killed her lover, Dominic Cataldo. At her trial, two inexperienced and overmatched attorneys appointed by the court thoroughly botched the case, failing even to straighten out the spelling of her name so that she went down in legal history as Marie Barberi." (Babcock, *Inventing the Public Defender*, at 1290–91.)

[41] *People v. Barberi*, 149 N.Y. 256, 43 N.E. 635 (1896).

[42] Babcock, *Inventing the Public Defender*, at 1291.

[43] Gerald Uelmen, *The Tragedy of Rose Bird*, 38 T. Jefferson L. Rev. 143, 143.

[44] Rose Elizabeth Bird, California Supreme Court Historical Society (profile) (noting "firsts," including first woman deputy public defender in Santa Clara County).

[45] Patrick K. Brown, *The Rise and Fall of Rose Bird: A Career Killed by the Death Penalty* (2007) at 4–5.

the appellate division within just eight years. She argued cases in the Supreme Court, Courts of Appeal, and the federal court. Even though public defense was much more institutionalized[46] as a practice by her time, Bird was still a trailblazer in her own right—she just did it on the bench.

The first hurdle was getting to the bench at all. When Governor Jerry Brown made her appointment, letters from Republican legislators flooded in, asking the Attorney General to vote her down. Indeed, nineteen of the twenty-three assembly Republicans and seven of the fourteen senate Republicans would send such letters.[47] And naturally, they contained many of the same staid attacks that have assailed strong women throughout the ages.[48] Ahead of the vote of the three-person Commission on Judicial Appointments, the votes of two were known, yes by Acting Chief Justice Mathew O. Tobriner—Chief Justice Donald Wright had retired—and no by Court of Appeal Presiding Justice Parker Wood, Second Appellate District, Division One. The vote of Attorney General Evelle Younger was unknown until the hearing which was held on March 11, 1977. Younger ultimately voted to confirm Bird, but issued a statement that, "the law does not require [the Governor] appoint as a judge the best-qualified or even a well-qualified person. My limited responsibility requires only that I determine if Rose Bird is qualified. Absent any significant evidence to the contrary, I am compelled to find that she is."[49]

During her tenure as Chief Justice, the California Supreme Court was confronted by numerous high-profile issues characterized by strong public opinions on both sides. Faced with these highly public, controversial cases, Bird did what strong people do: take a principled stand even if unpopular.[50] One of the first challenges was about Proposition 13 from the 1978 primary election—a measure that gave many home owners an immediate one-third reduction in property taxes.[51] Bird authored the sole dissent, arguing that tax assessments of property of equal value would violate equal protection of the laws if the value changed widely based on when the property was acquired.[52] Then came the "use a gun, go to prison" laws enacted in 1975—a bill designed

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[46] Thanks in no small part to the work of predecessors like Foltz, Willebrandt, and others.

[47] Uelmen, *The Tragedy of Rose Bird*, at 144.

[48] One such letter derided her temperament, claiming she was prone to lashing out and projecting her feelings.

[49] Uelmen, *The Tragedy of Rose Bird*, at 145. It should be noted that Bird was not the only justice elevated to a high court without judicial experience. By 1986, fifteen U.S. Supreme Court justices had had no previous experience, including the well-regarded Earl Warren.

[50] At one time, it was not popular for women to vote. Or be lawyers. Or attend law school. Principled defiance and a commitment to equity is the throughline here, be there any.

[51] *Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization*, 22 Cal.3d 208 (1978).

[52] *Id.* at 249, dissenting opn. Bird, C.J.

to make prison mandatory in cases where an offender used a gun in the crime.[53]

But the most notable would become her stance on the death penalty. In her time on the bench, she voted to reverse 58 death penalty appeals since the enactment of a bill to restore the death penalty in California.[54] Her public stance against the death penalty ultimately became political fuel. This stance placed her squarely against the tough-on-crime wave that swept across California politics. After narrowly winning retention in 1978, she was subjected to several recall petitions, and in 1986, a highly partisan confirmation election, Bird and three high court colleagues faced voters. She and Justices Cruz Reynoso and Joseph Grodin lost substantially. Only Justice Stanley Mosk, a Governor Pat Brown appointee, survived.

The 1986 confirmation election campaign bucked the traditional non-partisan nature of judicial elections. Bird faced a well-funded campaign backed by Republican donors who believed that Governor George Deukmejian would appoint replacement justices who were more friendly to business interests than Governor Jerry Brown's three appointments—Justices Bird, Reynoso, and Grodin.[55] The entire campaign centered on the death penalty, replete with television ads and mailers. In the end, judicial independence was outspent by more than $5 million dollars.[56,57] Ultimately, Bird secured less than 34 percent of the vote.

And how did the Chief Justice take removal? In her own words, "How am I taking this? My answer is, just like a man."[58]

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[53] Cal. Pen. Code, § 1203.06 [Deerings, 1975]. For more, see *People v. Tanner*, 23 Cal. 3d 16 (1978) (*Tanner I*), which resulted in a 4-3 vote rejecting the law imposing on judicial discretion. Various petitions for rehearing of *Tanner I* were filed, including one spearheaded by the California District Attorneys Association, which attracted more than 100 legislators of both parties as coauthors. A rehearing was granted by the California Supreme Court. Governor Deukmejian argued *Tanner II*, with oral argument held in Sacramento. The high court reversed itself in *People v. Tanner*, 24 Cal. 3d 514 (1979) (*Tanner II*). Justice Mosk's vote switch, without explanation, made it 4-3 upholding the law after being the swing vote in the earlier, 4-3 vote against the law. *Tanner* is also the case that almost cost Chief Justice Bird's confirmation election in November 1978 and led, at her request, to a Commission on Judicial Performance investigation and hearing which was open, also at her request, until it came time for Justice Mosk to testify, when he sued and got the law of closed hearings enforced. For the whole story on that hearing, see Preble Stoltz, *Judging Judges: The Investigation of Rose Bird and the California Supreme Court* (1981).

[54] Uelmen, *The Tragedy of Rose Bird*, at 148.

[55] While part of Governor Brown's cabinet, Bird's earliest victories included banning the use of the short-handled hoe and regulating toxic waste.

[56] Uelmen, *The Tragedy of Rose Bird*, at 149.

[57] Deukmejian's appointments certainly got the message—death penalty affirmances by the Supreme Court went from 7.8 percent to 71.8 percent after the election. In a mere two years, the California affirmance rate went from the third lowest to the eighth highest in the United States.

[58] Frank Clifford, *Voters Repudiate 3 of Court's Liberal Justices*, L.A. Times, Nov. 5, 1986.

Women Continue to Lead in Public Defense

Numerous public defender offices and appointment panels are run by women, including offices in Contra Costa (Ellen McDonnell), El Dorado (Teri Monterosso), Fresno (Antoinette Taillac), Monterey (Susan Chapman), Napa (Kris Keeley), Ventura (Claudia Bautista), Nevada (Keri Klein), Sacramento (Amanda Benson), San Joaquin (Judyanne Vallago), San Mateo (Lisa Maguire), Santa Barbara (Tracy Macuga), Santa Cruz (Heather Rogers), Shasta (Ashley Jones), Siskiyou (Lael Kayfetz), Orange (Sara Nakada), Solano (Elena D'Agustino), Stanislaus (Jennifer Jennison), Tulare (Erin Brooks), and Yolo (Tracie Olson). A woman (Galit Lipa) heads the Office of the State Public Defender. Fern Laethem was the first to serve as California's State Public Defender.[59]

While there is not widespread data on gender within the field, a few offices have made their demographics public. In Contra Costa County, 58 percent of the attorneys are female.[60] In San Francisco, 60 percent of attorneys and 60 percent of management are female.[61] Moreover, the pipeline is strong: 56 percent of newly admitted attorneys are women and women make up the majority of government lawyering.[62] On the federal side, three of California's four defender organizations are woman-led: Jodi Linker (Federal Public Defender, N.D. Cal.), Heather E. Williams (Federal Public Defender, E.D. Cal.), and Kasha Castillo (Executive Director, Federal Defenders of San Diego).

And on the bench, female public defenders continue to gain representation. In the appellate courts, Justice Mary J. Greenwood (former Santa Clara County Public Defender), Justice Maria E. Stratton (former Federal Public Defender, C.D. Cal.), Justice Cynthia C. Lie (former Assistant Federal Public Defender and San Diego County Deputy Public Defender), Justice Laurie M. Earl (former Sacramento County Assistant Public Defender), and Justice Shama Hakim Mesiwala (an assistant federal public defender). On the California Supreme Court, Justice Kelli Evans (former Sacramento County Assistant Public Defender). And while not a Californian, one must mention Associate Justice Ketanji Brown Jackson of the United States Supreme Court (federal public defender).

Public defense has come very far from capricious charity. And it is intrinsically intertwined with the suffrage movement and the work of these and other notable women. The parallels seem obvious—the public defender

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59 Three men—Paul Halvonick, Quin Denvir, and Frank Bell—first held the job, and then Laethem.

60 *See* Contra Costa County Public Defenders.

61 *See* San Francisco Public Defender: Diversity, Equity, and Inclusion.

62 *See* The State Bar of California, 2024 Report Card on the Diversity of California's Legal Profession.

stands up to current paradigms, demands explanation, and excels. In some ways, the public defender is also the recipient of undeserved attacks not levied against their counterparts.[63,64] And even still, women continue to lead the fight in public defense.

[63] John Donohue III and Eric A. Baldwin, *The Crisis of America's Public Defenders*, Op-Ed, Stanford Law School, Oct. 8, 2024.

[64] Or, see "dump truck": noun, defined once by Presiding Justice Gardner of the Fourth District Court of Appeal thusly,

> For the benefit of the uninitiated, "dump truck" is a term commonly used by criminal defendants when complaining about the public defender. The origins of the phrase are somewhat obscure. However, it probably means that in the eyes of the defendant the public defender is simply trying to dump him rather than afford him a vigorous defense. It is an odd phenomenon familiar to all trial judges who handle arraignment calendars that some criminal defendants have a deep distrust for the public defender. This erupts from time to time in savage abuse to these long-suffering but dedicated lawyers. It is almost a truism that a criminal defendant would rather have the most inept private counsel than the most skilled and capable public defender. Often the arraigning judge appoints the public defender only to watch in silent horror as the defendant's family, having hocked the family jewels, hire a lawyer for him, sometimes a marginal misfit who is allowed to represent him only because of some ghastly mistake on the part of the Bar Examiners and the ruling of the Supreme Court in *Smith v. Superior Court*, 68 Cal.2d 547.

People v. Huffman 71 Cal. App. 3d 63, 70 (1977).

JEFFREY SEAMAN* & PAUL H. ROBINSON**

What Justice? Confronting the Criminal Justice System's Biggest Problem

Introduction

The criminal justice system is supposed to do justice by punishing serious crime, which also advances public safety.[1] At least, this is how the system is supposed to work, and if one reads most legal scholarship, one might get the impression the system is too good at punishing crime. Concerns over mass incarceration, over-punishment, over-criminalization, and unjust or brutal enforcement abound. The picture is often of a draconian system trampling the rights of defendants as it herds both serious and minor offenders behind bars. There is certainly merit to some of these concerns, and we have written extensively about the need to ensure fair law enforcement, prevent over-punishment, reverse over-criminalization, and reduce America's prison population. But none of those familiar concerns are the biggest problem facing America's criminal justice system.

The central problem is not that the system punishes crime too much but that it fails to punish the vast majority of crime at all. Most murders, rapes, robberies, assaults, thefts, and crimes of every kind go unpunished. The justice system is failing at a massive scale to do justice, with catastrophic consequences for victims and vulnerable communities. This is the single greatest problem the justice system faces, and yet it receives shockingly little attention. Exhaustive

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1 This article is based on, and includes excerpts from, *Confronting Failures of Justice: Getting Away with Murder and Rape*. See Paul H. Robinson, Jeffrey Seaman & Muhammad Sarahne, Confronting Failures of Justice: Getting Away with Murder and Rape (2024). We thank Muhammad Sarahne, Sarah Robinson, and all others who assisted in the creation of that book.

scholarship and reform attention has focused on when the system does *injustice* by punishing the innocent, over-punishing the guilty, or punishing disparately.

Far too little attention has been paid to far more frequent *failures of justice* where the system fails to punish serious crime at all or punishes it with grossly unjust lenience in the eyes of the community. Research shows ordinary people care deeply about doing justice and believe punishing the innocent and failing to punish the guilty are errors of equal magnitude.[2] Legal scholars, professionals, and reformers need to open their eyes to the sheer scale of how often failures of justice occur, their costs, why they occur, and the ways they can be reduced. This article is an attempt to do just that, but it provides only a brief introduction. For a more comprehensive study, we recommend our book *Confronting Failures of Justice: Getting Away with Murder and Rape*.

I. The Extent of Failures of Justice[3]

Most Americans have no idea how bad the justice system is at catching and punishing serious crime. Even many legal scholars are unaware of the full extent of failures of justice. The justice system is at its most effective when punishing murder, but even there, the statistics are damning. Getting away with murder is a coinflip in America, and the odds may even be on the killer's side. During the murder surge of 2020, there were around 22,000 murders in America, and police likely solved fewer than 50%.[4] In 2023, the official clearance rate rose to a more normal 57.8%, but not every case police clear results in a conviction or even an arrest.[5] The fact that some "cleared" homicide cases result in no murder conviction means the conviction rate may still be less than 50%.[6] And homicide has by far the best victimization-conviction ratio of any offense. Most other crimes are rarely punished and often go unreported because victims know the system will do nothing. In 2023, only about 45% of violent and 30% of property crimes were even reported to police.[7] Among those reported crimes, clearance rates were dismal. Police cleared 41.1% of violent crimes in 2023 and 13.9% of property crimes.[8] But most of these clearances do not lead to conviction due to a lack of successful prosecution. Thousands of killers and hundreds of thousands of rapists, robbers, and assaulters escape justice each year in America.[9]

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2 Brandon L. Garrett & Gregory Mitchell, *Error Aversions and Due Process*, 121 MICH. L. REV. 707 (2023).

3 *See* Robinson et al., *supra* note 1, at 1–7.

4 Estimates vary by data source, with the official FBI homicide clearance rate for 2020 being 54%, although there are reasons to think that may overstate the rate. *See* Robinson et al., *supra* note 1, at 1 n.1.

5 *Crime Clearance Rate in the United States in 2023, by Type*, Statista (last visited Aug. 1, 2025).

6 Robinson et al., *supra* note 1, at 1.

7 Susannah N. Tapp & Emilie Coen, *Criminal Victimization, 2023*, BJS (2024).

8 *Crime Clearance Rate in the United States in 2023, by Type*, *supra* note 5.

9 Robinson et al., *supra* note 1, at 1.

It is easy to see why most criminals are undeterred. For any given crime, what do they have to fear? On average, only 2.8% of rapes and sexual assaults, 2.2% of robberies, and 4.1% of assaults lead to a felony conviction.[10] Of course, career criminals eventually do get unlucky and wind up being punished for a tiny fraction of their crimes.

America's justice system does not have to be this way. Many other countries enjoy higher clearance and conviction rates. Consider Japan's 2022 clearance rates: 96% for homicide, 92% for robbery, 85% for rape/sexual assault, and 84% for assault.[11] America's homicide clearance rate is also lower than many other Western countries.[12] It is true that low crime and high clearance rates tend to go together, but a large part of the reason is because raising clearance rates lowers crime rates and vice versa. Even in America, there is significant variation in clearance rates by jurisdiction, including across jurisdictions with high crime rates.

It is important to understand that justice system effectiveness can be raised or lowered regardless of current crime rates, and such raising or lowering will affect those crime rates. Jurisdictions often find themselves in either virtuous or vicious cycles of rising crime and falling clearance rates or rising clearance rates and falling crime.[13] This is a hopeful fact, since it means positive progress can accelerate, but it also means the toleration of high crime rates and low punishment rates are policy choices. The current justice system actively allows most murderers, rapists, and robbers to get away with their crimes and revictimize their communities. It is well and good to talk of "root causes" of crime (and of course, we support targeting those root causes where cost-effective), but this cannot absolve the justice system of its responsibility to do justice and provide safety—a responsibility it is currently failing in many communities across America.

A. The Problem Isn't Going Away: Serious Crime Is Still a Serious Problem

But perhaps focusing on the problem of unpunished crime is unnecessary because the problem of serious crime is solving itself? One common response to worries over crime and lack of punishment is that we are enjoying historically low rates of crime. Are failures of justice really a pressing problem for policymakers if serious crime is continually shrinking?

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[10] *The Criminal Justice System: Statistics*, RAINN (last visited Aug. 1, 2025).

[11] Research and Training Institute Ministry of Justice Japan, White Paper on Crime 2023 5–7 (last visited Aug. 1, 2025).

[12] Marike Liem et al., *Homicide Clearance in Western Europe*, 16 Eur. J. Criminology 81–101 (2019).

[13] Robinson et al., *supra* note 1, at 4–6.

First, it should be noted that any murders, rapes, robberies, and assaults are too many, and the moral need to solve, punish, and prevent them remains regardless of the total number. However, it should also be noted that America is not enjoying historically low rates of crime (except from a very limited perspective), and rates of serious crimes such as murder, rape, and aggravated assault have stagnated, or are even broadly rising again, in many urban jurisdictions after falling from their peak in the early 1990s. Comparisons to the great crime wave that started in the late 1960s and ran through the 1990s are misleading because they suggest America is enjoying its lowest rates of crime. In fact, America has yet to recover to early 1960s levels. For example, comparing the FBI's crime data from 1960 with 2019 shows that total offenses per 100,000 were 32% higher in 2019. Modern violent crime rates are well above double the 1960 benchmark, mainly due to the explosion in aggravated assault.

Table 1: 1960 vs. 2019 Crime Rates[14]

Year	Total Offenses per 100,000	Violent	Murder	Forcible Rape	Robbery	Aggravated Assault
1960	1,887.2	160.9	5.1	9.6	60.1	86.1
2019	2,489.3	379.4	5.4	42.6	81.6	250.2

Even these data understate the size of the problem as the murder rate comparison is deceptive: enormous advances in emergency medical care since 1960 have dramatically improved the survivability of a shooting or aggravated assault. Victims now arrive at hospitals sooner due to better ambulance and helicopter response times, and most hospitals now have dedicated trauma centers skilled in treating severe wounds. For example, serious gunshot wounds treated in hospitals increased almost 50% between 2001 and 2011 even as the death rate decreased, contributing to the murder rate dropping from 5.6 to 4.7.[15] Studies suggest that today's crime rates combined with 1960s medical technology would yield a murder rate up to five times higher than it is.[16] America is not in a period of historically low violent crime but rather a period of advanced emergency care saving many victims from death despite steady, or even broadly increasing, severe violence in many jurisdictions. Addressing failures of justice is more important than ever as the problem will not go away

14 *United States Crime Rates* 1960–2019, Disaster Center (last visited Aug. 1, 2025).

15 Gary Fields & Cameron McWhirter, *In Medical Triumph, Homicides Fall Despite Soaring Gun Violence*, Wall St. J. (Dec. 9, 2012).

16 Roger Dobson, *Medical Advances Mask Epidemic of Violence by Cutting Murder Rate*, 325 BMJ 615 (2002).

on its own. America has unacceptably high levels of serious crime compared to both many Western countries and the America of 1960.

II. The Costs of Failures of Justice[17]

The costs of failing to provide justice for serious crimes are severe. One set of costs is moral—failing to provide justice when someone is murdered, raped, or robbed is simply wrong. It is a violation of transcendent morality, basic human instincts, and the government's social contract with its citizens. In addition to these abstract moral costs, failing to punish serious crime produces and exacerbates many concrete harms. These include trauma to victims and co-victims, increased crime, a decline in the law's moral credibility, and disparate impact on vulnerable and marginalized communities.

A. Costs to Victims and Co-victims

Many serious, violent crimes leave victims alive but scar them with trauma, especially when justice is not served. A victim may well find some measure of solace and healing in the thought that their attacker has been punished, but most victims of serious crime never experience that comfort. It is impossible to quantify the suffering victims' experience when their victimizers escape justice, but the cost is real and significant. Rape victims are more likely to experience posttraumatic stress disorder if they have negative experiences with the justice system, and the knowledge that one's attacker still walks free can be infuriating and crippling to many victims, as well as conveying the disillusioning message that society does not value them or consider their harm worth the effort of catching and punishing the offender.

Rape is not the only crime with enormous personal costs. When a murderer or other serious violent offender escapes without deserved punishment, the victims' families and friends are emotionally scarred. The relatives and friends of someone lost to homicide are often referred to as "co-victims," a term that acknowledges victimization extends beyond the person killed. Anyone who has had a friend or a family member murdered will have to deal with lifelong grief, but a failure of justice adds anger, upset, and fear to that pain through the constant knowledge that the killer is free. In the United States, it is estimated that roughly 9% to 15% of adults and 8% to 18% of youths are co-victims of homicide.[18] Since justice fails in more than half of such cases, around 5% or more of the population suffers from the knowledge that the killer of their loved

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[17] *See* Robinson et al., *supra* note 1, at 12–19.

[18] Marilyn Peterson Armour, *Experiences of Covictims of Homicide: Implications for Research and Practice*, 3 Trauma Violence & Abuse 109–24 (2002).

one got away with murder. Worse, the co-victimization rates are much higher for other crimes, such as rape or aggravated assault, where the punishment rates are so low as to appear almost trivial.

B. Costs to Society Through Increased Crime

But failing to punish serious crime does more than traumatize victims and their families. It also breeds more crime through several mechanisms. First, low punishment rates decrease deterrence as criminals or would-be perpetrators correctly believe they are unlikely to be punished for any given crime. Research suggests that significant deterrence is not generated among offenders until they perceive a 30% chance of being caught—something which is not close to being true for any crime except murder.[19] Second, low punishment rates fail to incapacitate repeat offenders from committing long strings of crime. While most career criminals eventually get caught, their convictions represent only a tiny fraction of their crimes. Surveys suggest the median prisoner in America has committed twelve or more nondrug crimes in just the prior year before incarceration.[20] Roughly 20% of criminals commit around 80% of violent crimes and over 50% of all crimes.[21] Most crime in America is repeat crime committed by offenders with a string of ten, twenty, or even thirty uncaught crimes—many of which would not have occurred had they been punished for their earlier crimes. America's ineffective justice system helps explain its high crime rates because a massive failure to punish crime means a near-total failure of deterrence and massively reduced incapacitation.

In addition to reducing deterrence and incapacitation, failing to justly punish crime carries another criminogenic cost through eroding the law's moral credibility with the community. Communities that witness repeated failures of justice commonly lose faith in the criminal justice system—a loss of faith that undermines the criminal law's ability to gain compliance, deference, and assistance. This leads to legal cynicism, witness noncooperation, and increased lawbreaking. It can also provoke a justice-seeking backlash in the form of vigilantism where individuals deliver punishment with their own hands when the law seems unwilling or unable to do it. A loss of the law's moral credibility is highly damaging because it creates a vicious cycle in which lost credibility produces more crime and less justice, which in turn reduces the system's credibility further. This dynamic is particularly noticeable in many of

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[19] Raymond Paternoster, *How Much Do We Really Know About Criminal Deterrence*, 100 J. Crim. L. & Criminology, 765, 814 (2010).

[20] John J. Dilulio Jr., *The Numbers Don't Lie: It's the Hard Core Doing Hard Time*, Brookings (Mar. 17, 1996).

[21] *See* Paul E. Tracy, Marvin E. Wolfgang & Robert M. Figlio, Delinquency Careers in Two Birth Cohorts (2013).

America's urban neighborhoods where high rates of crime go together with high rates of crime nonreporting, witness noncooperation, vigilante killings, and distrust in official justice system processes.

It is worth noting that all the above costs apply regardless of whether a criminal completely escapes punishment or whether they are convicted and punished in a way the community sees as grossly insufficient and unjust. Sometimes, delivering a flagrantly inadequate punishment may be worse than delivering no punishment at all. For example, if an individual rapist escapes capture, it is unlikely to attract public attention. By contrast, the case of a rapist who is convicted but receives a slap on the wrist sentence (e.g., community service) is likely to spark far greater public outrage and cynicism because it showcases that the system is unable or unwilling to do justice even when a perpetrator is caught.

Through these three mechanisms—reduced deterrence, incapacitation, and the law's moral credibility—failures of justice contribute substantially to the cost of crime in America, which is estimated at a staggering 2.6 trillion dollars each year.[22] Allowing serious criminals to escape justice is unlikely to be a societally cost-effective decision, and doing justice pays for itself in the long run by reducing the costs of crime.

C. Costs to Marginalized Communities

Yet another cost that should concern everyone (but is likely to resonate especially with progressives) is the disparate impact unpunished crime has on poor and minority communities. Crime clearance rates are significantly lower in poorer areas with high racial minority populations than they are in White middle-income and high-income areas. One analysis of fifty-two of the United States' largest cities found that police arrested someone in 63% of homicides that killed White victims, compared with just 47% of homicides of Black victims, a 16-percentage-point difference in clearance rates.[23] Data from Chicago indicates that homicide cases involving a White victim are solved 47% of the time, cases involving a Hispanic victim are solved 33% of the time, and cases involving a Black victim have a clearance rate of a mere 22%.[24] There are several factors that likely contribute to these disparities (such as the type of killing, with street shootings being especially hard to solve), but regardless of the causes, the effect is clear: poor neighborhoods and minority communities

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[22] *New Research Examines the Cost of Crime in the U.S., Estimated to Be $2.6 Trillion in a Single Year*, Vanderbilt News (Feb. 5, 2021).

[23] German Lopez, *There's a Nearly 40 Percent Chance You'll Get Away with Murder in America*, Vox (Sept. 24, 2018).

[24] Conor Friedersdorf, *Criminal Justice Reformers Chose the Wrong Slogan*, The Atlantic (Aug. 8, 2021).

suffer failures of justice at highly disproportionate rates to their share of the population. This contributes to higher crime in such communities, driving away opportunity and trapping innocent community members in cycles of victimization and poverty. In fact, leaving conviction rates low and crime rates high in minority communities is arguably a continuation of historically racist policies that left Black communities under-protected. As the author of a recent work studying Jim Crow policing in the American South concludes:

> For decades, African Americans complained of being underpoliced in the sense that law enforcement officers typically showed little concern for crimes that involved black victims. Supporters of fair administration argued that would-be criminals knew law enforcement officers would not investigate crimes concerning black victims, which led to increased rates of violence committed against African Americans.[25]

While the racist intent may be gone, the current system's failure to provide justice in Black communities leaves Black Americans to be victimized at higher rates and with greater impunity than others. About 33% of reported crime victims are Black, despite Black Americans making up only 13% of the population.[26] Black Americans are far more likely to be affected by the problem of rampant, unpunished crime compared to other Americans. According to a 2018 survey, 75% of Black Americans stated violent crime was a "very big" problem in the country compared to only 46% of White Americans, and 38% of Black Americans said crime was a major problem in their community compared to only 17% of White Americans.[27]

Too often the same advocates and reformers who protest against police violence and decry the injustices of systemic racism in the legal system are nowhere to be found on the issue of solving and punishing crime. What such advocates need to understand is that solving and punishing serious crime isn't simply a criminal justice issue but is also a social and racial justice issue.

III. What Causes Failures of Justice?

There are numerous reasons why the justice system fails to do justice, both in the sense of convicting an offender for their crimes and in giving them a punishment the community sees as sufficiently just. In our book *Confronting Failures of Justice*, we grouped these individual factors into four conceptual

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[25] Brandon T. Jett, Race, Crime, and Policing in the Jim Crow South: African Americans and Law Enforcement in Birmingham, Memphis, and New Orleans, 1920–1945 63 (2021).

[26] *FBI Crime Data Explorer*, FBI (last visited Aug. 1, 2025).

[27] John Gramlich, *From Police to Parole, Black and White Americans Differ Widely in Their Views of Criminal Justice System*, Pew Research Center (May 21, 2019).

categories: formal criminal liability rules (such as nonexculpatory defenses like statutes of limitation), limitations on investigation (such as constitutional limitations, lack of funding, poor training, or failure to adopt new technology), criminal adjudication procedures (such as pretrial release, the exclusionary rule, plea bargaining, and sentencing procedures), and social/political influences (such as legal cynicism or anti-punishment ideologies). Each category—indeed, each individual factor—deserves a book-length treatment of its own, but this section briefly considers each category in turn.

It is important to keep in mind that many justice-frustrating causes exist for a reason due to policymakers balancing competing societal interests. In some cases, such as maintaining certain limits on police investigations, justice-frustrating rules are necessary. But there is often room to reform even necessary rules to make them less justice-frustrating, as well as room to revise or eliminate policies that reflect an incorrect or archaic balance of interests.

A. Formal Criminal Liability Rules[28]

Some formal legal rules bar prosecution of undeniably guilty offenders. While they do not cause a large percentage of failures of justice, these nonexculpatory defenses are some of the clearest examples of the law attempting to promote other societal interests at the expense of justice, and some of them also provide a clear example of rules in need of updating. Statutes of limitation, double jeopardy, diplomatic immunity, and legality principle defenses (such as relying on the rule of strict construction) can all prevent conviction of individuals who have obviously committed serious crimes.

Statutes of limitation are an especially good example of rules in need of updating to better serve justice. Today, the justice system is very different than when statutes of limitation were first conceived. Fairer trial procedures now make it much easier for defendants to discredit old evidence or witness statements that may have become unreliable over time. Additionally, advances in forensic science, such as the advent of DNA analysis, make it possible to show guilt with high certainty even in old cases, particularly rape cases. Thus, the original justifications for many statutes of limitation may no longer apply. Why should the perpetrator of a rape go free simply because he has escaped detection and capture for ten years while a similar offender goes to prison for committing the same offense nine years ago? Eluding investigators for a fixed period of time should not entitle an offender to walk free, something that was always understood in the case of murder, which never had a statute of limitation. Fortunately, many states are eliminating statutes of limitation for all felonies,

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[28] *See* Robinson et al., *supra* note 1, at 25–51.

all felony sex offenses, or all crimes with DNA evidence. Statutes of limitation are a paradigmatic case of a justice-frustrating rule that could be changed to better serve justice without creating significant damage to other societal interests. Similarly, double jeopardy can also let clearly guilty offenders escape justice. When double jeopardy was first conceived, a second prosecution would almost certainly have been an attempt to jury shop with the same evidence or persecute an individual defendant, but advances in evidence (such as DNA) and the professionalization of police forces mean that it is more likely than ever that new evidence may turn up in acquitted cases. Recognizing the increasing number of high-profile failures of justice being caused by double jeopardy, in 2003 the United Kingdom passed the Criminal Justice Act, which permitted acquittals to be reversed in very limited circumstances and only when new evidence (e.g., DNA evidence or a confession) comes to light in cases of serious crime (e.g., homicide, kidnapping, and sex offenses). Since then, there has been no wave of innocent defendants being hounded in the UK—only a number of serious criminals being brought to justice.

B. Limitations on Investigation

There are numerous factors that reduce police departments' and prosecutors' ability to successfully investigate and prosecute crime. Several stand out as especially important: inadequate financing, poor training and procedures, witness intimidation, and legal restrictions (including on the use of new technology).

1. Inadequate Financing[29]

A lack of financial resources directed toward investigating and prosecuting serious crime is responsible for a large share of failures of justice. It is no surprise that murder, which receives the most investigative and prosecutorial attention and resources, also has the highest clearance and conviction rates.

a. Inadequate Financing of Police

Cases are more likely to be cleared when each detective has smaller caseloads and can investigate each crime soon after it occurred. In most high-crime, low-clearance rate jurisdictions, there simply aren't enough detectives to solve most murders, let alone rapes, robberies, and assaults. The result is that generally only "easy" cases get solved as police pick the low hanging fruit, leaving the offenders in many potentially solvable cases to go free.

Consider a case example of how a lack of financial resources affects clearance rates and crime. Stockton, California had twenty-four murders in 2008. That

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[29] *See* Robinson et al., *supra* note 1, at 97–111.

year also brought a national recession, and Stockton laid off a quarter of its police personnel and instituted pay cuts. The narcotics force was closed entirely, and community policing became an unaffordable luxury. The arrest rate for homicides saw an immediate decline from 68% in 2008 to 24% in 2009. By 2012, the city had to file for bankruptcy, and killings hit a record high of 71. There were six people left in the homicide department to work on the ever-growing mountain of unsolved cases. Would-be offenders correctly understood the police were too underfunded to effectively solve or prevent crime.

High-crime, low-clearance rate jurisdictions are swamped with serious criminal cases, making it impossible for police to devote the attention needed for each case. One reason low-crime jurisdictions often have higher clearance rates is because police have a higher rate of funding and staffing compared to the total amount of serious crime—something which contributes to a virtuous cycle keeping the jurisdiction's crime rate low. One obvious conclusion is that America simply does not spend enough to sufficiently investigate most serious crime. Only about 3.7% of combined state and local budgets go to policing (about 1% of state budgets and 6.1% of local budgets).[30] Crucially, the problem of underfunding is not evenly distributed—many suburban police departments are well funded compared to their serious crime rates while many urban ones are not. The primarily local model of police funding means poorer areas are less able to pay for the police they need while richer areas have no trouble paying for sufficient justice and safety.

The problem of police underfunding was not helped by the recent "defund the police" movement which led to twenty-four of the largest fifty American cities cutting their 2021 police budgets or canceling regular increases. While such police budget cuts certainly do not explain all (or even most) of the subsequent crime increases, they likely contributed to murders surging 30% nationwide in 2020 (and surging further in 2021) and clearance rates falling to record lows. Unsurprisingly, cities that cut their police budgets were quick to reverse the move, but funding levels remain woefully inadequate compared to the amount of unpunished serious crime such cities experience.

Underfunding is also compounded by the "mission creep" policing has experienced in the last half-century. Most police departments are expected to do more than ever, whether it is dealing with the mentally ill, domestic violence, homelessness, cybercrime, terrorism, human trafficking, or illegal drug distribution.

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30 *Criminal Justice Expenditures: Police, Corrections, and Courts*, The Urban Institute (last visited, Aug. 1, 2025).

b. Inadequate Financing of Prosecutors and Crime Labs

Police departments are not the only part of the justice system that suffers from underfunding. Prosecutors play a critical role in securing justice for serious crimes, but many prosecution offices are overworked and understaffed, leading to criminal cases being dropped or resolved through grossly lenient plea bargains. There are two basic levels of prosecution offices: ninety-four U.S. District Attorney offices, which prosecute federal crimes, and over 2,300 district or county attorney offices which prosecute state and local crimes. All such offices not only employ a chief district attorney but also dozens or hundreds of deputies and line prosecutors who handle everything from charging and plea-bargaining decisions, preparing witnesses for trial, guiding victims through the court system, paying for expert witnesses, and arguing cases before juries. While federal offices are better funded, and such federal jobs are seen as steppingstones to lucrative careers in private law, state and local prosecution offices have chronically struggled with a lack of funds and staff.

Part of the staffing shortage is because of poor prosecutor pay, with entry-level state prosecutors making around $70,000 compared to salaries of well over $200,000 at large law firms. Prosecution offices struggle to attract and retain talented lawyers, and caseloads are often so crushing that even the most talented lawyers would struggle. While the problem of overworked public defenders is more publicized, research shows prosecutors and public defenders should have fairly equivalent caseloads, with the national advisory board setting that load at around 150 felonies or 400 misdemeanors per year. In reality, prosecutors in some jurisdictions are assigned more than 1,000 cases annually. As one New Mexican prosecutor, Raul Torrez, stated: "Simply put, we lack both the personnel and the basic resources necessary to provide adequate justice to the citizens of this community."[31] Many criminal cases police refer to prosecutors are dropped not because they could not be won, but simply because underfunded prosecution offices must prioritize time and resources. A 2020 study found that state prosecution offices reject an average of 22% of felony cases referred by police, and of the cases that are filed, another 17% of felony cases are dismissed, meaning over a third of felony cases referred by police end up getting dropped.[32] What makes the situation worse is that funding prosecution offices is so cheap. In 2020, all state prosecution offices cost only $6.5 billion[33], or just 0.15% of state and local expenditures—a miniscule

[31] Raúl Torrez, *Underfunding of DA's Office Must Be Fixed*, Albuquerque Journal (Feb. 8, 2017).

[32] George E. Browne & Mark A. Motivans, *Prosecutors in State Courts, 2020*, BJS (2024).

[33] *Id.*

percentage showing how easy it would be to significantly increase prosecution resources.[34]

Another area where inadequate financing undermines justice is in crime laboratories, which are chronically underfunded and face massive backlogs. For example, at the end of 2020, crime laboratories had a backlog of over 700,000 untested cases.[35] This has made headlines in the case of rape kits being left untested despite containing DNA evidence that could have ended serial rapists' careers. For example, in 2009, an assistant prosecutor in Detroit discovered 11,341 untested rape kits dating back to 1984 in a police warehouse. It took ten years to get the funding necessary to test all the kits, which revealed over 800 serial rapists and secured hundreds of new convictions. Tragically, hundreds, if not thousands, of rapes could have been prevented if the kits had been promptly tested instead of shelved.

2. Poor Training and Inefficient Procedures[36]

Another cause of failures of justice is the inefficient use of existing resources through poor training or inefficient procedures. Increased police funding does not necessarily translate into higher clearance rates if departments use funding inefficiently. Similarly, the justice system can increase justice by making more efficient use of existing resources. One significant area in need of improvement is investigative training and procedures. For example, in 2002 Baltimore lost up to 44% of its homicide prosecutions because investigators had conducted investigations improperly, such as by failing to secure crime scenes, interview witnesses, or follow steps to ensure accuracy in witness identifications. The disastrous state of Baltimore's homicide investigations in the early 2000s illustrates a deficit of training that afflicts many investigative forces.

Police departments with the highest homicide clearance rates tend to offer continuing training for all homicide officers, and better training generally leads to better evidence collection, analysis, and maintenance. There are over 17,500 state and local law enforcement agencies, making standardization difficult and leading to a wide variety of investigator training methods and procedures. Almost all police departments could benefit from improvement in some areas, whether it is chain of custody procedures, standard operating procedures and checklists for investigations, organization of detective units, or taking advantage of new technologies. Sometimes, this means implementing cutting-edge technology like facial recognition algorithms. Sometimes, it means

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[34] Randy Moore, Kristen Ricks & Jeffrey Little, *Annual State and Local Government Finances Summary: 2020*, United States Census Bureau (Sept. 22, 2022).

[35] Connor Brooks, *Publicly Funded Forensic Crime Laboratories, 2020*, BJS (2023).

[36] *See* Robinson et al., *supra* note 1, at 83–96.

catching up with the twenty-first century. In 2020, the Philadelphia homicide unit was still using typewriters.[37]

One significant way to improve investigative effectiveness without large additional spending is making greater use of cost-effective technologies. As the next subsection discusses, this may require removing legal barriers that bar the expanded collection or use of DNA or surveillance technology. A failure to adopt new technology may also be due to inadequate financing, but sometimes it is simply due to a lack of knowledge or inertia. For example, while installing new public CCTV cameras may cost money, many police departments could make greater use of public-private CCTV camera partnerships where police integrate private security cameras into a larger usable network. Similarly, using new rapid DNA testing technology can be faster and cheaper than initially relying on older laboratory tests. Given the range of police departments and massive range of potential improvements, what is really needed is a system to match individual departments with needed improvements instead of expecting every department to discover all of them on their own. A similar situation also applies to crime laboratories and prosecution offices across the country, which could likely all benefit from at least some cost-neutral or cost-saving efficiency reforms.

3. Witness Intimidation[38]

Witness intimidation is widespread, although when successful it defies efforts at measurement. But available evidence points to a catastrophe of silence. One study suggests 23% of reported serious crimes are not prosecuted because of witness noncooperation, and prosecutors in Baltimore and Boston report witness intimidation in up to 80% of cases. A National Youth Gang Survey found that 83% of police departments in larger areas reported that witness intimidation was common. Another study found 36% of witnesses who testified in criminal courts in Bronx County, New York, received direct threats. Perhaps the single greatest limitation on the investigation and prosecution of murder cases is the lack of witnesses willing to testify or cooperate. In many of the tens of thousands of unpunished murder cases across America, police or prosecutors suspect who the likely killer is but are unable to proceed due to a lack of witness cooperation. Witness intimidation is also widespread in rape cases and in any criminal case involving gang members.

4. Legal Restrictions on Investigations and Adoption of New Technology

In many cases, legal restrictions on investigations or new technology

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37 *Crime Without Punishment: Homicide Clearance Rates Are Dropping in Philadelphia as Murder Rates Skyrocket*, CBS Philadelphia (June 29, 2022).

38 Robinson et al., *supra* note 1, at 288–97.

contribute to many preventable failures of justice. Consider limits on searches and interrogations as well as restrictions on new technology such as DNA collection, surveillance cameras, and facial recognition algorithms.

a. Limitations on Searches[39]

Society faces many tradeoffs in creating criminal justice system rules. One of the most pervasive dilemmas is how to strike the proper balance between protecting personal liberties, including the right to privacy, and the importance of doing justice. Criminal investigations commonly require some intrusion into personal liberty and privacy, whether it is searching personal property, monitoring online traffic, or interrogating suspects. Society imposes limitations on investigators to strike a balance between these interests, but each additional limitation imposed can come at the cost of increasing failures of justice.

The overarching limitation on criminal investigation in the United States is found in the Fourth Amendment to the Constitution, which protects against "unreasonable" searches and seizures. The immediate purpose of the Fourth Amendment was to ban the English practice of general warrants, which allowed law enforcement to enter any building to search for illegal goods regardless of whether probable cause or even reasonable suspicion existed. While the Fourth Amendment clearly bans such general warrants, the proper interpretation of the amendment is not obvious in other aspects, such as exactly when a warrant is needed in the first place and how this relates to reasonableness and probable cause. The result is that search law has generally been constructed by courts. Some judicial rules seem to have little relation to rational policy ends and would likely never have been adopted by a legislature. For example, judicial rulings have variously allowed police to search a car but not the driver and to arrest a suspect but not search the bag he is carrying.

It is hard to precisely quantify how much of a justice-frustrating effect warrant and probable cause requirements have, but it is not insignificant. Thousands of warrant requests are denied each year, but this is just the tip of the iceberg, as hundreds of thousands of potentially useful searches likely do not take place because of the (often reasonable) limitations, which also lead to criminals going uncaught and revictimizing their communities. Consider a case example: Earl Bradley was a Delaware pediatrician who was found to have abused over 1,200 patients when he was arrested in December 2009, and a search warrant turned up photographic evidence of the abuse. What makes his case more disturbing is that complaints led to police seeking an arrest

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[39] *Id.* at 113–26.

warrant in 2005 and a search warrant in 2008—both of which were denied, allowing Bradley to keep abusing children, some as young as three months old.

b. Limitations on Interrogation[40]

Another kind of limitation on investigation applies to interrogation, through the prophylactic judicial requirement that suspects be read their "Miranda Rights," which include the right to remain silent, a warning that any statement can and will be used against them in court, and the right to have a lawyer present during questioning. Only if a suspect acknowledges they understand and waive these rights can custodial questioning proceed. Statements or confessions obtained without such a waiver will likely be excluded from evidence under the exclusionary rule no matter how volitional and no matter how reliable they are. Moreover, post-arrest silence cannot be used against a defendant even to impeach an "ambush defense"—an exculpatory story or alibi carefully constructed after arrest to be consistent with the facts the prosecution will be allowed to present at trial and mysteriously never mentioned previously to investigators.

Many have questioned who benefits most from the replacement of the pre-1966 voluntariness standard in confessions with the *Miranda* requirement. Most innocent suspects are eager to talk to police to clear themselves, vulnerable suspects can still be coerced into waiving their rights, and the main beneficiaries appear to be those guilty criminals who previously would have impulsively or foolishly spoken, either confessing their crimes or accidentally revealing inculpatory information. This fact was apparent to Justice Byron White, who dissented from the *Miranda* decision, stating "in some unknown number of cases the Court's rule will return a killer, a rapist or other criminal to the streets and to the environment which produced him, to repeat his crime whenever it pleases him."[41] The extent of these predicted justice failures has become clearer since the advent of *Miranda*. Research suggests that *Miranda* did indeed reduce confession and clearance rates, with even conservative estimates suggesting the new rules led to a loss of almost 5,000 violent crime convictions per year—over a quarter million since the *Miranda* decision. Other estimates put the loss in crime convictions in the tens of thousands per year. Suspects have a right to remain silent, but society may wish to reconsider the consequences of encouraging silence.

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40 *Id.* at 126–36.

41 Miranda v. Arizona, 384 U.S. 436, 542 (1966) (White, J., dissenting).

c. Limitations on Adopting New Technology[42]

Sometimes, the widespread use of new technology, like certain forms of online or location monitoring, run afoul of judicial search rules. However, even when the use of new technology is judged constitutionally permissible, some jurisdictions have not authorized its use, either from inertia or an excessive concern with potential effects on privacy. For example, the Supreme Court has found that states and the federal government have wide constitutional authority to collect DNA from offenders and arrestees.[43] The federal government mandates DNA collection from all arrestees, just like fingerprinting, but many states have lagged behind the federal government in taking advantage of the crime-solving potential of DNA collection. One reason is many privacy advocates mistakenly believe that the DNA stored in police databases contains a great deal of personal information—in fact, it contains little more than a genetic fingerprint.

With a wide enough database, practically every crime where the perpetrator leaves DNA should be solvable. The federal DNA database, CODIS, has 25 million profiles and has produced over 750,000 hits as of 2025.[44] The larger the database, the higher the hit rate, and the more serious crimes are solved. Among one set of 295 Louisiana cold cases, the CODIS hit rate increased from 47% to 58% between 2011 and 2021 purely due to database expansion—meaning 11% of the unsolvable cases with DNA evidence were solved purely by adding more profiles to the database.[45] Adding an offender's DNA to a database also reduces recidivism by massively increasing specific deterrence—a reduction that can be up to 42% in terms of one-year recidivism risk.[46] Yet despite the incredible cost-effective benefits of expanding DNA databases, most states do not collect DNA from all arrestees the way they do for fingerprints.

As of 2021, thirty-four states allowed DNA collection from at least some arrestees. Among these thirty-four states, fifteen generally allowed collection from only arrestees of certain serious felonies, twelve allowed collection from any felony arrestee, and six also allowed for collection from misdemeanor arrestees. The rules across the remaining sixteen states ranged from barely utilizing DNA collection to allowing it for all convicted offenders. There are additional state-by-state differences with respect to issues such as juvenile

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42 *See* Robinson et al., *supra* note 1, at 137–66.

43 *See, e.g.*, Maryland v. King, 569 U.S. 435 (2013).

44 *CODIS-NDIS Statistics*, FBI (last visited Aug. 1, 2025).

45 Ray A. Wickenheiser, *Expanding DNA Database Effectiveness*, 4 Forensic Science International: Synergy 100226 (2022).

46 Anne Sofie Tegner, Anker Jennifer L. Doleac & Rasmus Landersø, *The Effects of DNA Databases on the Deterrence and Detection of Offenders*, 13 Am. J. Econ.: Applied Econ. 194–225 (2021).

offenders and whether DNA records are automatically expunged if charges are not filed or if the case ends in acquittal.

There is also the problem of patchwork DNA databases because some jurisdictions do not cooperate or consolidate with the national CODIS network. Additionally, the federal government and almost no states utilize DNA databases for familial searching—an incredibly powerful tool that allows investigators to identify partial matches, indicating an offender's relative is in the DNA database, which then allows investigators to identify possible suspects. California's infamous Golden State Killer was caught in 2018 through such a familial DNA search of the private ancestry DNA database GEDmatch. Without it, the Golden State Killer's thirteen murders, over fifty rapes, and some 120 burglaries would never have been punished.

Another technology that is often not fully exploited, either due to lack of funding, legal barriers, or political opposition is surveillance of public spaces. Studies show that CCTV has helped solve numerous serious crimes including kidnapping, murder, and assault and has been especially useful when other forms of evidence such as DNA are not available. A study in Milwaukee found that clearance rates were 82% higher for violent crimes occurring on street intersections with PTZ (pan-tilt-zoom) cameras than at intersections without the cameras. Washington D.C.'s former police chief Peter Newsham explained that CCTV is "one of the advances in technology that has been most significant in helping law enforcement," noting that CCTV footage advanced the investigation in 70% of homicide cases and "contributed to closing 40%" of homicide cases in D.C. in 2018.[47] In Vancouver, Canada, murder suspects are tracked with CCTV footage in 41% of cases, and CCTV identifies murder suspects in 13% of cases. Many high-crime, low clearance rate U.S. cities lag behind police CCTV coverage in places like London or parts of Asia. The sacrifice to privacy of monitoring public spaces is low, and a 2013 poll found 78% of Americans view street surveillance cameras as a good idea.

Another new technology that complements CCTV cameras is the use of increasingly advanced facial recognition algorithms that allow investigators to quickly identify suspects and track their movements across public spaces. A great deal of misinformed fearmongering has led to substantial legal restrictions on law enforcement use of facial recognition technology despite its obvious benefits. Claims that facial recognition algorithms are racially biased are massively overblown. Larger disparities in accuracy that existed in the past were caused by the greater prevalence of certain faces in original training set

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[47] Natalie Delgadillo, *Amid Spiking Homicide Rate, D.C. Will Spend $5 Million to Install New Security Cameras Around the City*, dcist.com (Nov. 24, 2019).

data, which also explains why facial recognition algorithms developed in East Asia have higher accuracy for Asian faces than non-Asian faces. However, as far back as 2018, advances in facial recognition technology had brought the accuracy rate up to 99.97% for all races, and false matches were almost never due to race or gender but due to aging or injury. Moreover, fears about rare inaccurate identifications completely neglect the fact that inaccurate identifications by human investigators or witnesses are far more common. Indeed, facial recognition may actually reduce the risk of innocent people becoming suspects.

C. Criminal Justice Adjudication Procedures

Even after a criminal has been arrested with sufficient evidence to prove their guilt beyond a reasonable doubt, there are still many factors that can result in a failure of justice. An offender can escape conviction entirely via the exclusionary rule, pretrial release, or speedy trial rules, and even if they are convicted, they may receive a lenient punishment the community sees as grossly unjust due to plea bargaining, sentencing discretion, early release, or executive clemency.

1. Escaping Conviction

The exclusionary rule is famous for letting obviously guilty offenders escape justice if police gathered the inculpatory evidence in violation of search or interrogation rules.[48] Suppression motions are filed in somewhere between 4% to 10% of all felony cases, and a conservative estimate is that at least "10,000 felons and 55,000 misdemeanants evade punishment" each year due to the exclusionary rule.[49]

Pretrial release is another mechanism that some offenders use to escape justice.[50] Historically, about a quarter of defendants released pretrial fail to appear in court, leading to a bench warrant for their arrest. While many of these defendants eventually show up in court or are later arrested, some evade justice for years, and all cause delays and waste justice system resources. The move to eliminate cash bail in some jurisdictions without replacing it with adequate flight risk assessment tools has also added to this problem. While no one should stay in jail because they are poor, some bail reform efforts have focused on decarceration at any cost, including justice and safety, as opposed to pursuing more thoughtful bail reform measures.

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48 *See* Robinson et al., *supra* note 1, at 169–85.

49 Christopher Slobogin, *Why Liberals Should Chuck the Exclusionary Rule*, 1999 U. Ill. L. Rev. 363, 443 (1999).

50 *See* Robinson et al., *supra* note 1, at 193–206.

Speedy trial rules (which vary significantly by jurisdiction in terms of the maximum time allowed between charging and trial) also lead to some cases being dismissed.[51] Strict time limits can also lead prosecutors to decline a greater number of provable cases to focus on completing open ones before the deadline.

2. Escaping a Just Punishment

Even if an offender is convicted, this does not mean justice has been fully done. In many cases, offenders receive sentences that are unjustly lenient from the perspective of the community. While some punishment is usually better than no punishment, there are even cases where extremely lax sentences may be worse than no punishment because it signals to the community that the justice system is not committed to actually doing justice.

a. Plea Bargaining[52]

Over 90% of criminal cases are resolved by plea bargains, including a majority of serious criminal cases. The discount prosecutors give varies by crime, jurisdiction, and individual case, but it can be quite high, with punishments often being more than double for those defendants who go to trial. Plea bargains also routinely lead to below-guideline sentences for serious crimes: 38.3% of federal murder sentences fall below minimum sentencing guidelines due to plea bargaining, and the average below-guideline sentence for murder is 52.1% less than the minimum recommended sentence. Additionally, charge bargaining is rampant, with many felonies being downgraded to misdemeanors. Research suggests that about one in five felony arrests that end in a conviction end in a *misdemeanor* conviction, often allowing serious offenders to be convicted for crimes far more minor than the harms done to their victims.

b. Judicial Sentencing Discretion[53]

Judges often have wide sentencing discretion in determining punishments. Some discretion is clearly necessary to allow an individualized assessment of blameworthiness based on case circumstances. However, when too much discretion exists, this can create wide sentencing disparities and failures of justice when judges apply their own idiosyncratic views instead of those of the community. The problem of lenient sentencing has been particularly criticized in cases of rape. For example, in the 1980 case *People v. Guthreau*, the judge sentenced a forcible rapist to a year in jail (which in fact meant seven months because of standard early release). Indeed, the probation officer had been

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[51] *Id.*, at 206–13.

[52] *Id.* at 215–28.

[53] *Id.* at 229–47.

reluctant to recommend any incarceration in the presentencing report because, "after all, [the victim] wasn't hurt."[54] Many Americans were so infuriated with the six-month jail sentence given to Brock Turner, a Stanford swimmer who was convicted of sexually assaulting fellow student Chanel Miller in 2015, that a petition requesting the judge's removal acquired more than 240,000 signatures. The judge was successfully recalled from office over the lenient decision, which itself was partly due to lenient sentencing guidelines for sexual assault.

c. Early Release[55]

In most states, the sentence passed in court is not the punishment served in prison. Early release mechanisms like parole mean most offenders get out of prison early. While the federal system has abolished parole and implemented an 85% time-served requirement (allowing a 15% reduction for good behavior in prison), most states have not, although two-thirds have adopted the 85% time-served requirement for violent offenders. Overall, state prison data show that violent offenders serve on average 54% of their original maximum sentence, though this varies significantly by state. It would be one thing if early release was truly successful at identifying rehabilitated offenders, but there is no evidence that it is. Only 42% to 49% of those on parole successfully complete their term of supervision.

d. Executive Clemency[56]

One final post-sentencing mechanism that can lead to failures of justice is executive clemency. While clemency is fairly rare at the federal level (where it is often associated with corruption and midnight pardons as presidents leave office), around 10,000 or more acts of clemency occur at the state level every year. The lack of transparency and accountability in clemency decisions at all levels is disturbing, and many criminals with powerful connections have benefited from having their punishments short-circuited.

D. Social/Political/Ideological Factors

There are numerous social, political, and ideological factors that contribute to failures of justice. The ones covered here include legal cynicism, anti-justice system narratives, opposition to the concept of desert-based justice, and a lack of awareness or political attention.

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[54] Izabelle B. Reyes, *The Epidemic of Injustice in Rape Law: Mandatory Sentencing as a Partial Remedy*, 12 UCLA WOMEN'S L.J. 355, 357 (2003).

[55] *See* ROBINSON ET AL., *supra* note 1, at 249–59.

[56] *Id.* at 269–84.

1. Legal Cynicism[57]

Legal cynicism can be defined as "a cultural frame in which the law and the agents of its enforcement are viewed as *illegitimate*, *unresponsive*, and *ill equipped* to ensure public safety."[58] At its core, legal cynicism is a loss of faith in the justice system caused by the belief that the system cannot or will not provide justice or keep communities safe. A primary driver of such legal cynicism is high crime and low clearance rates that seem to prove the claim that the system is failing. Legal cynicism leads to less crime reporting, less cooperation with police, and more failures of justice, thus causing more legal cynicism in a vicious cycle. In addition to affecting specific communities, legal cynicism can also occur around specific crimes, such as rape, where the system seems unable to deliver the justice the public demands.

Legal cynicism is also especially widespread in poor and minority neighborhoods that are often worst affected by crime and have some of the lowest clearance rates. Studies across many decades show that Black Americans have less favorable views of police than other racial groups. A 2016 survey found that 68% of White Americans, 59% of Hispanic Americans, and only 40% of African Americans had favorable views of police.[59] Unsurprisingly, research has found African Americans are 20 percentage points less likely than White Americans "to say they definitely would report a crime."[60] In fact, 55% of Black respondents agreed that calling the police often does more harm than good, a perception shared by just 25% of White Americans.[61]

As noted previously, only 45% of violent crime and 30% of property crime is even reported in America. A significant reason for this is a belief that reporting crime will do no good—a belief that is sadly true in many cases. However, for the justice system to even have a chance at punishing crime, the crime must be reported. Legal cynicism also makes witnesses less likely to cooperate with police even if they are not intimidated.

2. Anti-Justice System Narratives[62]

Most people of all political backgrounds agree it is important to solve and punish serious crime. However, views of the criminal justice system and police

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57 *See* Robinson et al., *supra* note 1, at 301–07.

58 David S. Kirk & Mauri Matsuda, *Legal Cynicism, Collective Efficacy, and the Ecology of Arrest*, 49 Criminology 443, 444 (2011).

59 Emily Etkins, *Policing in America: Understanding Public Attitudes Towards the Police: Results from a National Survey*, Cato Institute (Dec. 7, 2016).

60 *Id.*

61 David Nather, *Axios-Ipsos Poll: Black Americans' Police Experiences Are Getting Worse*, Axios (May 22, 2021).

62 *See* Robinson et al., *supra* note 1, at 307–26, 357–83.

have been increasingly politicized, with several ideological narratives leading to misguided beliefs or reform efforts that sometimes reduce the chance of doing justice.

A prominent example is the popular false narrative that policing in America is marked by an epidemic of systemically racist police killings. While police do unjustly kill suspects (as in the case of George Floyd), such unjustified killings are rare and almost never racially motivated (even in the case of George Floyd, there was no evidence of racial animus). However, the perception that there is an epidemic of racially motivated police killings is deeply entrenched and leads to legal cynicism. One study found that "eight in 10 African-Americans … said that they thought that young black men were more likely to be shot to death by police than to die in a car accident," when in reality, Black men are more than 15 times likelier to die in a car accident than be killed by police.[63] When asked to estimate how many unarmed Black men were killed by the police in 2019, 44% of self-identified liberals estimated between 1,000 and 10,000 or more (20% of self-identified conservatives gave this estimate).[64] In reality, in 2019, around ten unarmed Black men were killed by police. Only around 20% of self-identified liberal respondents (and 45% of the conservative ones) guessed anywhere close to the right answer. Similarly, the average survey participant guessed that 50% of those killed by police are Black, while the actual percentage is 25%.

The truth is that there is no widespread problem of racist police killings in America. Police kill around 1,000 people in the United States each year, of whom around 250 are Black. Only around 6% of suspects police kill are unarmed, and even unarmed suspects often pose a serious risk. No scientific study has ever found that Black Americans are more likely than White ones to be killed by police in a given police–suspect interaction; indeed, the reverse may even be true.[65] Yet the well-accepted current narrative portrayed by the media, activists, and many politicians is just the opposite and contributes to anti-police sentiment that increases legal cynicism, reduces crime reporting, reduces witness cooperation, and increases opposition to better funding police or providing more effective justice system intervention.

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[63] Robert VerBruggen, *Fatal Police Shootings and Race: A Review of the Evidence and Suggestions for Future Research*, Manhattan Institute (Mar. 9, 2022). Black men die in fatal traffic accidents at a rate of 52.1/1,000 and from police related encounters the rate is 3.4/1,000.

[64] Kevin McCaffree & Anondah Saide, *How Informed Are Americans About Race and Policing?*, Skeptic Research Center (Feb. 20, 2021).

[65] Ronald G. Fryer, *An Empirical Analysis of Racial Differences in Police Use of Force*, 127 J. POL. ECON. 1210–1261 (2019).

There is also a widespread narrative that portrays the current justice system as racially discriminatory against minority, particularly Black, offenders. However, the popular claim that Black Americans are more likely to end up in prison because of racial discrimination in arrests, prosecutions, and sentences is unsupported.[66] The share of Black offenders in prison reflects the share of Black offenders who commit serious crimes. For example, in 2018, Black offenders made up 33% of America's sentenced prison population, while Black offenders made up 36% of arrests for serious nonfatal violent crime in 2018. Nor do arrest rates for Black offenders reflect discrimination as 42% of serious violent victimizations reported to police involved a Black offender in 2018. Indeed, Black offenders were more likely to escape arrest for serious violent victimizations reported to police than White offenders were in 2018. While it is true that Black drug offenders may be more likely to be arrested than White drug offenders, there is no evidence this is due to racial discrimination, and it seems more likely to be due to the fact drug enforcement is focused around cities, high-crime communities, and street dealing for logistical reasons.

None of this is to say that it is impossible to find individual cases of racist mistreatment in the justice system today. There are always bad apple police, prosecutors, and judges, and to the extent data really does show racial discrimination at play—inexplicable by crime rates and other relevant factors—that deserves to be taken seriously. For example, there is evidence in some jurisdictions that police are more likely to use some (nonlethal) forms of force in interactions with Black suspects. But what is truly ironic about these narratives is they miss the most obviously present form of systemic racism in the justice system: the systemic under-provision of justice system resources to Black communities. It is not Black offenders who are unfairly treated by the system but Black victims, who are left vulnerable to victimization at higher rates and with greater impunity than other Americans. This is a serious problem that must be remedied, and it requires more justice system intervention, not less. It is also not helped by false narratives that paint the justice system as the enemy of minority communities.

Another false narrative holds that America's justice system frequently gives brutal and undeserved punishments. It is certainly important that criminalization and punishment decisions reflect community intuitions of justice, and this may require rolling back some punishments (such as mandatory minimum or three-strike sentencing laws) or decriminalizing certain conduct

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[66] *See e.g.*, Christopher J. Ferguson & Sven Smith, *Race, Class, and Criminal Adjudication: Is the US Criminal Justice System as Biased as Is Often Assumed? A Meta-Analytic Review*, 75 Aggression and Violent Behavior 101905 (2024).

(such as marijuana possession). However, the popular narrative of America being a carceral state with barbaric punishments is simply incorrect. If anything, the average American might be surprised at just how lenient some punishments are. Over 60% of state prisoners are incarcerated for a violent offense, and most of the rest are recidivists.[67] One study found "that fully 94% of state prisoners had either committed one or more violent crimes (62 percent) or been convicted more than once in the past for nonviolent crimes (32 percent)."[68] Only 17% of the prison population is sentenced for drug charges (mainly trafficking/distribution), and only 3.7% are sentenced for drug possession—despite popular myths about prison being filled with drug possessors. Most prisoners are also quickly released. The median time served in state prison is 15.6 months, and the mean time served (which is influenced by longer sentences for the most severe offenders) is only 32 months.[69] Moreover, only about 40% of state felony sentencings even result in a prison sentence, with around another 30% resulting in a jail sentence (of a year or less), and the rest resulting in probation.[70] Also, despite popular claims, the system has not massively increased in harshness compared to the past. The median time served in 1960 was 21 months, and the mean time served was 28 months.[71]

It should be noted that we are no friends of prison and fully support decarceration conducted in a manner that ensures justice and safety. Indeed, we have suggested elsewhere the use of non-incarcerative punishments combined with electronic monitoring to create "electronic prison" sentences that might safely and justly replace a majority of prison sentences.[72] However, even decarceration advocates like ourselves must acknowledge that many popular claims in the mass incarceration narrative are simply false.

3. Opposition to Desert-Based Justice[73]

Of course, even the justice system's current levels of punitiveness are unacceptable to prison abolitionists and others who oppose the concept of retribution and desert-based justice. There is no need to argue the moral merits of punishment here. Even if one rejects the deontological arguments in its favor, there are still the utilitarian and democratic arguments founded on the

[67] Paul H. Robinson & Jeffrey Seaman, "*Mass Incarceration" Myths and Facts: Aiming Reform at the Real Problems*, 50 AM. J. CRIM. L. 1, 20 (2024).

[68] Dilulio Jr., *supra* note 20.

[69] Robinson & Seaman, *supra* note 67, at 44–46.

[70] *Id.* at 42–43.

[71] *Id.* at 44–46.

[72] *See*, *e.g.*, Paul H. Robinson & Jeffrey Seaman, *Electronic Prison: A Just Path to Decarceration*, 58 UIC LAW REVIEW, 307 (2024).

[73] *See* ROBINSON ET AL., *supra* note 1, at 53–79.

fact that the vast majority of ordinary people have a strong, innate desire to see retributive justice done in cases of criminal wrongdoing.

A large body of research shows that laypeople assign punishments based on desert (as opposed to other factors) even if they endorse other sentencing principles as a general matter (such as deterrence, incapacitation, or rehabilitation). Of course, it is possible to achieve all those other goals through a properly constructed desert-based sentence, but ordinary people put desert first. Additionally, laypeople's intuitions as to the seriousness of different offenses are closely correlated with one another, allowing the criminal law to use these shared intuitions as the basis of a criminal code. The correlation is around 0.9 for all subgroups, indicating an impressive societal consensus.

Not only do people have shared intuitions about what justice means and when it should be done, but they also have a strong innate desire to see it done, even if they have no personal interest in the case. As one metanalysis notes, "Unfair treatment triggers a desire to punish the offender, both among victims (i.e., 'second-party punishment') and among uninvolved observers (i.e., 'third-party punishment'). This finding is so universal and robust that it does not require any more replication studies."[74] Even preverbal infants display a third-party desire to punish offenders—demonstrating just how deep and instinctual the human desire for desert-based justice is. Research leaves no question that ordinary people care deeply about imposing a just, desert-based punishment on offenders and are even willing to sacrifice their own resources to achieve it.

In any democratic society, this means punishments should be assigned on the basis of desert in order to satisfy the community's sense of justice. Indeed, a utilitarian argument for why desert-based justice is important for crime control is because the community will lose faith in the law if desert-based justice is not done. While some individuals may oppose the concept of desert-based punishment and see no value in punishing serious crimes, they are a small minority whose voice should not be allowed to control criminal justice policy in a democratic society. Unfortunately, anti-punishment activists often gain outsized political influence through spreading false narratives or pitching reforms aimed at reducing justice system resources to advance other goals.

4. Lack of Awareness and Political Attention

A critical sociopolitical cause of failures of justice is that there is a shocking lack of awareness about the problem and a lack of political attention or will toward solving it. There are numerous reasons for this lack of awareness, but a

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[74] Mathias Twardawski et al., *What Dirves Second- and Third-Party Punishment?*, 230 Zeitschrift für Psychologie, 77–83 (2022).

significant one is that most people live in neighborhoods where serious crime is not a serious concern. Moreover, the availability heuristic likely makes people think crime is punished at greater rates than it actually is since people are used to hearing or reading stories about arrests and convictions. Similarly, crime TV and entertainment shows usually end with the crime being solved—not a more accurate depiction where over 90% of the episodes should end with the criminal never being found or punished. There is also the sad truth that those with the most political power are also the least likely to be affected by failures of justice or crime. There is no powerful, well-funded lobby in favor of solving and punishing crimes, and as a result, addressing failures of justice is often pushed off policymakers' priorities list.

IV. Reducing Failures of Justice[75]

Given the prevalence and cost of failures of justice, policymakers urgently need to address the problem. The multitude of causes of justice failures also means policymakers have many potential levers to pull. However, clearly not every justice-frustrating rule should be eliminated, and every reform should be the result of a thoughtful balancing of competing societal interests.

A. Balancing Competing Societal Interests

There are several considerations policymakers should keep in mind when balancing competing societal interests. First, different communities may prefer different balances, and the preferred balance of interests may shift over time. This means that where possible, important decisions should be made in a democratic, local, and flexible manner. A natural corollary of this observation is judicially made criminal justice rules often strike an undesirable balance of interests for the community. Claims that courts are better placed to make rules because of their lack of political partisanship also ring increasingly hollow as accusations of judicial partisanship and threats of court packing are made with ever greater regularity. There is also no reason to believe that judges—who are generalists by necessity—possess more relevant expertise in specific criminal law policymaking than legislative committees. It is unfortunate that the latter half of the twentieth century saw courts strip legislatures of their ability to weigh the balance of interests in matters such as search and seizure, interrogation, and the question of excluding improperly obtained evidence. A better approach would be for courts to more frequently decline opportunities to become lawmakers and to more regularly signal the legislative branch that a balancing debate needs legislative resolution or even that a particular reform

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[75] *See* ROBINSON ET AL., *supra* note 1, at 53–79.

is needed. Even if the legislative branch refuses to act on such judicial advice, any judicial remedy should be limited and open to revision by later legislative enactment.

A second important consideration is that balancing requires compromise. A proper balancing of interests is likely to produce more compromise policies than the partisans of a particular issue might like. On the issue of privacy, for example, a proper balancing of interests reflecting society's preferences would likely satisfy neither extreme privacy advocates nor extreme justice proponents. The importance of interest-balancing is often ignored by those who might be called "rights absolutists" who believe that any attempt at accommodating a competing interest fatally undermines the other interests at stake. For example, a privacy rights absolutist might see no room for expanding DNA collection, as they fear it would lead to a slippery slope to totalitarianism. Such absolutist thinking creates false dichotomies in policymaking where policymakers and the public are confronted with an either-or fallacy and asked to choose between two extreme versions of the world. Such absolutism can occur on all sides, of course.

Third, rational, well-intentioned people should agree on at least a general decision-making principle that considers the interests of everyone in a democratic society—not merely the ones with the most political power. John Rawls, for example, suggested the decision-maker should stand in the "original position" under a "veil of ignorance"—whereby they imagine making the decision not knowing what their place in society will be. Policymakers should consider what financial allocation decisions and rulemaking they would engage in from such a position. Performing this exercise in an intellectually honest way can be a challenge, especially for those people with strong ideological commitments, but it does provide a useful way for good-faith actors to come to a "correct" decision for a democratic society. It seems likely that if policymakers seriously considered the possibility that they might suffer from being victimized with impunity, they would devote greater attention (and financial resources) to reducing failures of justice in society.

B. The Need for Experimentation

Failures of justice occur in all states and localities across America, but the beauty of federalism is that America also offers a laboratory for experimentation on how to fix any problem. There is a wealth of useful information that can be gleaned from examining the variation in policies and outcomes across jurisdictions, both domestically and internationally. In our book, *Confronting Failures of Justice*, we devote a section in each chapter on causes of justice failures to reforms that have been tried by various jurisdictions. We

are also working on another book, *Experiments in Criminal Justice*, detailing the motivations, outcomes, and lessons of some of the most important criminal justice experiments in America over the last century. Policymakers at every level, from police captains to presidents, need to experiment and learn from other jurisdictions' experiments instead of bowing to inertia. America's justice system is in desperate need of improvement, and improvement will often require that policymakers be willing to experiment and try new ideas.

C. A Sample List of Reforms[76]

Each jurisdiction may have different reform needs, abilities, and priorities when it comes to reducing failures of justice. What follows is a sample list of suggested reforms (in no particular order) that provides a starting idea for how some of the previously mentioned causes of justice failures might be tackled. More detailed suggestions can be found in our book *Confronting Failures of Justice*.

1. **Abolish Statutes of Limitation for Serious Felonies, and for Other Felonies Restart the Limitation Clock after Any New Felony.** While statutes of limitation might have had more justification when introduced centuries ago, the reasons for their continued use are lacking, especially when they regularly produce failures of justice for serious offenses. The fact that some jurisdictions have successfully abolished them for felonies, without any significant ill effect, shows they are outdated. However, for cautious policymakers, one solution might be to abolish statutes of limitation for serious felonies and maintain current limits for less serious felonies while adding a "clock restart" feature that would mean the limitation only applies if the offender has not committed another felony during the limitation period.

2. **Increase Funding for Police and Prosecutors and Also Make Greater Use of Centralized Resource Sharing.** If policymakers are serious about tackling failures of justice, most high-crime, low-clearance rate jurisdictions will have to spend more. With police spending only making up 3.7% of state and local budgets, even a small, sustained increase could go a long way. Similarly, increasing funding to America's woefully underfunded prosecution offices involves what amounts to spare change at the national level—an extra $5 billion would almost double prosecutors' funding and significantly ease the problem of justice failures caused by overstretched prosecution offices.

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[76] *See* Robinson et al., *supra* note 1, at 385–402.

One way to sustainably increase justice system resources to high-crime, low-clearance rate communities, while minimizing the increase in spending, is to modify the way policing (and prosecution) is funded and provided. Instead of some communities suffering from an under-resourced justice system while others enjoy more than enough, it may make more sense for state and national governments to provide more centralized justice system funds and personnel that can be deployed differently each year to address shifting crime challenges. Such a system would still see local communities control their police departments and fund them primarily through local taxes, but the state would deploy a much larger set of funding grants and state police officers, particularly detectives, who could deploy to local communities as needed based on crime trends. To an extent, this model already exists as it is common for local police departments to call in backup for certain kinds of investigations—such as state police or the FBI for some serious crimes. Expanding that successful model to play a much larger role in providing investigative resources to overwhelmed localities could significantly reduce failures of justice while minimizing costs through exploiting economies of scale. This same model could also apply to prosecution resources, with a larger group of statewide or federal prosecutors deploying to help local district attorneys' offices tackle larger loads or more complex prosecutions.

3. **Establish National/State Expert Groups to Set Best Practices, Help Local Departments Meet Them, and Oversee Experiments.** An enormous number of failures of justice come from investigative errors, poor training, and failures to adopt the most efficient policies. There is a real need for a national expert group to set best practices standards and help individual police departments meet them. Such a group could exist as part of the Department of Justice and also work to facilitate existing (or newly created) grant funding to meet such goals (indeed, the Bureau of Justice Assistance could be transformed into this sort of organization). Similar groups could also exist at the state level and for prosecution offices. Such groups could also serve a valuable role in arranging for controlled experiments and data collection around policy changes aimed at improving clearance and conviction rates.

4. **Enlarge Investigative Databases and Capabilities but Establish Limitations on Their Use.** There is understandable reluctance to allow governments to be too intrusive in our private lives, but at the same time there seems to be strong support for the idea that minor intrusions in our collective privacy are worth the enormous benefits to justice and safety

that can be obtained by allowing investigators to have greater access to modern technology. Greater access can dramatically improve justice with only minor intrusions on privacy, as in the collection of a genetic fingerprint from all arrestees, perhaps only to be used when investigating serious offenses (or perhaps familial DNA searching should only be allowed for serious offenses). Additionally, expanding the use of CCTV in public spaces and facial recognition algorithms improves justice at little cost to privacy. However, a key to adopting modern investigative technology is making sure sufficient limitations and safeguards are put in place to prevent its abuse by bad apple government agents and assuage public concerns. Even if the threats created by new technology are small, it will improve the political feasibility of adoption to add some safeguards.

5. **Create a Police-Community Oversight Commission Designed to Build Trust with Both the Community and the Police.** Poor police–community relations stem from a variety of factors and have an enormous negative effect by producing a regular stream of serious justice failures and increased crime. The solution to the problem cannot be found simply in "fixing" bad policing (though improving policing is essential), but rather in building a police–community relationship that changes community views as well as police practices. What might help is a new kind of joint police–community oversight commission that has broad jurisdiction to cooperatively oversee police–community interactions and to actively promote better policing and combat false narratives. The goal of such a commission would not just be to monitor police but also to work to increase clearance rates and reduce crime through leveraging community insights and cooperation.

6. **Alter or Replace the Exclusionary Rule with Direct Sanctioning of Offending Officers.** For some people, the exclusionary rule stands as one of the most offensive doctrines disregarding the importance of doing justice. Should a serial torturer and murderer like Larry Eyler have gone free (to kill again) because he was held too long during a *Terry* stop?[77] Such applications of the exclusionary rule bring into disrepute the entire criminal justice system, and the existence of the rule is even more offensive because it commonly fails in its stated justification of deterring police overreach. Replacing the rule with direct sanctioning of offending officers would make more sense, and if that proves infeasible, the rule could at least be transformed into a discretionary rule that balances the seriousness

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[77] *See* Robinson et al., *supra* note 1, at 170–71.

of the offenses against the size of the infraction (as is common in other countries).

7. **Use Consolidated Offense Drafting with Particularized Offense Grading to Reduce the Justice-Frustrating Costs of Plea Bargaining.** Plea bargaining may be the most common source of justice failures in the current system among convicted criminals. Nearly every "bargain" is a case in which the offender is getting less criminal liability than they deserve, with the prosecution trading that deserved punishment for the efficiency and certainty of a guilty plea. While it may be impractical to stop offering plea bargains, there is no reason to have a system that offers any greater reduction in justice than is needed to induce a plea. Prosecutors can try to work around the problem in a variety of ways, but the most obvious and cleanest solution is simply to draft criminal codes in a way that consolidates all related offenses into a single offense provision (for homicide, theft, assault, sexual assault, fraud, etc.) and provides many offense grades within each consolidated offense, as some modern and proposed codes already do. This gives prosecutors greater room to maneuver within the correct offense category and ensures each grade reduction given up in a plea has a smaller effect on the resulting punishment.
8. **Adopt Comprehensive Sentencing Guidelines, as per the Federal System.** While some sentencing discretion is clearly required, there is no good reason to provide incredibly loose or vague sentencing guidelines. A lack of sentencing guidelines pegged to community intuitions of justice invites overly lenient, overly harsh, and unfairly disparate punishments. Crafting detailed sentencing guidelines is a simple and effective step in the direction of justice.
9. **Abolish Early Release on Parole, as per the Federal System.** The federal system provides transparency with the public (and individual offenders) about how offenders are punished: the sentence publicly imposed in court really is the sentence served. Compare such honesty with the shell game currently played in many states where the sentence publicly imposed means little or nothing, with the actual punishment determined later out of public view by a parole commission prone to inaccuracy and bias. This systemic deception simply contributes to the lack of confidence many have in their criminal justice system. Of course, abolishing parole may require giving shorter sentences, but this is a small price to pay since most offenders understand the longer court-imposed sentences in parole jurisdictions are meaningless.

10. **Adopt a Desert-Based Distributive Principle, as per the Model Penal Code.** Half a century ago, when the Model Penal Code was first drafted by the American Law Institute, the state of criminal law theory left it unsettled as to whether criminal law ought to primarily aim at doing justice—giving offenders the punishment they deserve, proportionate to the seriousness of the offense and the blameworthiness of the offender—or aim at avoiding future crime through general deterrence or incapacitation of the dangerous, even if doing so meant violating principles of deserved punishment. But as the 2007 amendment to the Model Penal Code illustrates, it should now be clear that abandoning desert as the guiding principle for criminal liability and punishment creates its own enormous costs to effective crime control by eroding the moral credibility of the justice system. Lawmakers should explicitly dedicate the justice system to the task of doing justice through adopting a desert-based distributive principle in their criminal codes.

Conclusion[78]

The tragic irony of the American justice system is that so little justice is done by it. Change begins with awareness, however, and this article is an attempt to provide a brief introduction to failures of justice, their costs, their causes, and some ways they might be reduced. We are not one-sided activists—there are serious tradeoffs faced in crafting criminal justice policy, and it would likely not be worth creating a system that could punish literally every crime. Our ultimate goal is a justice 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—all to a degree consonant with overall societal well-being. Given the current system is failing to do justice at such an extreme rate and with such high costs, we believe it is clear that societal wellbeing demands more justice be done. Addressing the problem should be criminal justice reformers' top priority, and failures of justice should concern everyone who wishes to make the American justice system and American society more just for all. Failing to do justice for serious crime is failing one of government's most fundamental responsibilities under the social contract, and the human cost is staggering. As one mother of a murdered son pleaded: "I'm sick myself. I got cancer. I wasn't expecting to bury my son, I was expecting my son to bury me. I need some justice before I lay my head down. I want him [the killer] caught."[79] When we fail to provide

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[78] *Id*. at 402.

[79] Ted Scouten, *Video Murder of Suspect Released as Dying Mother Asks Public to Forget "No Snitch Code," Bring Killer to Justice*, CBS Miami (June 8, 2021).

justice in such situations, we compound the suffering of victims, ensure there will be more victims, and fail a basic moral duty. It is time to stop failing that duty and confront failures of justice.

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THOMAS HOGAN*

Confronting Failures of Justice:

Exposing the American Criminal Justice System's Protection of Criminals, A Book Review

"Most killers get away with murder." That is the sobering first sentence in *Confronting Failures of Justice*, a new book by Paul Robinson, Jeffrey Seaman, and Muhammad Sarahne. The book is a damning indictment of the American criminal justice system, exposing how the system has been warped to favor the rights of guilty defendants over the search for the truth or protection of victims. Returning to the authors' first sentence, fewer than 50% of murderers are arrested and convicted for their crimes in the modern United States.

One of the immediately notable features of this tome is the lead author. Robinson is a distinguished professor at the University of Pennsylvania Law School, one of the most liberal law schools in the nation. A scholarly work attacking the American criminal justice system as too lenient coming from a scholar at Penn is unexpected and intriguing. Robinson's coauthors are an Israeli prosecutor and a current law student, both also affiliated with the law school.

While the book is 500-plus pages of comprehensive analysis, it is organized in a fashion that makes for compelling reading. In each chapter, the authors describe a particular rule or aspect of the American criminal justice system. They then discuss the competing normative interests underlying the rule at issue, the logical pros and cons of the rule. The authors provide real-life

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examples of cases where the rule has been applied, providing useful context for the theoretical discussion. Each individual chapter ends with some specific recommendations for repairing the American system. The book culminates with a "top ten list" of the highest priority reforms for the United States.

As an example of the authors' approach, they discuss the famous *Miranda* warnings required for every custodial interrogation by the police—the "you have the right to remain silent, etc." mantra that every American has heard in popular media. If the police fail to provide the warnings or a court finds that the defendant invoked his right to remain silent or request counsel, a confession will be suppressed. On the one hand, the warnings are designed to reduce coerced confessions. However, this goal is balanced by the concern that the *Miranda* requirement has resulted in fewer confessions, the exclusion of some clearly truthful confessions, and a general message to the public not to cooperate with the police.

The authors justifiably point out that the *Miranda* warnings were created out of whole cloth by Chief Justice Earl Warren and the Supreme Court in 1966. While allegedly based on the Fifth Amendment protection against self-incrimination, the text and history of the Fifth Amendment are entirely devoid of anything like the now-required warnings. Instead, the Warren Court engaged in an "act of judicial policymaking" that "provoked outrage" at the time, both from the dissenting justices as well as legislators. Even as recently as 2022 in *Vega v. Tekoh*, Supreme Court Justice Samuel Alito penned a majority opinion pointing out that *Miranda* warnings are not really a Constitutional right, potentially signaling this Supreme Court's skepticism with the entire concept of *Miranda* warnings in criminal investigations.

As a case example, the book describes an Idaho gang rape of an 18-year-old woman by four men. As cited by the authors, the confessions by the defendants were suppressed because the phrasing of the *Miranda* warnings provided by police to the suspects was not exactly right (nor do the warnings have to be correct word-for-word, a fact ignored by the trial court). As a result, the defendants were only convicted of misdemeanor offenses. The authors then cite studies showing that confessions have dropped by up to 25 percentage points since the imposition of *Miranda*, resulting in a "non-trivial effect" in tens of thousands of cases.

The authors discuss possible reforms of *Miranda*, including (1) simply overturning it, (2) creating a public safety exception (a step already taken by the Supreme Court), and (3) including in *Miranda* warnings an incentive for defendants to get a lower sentence if they confess. The ultimate reform

proposed by *Confronting Failures of Justice* is to adopt the United Kingdom's model of *Miranda* warnings: suspects are given the warnings but also advised that their silence may be used to impeach them if they later decide to testify at trial. There is some irony in this proposed reform, because the United Kingdom only has its equivalent of *Miranda* warnings because our English cousins belatedly copied the judicial legislating of Chief Justice Warren—such warnings are completely absent from historical English common law.

The authors apply this same analytic framework to a series of other issues in the American criminal justice system. A few deserve particular note as setting the tone for *Confronting Failures of Justice*.

The authors take aim at unconstrained sentencing by judges in criminal cases. In many state court systems, judges have virtually unchecked discretion when imposing sentences for crimes. A defendant in State A convicted of Crime X gets sentenced to 20 years of incarceration, while a defendant in State B convicted of the same Crime X (and with the same prior criminal record) gets sentenced to probation. The book cites to a number of actual cases of homicide or rape where defendants received little or no punishment from lenient judges, a far cry from the usual academic lament that sentencing in the United States is overly punitive.

Addressing the sentencing discretion of judges, the competing interests described by the authors include the benefits of allowing judges to custom-make sentences to fit each defendant and permitting judges to impose changing societal views of the correct punishment for a particular crime. However, the negative impacts of such judicial discretion in sentencing are demonstrated by stark disparities in sentencing for otherwise similarly situated defendants and the judicial branch's failure to defer to the elected legislature on the appropriate punishment for a crime. The authors recommend that states shift to a sentencing model like the U.S. Sentencing Guidelines imposed in federal criminal cases. The federal sentencing guidelines employ a comprehensive list of sentencing factors for every crime, which yields a relatively narrow, consistent sentencing range. Such guidelines vastly decreased disparities in sentencing in the federal system, while also increasing sentencing severity. Of course, in a testament to how much judges despise any constraints on their personal views, the Supreme Court eventually ruled that even the federal sentencing guidelines are merely advisory for life-tenured Article III judges, and federal sentences lost some of their uniformity. For the states to implement the authors' proposed reform, the challenge for each individual state would be to find a cadre of experts to create appropriate guidelines for that state (which some states already have accomplished) and to make such sentencing guideline ranges mandatory for

judges (which almost never survives the wailing of the judiciary).

Confronting Failures of Justice does not limit its criticisms to judges. The authors also call out prosecutors who engage in "ideologically motivated nonenforcement policies," also referred to in scholarly studies as deprosecution. Generally confined to so-called progressive prosecutors, deprosecution is defined as refusing to prosecute entire categories of crimes, regardless of the evidence of guilt, "to achieve [the prosecutor's] social or political goals like decarceration . . . ." The authors point to prosecutors like Kim Foxx in Chicago and Larry Krasner in Philadelphia refusing to charge shoplifting offenses, gun crimes, drug offenses, and even violent crimes as examples. The guiding philosophy behind these refusal-to-prosecute decisions appears to be a belief that the American criminal justice system is inherently and systemically racist and thus demands decarceration via deprosecution as a means to correct this flaw.

In analyzing the interests at play in this debate, the drafters of this new book cite to nonenforcement policies as potentially aligning with current democratic values that result in progressive prosecutors being elected, saving the expenses associated with incarceration, and capturing shifting societal standards. Cutting against such deprosecution policies, the authors convincingly argue that such prosecutors are ignoring the rule of law as established by the legislature, treating offenders unequally and, most importantly, failing to prevent crimes. Compelling empirical studies cited by the authors demonstrate that where progressive prosecutors refuse to prosecute the crimes that drive violence—like drug dealing and felons carrying firearms—violent crime soars. Ironically, this increased violence disproportionately hurts the poorest and most disadvantaged neighborhoods, often damaging the very minority populations that these political prosecutors had sworn to rescue.

The proposed reform here is to allow state attorneys general to assume jurisdiction over crimes when a local district attorney refuses to prosecute, explaining that the state's chief prosecutors could have stepped in when Krasner in Philadelphia or Chesa Boudin in San Francisco were refusing to prosecute crimes. The only problem with this reform is that those attorneys general often have political aspirations of their own. The Pennsylvania legislature gave then-Pennsylvania Attorney General Josh Shapiro the ability to overrule Krasner and prosecute gun and drug crimes in Philadelphia, but Shapiro meekly refused to step in because he had his eye on running for governor and did not want to irritate Krasner's supporters. A more cynical view is that the voters put these prosecutors in office and thus should suffer the consequences of their choices until they decide to "vote the bums out," in the old electoral vernacular. In fact,

many of the first wave of progressive prosecutors have since been ejected from office, including Boudin, Foxx, Kimberly Gardner in St. Louis, Marilyn Mosby in Baltimore, Pamela Price in Oakland, and George Gascón in Los Angeles. Sometimes, representative democracy is the best remedy for bad ideas.

Another compelling topic addressed by *Confronting Failures of Justice* is the byzantine jurisprudence created by the Supreme Court under the Fourth Amendment to the Constitution, culminating with the exclusionary rule. The exclusionary rule holds that if the police violate any of the rules for searching or seizing evidence, the evidence obtained must be suppressed from trial. The authors point out that the exclusionary rule—like the *Miranda* requirement—was another figment of the judicial imagination, originally envisioned only for federal criminal cases, but subsequently imposed on the states in 1961 by the never-humble Warren Court in *Mapp v. Ohio*.

As always, the authors consider the pros and cons of the rule. For the exclusionary rule, the benefit is that it should act to deter some police misconduct in searching and seizing evidence, as the police are punished by the suppression of the evidence. The negative impacts are multitudinous. Think about a drug dealer getting off because the police violated some technical rule before finding 20 kilograms of fentanyl-laced methamphetamine in his car or a murderer walking free because the knife or gun used in the murder is suppressed by a trial court for a Fourth Amendment violation. As a result of the exclusionary rule, a clearly guilty defendant goes unpunished, victims suffer, and the public perceives that the system is allowing criminals to get off on technicalities. As Justice Benjamin Cardozo pointed out in objecting to the exclusionary rule, "The criminal is to go free because the constable has blundered." The authors here point out that the Fourth Amendment rules created by the Supreme Court are so random and complex that not only is it impossible for the police to predict where and when the exclusionary rule will apply, but even experienced lawyers have trouble anticipating what will be allowed and what will be excluded by trial and appellate judges.

In suggesting reforms to the exclusionary rule, the authors point out that in many European countries, exclusion of evidence is not the default rule. Instead, the alternative approach is discretionary balancing, where the significance of the police rule violation is weighed against the seriousness of the offense and nature of the evidence discovered. Thus, a technical violation by the police would not result in the exclusion of the 20 kilos of drugs or suppression of the murder weapon discussed above but would bar the use of food shoplifted from a store and found in a suspect's car or a small amount of cocaine found in a suspect's pocket. The authors also suggest that better police training would

help minimize the impact of the exclusionary rule, although they do not explain how the police will be able to make sense out of rules which flummox seasoned lawyers. Despite hinting that the European balancing rule might be both better and more consistent with history, the authors eventually choose to reform the exclusionary rule by replacing it with direct sanctions for police officers who violate search-and-seizure rules, through department discipline or by making it easier to sue police officers via civil rights claims. This proposal is one of the authors' weakest suggestions and is discussed further in the context of their "top ten" reforms, which includes this proposal.

After excoriating injudicious judges and deprosecuting prosecutors, *Confronting Failures of Justice* takes aim at false narratives from the media and academics addressing criminal justice issues. The authors frankly call out the media for creating the public perception "that police are gunning down Black men for racist reasons with impunity," stating that such perceptions are "simply inconsistent with the facts." Instead, the authors describe how unjustified police shootings are relatively rare and even rarer are police shootings based on racial animus. As an example, the book engages in a graphic retelling of the actual facts of the Michael Brown shooting in St. Louis, resulting in a clear finding by both local prosecutors and the Obama DOJ that the shooting of Brown was justified, as opposed to the false narrative constantly replayed by the mainstream media.

The authors also pull back the curtain on the legal academy, pointing out that the studies churned out by legal scholars about crime and the criminal justice system are "riddled with false claims, half-truths, and deliberate obfuscation, often motivated by ideological biases." Some straightforward examples not mentioned by the authors but plain for historical researchers are the oft-repeated but easily debunked claim that American policing arose from slave patrols (instead of being based on the model of English policing created by Sir Robert Peel), or that American criminal law was designed simply to oppress minorities (instead of the fact that the Model Penal Code that is the basis for most states' criminal laws was created by the American Law Institute, and included a number of liberal scholars as drafters). Researchers who challenge the progressive orthodoxy in academia are attacked, unpublished, and untenured. Instead of suggesting possible reforms in this area, the authors wearily advise that the "ideological lock on criminal justice disciplines is unlikely to be broken anytime soon" and warn that we can expect little honest debate and truth from such a stifled academic environment.

As described by *Confronting Failure of Justice*, the result of this constant drumbeat of misinformation from the media and academics is profound. The

factually inaccurate claims by these putative experts create a vicious cycle. The public grows to distrust the police and the criminal justice system. As a result, citizens stop cooperating in criminal investigations, making it difficult for law enforcement to solve crimes. The failure to solve crimes leads to more crimes, which in turn results in even greater distrust in the police and justice system. The authors convincingly describe a system where the criminals have taken the upper hand—witnesses are regularly intimidated and an entire "stop snitching" culture has made it virtually impossible to convict even violent criminals, with the problem particularly acute in murder cases. The book describes that up to 80% of cases in cities like Baltimore experience some form of witness intimidation. The authors might have used this area as an opportunity to loop back to *Miranda* and the warning issued by the dissent of Justice John Marshall Harlan, who predicted that Chief Justice Warren's new judicial fiat was going to greatly hinder law enforcement in catching guilty criminals and was "taking a real risk with society's welfare in imposing its new regime on the country . . . [the] social costs of crime are too great to call the new rules anything but a hazardous experimentation." In retrospect, given the current state of the criminal justice system, a fitting latter-day sobriquet for Earl Warren would be the "Godfather of the Stop Snitching Movement."

For those interested in taking on the enjoyable challenge of reading the entirety of *Confronting Failures of Justice*, the book delves into many other worthwhile areas where the American criminal justice system is being confounded by specific rules or particular actors, including such fascinating topics as creating exceptions to the double jeopardy clause for serious crimes, expanding or abolishing statutes of limitations, and constraining the ever-expanding abuses of executive clemency. The above-referenced examples are merely a sampling of the topics explored, and methodology applied by the authors.

The overwhelming strength of *Confronting Failures of Justice* is its comprehensive and unstinting look at exactly how biased the American criminal justice system has become in favor of defendants and prejudiced against victims of crime. The main casualty of the current system is the truth, as clearly guilty individuals are regularly set free on technicalities. As a result, the public has become less trustful that the criminal justice process in the United States actually is delivering justice. Instead of a solemn process to discover the truth, the system described by the authors has devolved into an asymmetrical game with most of the rules favoring usually guilty defendants.

And how did we get here? The authors scatter the evidence throughout the book, but a clear path emerges. The majority of the legal rules criticized by the authors originated with the wild and unconstrained jurisprudence of

the Supreme Court led by Chief Justice Warren, as decisions on criminal law were rendered with little regard for the text of the Constitution. Later versions of the Supreme Court then oscillated between conservative and liberal iterations, but always reacting to the "burning bush" pronouncements of the Warren Court, rather than simply overruling those flawed prior decisions. Also notable is that the Supreme Court has been occupied almost entirely by judges with no professional or personal experience in the criminal justice system, with the antipodal exceptions of Thurgood Marshall and Samuel Alito. As chronologized by the authors, academics and the mainstream media then piled on with ideological attempts "devoted to advancing narratives of racism and systemic oppression that always cast the justice system as the problem and offenders as largely victims of forces beyond their control." Finally, this parade of misdirection was followed by the election of progressive prosecutors, who assured the public that not prosecuting criminals certainly would lead to less crime, relying on the groundwork laid by the Supreme Court and academics. In the face of all of this "evidence" from "experts," it is not surprising that the American public has been led down the primrose path to endorsing a criminal justice system favoring defendants instead of justice. The authors of *Confronting Failures of Justice* skillfully confront and critique each of these ideological groups and faulty arguments throughout their analysis.

Confronting Failures of Justice is an outstanding, well-researched, and well-written book by serious scholars. But no review would be complete without at least some criticism, even if it is minor. The authors conclude the book with their top ten highest priority suggestions for reform. After the roaring criticisms raised in the body of this work, readers will be expecting truly bold and innovative proposed transformations of the American criminal justice system.

Instead, the authors make some fairly quotidian suggestions. For instance, they advocate replacing the exclusionary rule—suppressing evidence when police fail to follow the endlessly evolving search-and-seizure rules of the Supreme Court—with a system of directly sanctioning the offending police officers, mainly through monetary or job-related sanctions. This remedy is a tired trope suggested by many other academics but is doomed to failure both because internal police procedures already address such a remedy and because it would discourage the police from doing anything for fear of losing money. The authors also suggest establishing a national group of experts on criminal procedure and investigative practices to help guide training and reforms. The problem with this suggestion is that it was tried by the Obama administration with the President's Task Force on 21st-Century Policing, which mainly resulted in a series of ideologically tilted recommendations on police use of force and

de-escalation, gender identification, and racial profiling, consistent with that administration's view of the world. In the history of expert panels attempting to guide criminal justice reform, such panels traditionally end up in one of three categories: (1) politically motivated idealogues trying to crash the system; (2) politically motivated idealogues trying to defend the status quo; and/or (3) politically motivated idealogues who eventually are stymied by the power of judges, police unions, and misinformation from academics and the media. The only common theme is failure.

The authors missed a chance to recommend some fundamental reforms that might truly change the nature of American criminal justice. They could have suggested that the current Supreme Court revisit and reverse wholesale the atextual and ahistorical rules of criminal procedure created out of thin air and then imposed willy-nilly on the states by the Warren Court, reinvigorating the Tenth Amendment and the states as laboratories of democracy. They could have suggested consolidating the over 18,000 fragmented law enforcement agencies in the United States into fewer but more centrally organized police forces, resulting in better trained and disciplined police officers. While addressing law enforcement, the authors could have explored the salutary effects of ending the hegemony of public sector unions like the police fraternal organizations, which both stymie effective change and protect bad cops. They could have suggested abolishing the process of electing increasingly political judges at the state level, as a means to reimpose the rule of law from the bench. While these are fair criticisms, they are quibbling when compared with the outstanding scope and refreshing candor of the balance of the book.

Confronting Failures of Justice is a book that should be read by scholars and ordinary citizens. The tragedy of a book like this is that it will be ignored by politicians, activists, and members of the mainstream media who regard it as a collection of inconvenient truths best swept under the rug. The players in the American criminal justice system with actual skin in the game – crime victims, police, prosecutors, defense lawyers, honest judges, and people who live in communities devastated by criminals—will recognize the integrity of this scholarly work. Robinson and his fellow authors are the proverbial *vox clamantis in deserto*, and we should hope that somebody is listening.

★ ★ ★

TERRY MCHALE*

An Intersection of Art and the Law in the Age of the Baby Boomer

The world was a scrappy place when Terry Flanigan and his three brothers were born in the immediate years following the end of World War II. Sixteen million Americans traveled across oceans to see humanity at its worst, and with vivid memories of power unchecked for too long were coming home to start families.

Freeways were planned and rapid transportation soon provided easy travel for anyone wanting to cross the continent. Ford and Chevrolet refined their war effort production methods to sell millions of affordable station wagons with built-in radios. Seatbelts were not considered necessary for several more decades.

The baby boom era, of which the Flanigan boys were in the forefront, was in the beginning a period of accessible affluence with an average household income of $3,500. After years of war and deprivation, an unbridled optimism had been initiated.

The parents of the first boomers were working class. They considered high school graduation necessary to get a good job, and less than 10 percent had a college degree. They had big dreams for their children, wanting them to find ultimate success by becoming doctors and lawyers. This generation saved democracy from apocalyptic threat and then voted to use their taxes to finance world-class colleges the next generation could attend for free.

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The dour Fred Vinson, son of a Kentucky jailer, had taken over as Chief Justice of the United States Supreme Court, a role he would fill until his sudden death from a faulty heart at the age of sixty-three. Vinson, tepid in disposition and approach, would leave major issues on the table to be resolved by his successor, a three-time governor who ran for his final term as a Republican and a Democrat, California's Earl Warren.

Clarence Darrow, the greatest trial lawyer of the early twentieth century, was dead. The stories of his courtroom strategies served as how-to lessons in law school. Those choosing the law for a livelihood placed themselves at the fulcrum of great change on seminal issues covering everything from civil rights to how taxes get paid.

A study of the Chicago Bar Association by Charles Cappell and Terence Halliday reached the conclusion that the legal profession was accommodating diverse interests to an extent not previously measured or assessed.

Art was in a period of flux. Jackson Pollock was dripping paint on canvas and thrilling his followers while confusing the lunchpail Americans who shook their heads in wonderment at his popularity.

Norman Rockwell, the staid, highly recognizable New Englander rare to controversy, would break form and paint "The Connoisseur," a detailed illustration of a man looking at a Pollock painting as a message to the viewer that unlike poseurs, he was a master.

In Europe, Picasso, whose name was on the way to being immortal, was very much alive at the end of the war and would live and create for another thirty years. "Action," Picasso said, "is the fundamental key to success."

The possibilities in America to invent, to create, to establish precedent, and to alter perspective suddenly seemed endless. This would be the world for Terry Flanigan.

2

Someone smart said, "Destiny is geography." This is no doubt true for the sons of John C. Flanigan II and his wife Ginny.

Family photographs serve as proof enough that John C. was one of those dashing heroes of America's greatest generation. He was an underclassman at Notre Dame during the final season of Knute Rockne's legendary run. Practical and mathematical, he had a precise way of thinking. War interrupted his life and drew a definite line between his own ambitions and what became his responsibilities. John C. Flanigan was trained in ninety days to become an American naval officer and served as a cryptologist in England deciphering

Nazi operations.

Dr. David Lantry in his lecture "Code Machines" said that "Breaking German and Japanese codes saved many lives and shortened the war by some estimates as much as two years."

Ginny was a beauty queen who worked as a fashion model in New York. The traits that allow someone to qualify for such distinctions are obvious and, while easily recognized, are less remembered than Ginny's warmth. Ginny was enchanted by the soldier she married and with whom she quickly settled down and had four sons in five years—Jack, fraternal twins Terry and Tim, and Mike. Whatever disappointments might have been part of their lives, John C. and Ginny were attentive parents who for the entirety of their marriage focused more on their boys than outside interests.

The family fortune was tied to Flanigan Plumbing and Heating, which they ran out of the basement of an old Chicago Victorian. The architecturally splendid building would survive enough in memory for Terry to create a book combining his artwork and poetry paying tribute to a classic San Francisco home of the same style.

Unpublished, he kept the narrative poem personal and didn't submit the book to publishers. The esthetics are strikingly unique, the depictions of the home solitary, yet the images emerge in dimension from the page. Recently unearthed, not even on Terry's list of things to do, the project "Victoria" was something he did twenty or thirty years ago for himself. The benefit of being a financially successful lawyer is you don't feel the urgency of a starving artist.

Chicago was the Flanigans' first home for a much shorter time than expected. Their father and grandfather had the entrenched plumbing and heating business as well as nightclub ventures that were working out well. They had good reasons to stay. The twins were four years old when the family moved west. Unbelievable perhaps, but Terry and Tim both swear that among their earliest memories is being in the crib together. What is undisputed is that their lives would have been very different had they missed the West Coast migration and stayed in the old-world environment of the Midwest.

3

Ginny was the reason the Flanigan family departed the cold and wind of industrial Chicago. The fear of lung diseases as severe as tuberculosis was familiar in the painful coughs frighteningly common in America. Ginny's health concerns were significant enough that her doctors recommended that for her safety she relocate to the dry desert of Tucson, Arizona.

John C. bought a motel, the Major Motel on Oracle Road, among establishments with names like the Linger Longer, the No Tel Motel, and the Welcome Tourists Court. The Arizona Department of Transportation would optimistically change the name of the street to the Miracle Mile. The new name would stick until decades later when the buildings were decrepit, long after the Flanigans moved on and rooms were being rented by the hour. The Miracle Mile once again became Oracle Road.

A young Elvis Presley made one of his groundbreaking appearances at the Tucson fairgrounds. The most popular television Western of the time, the Lone Ranger, was shot in the surrounding wildlands. Hollywood sent their best actors and directors to make movies in the relentless beauty of Old Tucson, building a studio still in use today and a recognized draw as a tourist attraction.

An Englishman, a former New York opera singer afflicted by tuberculosis and looking to recover his health, moved to Arizona and created the Tucson Arizona Boys Chorus. He had the audacity and daring to imitate the Vienna Boys Choir. The youthful altos and sopranos from Austria had garnered worldwide recognition. The idea caught on. The Tucson chorus enjoyed a period of international fame. Due to the way they enhanced the reputation of their city, the chorus members were deemed to be "Ambassadors in Levi's."

The Flanigan twins could sing. Terry and Tim also had an inherent dramatic flair. Not desperate or strident in a search for the spotlight as some ambitious kids can be, they understood early that a level of excellence brought opportunities. They were invited to join the chorus. The concerts and appearances were heady events. The lesson of the power of creativity became deeply imbued. The world Ginny imagined for her sons was meant to be more expansive than Little League and Boy Scouts.

"Our parents wanted us exposed to every possibility," Terry remembers. "My mother would load us into the station wagon, the same kind of car every family seemed to own, and take us to golf and tennis and fencing lessons. We were encouraged to be daring."

One of the places the Flanigan boys ended up in was a small horse ranch at 3736 North Jackson Avenue alongside the resilient Rillito River.

The ranch belonged to Pedro Pablo Martinez, "Pete," a four-fingered lifetime ranch hand turned rancher. Ignoring the fact that a thumb was lost when it got stuck in the rope he tied too tightly around his saddle horn when bringing down a cow, Pete had considerable skills as an artist. His murals from more than a half-century ago have lasted in Tucson buildings. His etchings can

be found today in the famous Hotel Congress where mobster John Dillinger was arrested for the first time. Pete's work remains available to be purchased online.

Pete was a drinking buddy of his much more famous Tucson neighbor Maynard Dixon. Like Maynard, Pete was born in Fresno, California. The art world's view of Dixon as a genius of Western painting has been confirmed by the popular niche he has maintained in history. The themes in Dixon's paintings are of independence and self-sufficiency.

Today, several murals by Dixon hang in the Stanley Mosk Library and Courts Building across from the California Capitol. Home to the Third Appellate Court, host to the California Supreme Court, and housing the California State Library, the classical Greek-style edifice was described by writer Michael Rich as the best kept architectural secret in Sacramento.

Truthfully, the Mosk did have an esteemed architect, and real laborers handled the construction. Equally true is the Mosk appears to be a naturally ageless landmark of a grand landscape belonging to proud people. The Mosk is a building that can never be duplicated. The most elegant courtroom in the state is on the first floor, and the library has the feeling of a beatific chapel. This is also where drawings depicting the legal profession by Terry Flanigan are on permanent display.

Pete Martinez was in his mid-fifties when the Flanigan brothers arrived at his ranch for horse riding lessons. He was sun-burnished and straight talking. He'd been on his own since a teenager, and by the time he died was a familiar friend to movie stars with a lasting reputation and a collection of memorable films.

It was Pete Martinez who, after spending an afternoon riding, got out the paper and supplies and told the boys to draw.

The moment was an epiphany.

Terry saw a particular horse and began drawing. The horse he put on paper was not a familiar rendering by a little boy. The horse had movement and life.

"Every child is an artist," is a quote originally ascribed to Picasso and remembered by Terry. "The problem is how to remain an artist as we grow up."

Pete Martinez was not as judicious with his observation. "Terry should pursue his artwork," Pete told Ginny Flanigan. "The other boys should stick to riding."

The Flanigan brothers acknowledged Terry's skill with pride in his abilities. They had their own talents that were not being ignored, and Terry remembers that each brother's individualism was respected at the same time they remained a family unit.

Jack, the oldest brother—gifted, rarely out of line and never out of touch, followed by friends wherever he went—was preternaturally wise and set the bar for his brothers. They were not going to walk in lockstep, and he led by example. However, the old Catholic adage of charity beginning at home was translated by Jack into the brothers remembering they were brothers.

"There was never a fight among us, an expression of jealousy or sibling rivalry," Terry recalls. "There was trust and lots of humor. As we got older, we filled in for one another in different jobs. We all worked at one time or another for the same men's clothing store, and I could always get a brother to substitute for me as a lifeguard. The local joke as we were growing up was that if you hired one Flanigan you hired a Flanigan for life."

Rusty Areias, a former legislator and noted political consultant, would make a comment when the brothers were well into their seventies that dozens of people believed they were best friends with the Flanigans.

The loyalty the Flanigans engender is a result of them understanding the responsibility of friendship. They don't arrive listlessly at the table. They manage to be interesting, playful, and serious with equal competence, in the mix with quick witticisms and well-told stories, and informed enough to provide precise observations about people and places and events. Not prudish by any means, they are essentially decent, and folks find reasons to share long meals with them. However, the real truth is that the best friends to the Flanigans have always been the Flanigans themselves.

4

The beauty that was California is inexplicably difficult to convey. The story is that the devil was asked why he was so obsessed with California, and he answered that if he could get God's people to ruin this paradise, then no part of the planet was beyond being compromised.

John C. and Ginny Flanigan uprooted the family for the opportunities in California. Unchallenged and likely bored with the motel business, John had been offered a job estimating the cost for putting heating and plumbing units in large buildings. A construction craze that never quite ended was erupting. John C. was good at what he did, and the family was secure enough to even be

thought prosperous. If Terry's parents were disappointed that their own lives were not lived on a larger scale, those feelings were not conveyed to their sons.

"They took seriously being a mom and dad," Terry says. "The simple truth of our lives is that they were very good at providing a loving home."

On the day the Flanigan station wagon crossed into California, there were one-third as many people living in the state as there are now. The freeway system that would scar the landscape was in a nascent stage, and even the largest cities had pockets of farms and dairies and were covered with the same soil placed there at creation.

Not undiscovered, but far from exploited, the jewel was San Diego. Barely half a million people were living there, one-seventh the present population, and the surrounding communities were sparse, open land. The perfect weather of mostly sunshine was influenced by the omnipresence of ocean waves and mist. The neighborhoods with an average price for a house of less than $12,000 were being built so schoolteachers and truck drivers could buy a home next to firefighters, cops, and the manager at Sears and Roebuck.

San Diego was safe. Whatever the crime rate might have been, it was unnoticeable. The cliches of leaving doors unlocked and keys in the ignition of a parked car were true. Kids got up early to make their own breakfasts of Kellogg's cereal and toast and were on their own. Unfenced school grounds were full of boys and girls playing on the courts and fields unsupervised.

The Flanigan brothers would ride their bikes a short distance to swim with their friends at the Plunge, a massive pool originally filled with salt water and converted at the beginning of the war to fresh water. Today, the Plunge has San Diego Historic Site Plaque 83 designating it as historically significant. The style of the pool site is Spanish Renaissance Revival and like much of San Diego was important for artistry as well as recreation.

Among the friends they encountered at the Plunge were the obstreperous O'Connors, a collection of thirteen or fourteen brothers and sisters. Ginny was close enough to their mother to help sew shamrocks onto the girls' swimsuits as a tribute to their Irish heritage.

Maureen O'Connor, a year older than Terry and Tim, would grow up to become the wife of Robert O. Peterson. The owner of Topsy's, a drive-in restaurant, Peterson whimsically installed a sculpted clown on the roof. He also added a revolutionary new two-way intercom system allowing customers in their cars to give their order to the kitchen at the beginning of a drive-through. Topsy's was renamed Jack-in-the-Box.

The first Jack-in-the-Box on Mission Boulevard was blocks from the rental apartment the Flanigans lived in before they bought their home. The boys would regularly treat themselves to the affordable fifteen-cent hamburgers with a secret recipe rumored to be ketchup, mustard, and mayonnaise mixed together.

Maureen O'Connor entered politics. She was the youngest person elected to the San Diego City Council and at forty became the first woman mayor of San Diego.

She won the job three years after Pete Wilson—a major figure in modern California history and someone who took pride in saying he was the fifth Flanigan brother—left after twelve years of leading San Diego to serve in the United States Senate. Pete was a flashpoint for serious decisions made by the Flanigans for most of their professional careers.

5

Growing up in Southern California in the early sixties was a lyrical period of surfing as a religion and being influenced daily by walking barefoot in the sand. Terry liked to play. He enjoyed the beach. The four brothers were naturally athletic. Terry made the semifinals in the citywide track championships. He was a high jumper. He'd joke later that he chose the event because it didn't involve much running, and the guys stood around being cool with their sunglasses on until it was their turn to jump.

His artwork was a calling card. Terry was the one other kids asked to create campus posters, do the signs for sports programs, the cartoons for student periodicals, and the illustrations in graduation annuals. Shy with girls, an affliction from which he would eventually be fully cured, Terry was able to delight friends with his drawings of them, usually comical and sometimes not. He got involved in student politics. He and Tim were avid debaters. The wrestling with facts and putting arguments into cogent order were exciting for them both. They decided as teenagers that they wanted to be lawyers.

At sixteen, Terry completed an oil painting, two feet by two-and-a-half feet on canvas. The subject was a close-up of a young man's face. Terry titled his painting, "The Everyman."

Years later he would accept that he had inadvertently painted a version of himself. The likeness was evident. The teenage feelings of the moment were visceral and faithfully preserved. The phenomenon is not unusual in young painters. Their imagination is influenced by the face they have seen so often in the mirror.

A teacher, a middle-aged art instructor named Helen Delaney, took notice of "The Everyman" and was openly effusive about Terry's skills. Mrs. Delaney encouraged sketching as an everyday exercise. Her critiques were honest. Real talent, in her view, was as much the result of labor as inspiration. She was an extraordinary teacher. Her expectation was that Terry would be equally committed as a student.

Her thinking was that if you want to be a great lawyer, you study lawyers like Clarence Darrow and judges like Earl Warren. Knowing the history of what you are doing is no less true for art.

Mrs. Delaney insisted that Terry explore the works of William Hogarth, the eighteenth-century modern moralist who mastered the bite of cartoon satire as easily as he managed portraits of stark realism. She wanted Terry to understand what lasting works look like. Because Mrs. Delaney also encouraged him to study Honore Daumier, Terry could ride his ten-foot longboard across an ocean wave while mulling the risk of an artist making a statement and hoping for good luck with the response. Daumier took particular joy in satirizing the French court and contemporary politicians. In 1832, Daumier was imprisoned instead of being killed by King Louis-Phillipe for the insult of drawing a fabulously insightful caricature of the King being fed money by the masses.

Terry learned that the DNA of art history is not so much an original thought as it is developing your own style by copying the techniques manifested by other artists. There is no shame in adapting to an established style. The peril is standing inert and not evolving with intellectual exposure and maturation.

Difficult to imagine now, Terry and Mrs. Delaney took a day trip alone to the Los Angeles Art Museum. Schools and parents trusted each other then. Mrs. Delaney's interest in Terry's artistry impacted his entire life and transformed her from a teacher into a mentor.

At the Los Angeles Museum, Terry was transported to another world. Pop Art was the rage, and he saw originals by Warhol and Rothko and Lichtenstein. There were no limits to how the world could be viewed. The daring vision of the artists was overwhelming to see in person. The Pop Art rage was an indication of how differently and brilliantly people and surroundings could be interpreted. Commercialism and advertising could now be considered art.

Lichtenstein used comic book art as his inspiration. Terry was moved by his vision. He did an 8x4 on masonite of a German half-track tank, a vehicle resembling a truck with tank tracks to drive through muddy conditions. Terry agreed all the rules could be set aside and drew in destructively bright yellow

and green the tank blowing up with words comically printed in a cartoon balloon, “The Art used to go Pop”. Outside the balloon it said, “Blang.”

6

Whether it was cost or the familiarity of ocean life, Terry chose not to take Mrs. Delaney’s advice that he apply to art schools. He chose to stay close to home and, like his twin, Tim, studied rhetoric at San Diego State College.

Terry followed his brother, the uncatchable Jack, as student body president. Jack ran as a fraternity brother having beer parties with fellow students. One year later, the discussions were dictated by the tumult of Vietnam and the civil rights movement. The extended adolescence of college life was replaced by social upheaval and a political youth movement. Except for his own campaign sign, Terry began to forsake art as he concentrated on his studies. A feeling of impending violence was present on the campus. The poet of his era said, “The times they are a-changin’.”

Transferring to law school at UC Davis, Terry’s serious pursuit of a legal career was broken up with playful drawings of professors augmented with witty quotes. The pieces were clever enough to be collated into a popular calendar and sold in the college store.

He returned to San Diego as a young lawyer where he worked in the city attorney’s office as a prosecutor. Terry tried more than one hundred cases—only stopping once when new evidence made him doubt the defendant’s guilt. His debating history worked well with the analytical aptitude he inherited. At times, the law was a production line service. It was not entirely unusual to be handed a case on the morning the defendant was walking into the courtroom.

Terry and his brother, Tim, as a result of their debating background, later taught an MCLE class, “The Art of Persuasion for Lawyers.” They utilized concepts of ethos, pathos, and logos embodied in the treatise on persuasion, *Rhetoric*, originated by Aristotle.

“I’ve always seen Ethos (character) as the doorway to effective communication, how the listener first perceives the speaker or the artist,” Terry concluded.

> Character is communicated in many ways, one’s knowledge, projected authority, likeability, believability, motive, or reputation. Lawyers will be attempting to convey these impressions in trial as early as the voir dire stage or jury selection, and surely at the first appointment with a potential client. The ethos of the visual artist, the painter or illustrator, most often being evaluated in absentia, relies on the immediate impact on the viewer.

It is the quality of professionalism and likability that grabs the viewer's attention. One can use their own imagination to fill in the variety of ways that the lawyer and the artist persuade their listeners or viewers utilizing the effects of Pathos (emotional response) and Logos (logic or technique).

Terry's love of surfing and the unique cultural perspective of life at the ocean would likely have been fully documented in his art if his passions weren't bifurcated by his attention to a legal career. The good news and the bad is that the idea espoused by Irish-American writer Eugene O'Neill that an artist must be consumed by their craft did not take root.

If there are regrets, they are muted by the opportunities being a lawyer has offered in the full life Terry has led. Until he got older and tomorrows became limited, he did not have time to be wistful about not primarily being an artist.

Terry joined a law firm with his brother, Tim, and a respected friend, Dan Bamburg. He reversed sides of the courtroom as a criminal defense attorney. While the work was lucrative and challenging, unresolved dissatisfaction meant a three-month escape to Europe. He studied the Masters. He was never without his sketch book. He did not miss walking through a museum or seeking out the ancient churches.

A stay in Ashland, Oregon, followed. Still, Terry could not make the total commitment to art.

7

Terry made the best of his vocation and avocation by combining the two whenever possible. He focused on legal art and various legal publications commissioned him over the years to do magazine covers.

His Legal Lithograph series has been framed and is hanging on the walls of countless law firms. The drawing of Blind Justice wearing sunglasses was an accurate reflection of satire and his own ambivalence.

A provocative lithograph illustrating the evolution of women in the law profession was ahead of its time. Terry created a striking image of five characters, a young woman evolving from college days through early days of being a lawyer, motherhood, and eventually a seat on the bench. Visually compelling, there is a sense that the little girl, the fifth character making the story epic, pulling on her mother's dress as she steps into the frame will inherit a future her mother made better. The original would hang behind his desk when he was appointments secretary working for governors and winnowing down who would hold key governmental positions.

Terry was on a path to a career most would have envied, and one he went to great lengths to attain. Yet, breaking away again from lawyering, he took a class in San Francisco being taught by Howard Brody. At the time, Brody was the premier courtroom artist in America.

Long before live television intruded, the media relied on gifted artists to provide images for Americans to feel what it was like to be witness to a major trial. Brody put millions in the room with Jack Ruby, the man who revenged the killing of JFK; the Chicago Seven making a mockery of Judge Julius Hoffman; Charles Manson gaining lasting celebrity as a mass murderer; and the heiress, Patty Hearst, the kidnapped teenager who went on trial for robbing a bank with her captors, a crime in which a young mother was killed.

Brody had a scribbly, yet highly controlled interpretation of his subjects. He used Prismacolor, a colored pencil, to elicit detail.

Brody was a figure out of Hemingway, not Fitzgerald. He'd gone to war to draw the horrors of young men doing their country's work in places like Guadalcanal and the Battle of the Bulge. He would capture moments of death and near-death in Korea and Vietnam. A chronicler of the century's worst moments, Brody never carried a weapon. He won a Bronze Star for valor when he put down his drawing materials and assisted the medics.

Terry considered for a time becoming a courtroom artist. Finding out that Brody was teaching a class, he drove to San Francisco one night a week to attend.

"Brody was a mythical figure," Terry recalls. "He had a fierce fidelity to naturalistic body features and facial emotion. I learned a great deal by paying close attention to how truthful he was about drawing what was in front of him."

A man shot at the stake is painfully human when you see the spit falling from his dead lips. Soldiers manning a cannon are a team stressed and fearful as they rush to contain the enemy. Some of the men with their shirts off reveal the strain on their muscles, all of them engaged in a deathly situation.

One evening an assistant said that Brody would be late to the class. Brody was returning from Utah and the firing squad execution of Gary Gilmore, the murderer of a gas station attendant. The country was transfixed by the resurrection of the death penalty and having it carried out with guns. Brody brought the portfolio of the original artwork that appeared on CBS News that evening. Terry was able to discuss each one of the paintings with Brody and the circumstances behind their creation. As an artist and an attorney, it does not get closer to the source.

Terry did not pursue being a courtroom artist. He had too many options as a lawyer and lobbyist and consultant to take the possibility seriously. He did complete several pen and ink drawings of famous lawsuits, jury scenes, courtroom figures, and legal concepts. They sold for enough to know he had something to come back to whenever real life wasn't happening.

8

Terry's brother Jack managed Pete Wilson's first run for mayor, a campaign run out of an apartment shared by the Flanagin brothers on First Street in San Diego. The first election was about getting Pete the job. During the second campaign, Terry did the graphics featuring a "Re-Pete" theme. The candidate knew what he was doing and on his way to the governorship took a close cadre of inspired followers along with him.

Prior to working as appointments secretary, first for Governor George Deukmejian and later Pete Wilson, Terry worked as a lobbyist, a trade he would return to later.

His clients included the State Bar of California. He enjoyed the change even if he was surprised by the difference in the decision-making process. A product of the hermetically sealed environment of the court, Terry learned that the strict rules of hearsay did not apply for testimony before the Legislature.

Future Appellate Court Judge, George Nicholson, was at the time beginning a distinguished career in public policy. A garrulous man with a quick mind and a tireless capacity for new projects, Nick, as he was called, met Terry when he started lobbying for the District Attorneys Association. Nick was given a tiny office with dusty furniture. The day before he started, there was a murder in his building. He and Terry would find some macabre bemusement in the story.

Nick has a history of working with the families of Frederick Douglas and Jackie Robinson. He was also involved in maintaining accurate history with baseball's Hall of Fame. A move was made to honor Emmett Ashford, the first black umpire in the major leagues. Nick asked Terry to do a portrait of Ashford.

"The piece on Emmett Ashford is watercolor on 300 stock watercolor paper and reminded me again of how versatile Terry is as an artist," Nick said. "The painting has the accuracy of bone and blood, a feeling you are looking at an umpire from the batter's box—no one could have captured the man and the moment better."

Nick also pushed Terry to do a watercolor of Norton Parker Chipman, a close confidante of Abraham Lincoln, a man who in his twenties rode on the train with Lincoln to and from Gettysburg and stood on the stage with the

sixteenth president. He would be familiar with characters good and bad from America's pivotal age who are memorialized in history as sculpted presidents and activists. The youthful Chipman survived grievous injuries in the war to serve as judge advocate prosecuting the commandant of hellish Andersonville Prison where Yankee soldiers endured inhumane horrors. A Broadway play about the trial was written and successfully produced. Academy Award winner George C. Scott directed a movie based on the play. William Shatner of Star Trek fame played Chipman, the Western philosopher.

Chipman would serve in the United States Congress. He moved west for reasons of health and spent a fruitful life growing old as an appointee of Dr. George Cooper Pardee, the twenty-first governor of California, as the presiding judge of the Third Appellate Court. He would die sixty years after Gettysburg as the man who knew Lincoln. Artwork of his that survived a housefire, a painting of the burning of Fort Sumter and a signed sketch of Ulysses S. Grant hang in the Mosk Building. Terry's portrait of Chipman would appear on the cover of a Chipman biography by Jeff Hogge. The original hangs at the University of Cincinnati where much of who he became happened because he was once a student there.

Terry Flanigan was a natural choice for illustrating a Supreme Court publication covering an article on six prosecutors who served in the Alameda District Attorneys' office. He decided to paint the Alameda County Courthouse and surrounding landscape. Inserted in equal spacing are expressive portraits of the district attorneys—all of whom would have estimable careers of great heights.

In sepia color with early twentieth-century front page newspaper style, Terry put down for permanence United States Attorney General Ed Meese; California Governor and Chief Justice of the United States Supreme Court Earl Warren; California Supreme Court Justice Ming Chin; California Supreme Court Justice Carol Corrigan; California Supreme Court Justice Martin Jenkins; and Attorney General of California, United States Senator, and Vice President of the United States Kamala Harris.

One of Terry's favorite projects was memorializing a man whom Pete Wilson called "the guru of California law," Bernie Witkin. Bernie's scholarly reputation preceded him wherever he went. His salient Witkin Library of Legal Treatises remains resonant more than fifty years after he completed the massive project. Terry was delighted when he attended a Bar dinner and noticed the place card to his right had Bernie's name. He'd never met Bernie and was looking forward to what he expected to be a conversation of depth and great insights.

A nimble man, smallish, energetic, and irrepressible took the seat just as dinner was about to begin. He glanced at Terry's place card, looked at Terry, and said, "Flanigan, the joy went out of roller derby when it was taken off television."

It was not what Terry expected as the beginning note of their conversation.

Terry would learn later that one of Bernie's prized possessions was a Kansas City Bombers jacket given to him by one of the great roller derby teams.

"I discovered he was a man of great curiosity and eclectic interests and that made his writing and his personality vibrant," Terry recalls. "I got to know Bernie. I had the opportunity to visit him and his wife, Alba, at their Berkeley Hills home in preparation of a caricature of Bernie for the Lawyers' Club of San Francisco event brochure honoring his eighty-fifth birthday. I attempted to highlight some distinct characteristics that elicit an instantly honest response. Six years later, it appeared on his memorial service program. As a final tribute, I was responsible for his image on the first State Bar Bernie Witkin Award."

Terry Flanigan succeeded Marvin Baxter as George Deukmejian's appointments secretary in December of 1988, when Baxter was confirmed to the Court of Appeal, Fifth Appellate District (Fresno). Terry was his chief deputy, focused on executive branch appointments. Chuck Poochigian, who would have his own bright future, became Terry's chief deputy and later succeeded him as Governor Wilson's appointments secretary.

Baxter recalls having difficulty finding the right person to replace Gaddi Vasquez, who is a remarkable story too. Born into severe poverty, Vasquez grew up a migrant worker to eventually become the first Latino head of the Peace Corps and had served earlier as Baxter's chief deputy.

Baxter voiced his concerns to the governor, who said Tim Flanigan had a twin brother. Baxter immediately interviewed Terry and hired him, proof again that once you hired one Flanigan brother you hired a Flanigan for life.

Governors at the time made approximately one thousand appointments per year, with roughly one hundred being judicial appointments and nine hundred being executive branch appointments. The number of judicial appointments greatly increased in 1988 during Terry's tenure when the Legislature increased the number available.

The workload is considerable when you consider researching background and history. Terry recalls it is reasonable to estimate that at least two finalists were interviewed for each judicial appointment.

George Deukmejian utilized a single appointments secretary. Governor Jerry Brown set up separate offices for judicial and executive branch appointments

during his terms in office, as did Governor Pete Wilson once Chuck Poochigian left the executive branch and was elected to the State Assembly. The system of dual offices has continued since then.

Terry tells the story of himself and the governor interviewing Appellate Court Justice Joyce Kennard for an opening on the Supreme Court.

The meeting went well and resulted in an offer and acceptance.

Days later, Terry received a call from the State Bar, whom he had previously represented as a lobbyist, asking if he would consider doing a portrait of Justice Kennard to appear in *The California Lawyer* with an accompanying biography.

He agreed, and at that moment realized that his career lines as a lawyer, lobbyist, appointments secretary, and artist had crossed simultaneously for the first time. Terry would also agree to do magazine covers featuring Justices Rod Davis and Ming Chin, who he'd earlier interviewed and played a role in their appointments to the court.

Terry has noted the daunting awareness that he was advising the governor, who in return was relying on his character and competence for that advice. He remembers meeting the best and the brightest individually as a major aspect of the job where one relies on their own style and technique.

"The most enjoyable part of the appointments process is the interviews," Terry says. "You get the sense of being Dick Cavett for an hour as you question an array of characters."

Chuck Poochigian, the gubernatorial staffer, Central Valley assemblymember, senator, and judge, who found success by proving you can be one of the nicest people in government and at the same time be smart and effective, remembers fondly his beginning in Sacramento working as Terry's deputy appointments secretary.

"Terry made us realize you can be calm while working in the inner sanctum of a governor," Poochigian says. "Terry also taught us to measure the ambitions of good people with what was best for the Administration."

Poochigian is the one who revealed that Terry would draw the people he was interviewing. The drawings would be included in the files. They were quick portraits done unhesitatingly with startling accuracy in ink or pencil.

"I think Terry did it to help him remember each person he talked to and to take them seriously as a human being. He would ask me after we did an interview together if I noticed the way they looked in a certain direction when asked a question or how they moved their hands. Terry saw things in people others didn't."

George Deukmejian was followed by family friend Pete Wilson as governor, only the second time in sixty years that in an election the same party repeated as governor. In Terry's view, George was a serious administrator:

> A dirty joke would not normally be told in his presence, and if it had been, would likely not resonate. He brought a brown bag for lunch and wanted to be home for dinner with his family. He treated everyone in his office with the same respect he'd extend to a United States senator. A former attorney general, he was an astute legal scholar, politically unflappable, an individual of unflinching integrity, and a deeply caring public servant who while running the government made sure the trains ran on time.
>
> Pete Wilson was an Irish Catholic marine with whom you would enjoy sharing a scotch and a cigar. He had a place in the center at every level of government where he served. People who worked for him loved him. He was unrepentantly honest in spite of the political winds. Pete was important enough to our family that when my mother died, he did the eulogy. He was affectionate, appropriately funny, not a false note in his caring, a reminder that I had not wasted my time believing that as much as I wanted to do art for a living, politics can be a noble profession.

9

Terry began taking an interest in the Japanese woodblock style of Ukiyo-e, a meaning traced to "the floating world." The focus is mostly on the value of personality in the confines of a strict society. The first adherents concentrated on beautiful women and sumo wrestlers. It has been described as a cross between *Cosmopolitan* and *Playboy Magazine*.

Since there was a dearth of sumos in the area, and Terry's view of beauty includes strength, he decided to paint women who were clearly capable of defending themselves and others. His colorful paintings of beauty and strength are compelling.

One of the most popular restaurants in Sacramento, Mikuni, features his paintings. "It was a personal art gallery disguised as a sushi restaurant," Terry jokes.

Terry returned to Tucson, where he now lives and works. He is influenced by the Taos Art Society, as many artists are. Earnest Blumenschein caught his attention. The founder of the Taos Society wrote with unusual clarity for a young man. Only twenty-four at the turn of the twentieth century, Blumenschein insisted that he was interested in preserving the smell of the air or the feel of the morning sky.

> I have never forgotten what it was like to have an artist like Pete Martinez show me what he had done and suggest I could do the same. Mrs. Delaney lives on in my life long after she is otherwise gone. I hesitate to wonder if I would have the same commitment to art without her generous spirit.
>
> And, not surprisingly, Maynard Dixon is someone whose work brings something new and noticeable every time I look at the same paintings. Dixon died in Tucson where the Medicine Man Gallery provides a museum in tribute to his mastery. The preparation for a painting is what Dixon appreciated. He taught that the process of stretching the canvas to make it more accepting of the paint is a physical part of getting in the frame of mind to hopefully do something that touches people.

10

"I got lucky with my children," Terry says. "That doesn't mean it is always easy—the three of them are independent thinkers who are smart enough to want to be in charge of their own world."

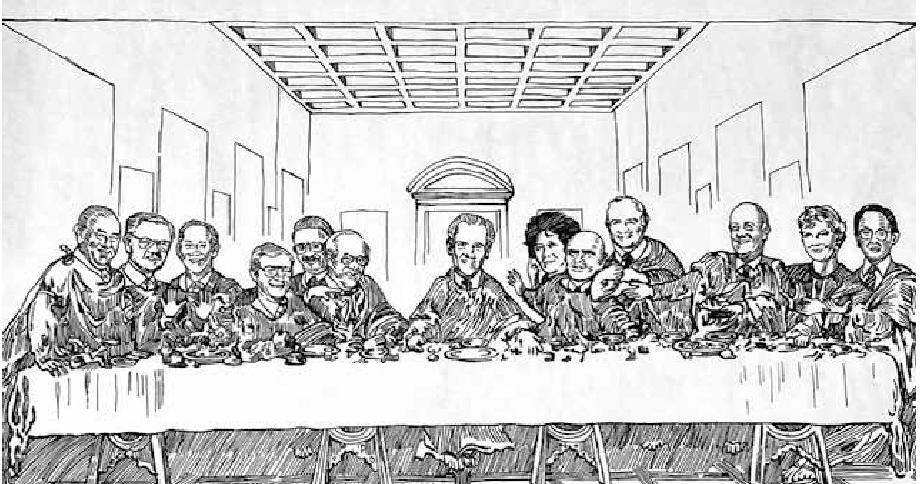
Terry's two sons, Robert and Shaun, have successful careers in business and public policy. Both of them are tall, beach-blond handsome, toothy smiles, and personalities that are different and compelling in their own way. His daughter, Molly, has been a favored muse, a treasured little girl who has become a mother herself and enjoyably independent. Terry has paintings of Molly at different stages of her life.

"I don't want to only paint the past," he says. "I have two grandchildren, and I want them to have a future that they will be excited for me to paint on canvas."

Terry Flanigan was asked how he views himself and his own work. He took a breath, and said, "I will give you the short answer. An artist is influenced and changes until the day they die. About myself, I have been an attorney, a political advisor, a legal advisor, and a lobbyist. I am also a representational artist, a portraitist, and caricaturist who incorporates romantic, cultural, historic, and commercial references."

"And yes," Terry laughs, "that is the short answer."

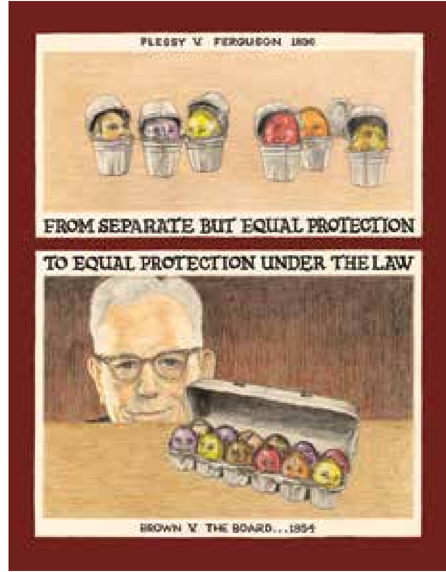
Terry Flanigan Works of Art



When I agreed to do a caricature of Chief Justice Malcom Lucas for his retirement lunch, I was later contacted and asked if I wouldn't mind including images of all the justices with whom he had served during his tenure as Chief. Oh sure, no problem, right? What followed, based upon the numbers, was a natural setup for a parody on da Vinci's "Last Supper." Each participant was provided with a copy along with an explanation that their placement in the picture from Lucas's right arm outward and left arm outward was based upon tenure. More importantly, it clarified why Justice Ed Panelli found himself sitting behind the table as Judas Iscariot in the "Last Lunch." Following this placement formula, you will find justices, from Malcolm Lucas in the center leftward, Stanley Mosk, Allen Broussard, Edward Panelli, John Arguelles, David Eagelson, Marcus Kaufman; and from Lucas rightward, Joyce Kennard, Armand Arabian, Marvin Baxter, Ronald George, Kathryn Werdegar, Ming Chin.

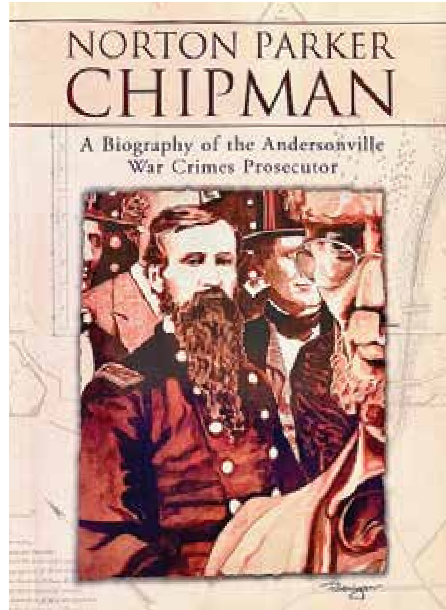
-Terry Flanigan

Alameda Courthouse Prosecutors

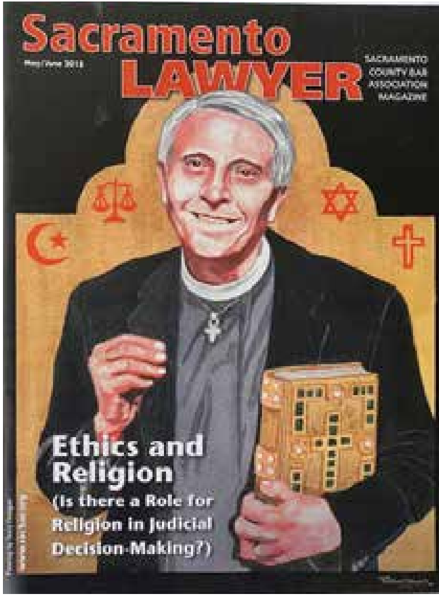


Separate But Equal to Equal Protection Under The Law

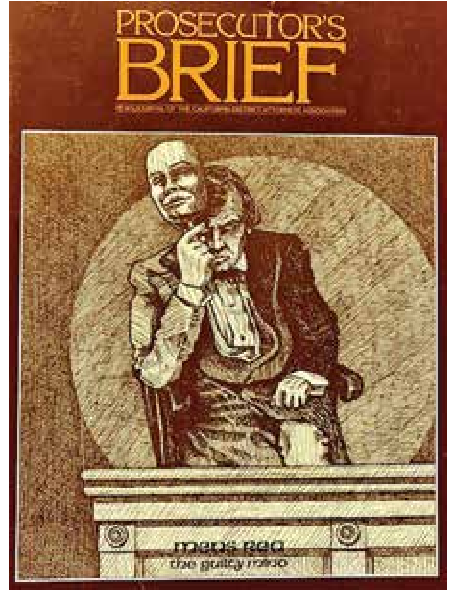
'The Cinderella Justice'- California Supreme Court Justice Joyce Kennard



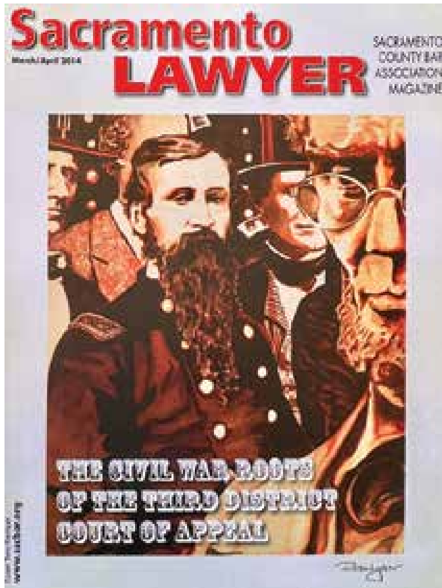
Biography Cover of Norton Parker Chipman written by Jeffery Hogge



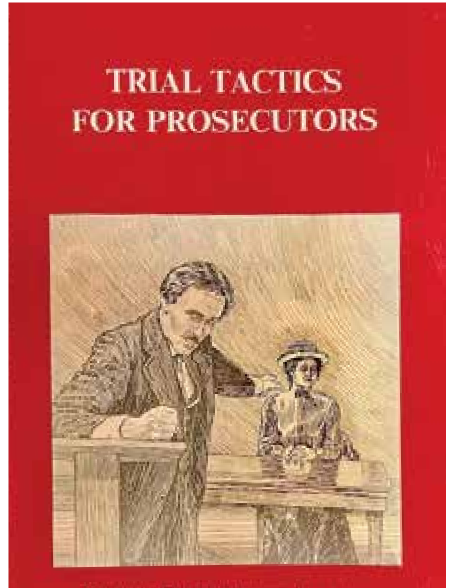
Father Rodney Davis, former Justice, Court of Appeal, Third Appellate District



Men's Rea-The Guilty Mind



Norton Chipman-On the Stage with Lincoln



California DA Handbook

LEGAL LITHOGRAPHS

by
Terrance Flanigan

TERRANCE FLANIGAN the artist is also Terrance Flanigan the attorney. Graduating from the University of California School of Law at Davis in 1973, he began his legal career as a criminal prosecutor with the San Diego City Attorneys' Office. Later, he joined his twin brother as a partner in the law firm of Bamberg, Flanigan & Flanigan. He has represented California's 58 counties as a lobbyist in the State Capitol handling legislative assignments dealing with criminal justice, law enforcement, court administration, and, most recently, has been employed as a lobbyist for the California State Bar.

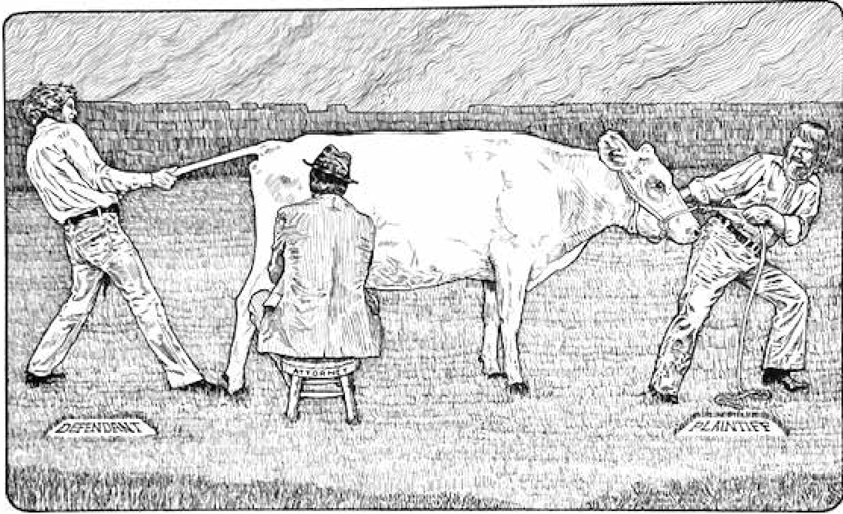
Legal Lithographs Brochure 1978

Blind Justice

The Legal Secretary A.M-P.M

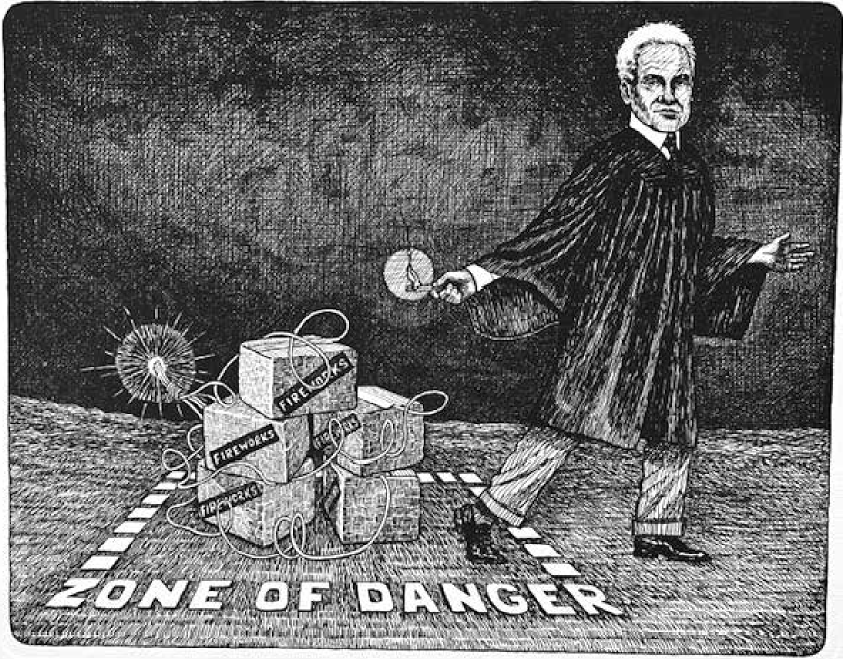
Opening Statement

Closing Argument

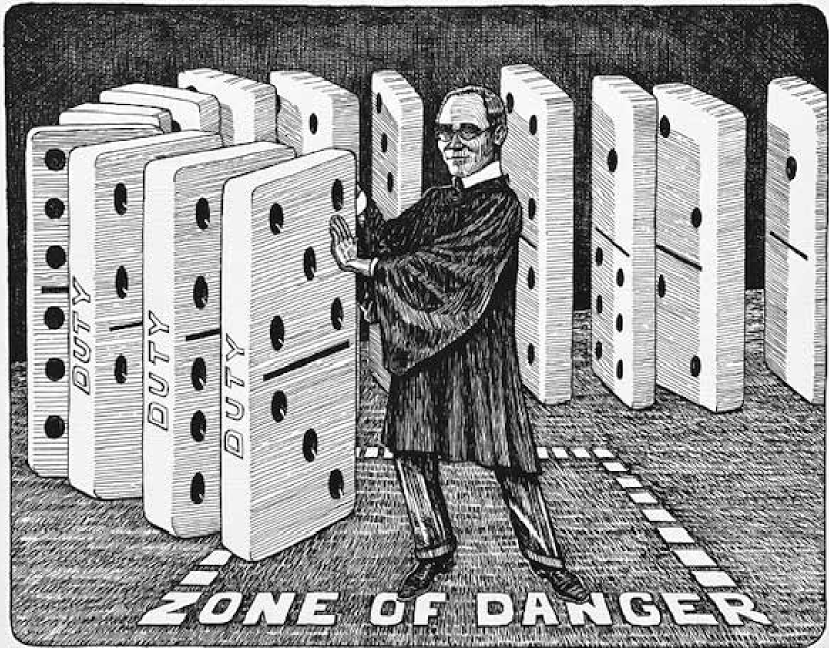


The Law Suit

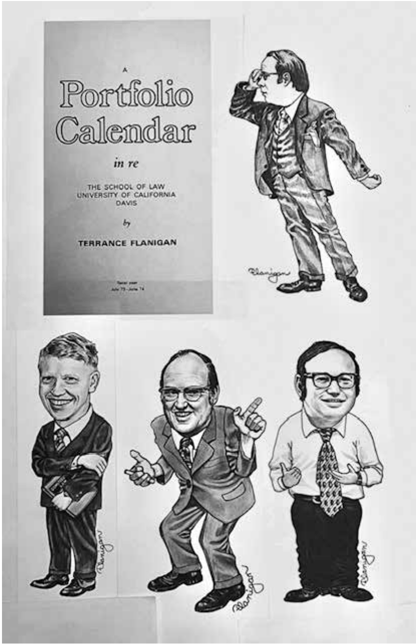
Legal Passages



Cardoza's Proximate Cause



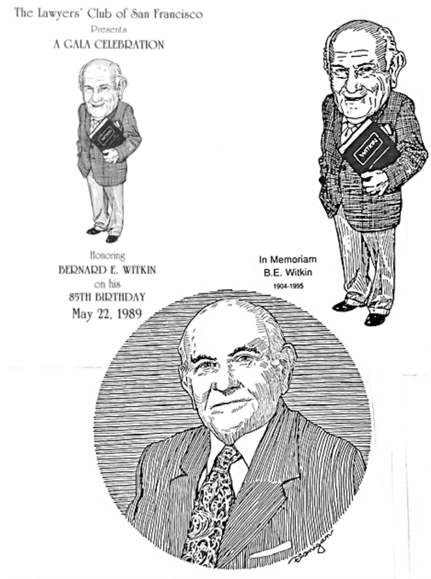
Andrews' Proximate Cause



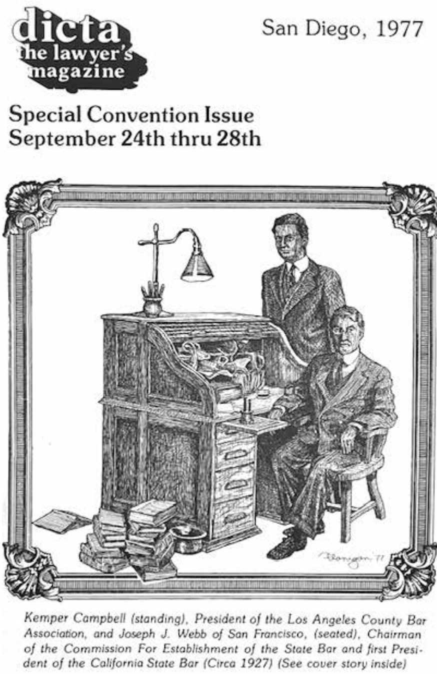
Top: Prof. Daniel Wm. Fessler.
Bottom: Dean Edward Barrett, Prof. Dan Dykstra, Prof. Dov Grunschlag

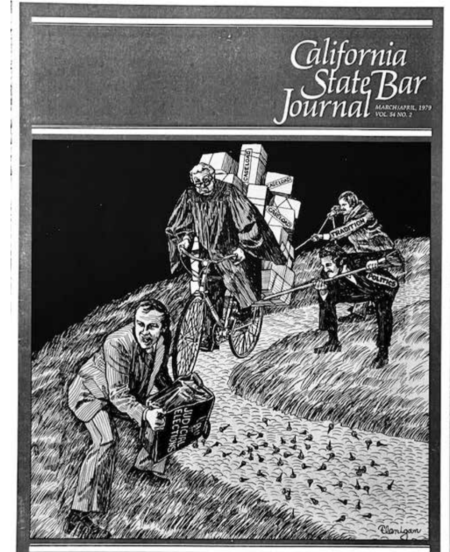
Professors Brigitte and Edgar Bodenheimer. Bottom: Prof. John Whelan

Top: Prof. John Poulos, Prof. Jack Ayer, Prof. Gary Goodpaster. Bottom: Prof. Harrison "Hap" Dunning, Prof. Richard Wydick, and, Prof. Jim Hogan



Bernie Witkin





Legal Magazine Covers

RETIREMENT DINNER CARICATURES
COURT OF APPEAL, THIRD APPELLATE DISTRICT

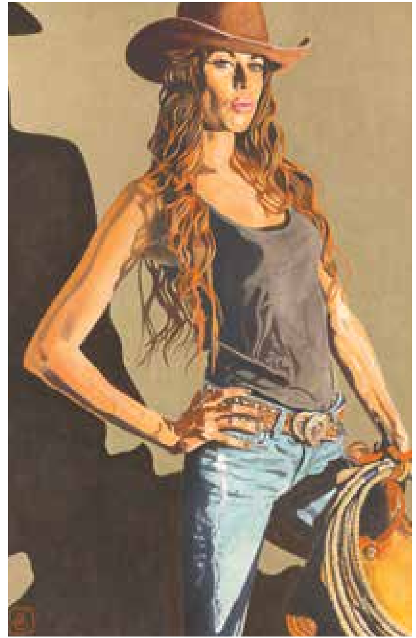
Arthur G. Scotland
Associate Justice, 1989-1997,
Presiding Justice, 1998-2010

Vance W. Raye
Associate Justice, 1990-2010,
Presiding Justice, 2011-2022

George W. Nicholson
Associate Justice, 1990-2018

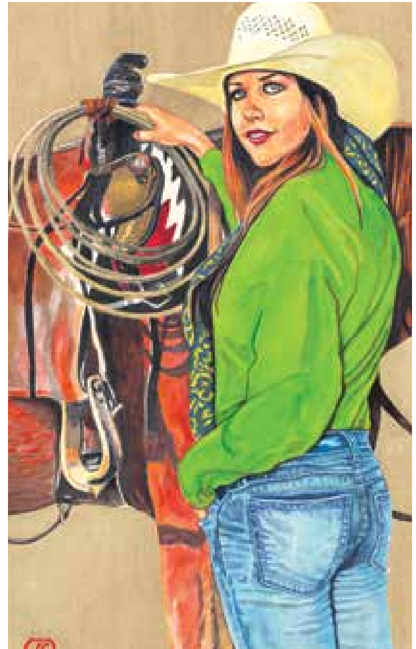
NON LEGAL ARTWORK

44-40



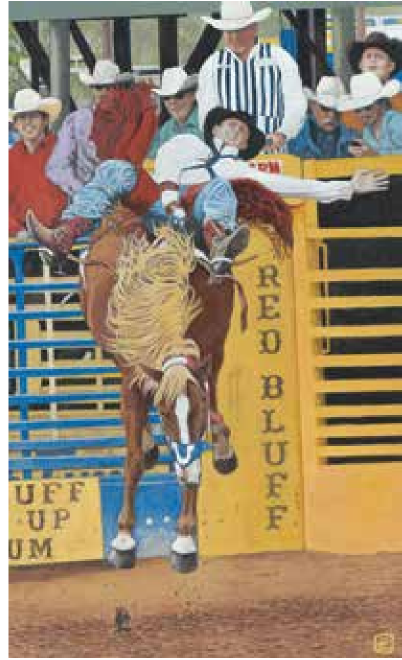
Saddle Up

Chevy Rider



Bakersfield Cowgirl

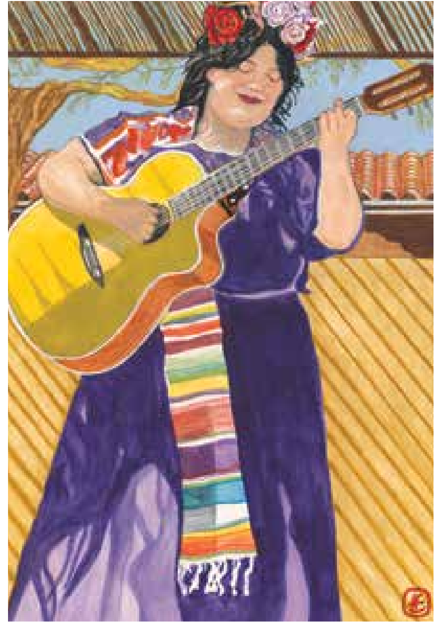
The Hatters



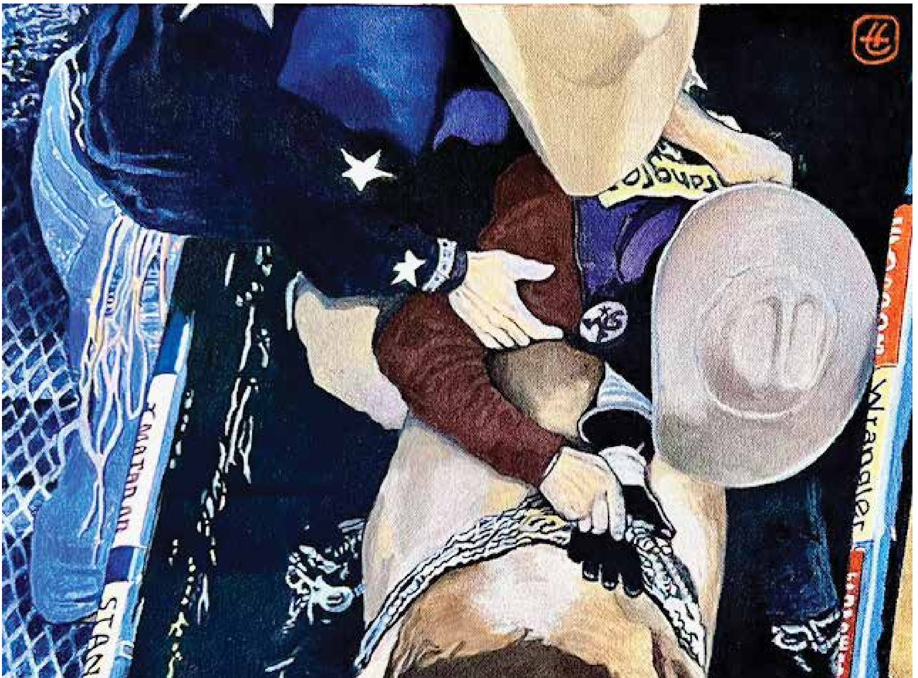
Pegasus With Leather Wings

The Pickup Man

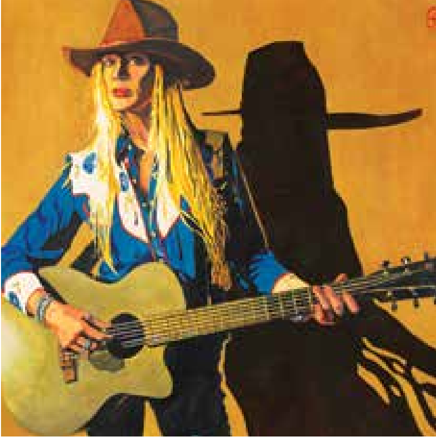
Cowgirl, Clouds, And Chrome Hooves



Mariachi Music - Made In The shade



Lead Pipe Cinch



Strings and Shadows

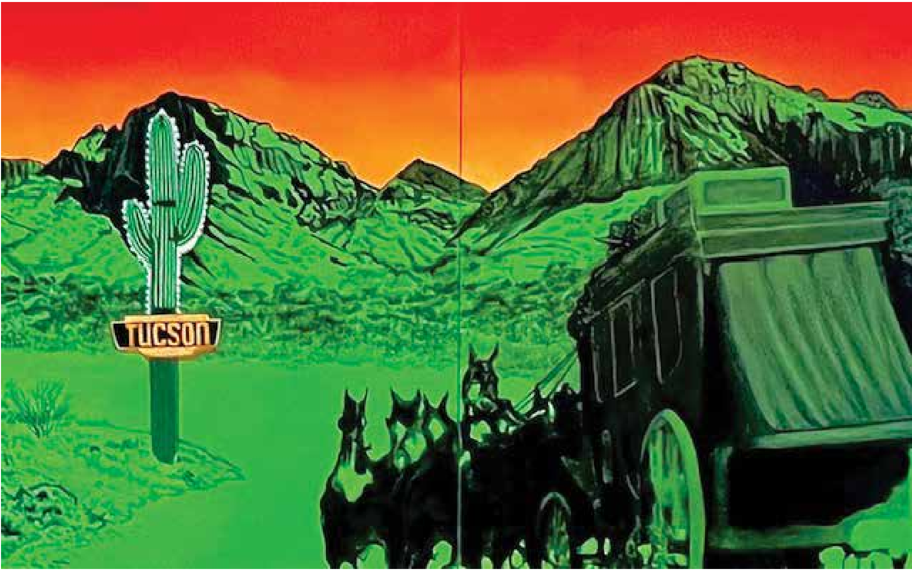
Moonlight Rider

Monument Valley Girl

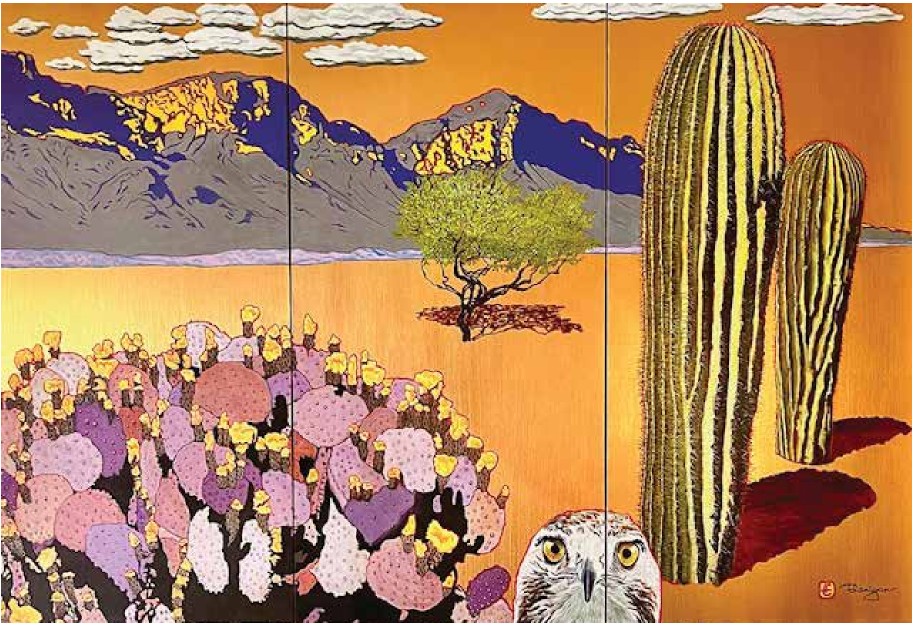
Camera Cowgirl

Thunder and Rein

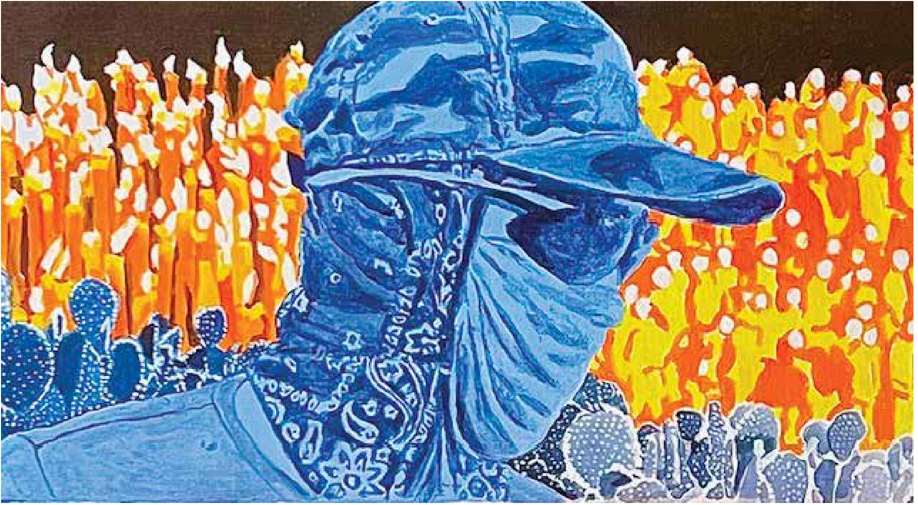
4th of July in Marysville



A Sign From The Future Along The Tucson Trail



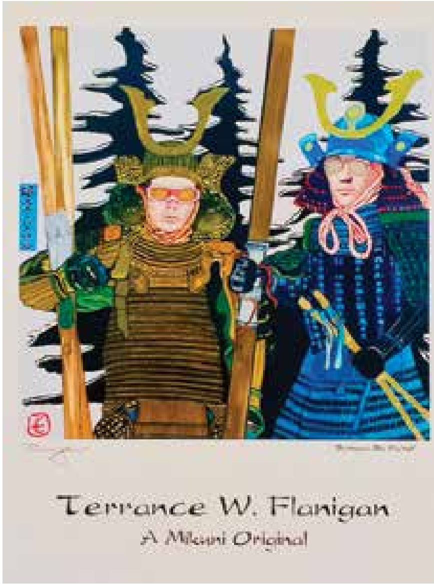
Desert Japonisme



Faith, Fear, And The Future?

Museo National de Antropologia - Mexico City (acrylic)

Produced For the Mikuni Restaurant Group (Home Base: Sacramento, CA). Done in the style of Frank Miller's graphic novel and movie "Sin City". The model is Taro Aris, Chief Dreaming Official for Mikuni.



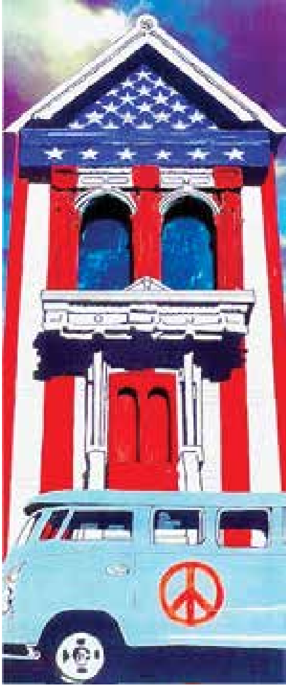
Samurai Ski Patrol

Samurai Mountain Biker

Mikuni Beauty #1

Mikuni Beauty #2

VICTORIA - A CHILDREN'S BOOK FOR ADULTS

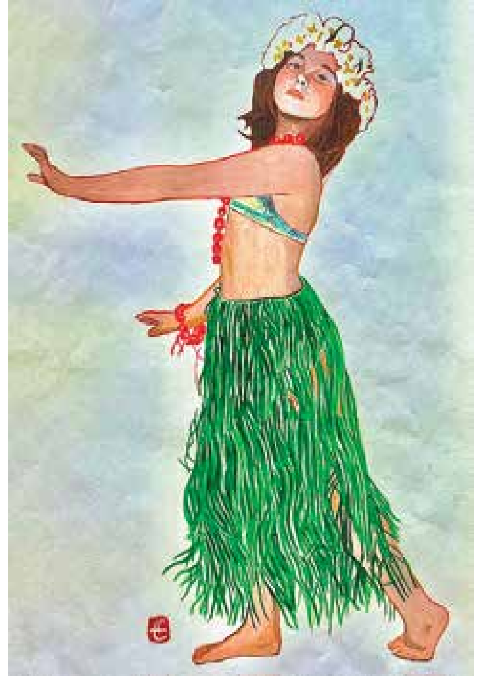


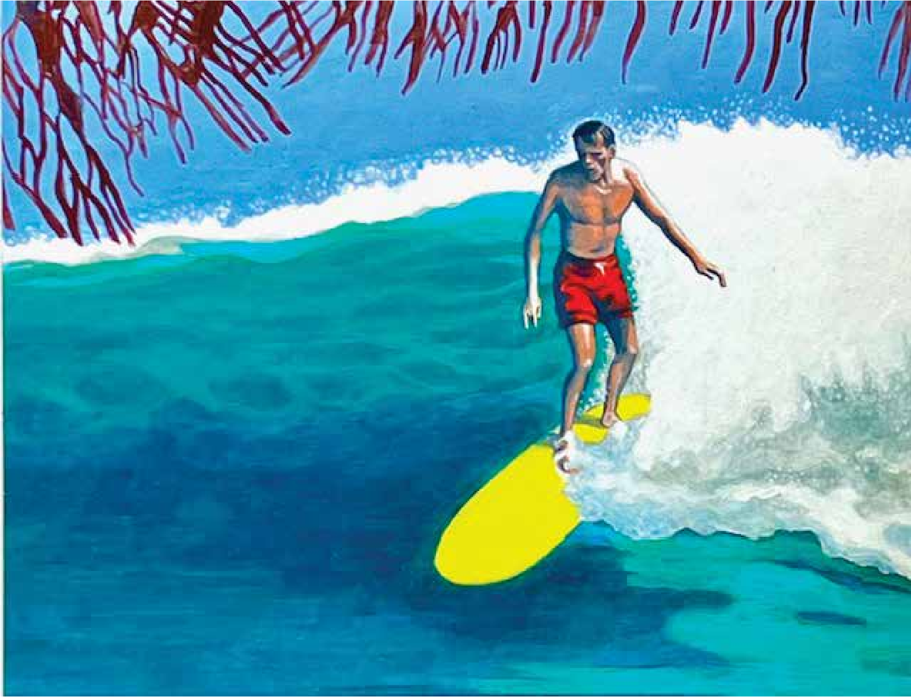
...struggling to be the Home Of The Brave And The Land Of The Free

When does a house become a person?

When cars had fins and lots of chrome trim

THE STAGES OF MOLLY KATHERINE FLANIGAN





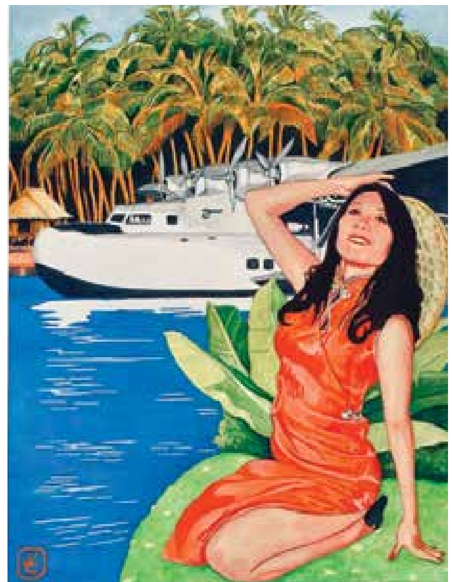
WINDANSEA La Jolla 1965

One of First Oil Paintings 1963

KOI #1

KOI #2

Oh well, marooned in Honolulu again



Taking the Clipper to Paradise (model is Fiona Ma, 34th California State Treasurer)

Nagelesque #1

Nagelesque #2

Revisiting the (Lawless and Lawful) Wild West

A précis to Judge Garen Horst, "Reflections on Justice, From the Historic Auburn Courthouse" and Justice Michael Raphael, "California's First Felony Murder Case"

Have you ever thought of the early twenty-first century as our return to the Wild West of California, experienced now within the virtual world? Our first era of the "Wild West" occurred in the middle of the nineteenth century, with the discovery of gold in California. Two towns were central to this early era of California history: Auburn in Placer County, and Placerville in El Dorado County. Approximately thirty miles separated these towns, traversed through vast forestlands and canyons guiding the American River toward Sacramento.

As these towns were formed, the rule of law was carried out during a time when the laws were in flux and California was just becoming a state. Placer County Superior Court Judge James Prewitt described this era during his dedication of the Historic Courthouse in Auburn in 1898 as follows:

> When the mad tide of humanity arrived here in 1849, they found a land without government, without laws, officers or court. No Court House, no jails, no penitentiaries. But almost by intuition, they remedied all that. Miners' meetings took the place of government; their own inherent sense of right the place of laws; which the Sheriffs and courts were represented by the vigilance committee, and a rude but high order of justice was generally administered on the spot.[1]

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[1] *Placer Herald*, July 9, 1898.

Both towns have a storied and sometimes troubled history pertaining to the administration of justice in these early years. Auburn has its own skeletons in its closet of justice, some of which may still be buried on the very grounds of its beautiful courthouse. The site was originally an old burial ground, and several hangings were conducted in that location. In 1858, a mob of over sixty people stormed the sheriff's office and removed Aaron Bracey, who was an African American, from custody. Mr. Bracey had been arrested for murder after he allegedly hit his neighbor James Murphy over the head with a pickaxe. The lynch mob took Bracey to the outskirts of town and tied him to a tree. Just before he was hung in front of approximately one hundred onlookers, the lights were extinguished so the executioners could remain unidentified.[2]

The town of "Placerville" has never been within Placer County, though the shared name continues to cause confusion to this day. Both names are a reference to the "placer" gold, which are the gold flakes and nuggets that can be found in rivers and streams. Placerville was originally known as "Hangtown" before the adoption of its formal name in 1854. The epithet is considered by some to have come from an incident in 1849, when three men were hung by a vigilante group after being accused of theft. The Hangtown reference stuck around for many years within the town and still can be a source of contention today.[3]

The two articles that follow are inspired by the historical backdrop of these towns once the rule of law was more firmly established. In the first article, "Reflections on Justice from the Historical Courthouse," Placer County Superior Court Judge Garen Horst reflects upon his evolving concepts of justice after decades of either practicing or presiding at the Historical Courthouse in Auburn. In the second article "California's First Felony Murder Opinion," Justice Michael Raphael of the Court of Appeal, Fourth Appellate District, Division Two, describes the evolution of the felony murder rule from a California Supreme Court opinion that originated from a Placerville murder case in the late 1800s. Both Judge Horst and Justice Raphael write about infamous murder trials that still are a source of intrigue and controversy today in their respective towns.

In 1904, a tragedy befell the prominent Weber family, shocking the small town of Auburn. As rescuers tried to put out the flames of their burning

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[2] April McDonald-Loomis and John Knox, "Crime in the Gold Rush," Placer County Historical Society, January 2016; William B. Lardner and Michael John Brock, *History of Placer and Nevada Counties* (Historic Record Company, 1924), 240, 246–47; "A Citizen Murdered—The Jail Broken Open by a Mob and the Murderer Hung," *Placer Herald*, February 20, 1858.

[3] M. G. Rawls, Hanging Justice: *The Compelling True Tale of the Last Hangings in El Dorado County in 1888 and 1889* (M. G. Rawls, 2025), 3.

home, they discovered the matriarch Mary and eighteen-year-old daughter Bertha shot to death inside. The young son Earl had been bludgeoned and died after being removed from the home. The patriarch Julius was later found shot dead while sitting on the commode. The sole survivor, the nineteen-year-old son Adolph Weber, was arrested the following day for murder, despite no confession, no eyewitness, and an alibi. His conviction was affirmed by the California Supreme Court, with a stinging dissent by the Chief Justice, arguing that Adolph was deprived of a fair trial, in part due to the surprise witness the prosecution presented that provided the smoking gun. The Weber family doctor later wrote that Adolph had suffered from mental illness and didn't deserve to die. Was he guilty? Was he insane? The case still haunts the town of Auburn, and is the subject of ongoing controversy, study, and reenactment.

Sixteen years earlier in the town of Placerville, John Lowell was killed by John Meyers, who was promptly tried, convicted, and executed. His accomplices John Olsen and William Drager were separately tried for murder and convicted, despite only being involved in theft and not the actual killing. The California Supreme Court upheld their convictions in what would become the genesis of our state's felony murder doctrine.[4] Their deaths were the last legal executions in El Dorado County due to a law change a couple of years later, requiring executions to be conducted in state prison. Did those men really get the justice they deserved? Sheriff James Madison Anderson, the man who arrested them and carried out their hanging, didn't think so. Over a century later, our state legislature changed the law of felony murder, weighing in on this issue of fairness and justice.

Both articles discuss historical events from these Gold Rush towns, but the words written and issues discussed are not simply stuck in the past. History still lives and breathes within us and the law. Our understanding of the historical good and the bad; all the splendor with all the sludge, and our legal achievements and shortcomings, can guide us in our pursuit of justice for tomorrow, whether on or offline.

[4] The same Chief Justice who later had misgivings about the Weber case apparently had no problem affirming the murder convictions of Olsen and Drager.

GAREN HORST*

Reflections on Justice from the Historic Auburn Courthouse

As one leaves the flatlands and congestion of the Sacramento area and travels eastbound on Interstate 80 toward Lake Tahoe, the approach of the old gold rush town of Auburn in the Placer foothills transports you almost into another time and space. Under the train trestle bridge, past the bend in the road, and beyond the statue of the miner panning for gold, stands the Historic Courthouse stoically upon the hilltop. After more than three decades of making this drive, I have yet to tire of this majestic site. Perhaps my appreciation derives from the accumulation of stories and experiences through my years practicing law in its courtrooms, but since presiding there as a judge my appreciation has run deeper. For me, and many in the community, the building represents a sense of shared history and justice that will continue long past my temporary passing through its halls.

* Judge of the Superior Court, County of Placer, handling a variety of assignments and at present presiding over multiple calendars, including mental health and felony sex crimes. He primarily sits at the Historic Courthouse in Auburn, presiding over jury trials, bench trials, and other long cause proceedings. He is also serving as the Presiding Judge of the Appellate Panel for Placer County. He served on the Court of Appeal, Third Appellate District, as an Associate Justice Pro Tempore for a portion of 2023. In that capacity, he authored opinions encompassing a wide array of California law and participated in several other cases as a panel member. Judge Horst is a judicial instructor for the California Center for Judicial Education and Research (CJER) and served on the curriculum development committee for the New Judge Orientation Program.

Historic Auburn Courthouse (Photo by Garen Horst)

At the time it was built in the late 1890s, the architectural beauty of our Historic Courthouse was renowned throughout the state. The structure was designed by John M. Curtis of San Francisco, the partner of architect Albert Bennett, who had worked on the California State Capitol and was known as the creator of the "capitol" style courthouses that included a dome. Curtis's own claim to fame included the original domed City Hall of San Francisco, which was later destroyed by the 1906 earthquake. Much of the material used to construct our Historic Courthouse came from local Placer County sources, including the gray granite from quarries in Rocklin and the pressed brick and terra cotta from the pottery of the Gladding McBean Company of Lincoln. Additionally, marble for the stairs came from Colfax and lumber and lime came from various other parts of the county. The building ultimately cost $173,583.55 to construct and furnish by the time of its opening in 1898.[1]

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[1] The Placer County Museums, The Historic Courthouse, 2020. The sum of $173,583.55 is the equivalent of approximately $61 million in 2024. (*See* "Purchasing Power Today of a US Dollar Transaction in the Past," MeasuringWorth, 2025.) For comparison, the recent renovation of the Courthouse in 1990 cost $6.8 million, equivalent to about $28.3 million in 2024 dollars.

Our Historic Courthouse, circa 1905 (Placer County Museum)

The Historic Courthouse was really Placer County's third courthouse. Auburn was originally part of Sutter County until it became the county seat of Placer in 1851. The first Placer courthouse was located in Old Town Auburn and built with canvas and wood. The second courthouse opened in 1853 on our current site of the Historic Courthouse, atop the hill on Court Street overlooking Old Town Auburn. The Placer Jail stood as a separate building next to the old courthouse, with an iron bridge connecting both buildings for forty years. In 1890, the Placer County Board of Supervisors decided to submit for approval to the voters of Placer the issuance of $150,000 in bonds for the construction of a new courthouse.

The honor of laying the first stone for the new building was given to the county's sole Superior Court Judge, James Prewett, who had been elected to the bench in 1890 and served in that position for over thirty-one years.[2] In addition to being a highly respected jurist, he was also a reputable historian, inventor, chemist, and linguist who could converse in Spanish, French, and Chinese. On July 4, 1894, the Honorable Judge Prewett stated these enduring words: "[w]e today lay the cornerstone of a grand structure that is expected to endure until our children's children shall have turned old and gray and passed away into the great beyond."[3]

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[2] At that time, Judge Prewett had one of the longest uninterrupted terms as Superior Court Judge in the state. In addition to his duties on the Placer Court, he travelled to other counties when they needed another judge to hear cases. He also sat on assignment for the Courts of Appeal. (Lardner & Brock, *History of Placer and Nevada Counties* (Historic Record Company, 1924), 265–67.)

[3] Remarks delivered by Judge Prewett on July 4, 1898 ("Auburn's Celebration," *Placer Herald*, July 9, 1898).

The new facility was originally designed to handle most of the county's business. The first floor housed the county jail, and the offices of the Sheriff, Coroner, Tax Collector, Treasurer, and Surveyor. The second story housed offices for the District Attorney, Recorder, Assessor, the Superintendent of Schools, and a jury room. The third floor housed one large courtroom, the judge's chambers, a library, the Supervisor's Room and the Office of the County Clerk. The fourth floor was used to store old books and records.

On July 4, 1898, four years after the laying of the first cornerstone, the new "Historic" Courthouse opened to great celebration amidst a grand parade, hot-air balloon, and parachute jump. Judge Prewett affectionately and eloquently addressed the town, giving a history of Placer County and its previous courthouse. He described this "new" courthouse as follows:

> This grand building is one of the finest courthouses in the state, and it is a credit not only to the county but the state itself. Several are larger, but none can excel in fine artistic effect. . . . It is our Temple of Justice, our repository of titles, the fortress of our personal and property rights, the fountain head of our school system, the registry of our births, marriages and deaths, and its inmates stand guard by day and by night over the peace and good order of our communities.

He ended the dedication with these words of hope that can still serve as inspiration for us today:

> And today, standing in the bright sunlight of liberty, thankful for the blessings of civil and intellectual freedom that we enjoy, reverently kneeling at its foundations, in the name of Almighty God, in consecration to our people and our homes, we dedicate this magnificent structure to Justice, Honor, and Truth. And as the rays of thy glorious sun shall shine upon it in splendor and glory, may also the light from its lofty tower suffuse the land about with the royal beams of equal and exact justice to all men.[4]

A Courtroom for the Ages

When the Historic Courthouse was dedicated in 1898, there was only one functioning courtroom which is now known as Department Four. Although it was reconfigured during the renovation and restoration of the 1980s, it still retains some of its original splendor with its high ceilings, crown molding, and replica hanging light fixtures. The judge's bench was originally on the east side of the courtroom, with the judicial chambers in the area of the current third-floor jury assembly room. The jury box was in the location where the judge sits

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4 *The History of the Placer County Court, Judicial Biographies*, Volume 2, by Lori Smith, Court Historian.

now, and jurors deliberate currently where there used to be a law library. The grand and expansive courtroom, measuring almost sixty by forty feet, had a large brick fireplace opposite the judge's bench and behind the seating.[5] Judge Prewett, as the first judge to ever sit in this courtroom, described it as being "distinctly the most beautiful courtroom I have ever seen."[6]

Throughout its over 120 years of existence, some of Placer County's most notorious cases have been heard within these walls. In my legal career as a prosecutor, I often brought cases into this department; the most infamous was *People v. Mario Garcia*, which involved the tragic death and disappearance of a young woman named Christie Wilson. While the case was tried in Sacramento County with a change of venue, the case began in this department with the preliminary hearing and ended with his sentencing to life in prison in 2007. The case gathered national attention and became Placer County's first no-body homicide conviction.[7] Thirteen years later, while sitting in Department Four as a judge, I received an emotional call from the lead detective in the *Garcia* case during a court break. They had finally found Christie Wilson's body that had been buried on the defendant's former property.[8]

Arguably the most infamous and influential case that happened in the original courtroom occurred during its infancy—the 1905 murder trial of Adolph Weber.[9] The Weber family owned the Auburn brewery and was prominent in the Auburn community at the turn of the century. On a November evening in 1904, the Weber home became engulfed in flames. As the townspeople of Auburn ran to the home to extinguish the fire, they discovered the Weber matriarch Mary and her daughter Bertha shot and killed. The young son Earl was bludgeoned and died shortly after being removed from the burning home. The body of the patriarch Julius was later found in the ruins, having been shot while on the commode. The only surviving person was

[5] Prior to the renovation in the 1980s, the courtroom had been divided to create an office that is now the judge's chamber. The space contains its own ceiling and from the courtroom it appears as if there had been a mezzanine over this space from which spectators could view the proceedings. There are no historical plans or photos showing a mezzanine, but its appearance adds to the historical folklore.

[6] *Placer Herald*, July 9, 1898.

[7] *People v. Garcia* (2009) 90 Cal. Rptr. 3d 440, previously published at 171 Cal. App. 4th 1649 (Review Denied and Ordered Not to be Officially Published, June 10, 2009). The Honorable Larry D. Gaddis presided over the trial. He began his tenure on the bench in 1988 after being elected to Municipal Court, and later was appointed to Placer Superior Court, where he served as a superior court judge until his retirement in 2012.

[8] "'A Day of Peace': 15 Years After Her Disappearance, Christie Wilson's Remains Found by Placer Deputies," by Sam Stanton, *Sacramento Bee*, August 25, 2020, p. 3A. Mario Garcia died later that year in prison on Christmas Eve, 2020. On August 12, 2021, Investigators Don Murchison (retired) and Lieutenant Nuno Tavares (retired) received the award for outstanding investigation from the International Homicide Investigators Association in Washington, D.C. For an excellent account of the recovery of Christie Wilson's body, listen to the podcast "Inside the Crime Files with Anne Marie Schubert—The Disappearance and Murder of Christie Wilson," by Anne Marie Schubert, February 4, 2022.

[9] *People v. Weber* (1906) 149 Cal. 325.

the 20-year-old son Adolph, who was walking around town when the fire was discovered. The following day he was arrested for the crimes and charged with the murder of his mother, despite his maintaining innocence and the lack of any direct evidence tying him to the murders.

The case was so sensational that it was followed in other parts of the state, country, and even abroad. The jury trial lasted a month during the winter of 1905 in the original courtroom before Judge Prewett. The lynchpin of the prosecution's case came with the surprise testimony of Henry Carr, who testified that he sold the alleged murder weapon found in the Weber barn to young Adolph the summer before the murders. The jury deliberated for twenty-one hours and thirty minutes and took seven separate ballots before convicting him of first-degree murder. "Justice" was swift in those days. Adolph, who maintained his innocence throughout the proceedings, was sentenced to Folsom Prison and hanged in 1906. An original newspaper article of his initial sentencing to death is framed and on display in the courtroom in Department Four.[10]

Adolph Weber, with his family resources, was able to mount a vigorous appeal. The case was heard and decided the following year by the California Supreme Court. The High Court upheld Judge Prewett's legal rulings and found that Adolph received a fair trial.[11] There was a stinging dissent by Chief Justice Beatty, who believed there were serious problems with the prosecution of the case and the defendant's right to a fair trial:

> The murder of the Weber family was one of those atrocious crimes which always arouse an intense desire to discover the perpetrator, and bring him to justice. Such a state of feeling pervading a whole community increases the danger that one upon whom suspicion first happens to fall may be convicted upon evidence which, in cases of a less aggravated character would not be deemed thoroughly satisfactory proof of guilt. This fact makes it peculiarly the duty of the courts in such a case to enforce with scrupulous care every right which the law accords to persons accused of crime—rights accorded not for the purpose of screening the guilty, though capable at times of being perverted to that end, but solely in order to guard, as far as may be consistent with the practical administration of

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[10] I have my friend and former supervisor at the Placer District Attorney's Office, Tom Beattie, to thank for this great find. An Auburn resident gave it to him after cleaning out his attic. On the front page was an article entitled "Must Suffer the Death Penalty, Judge Prewett Pronounced Sentence on Adolph Weber Last Thursday," *Placer County Republican*, dated April 20, 1905.

[11] The *In Bank* decision was written by Justice Henshaw, and joined by Justices Angelloti, Sloss, and Lorigan as well Justice Cooper, sitting pro tempore from the Court of Appeal. Justice Cooper filled in for Justice McFarland, who according to the decision notes, was unable to act. Before ascending to the California Supreme Court in 1886, Justice McFarland had been a Judicial District Court Judge of an area that comprised Placer County from 1864 to 1872.

> justice, against the danger of convicting the innocent. I cannot persuade myself that on the trial this defendant's rights were duly preserved.[12]

Chief Beatty described the case against Adolph as wholly circumstantial and rested in large part on the testimony of Henry Carr. Because this important witness had not testified before the grand jury, had been purposefully withheld from the defense before trial, and not even mentioned during opening statement, he argued that the defense had no meaningful opportunity to defend against the evidence with any rebuttal or impeachment type evidence. According to the Chief Justice, even though the law at the time technically only required disclosure of grand jury witnesses and their statements, such withholding violated the spirit of the law: "The policy of these laws is evidence, and they are in the interests of justice. It does not accord with our ideas of justice, and has no tendency to promote its ends, to keep the most important witness against the prisoner in ambush until the moment when he is called upon to make his defense."[13]

Chief Justice Beatty's eloquent defense of the rights of defendants and ideas of justice fell on deaf ears with his colleagues but was ultimately born out with a change in the law, requiring disclosure of such information by the prosecution.[14] It was the fact of Weber's conviction, however, that had an immediate consequence on the evolution of California law. The case received infamy and large amounts of press due to the popular indignation regarding the injustice that a person like Adolph Weber would be able to inherit money after killing his family. In 1905, Civil Code section 1409 was adopted, stating "No person who has been convicted of the murder of the decedent shall be entitled to succeed to any portion of his estate."[15] The irony for the Weber case is that at the time Adolph's estate was probated, and all expenses were paid, including attorney fees, his estate was only valued at $3,700, down from almost $74,000 at the time of the murders.[16]

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[12] *Weber*, *supra* note 9, at 351.

[13] *Weber*, *supra* note 9, at 352–53.

[14] *See, e.g.*, Penal Code section 1054, et seq. My study of this case inspired a program for the Placer County Bar Association presented in 2022, entitled "Did Adolph Weber Receive a Fair Trial—Lessons on Justice from Placer County's Most Infamous Case."

[15] *See Estates of Ladd* (1979) 91 Cal. App. 3d 219.

[16] Lewis J. Swindle, *The Story and Trials of Adolph Julius Weber* (Lewis Swindle, 2002), 282.

Weber Retrial by Lincoln Law School Students (2023)
Print used with permission from the Courtroom Artist, Vicki Behringer

Almost 120 years after the terrible murders, the Adolph Weber case returned to the same courtroom to be retried by the fourth-year law students from Lincoln Law School of Sacramento. For their final, the trial advocacy classes of 2023 and 2024 were divided into teams to conduct the Adolph Weber Mock Retrial with a clear mission—either to confirm that justice was achieved so long ago, or to right a wrong to exonerate someone falsely accused. The prosecution had to lay all their cards on the table with no surprises, and the students presented their case applying current law. Some dressed as the advocates would have circa 1900; and in one trial the former Sheriff of Sacramento County played Sheriff Keena who investigated the Weber case in 1904. Each Weber trial was different, a product of the quality of both the advocacy and the choices made in presenting their case. However, there was one consistency: the onlookers sitting in as jurors were split as to the proper verdict.[17]

[17] In 2025, the fourth-year law students returned to the courtroom to determine a different issue presented in the *Weber* case: whether he was insane at the time of the murders.

The Sound of Justice

One late afternoon after court had adjourned, I decided to journey up the metal spiral staircase to the top of the dome within the Historic Courthouse with my judicial colleague and friend, the Honorable Judge Mark Curry.[18] We emerged into a rotunda beautifully lit from natural sunlight, decorated with houseplants apparently tended to by the courthouse bailiffs. As I looked out a window toward the interstate, I saw what appeared to be a bell anchored between two granite columns. On a dare from my esteemed colleague, I crawled out to the bell and gave it a ring. When I came back inside, I looked more closely at the inscription on the outside casing and saw to my horror "Naylor Vickers 1859." I worried I had just disturbed a historical artifact and had visions of the cracked Liberty Bell in Philadelphia. That evening, inspired by that experience, this "Reflections on Justice" project took root as I began to research and write about our Historic Bell.

The Bell was cast in 1859 by the Naylor Vickers Company from Sheffield, England. The steel bell weighs 500 pounds free of its frame and is 27 inches in diameter. It was purchased originally for the old wooden courthouse in 1859 after the previous bell emitted "mournful sounds from its cracked sides for several months."[19] It is one of only 242 made and distributed in North America, out of less than 1,000 made by this company. Many of these English bells can be found in churches, universities, colleges, schools, cemeteries, town halls, and museums—but we may be one of only a few courthouses with a Naylor Vickers Bell.[20] In 1897, the bell was loosened from its moorings and placed in the dome of the then newly constructed Historic Courthouse.

The bell is equipped with a wheel that apparently was used with a cable to ring from below. It was known to have a clear, full mellow tone that could be heard at a large distance over the surrounding countryside. When it was first installed in our new and current courthouse in 1897, the local paper declared:

> At the third floor of the dome is old bell, which has called so many to the Halls of Justice in Old Placer, perhaps to be tried, to participate in trials, or to receive the verdicts or sentences passed by those sitting upon the luckless person who disobeys our laws.[21]

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[18] Judge Mark Curry was appointed by Governor Arnold Schwarzenegger in 2007 and served the Placer County Bench until he retired from the bench on September 3, 2021. For many years, he presided in both Departments Three and Four of the Historic Courthouse.

[19] *Placer Herald*, *Placer Argus*, May 28, 1897; October 22, 1859.

[20] Naylor Vickers, Index of Bells.

[21] *Placer County Republican*, October 8, 1897.

The bell was rung like clockwork ten or fifteen minutes before the court started, to provide warning to any attorneys, witnesses, and jurors who were running late. Apparently Judge Prewett, along with Judge Myres who presided in the earlier courthouse, were both sticklers for starting on time. The Honorable Judge Benjamin Franklin Myres, who served as District Court Judge from 1859 through 1884, and as our first Superior Court Judge from 1880 to 1891, was especially prompt and frequently would lose his temper when attorneys ran late. During his first year on the bench, he had a showdown with the sheriff, who was also his bailiff, over the ringing of the bell. During one rainy day, the sheriff neglected to ring the bell on time. Once everyone arrived, and the judge took the bench, he stated "Mr. Sheriff, I can walk a mile and be here on time, and you must ring the courthouse bell at ten minutes before ten, or I will put you in jail." Judge Myres and Sheriff Boggs glared at each other as court was called to order.[22]

The Bell was also used to announce the jury verdict. According to local folklore, the judge and attorneys used to wait downtown at the saloon until the bell rang informing them that a verdict was reached. Back in those days, juries worked late into the night until they could reach a decision. The rendering of a verdict was a community event in the early years of the Historic Courthouse, and people within earshot would eagerly await the ring of the bell and then walk to the courthouse to witness the drama unfold. For example, when the infamous Weber murder trial finally came to a close in the winter of 1905, the local paper reported the spectacle as follows:

> BELL SOUNDS WARNING
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> To-day, at 5 minutes after 2, when the bell rang out in solemn tones, people from all parts of the community hurried toward the courthouse. As the first touch of the bell sounded, Weber, in his prison, said to his guardian, John Adams, "Well, I suppose that means they have come to a verdict."[23]

Eventually the bell fell out of use despite an unsuccessful attempt to bring back the tradition in 1964 by the Placer County Bar Association.[24] It remained stranded outside by a pillar under the courthouse dome until November 19, 2021, when members of the Bar and Bench gathered in Department Four of the Historic Courthouse to honor the life of a respected and well-liked defense attorney who had unexpectedly passed away. As the master of ceremonies for this solemn event, I arranged with Ralph Gibson, the museum administrator, to ring the bell to commence the service. Ralph graciously agreed to rig a cable

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[22] Lardner & Brock, *History of Placer and Nevada Counties* (Historic Record Company, 1924), 132–33.

[23] *San Francisco Call*, Volume 97, Number 85, February 23, 1905.

[24] *Auburn Journal*, March 26 and April 2, 1964.

to the bell and volunteered to stand by and ring it on my cue. We had tested it a few days before on a quiet weekday, and we were able to hear it with the windows open in Department Four. As I asked everyone to take their seats in the courtroom, and texted Ralph to ring the bell. Nothing . . . . I texted him to ring it again, and this time there was a barely audible ringing in the distance, hardly noticed by anyone in the courtroom.

Before I texted him a third time, I made sure all windows were open and asked everyone in attendance for a moment of silence. Finally, we could all hear our Historic Bell as I started the memorial service. I did not anticipate the Friday night sounds of the busy freeway and Old Town Auburn, which drowned out the bell that had once been able to rouse a community to attention. Nonetheless, it served as a meaningful way to begin, and I explained the historical significance of what everyone in attendance had just heard—describing it as our "sound of justice." Our Historic Bell is now able to be rung again for suitable occasions in the future. For me that "sound of justice" will symbolize more than just the start of court or the taking of a verdict. It will remind me of that occasion in the late fall of 2021, amidst the COVID pandemic, in which defense attorneys and prosecutors gathered in unity in honor of an admired and beloved colleague of our legal community.

Historic Hauntings

Often, I might stay late while working at the Historic Courthouse. Once sundown occurs, the lights left within the building seem to luminesce magically to create an atmosphere where the mind wanders. The lower level of the building functions as a museum; and after dark the historical artifacts housed within are easier to imagine as the reality of our past. The vestiges of the stories told by the walls of the courtrooms become more distinctly heard when there is no one in the building to offer a distraction. At times I might be busy during this quiet time, only to be interrupted by an unknown echo, footstep, or mysterious creak of the door. Invariably, it is only our evening janitor, who on a nightly basis empties the trash, shines the floors, and vacuums the carpets to preserve the interior as both functional and beautiful.

On one such evening close to Halloween, I encountered a man dressed in historic-looking garb on the first floor as I was leaving for the night. It was our Museum Administrator Ralph Gibson preparing to take a group on an evening tour of the Historic Courthouse. On the first floor of the Courthouse, the Placer Museum has restored for public viewing the original sheriff's office from the early twentieth century, as well as the old vault of the county treasurer's office, displaying 194.11 troy ounces of unrefined gold mined from Placer

County. Curiously, the treasurer's office and vault was located right across from the courthouse jail, which is now an exhibition surveying Placer's history from the early Native American life to the construction of Interstate 80. Placer County has invested in preserving its historical roots; and the first floor of the Historic Courthouse contains one of seven engaging museums in the county.[25]

After introducing myself to what appeared initially to be an apparition, Mr. Gibson informed me of the fall tours he gives annually to talk about historical hauntings. During his guided tour, he informs the patrons that the site upon which the courthouse was built was initially the first official "burying grounds" in Auburn. Although all the bodies were supposed to be removed prior to the opening of the second courthouse in the 1850s, some may still be present on these grounds. In 1888, one was discovered while workers were digging a trench for water lines; and in 1902, a skull was found with money dating sometime between 1700 and 1826.[26] Additionally, on this same site, several people were hanged for their crimes in the yard behind the jail before the Historic Courthouse was constructed.[27] Finally, the Historic Courthouse is home to tragedy of its own—several people had died on the first floor when it housed the county jail; and one little boy, the son of a jailer, fell from the top of the stairs near the dome.[28]

This history creates the aura and environment for stories of hauntings at the Historic Courthouse to materialize and circulate. The museum administrator shares with visitors tales of the sightings of that little boy by bailiffs; and of a custodian who would on occasion smell women's perfume on the third floor. The custodian once saw the source—a woman wearing a long, old fashioned

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[25] In addition to the Placer Museum at the Historic Courthouse, there is the Gold Rush Museum on Lincoln Way in Auburn; the Bernhard Museum Complex next to the Gold Country Fair Grounds in Auburn; the DeWitt History Museum on Richardson Drive in Auburn; The Griffith Quarry Museum in Penryn; the Forest Hill Divide Museum in Foresthill; and the Golden Drive Museum in Dutch Flat. The county also has an Archives and Collections Facility in Auburn, from which I have drawn upon heavily for this project.

[26] This skull was for a time on display at the museum. (Bryanna Ryan, Curator for the Placer County Archives.)

[27] Bill Summers, a longtime detective for the Placer County Sheriff's Department, compiled the following list of people hanged either in the jail or jail yard on the current Historic Courthouse grounds:

- *Stephen Bowden Richards*—hanged in 1884 for shooting Thomas Nichols. He was hanged in the jail and his body was displayed for 150 invited witnesses (*Placer Herald*, January 12, 1884, *Placer Argus*, January 17, 1884, *San Francisco Call* January 12, 1884).
- *Ah Sing*—for the murder of William McDaniel, hanged in the yard of the courthouse in 1867 (*Sacramento Union*, June 29, 1867).
- *Genaro Quintano*, for killing Joseph Reynolds, and *Joseph Maes* for killing Joseph Thomas; both were executed in a "double hanging" in 1860 witnessed by about thirty people in the jail yard (*Sacramento Union*, September 22, 1860, *Placer Herald*, September 22, 1860).

After the Historic Courthouse was constructed, those convicted and sentenced to death were hanged at Folsom Prison.

[28] The child's name was Leroy Coan, and he was only three years old. He fell to his death within the Courthouse in 1899. On the night of his tour on October 30, 2018, Mr. Gibson encountered a retired sheriff's deputy who had worked in the old jail behind the Historic Courthouse. As a rookie in 1971, older bailiffs would share stories with him about either seeing or hearing the boy's ghost on the premises.

black dress and a wide brimmed black hat with feathers who disappeared through a locked door. Museum staff have had their own strange occurrences, which include the smell of cigar smoke at times in the morning upon opening of the old sheriff's office; and a coincidental clap of the shades that happened once upon the mention out loud of Adolph Weber's name.

I cannot personally confirm experiencing any such strange occurrences within this building. However, in my decades of work within its walls, I have many personal stories in each of its departments. Some of those stories reflect triumph, some tribulation. Some of them are celebrations of life, such as weddings and adoptions. Other stories involve crimes showing depravity, death, and the destruction of the human spirit. In my own mind, I can envision the good and the bad still lingering within these halls—I see that beautiful bride walking down the second floor hall to the stairs where I officiated her wedding; and I also can't forget the scene of the defendant being sentenced for murder in the presence of the distraught victim's family. As for me, I need no ghosts to remind me that this place is both hallowed and haunted.

Equal Justice for All

When Judge Prewett delivered his beautiful words about the tower from the courthouse suffusing the land with "with the royal beams of equal and exact justice to all men," we assume he meant to include women. Regardless of his intent, there were certain glaring inequities in how men and women were treated at the Historic Courthouse. For example, from 1905 to 1940, women prisoners were housed in a small "cubbyhole" under the north steps of the Historic Courthouse, underneath where I sit on the bench now. There was room for only two cots, a wash basin, and an open toilet. According to a 1937 Placer County grand jury report, "the odor [is] quite distressing, and a menace to health. There are no windows. The only light [comes through a] heavy iron screen over a hole in the door. There is no fresh air, sunshine, or exercise for any of the prisoners."[29]

Every business day, the employees of the Placer Museum open this area for display to the public. Perhaps the most infamous resident of this paltry space was Alma Bell, who was tried in the murder of her alleged lover Joe Armes in 1909. The case was heard by a visiting judge, sitting for Judge Prewett in our Historic Courtroom, Department Four. The jury of twelve men were chosen at an expense to the county of over $2,000, which cost more than jury selection

[29] Placer County Museum, "Placer County Women's Jail" by Carmel Barry-Schweyer with Bob and Sharon Balmain and Mary Louise O'Neal. In 1941, a new jail that housed both men and women was constructed behind the Historic Courthouse in what is now the back parking lot.

for the expensive Weber trial heard just a few years earlier. The reason for this, according to the news reports, is that many of the prospective jurors already had an opinion about the case and were sympathetic to Ms. Bell. At the close of the trial, the all-male jury found Alma Bell not guilty by reason of insanity, and she was released from the courthouse jail under the stairs.

For decades later, the courthouse continued to treat women unequally in both incarceration and jury service. Even though the right of women to serve as jurors was secured in California in 1917,[30] women still could not serve as jurors at the Historic Courthouse. The Honorable Justice Keith Sparks[31] described this inequity during his remarks honoring the naming of the Sparks Library, which is located across the street from our Historic Courthouse. Justice Sparks recounted a story from his childhood about his father Lowell Sparks, before his father became a Placer County Superior Court Judge:

> While my father was District Attorney, a man was murdered in old town Auburn, not more than a stone's throw from where we are standing now. In those days, once the case had been submitted to the jury for decision, the jurors could not be separated or sent home. And of course the county could not afford to house 12 jurors in the only hotel in Auburn. So, if the jury had not reached its verdict by nightfall, the bailiff trudged up to the attic and brought down 12 cots in the courtroom and resume deliberations as soon as they awoke. Needless to say, there were virtually never any two-night juries in Placer County.
>
> The man my father prosecuted was convicted of murder and sentenced to death. On his appeal to the California Supreme Court, his counsel made only one contention: his client had been denied due process and equal protection because not only were there no women on his jury, there were no women on the entire jury panel from which the jury had been selected.
>
> The high court patiently explained to counsel the conditions that prevailed in Placer County and then opined that it was inconceivable—absolutely inconceivable—that women should be forced to undergo the indignity of sleeping all night on cots with strange men. Under these

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[30] Women in the United States Juries—Wikipedia. Judge Prewett may have helped to draft this law. (Judicial Biographies by Courthouse Historian Lori Smith; *Placer Herald*, July 15, 1922.)

[31] The Honorable Keith F. Sparks served on the Placer County Superior Court from 1977 through 1981, and then on the Third District Court of Appeal until his retirement in 1997. He was one of three judges from Placer County Superior Court to be elevated to the Court of Appeal. The Honorable Richard Sims also served on the Placer Superior Court from 1980 through 1982, and then on the Third Appellate District with his colleague Justice Sparks until his retirement in 2010. The Honorable Justice William Newsom (father of Governor Gavin Newsom) served as a Placer County Superior Court Judge from 1975 through 1978 until he was elevated to the First Appellate District.

> circumstances there was no denial of due process or equal protection, the high court declared. Judgment of death affirmed.
>
> I'm happy to report about the great progress the court has made since those bye-gone days. Now women sit on juries as a matter of course and the Superior Court no longer owns even a single cot.[32]

Justice Sparks was referring to the homicide case against Everett Gilbert Parman, who was charged with the murder of George McElroy occurring on July 16, 1938. The defendant was represented by none other than L. De Witt Spark, who was District Attorney Lowell Sparks' reelection opponent. At trial, Mr. Spark argued that the law requiring jurors to be "made of men and women suitable and competent to serve as jurors" was mandatory and that the systematic denial of women deprived his client of due process. The defense lost at trial and ultimately on appeal. The California Supreme Court held that the exclusion of women due to the lack of accommodations at the courthouse did not violate the statute or his constitutional rights. The Court distinguished Parman's case from others in which members of a person's race were systematically excluded. They explained that Mr. Parman's right was for a fair and impartial jury, not to a jury comprised of any particular individuals.[33]

That was one instance where the defense attorney De Witt Spark should have prevailed against his nemesis, then–District Attorney Lowell Sparks. Today, Mr. Parman would have won that argument and been entitled to a new trial. The United States Supreme Court has since made it clear that systematic exclusion of women in both state and federal juries is unconstitutional.[34] We no longer sequester jurors at the courthouse until they arrive at a verdict, creating the perceived problem of men and women jurors having to sleep together in the same area. And, of course, the current jails in both Auburn and Roseville house both male and female inmates, with no difference in treatment. After all, "equal and exact justice" extends to all people regardless of gender.

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[32] Remarks at the Placer County Law Library Renaming on July 2, 2008, by Justice Sparks (pages 5–7).

[33] *People v. Parman* (1939) 14 Cal. 2d 17.

[34] *See Ballard v. United States* (1946) 329 U.S. 187 (holding women cannot be excluded from federal juries in a state (in this case California) where women may serve under state law); and *Taylor v. Louisiana* (1975) 419 U.S. 522 (holding systematic exclusion of women under state law violated the cross-section requirement of the Sixth Amendment). California law now bans such discrimination under Code of Civil Procedure section 204.

Our Lady Justice (Photo by Garen Horst)

Our Lady Justices

Standing dignified over our Historic Courthouse on three separate entrances is Lady Justice, a symbol of fairness and equality taken from the Greek and Roman times. In 1895, before the original dedication of this courthouse, some reportedly "irreverent" workmen constructing the courthouse gave each statue a separate name: *Mary Jane, Mary Ann, and Ann Eliza*. As reported when they were first installed: "Justice now stands fully equipped in the form of three graceful goddesses, having discarded the old time hoodwinks, are looking everybody in the face, and so frozen in meal that they could not wink at our infirmities if they tried."[35]

If one walks around the courthouse and gazes at these statues, one might notice that all of them are missing certain items commonly associated with Lady Justice. All three of our Lady Justices do not have a blindfold, which became a common adornment for Lady Justice in the 1500s to 1600s. The blindfold was added to represent impartiality; the concept that justice is blind and to be dispensed without bias, prejudice, wealth, or status. The blindfold as a symbol has since become controversial. Some suggest that Lady Justice, like our own, should be clear-eyed in order to expose and root out bias and imperfections in our justice system.[36]

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[35] *Placer Argus*, August 23, 1895.

[36] Judith Resnik and Dennis Curtis, *Representing Justice* (Yale University Press, 2011), 14, 103–05. Perhaps the best critique of the blindfolded justice comes from poet Langston Hughes, who stated that the "Justice's blindfold hid 'festering sores / that once were eyes,' because legal systems failed to confront the injustices of social and political inequalities." *Id.* at 14.

All three have their left arms bent upwards as if holding something. They are all supposed to be holding the scales of justice; and those scales represent the process of weighing both sides before making a decision based upon the evidence. Reporter Gus Thomson of the Auburn Journal once wrote about the missing scales as one of the many mysteries of our colorful courthouse.[37] One can actually see evidence of the scales in an old photograph taken before the courthouse was dedicated in 1898. Who knows what happened to them by the time the courthouse was opened—they could have fallen by windstorm, been taken by theft, or simply lost. When I share this story with jurors serving at our Historic Courthouse, I often joke with them to be on the lookout for our missing scales as they walk through our downtown antique shops.[38]

One of our Lady Justices is missing her sword, which represents punishment. If you look at the two of our statues that have a sword, you will observe that she is holding the sword at rest, in a downward position. I often tell jurors that the direction of the sword symbolizes that power is to be used judiciously, and that punishment only occurs after the weighing of the evidence with due process. As referenced in the book "The Price of Perfect Justice," by Macklin Fleming, a Goddess of Justice with a sword without scales represents brute force; and one with scales without a sword represents the impotence of law: "The sword and the scales belong together, and the law is in phase only when the power with which the Goddess wields the sword is equaled by the skill with which she balances the scales."[39] Although our Lady Justices may not be perfect, I tell our jurors that we do our best to represent her principles here in our courthouse.

In 2021, after over 120 years of having only "three" Lady Justices adorn our court, we added a fourth. In my exploration of the history of our great courthouse, I often wondered what happened to our native population who preceded the settlers in the Gold Rush Era. What was their interaction with the legal system and how were they treated? They had a social structure, a rule of law or code to live by, and some way to adjudicate disputes. How did they view justice and what did that concept mean to them?

In an effort to educate myself about the local history involving our Native Americans, I began reading books, articles, and cases on the subject. I had a rude awakening to a different perspective on American history after reading *An Indigenous People's History of the United States*.[40] I learned about the influence that

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[37] Gus Thomson, "Placer Courthouse Lady Justice Statues in Auburn are Missing Scales," *Auburn Journal*, February 21, 2016.

[38] They may not have to look much longer. In 2025, Placer County Facilities began work to create new scales.

[39] Macklin Fleming, *The Price of Perfect Justice* (Basic Books, 1974), vii.

[40] Roxanne Dunbar-Ortiz, *An Indigenous People's History of the United States* (Beacon Press, 2015).

the Iroquois tribe of the Northeast had on Benjamin Franklin and Thomas Jefferson and their views of federalism in the formation of our United States Constitution.[41] In the summer of 2019, I assigned to a bright young student from Granite Bay High school during his summer internship an assignment to research local Native American concepts of justice.[42] He wrote about the Maidu people who existed in Northern California for 2,000 years, and the devastation that befell them as California became a state and Placer County was being formed. I learned about the racist laws that were on the books during the Gold Rush area, including this one: "No Black, or Mulatto person, or Indian, shall be allowed to give evidence in favor of, or against a white man."[43]

In the spring of 2020, I had the good fortune of having lunch with a nationally renowned artist, Derek Smalling, who had created artwork of a lady justice from a Native American perspective for a federal task force. A local attorney friend of mine had commissioned him to paint a lady justice for her from the Native American perspective to hang in her law office. I envisioned his version of lady justice, and all that it represented, to be painted on the backdrop of an important legal document. After much discussion and searching, I decided upon something specific to California, the Gold Rush era, and the treatment of our indigenous population: the Governor's Executive Order N-15-19. This Order, signed on June 18, 2019, by Governor Gavin Newsom, formally and for the first time issued an apology by the state of California for the genocide of the native tribes in California during that Gold Rush era.

The painting arrived at my doorstep in December of 2020, rolled up on canvas with the dimensions of 4' by 6'. Though beautiful, it was too big to be framed and displayed in my house, plus it needed a more fitting and prominent location due to its meaning and significance. I contacted both our Placer County Museum and the Truth and Healing Commission that was established by the Executive Order, and our museum staff immediately seized upon the idea to display the piece in the courthouse. After I had the piece professionally framed, I sent the following words to Supervising Curator Bryanna Ryan in preparation of the display:

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[41] Bruce E. Johansen, *Forgotten Founders, How the American Indian Helped Shape Democracy* (Harvard Common Press, 1982).

[42] A special thanks to Nathan Wong, a soon to be lawyer and aspiring judge.

[43] Section 394 of the Civil Practice Act of 1850. In 1854, the California Supreme Court interpreted this law to apply to Chinese immigrants and reversed a conviction for murder where Chinese witnesses were called to testify against the white defendant. (*People v. Hall* (1854) 4 Cal. 399.) In 1863, the law was amended to read: "No Indian or person having one half or more Indian blood, or Mongolian or Chinese, shall be permitted to give evidence in favor of, or against, any white man." Even after the Fourteenth Amendment was ratified in 1868, our California Supreme Court upheld the 1863 law, finding that the equal protection clause did not prohibit the state legislature from determining the competency of witnesses. (*People v. Brady* (1870) 40 Cal. 198.)

> This artwork was commissioned in 2020 by Placer County Superior Court Judge Garen Horst as a way to celebrate the resilience and culture of our indigenous tribes; and to enhance our understanding of what it means to administer "Justice." Often Judge Horst relates to trial jurors the symbolism of the three lady justice statues presiding over the three entrances to the Historic Courthouse in Auburn. Those statues symbolize hallmarks of our American Justice system—equality under the law, due process, and accountability. This new lady justice, painted from a Native American point of view, provokes us to think about justice from another perspective, akin to the contemporary restorative and reparative justice movement.

The artist described his artwork as follows:

> The Operation Lady Justice Series is a reflection upon the ongoing Department of Interior Bureau of Indian Affairs multi-agency initiative. This operation is named for a painting of its name, focused on violence against women and more precisely Murdered and Missing Indigenous Women (MMIW). The Operation Lady Justice Taskforce has subsequently been renamed to the MMIW Task Force.
>
> It sits atop a copy of Governor Newsom's Executive Order N-15-19, an Apology to Native Americans for the State's Historical Wrongdoings, establishing a Truth and Healing Council. This historic document and the use of the artwork fits within a modern construct of Native American artwork termed Ledger Art. It is used to Affirm, Question, or Reject the primary document and/or what it represents within Indian Country.
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> The artwork itself shows the Lance as Pen, and Shield with the Interlocking Arms design. This Southeastern design is a conceptual motif of the ideal community: four directions, four people in concert grasping the wrist adjacent reflecting 50% of an individual's responsibility to the community and 50% to oneself. Thus, implying that both community and individual are the solution.
>
> The statement of this artwork being present within this Courthouse is a splendid example of our Republic addressing its brief history in so rapid a manner. No life is restored; yet we acknowledge in the heart of our Republic—the Courthouse—the harsh recent past and its contemporary effects. It demonstrates a commitment to do better and never to forget.[44]

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[44] I am grateful to Derek Smalling for his fine art and eloquent words, and to our museum curator Bryanna Ryan for encouraging this work to be seen.

In September of 2024, I was able to see my intention for the piece begin to take shape. I often present for our local Placer County Bar Association's annual conference on different legal topics, and for that fall I co-presented with the Honorable Jack Duran, a tribal judge in various jurisdictions and the Chief Justice of the Oglala Sioux Tribe Supreme Court in South Dakota. The presentation was entitled "Federal Indian Law and Policy and Its Effect on California Law." It was the first of its kind for our county and embraced by the local bar. I asked Justice Duran to discuss his work as a tribal judge, and we highlighted the similarities he and I both share as judicial officers in the pursuit of justice. That following weekend, in a serendipitous occurrence, the California Judges Association voted to include tribal court judges as members of the organization, recognizing our common issues, litigants, and ethics.

The Pursuit of Justice

As I continue my "Reflections on Justice from the Historic Courthouse," I recall again Judge Prewett's eloquent words dedicating our Temple of Justice, calling our Historic Courthouse a magnificent structure to Justice, Honor, and Truth, suffusing the land with royal beams of equal and exact justice. But what is "justice?" It is an amorphous concept that almost defies an exact definition. While true "justice" is much broader than what can be accomplished within the confines of the law,[45] its pursuit is our overriding purpose. As stated by the Founding Fathers of our country: "Justice is the end of government. It is the end of civil society. It ever has been and ever will be pursued until it be obtained, or until liberty be lost in the pursuit."[46]

As members of the legal profession, it is our duty to preserve, promote, and administer justice.[47] Both attorneys and judges take oaths to support the Constitution of the United States and California.[48] The central principle in being a judge and administering justice that guides the canons of judicial ethics is to ensure honesty and integrity in the process of judicial decision-making and the decisions of judges.[49] The roots of this principle can be traced back

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[45] Some of my favorite quotes illustrating this include "Justice, you get justice in the next world. In this world you have the law" (William Gaddis, writer); "Justice is incidental to law and order" (J. Edgar Hoover); "The arc of the moral universe is long, but it bends toward justice" (Dr. Martin Luther King).

[46] Federalist No. 51.

[47] *See* Business and Professions Code section 6068. The mission of the California State Bar in part is to "preserve and improve our justice system in order to assure a free and just society under law," and the mission of the American Bar Association is to "be the national representative of the legal profession, serving the public and profession by promoting justice, professional excellence and respect for the law."

[48] Business and Profession Code section 6067; California Constitution, Article 20, Section 3, par. 1.

[49] Rothman, Fybel, MacLaren, and Jacobson, "California Judicial Handbook," 4th ed., 2017, section 1.1, pp. 4–5.

to Biblical times, from the Book of Deuteronomy during its discussion of the appointment of magistrates:

> They shall govern the people with due justice. You shall not judge unfairly: you shall show no partiality: you shall not take bribes, for bribes blind the eyes of the discerning and upset the plea of the just. Justice, justice shall you pursue . . .[50]

We in the legal system are guardians of the rule of law, and the above reference repeating justice twice helps remind us that there are two main components of justice to be pursued.[51] The first is the impartial application and enforcement of the law. The second component is rooted in the process by which we arrive at the result. People are entitled to due process under the law; all litigants should expect a forum where they are heard and treated with respect and dignity. We can only have "justice" under the law if both components are pursued.

Sometimes a "just" result under the law does not seem right or even fair. Justice under the law requires us to abide by our oaths both as advocates and judges and follow the law, even if we may not like the outcome. We judges are trained to follow ethical canons that require us to foster respect for the rule of law by applying it with impartiality. We must make our decisions without bias, and based on the facts and the law, not a preordained outcome. We must have the courage to rule regardless of personal consequences or potential backlash. Such courage at times is not easy, but necessary.

Justice in result must be tempered with justice in process. When I was running for judge in 2012, this second component of justice appeared to be the most common area of concern among people I talked to on the campaign trail. People cared less how I would decide a particular issue or case, or how much law I knew. They cared how I would treat people. This lesson has stuck with me. I want all people in my courtroom, from defendants to victims, the attorneys and the parties, to feel they have been heard and shown respect. I may not rule in their favor, but I want my reasons to be transparent and understandable. Administering justice with this in mind not only is required under the Canons of Judicial Ethics,[52] but necessary to foster respect for the rule of law in our community.

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[50] Deuteronomy 16:18-20 (taken from *The Torah, A Modern Commentary* (Union of American Hebrew Congregations, 1981), using the Jewish Publication Society's English translation. *See also* California Judicial Handbook, section 1.1, p. 5, quoting same verses with a different translation.

[51] I credit constitutional scholar Erwin Chemerinsky, Dean at the UC Berkeley School of Law for introducing me to this concept.

[52] Canons 2B(3), (4), (5), and (7); California Judicial Handbook, 4th ed., 2017, section 2:40.

Our process must also be fair to all. Those words engraved above our United States Supreme Court, "Equal Justice Under Law," means that everyone, regardless of wealth, status, gender, race (or other protected category), should have both equal access to justice and be held equally accountable. That doesn't mean that we cannot exercise mercy when appropriate, and compassion in our application. I am inspired by the work of attorney and author Bryan Stevenson, who stated, "the true measure of our commitment to justice, the character of our society, our commitment to the rule of law, fairness and equality cannot be measured by how we treat the rich, the powerful, the privileged, and the respected among us. The true measure of our character is how we treat the poor, the disfavored, the accused, the incarcerated, and the condemned."[53]

Since 2018, I have been the judge of Placer County's Mental Health Court, which occurs one day a week at the Gibson Courthouse in Roseville. Over the last several years we have experienced in California a sea change in how we handle those with mental health challenges when they intersect with the criminal justice system, with a focus on treatment rather than incarceration or conviction.[54] Our mission in this court is "To promote treatment to ensure public safety, increase accountability and education, and lower recidivism of the mentally ill or disabled, and to work toward decreasing the stigma against those who are diagnosed or seeking mental health treatment by increasing acceptance and integration into our community for better long-term outcomes."[55] My own conceptions of justice have expanded as I have witnessed lives changed for the better as I graduate participants from our program and dismiss their case.[56] Although we have had failures, I have seen access to justice enhanced for so many suffering from mental illness, and accountability achieved in a way that protects public safety and is measured through treatment rather than incarceration.

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[53] Bryan Stevenson, *Just Mercy* (Spiegel & Grau, 2014), 18.

[54] For example, in 2018, the Legislature enacted section 1001.36 to create a program of pretrial diversion for criminal defendants with diagnosed mental health disorders. (Stats. 2018, ch. 34 (Assem. Bill No 1810); Stats 2018, ch. 1005 (Sen. Bill No. 215).)

[55] *See* Placer County Criminal Division.

[56] Our graduates receive certificates and a challenge coin to inspire a continued journey of health and well-being. The coin has our logo of a California Black Oak Tree, symbolizing fortitude and resilience, along with the words *Community, Accountability, and Wellness*. On the back of the coin, we have the words *Continued success is day by day knowing you are not alone*.

Placer County Mental Health Court Logo, created by Donovon Horst, used with permission

Finally, as members of the legal profession and as our chief purpose, we are required to "pursue" justice. Our pursuit is a call to action rather than words. Every day, in our interactions with our clients, our adversaries, or in our presiding over each case, we have this opportunity and obligation. Despite the volume of cases before us, the case we are handling at any given moment is the most important thing at that time for that person. Our diligent handling and demonstration of compassion shapes their perception of justice and our justice system moving forward. Our overriding goal is not simply to resolve disputes or create winners and losers—"Our courts are not gambling halls but forums for the discovery of truth."[57] I have this quote posted on the bench in Department Four.

Our pursuit of justice is not perfect. We can correctly apply the law, give people due process, and yet the law itself may be unjust in the larger conception of justice. At times our goals of *justice, honor and truth* within our courtrooms do not meet our expectations despite our intentions. To truly pursue justice, we must do so with an understanding that we may be wrong. Attorneys, jurors, judges, and justices will make mistakes.[58] True justice in our legal process requires humility and the ability to learn and evolve as our concepts of justice expand.

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[57] *People v. St. Martin* (1970) 1 Cal. 3d 524, 533.

[58] I am inspired by my former colleague Judge Mark Curry. Prior to becoming a judge, he worked as a prosecutor in Sacramento County for twenty-one years. As a homicide prosecutor, he convicted a man for special circumstance murder based in part on eyewitness testimony. While pending sentencing, he received credible information that he may have convicted the wrong person. He initiated an investigation and ultimately discovered the error and the actual perpetrators. He secured a dismissal for the convicted defendant and ultimately prosecuted and convicted the actual perpetrators. (*See* Playing by the Rules, Center for Public Integrity.)

Photo by Garen Horst

Long ago, as the Historic Courthouse was being constructed, Judge Prewett talked about laying a cornerstone to an enduring structure that he later described as our "Temple of Justice." We, as practitioners in our legal community, understand that our Temple of Justice figuratively is incomplete. The work we do, one client or litigant at a time, helps to build our justice system for the future. Our Historic Courthouse, with our Lady Justices looking forward into the distance during the light of day, serves for me as a strong symbol of our resolute pursuit of justice for today and tomorrow.

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MICHAEL J. RAPHAEL*

California's First Felony Murder Opinion

Following the murder of a farmer, a trio of hangings occurred in 1888 and 1889 in El Dorado County, where the Gold Rush began forty years earlier. After he executed the killer, Sheriff James Madison Anderson faced a duty to hang the two accomplices. Throughout their trial, the duo had claimed they were uninvolved in the murder, and Anderson, who interacted with the inmates as they awaited their fate, had to publicly extinguish their lives even after he signed a futile petition seeking clemency.

Pasadena lawyer M. G. Rawls, Sheriff Anderson's great-great-granddaughter, pursued the forgotten story of this case and has this fall published Hanging Justice: The Compelling True Tale of the Last Hangings in El Dorado County, California, in 1888 and 1889. *The case spawned a California Supreme Court opinion, and Ms. Rawls asked me to write an afterword for her book to discuss it. As it happens, the opinion presents the first time our state's Supreme Court addressed the felony murder rule as the term is commonly used: persons guilty of murder not because they personally killed or intended the killing, but because they joined the killer in another felony.*

Following is the afterword, lightly edited to adapt it for this publication. Hanging Justice *is available on the internet, and Ms. Rawls can be reached at mgrawls@hangingjustice.com.*

M. G. Rawls's intriguing tale of the trio hanged in El Dorado County for the 1888 murder of John Lowell involves a California Supreme Court opinion that offers a fascinating window into the history of our state's murder law.

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With the killer John Meyers publicly executed only six months after Lowell's body was found in June 1888—stunning rapidity by today's standards—Meyers's cohorts, John Olsen and William Drager, next faced the gallows. They sought aid from our state's Supreme Court. (The intermediate-level Court of Appeal would not be created until 1904.) The Court, also acting quickly, answered Olsen and Drager on August 3, 1889. It was not the help the condemned men were looking for.

From a twenty-first-century view, two aspects of the Court's opinion in *People v. Olsen*[1] are jaw-dropping. The case also is a milestone in the development of criminal law.

First, the Court affirmed the convictions and death sentence without seeing any trial evidence. Today, in reviewing death cases, our Supreme Court typically issues opinions exceeding one hundred pages, carefully examining the evidence. But responding to Olsen and Drager's claim about problematic evidence, the Court wrote, "It may be that the evidence was not only harmful to them but that it was beneficial. We may fairly assume this to be so as against an appellant who does not bring up the evidence for our inspection."[2] As to a jury instruction issue, the Court observed, "What the evidence was, or what it proved or tended to prove, we do not know. . ."[3]

Second, and even more astonishing, the court approved of a felony-murder jury instruction where larceny was the felony. The felony murder theory, which would blossom in twentieth-century California, allows for a murder conviction of accomplices in certain felonies where a victim died, even if the accomplice did not intend to kill or directly participate in the killing. In the doctrine's most robust form, for instance, when a teller is killed in a bank robbery, all the robbers (gunman to getaway driver) are guilty of murder.

Olsen and Drager's jury was instructed that if persons "conspire together to commit a felony" in which a victim dies, the law "superadds intent to kill," such as with the "conspiracy to commit the crime of grand larceny" charged in the case.[4] The Supreme Court approved, stating with sweeping breadth, "Whenever one, in doing an act with the design of committing a felony, takes the life of another, even accidentally, this is murder."[5] The words used in the instruction, and by the Supreme Court, were "a felony"—apparently any felony.

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1 80 Cal. 122 (1889).

2 *Id.* at 124.

3 *Id.*

4 *Id.*

5 *Id.* at 127.

Throughout California's history, the statute from which courts have derived the felony murder theory has contained only a short list of felonies that can support a first-degree murder conviction. At the time of *Olsen*, Penal Code section 189 listed five felonies: "All murder . . . which is committed in the perpetration or attempt to perpetrate arson, rape, robbery, burglary, or mayhem, is murder of the first degree; and all other kinds of murders are of the second degree."

Larceny is not on that list. Robbery is the taking of a person's property while they are present, through force or fear, but larceny is theft with no requirement of the victim's presence or of force or fear.[6] Larceny should not be a predicate crime for first-degree felony murder. I believe that no California case thereafter provides support for such a conviction.

In the twentieth century, some unlisted felonies that were "inherently dangerous" were held to form the basis for second-degree felony murder convictions.[7] Theft offenses such as larceny were never on *that* list, however, as they are not inherently dangerous.[8] And in any event, second-degree murder is not a death-eligible offense. Not only was the murder conviction based on a larceny predicate, but *Hanging Justice* suggests that the theft of Lowell's horses and mule probably was not, in fact, a robbery. Indeed, there was reason to conclude that (as Olsen and Drager's attorneys argued to the jury) the trio did not decide to take the livestock until Lowell was dead.

Finally, *Olsen* is a California felony murder landmark. It is the first reported California case where accomplices to the killer were convicted of murder on a felony murder theory.[9] That is, Olsen and Drager are our first record (at least in the case law) of murder convicts who did not themselves kill or aid the murderer in the killing but instead participated in a different felony with the killer.

Our Penal Code, in fact, did not state that accomplices could be found guilty in this manner. Penal Code section 189, quoted above, is most naturally read as a grading statute; that is, declaring that if a person commits a murder during one of the listed felonies, then it is a first-degree murder. Our Supreme Court read it that way in 1874, stating that the statute "only prescribes a severer punishment where the murder is committed in the attempt to perpetrate arson, rape, robbery or burglary (on account of the enormity of these offenses), than

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[6] Compare Penal Code § 211 & § 484.

[7] *See, e.g.*, *People v. Mattison*, 4 Cal.3d 177 (1971) (poisoning); *People v. Nichols*, 3 Cal.3d 150 (1970) (arson of a motor vehicle).

[8] *People v. Phillips*, 64 Cal.2d 574, 683 (1966) (grand theft not a second-degree felony murder predicate).

[9] This claim is based on my examination of all the California cases cited in Guyora Binder, *The Origins of American Felony Murder Rules*, 57 Stan. L. Rev. 59 (2004) (*Origins*). There are seven such pre-*Olsen* cases, all cited in the next several footnotes.

where it is committed in carrying out any other felonious design."[10] Nothing in the text of the statute makes a non-killer responsible for the murder by participating in the felony.

Before *Olsen*, indeed, every reported California case that implicated the felony murder statute involved the actual killer. In those cases, the statute meant that a murder committed during one of the enumerated felonies carried the "conclusive evidence of premeditation" needed for first-degree murder[11] such that the prosecution did not need to prove "that a homicide was intended."[12]

In one El Dorado County case, a deputy sheriff in pursuit of a group of fourteen robbers was shot and killed, yet it appears that only the shooter was charged and convicted of murder.[13] There, though, the Supreme Court stated broadly that "it is murder in all who are present aiding and abetting in the common design,"[14] and in another case, approved of a jury instruction that said the same, though again where only the shooter was charged.[15] These statements were dicta, declarations from the court but not strictly necessary to decide the case.

Sweeping in accomplices under the felony murder rule was, however, necessary to convict Olsen and Drager of murder. This is a significant development. The scholar Guyora Binder has explained that it is a "myth" that England had a common law felony murder rule that America adopted because "English courts first applied the felony murder rule in the second half of the nineteenth century."[16] In America, "felony murder liability was a late nineteenth-century phenomenon,"[17] and "there was no general common law rule."[18] Binder attributes to our state the development of a particular statutory approach to felony murder, which he labels the "California model: Implied malice with enumerated felonies," adopted by several Western states.[19] California was one of only eleven states that addressed accomplice liability

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10 *People v. Doyell*, 48 Cal. 85, 94–85 (1874).

11 *People v. Sanchez*, 24 Cal. 17, 29 (1864); *People v. Nichol*, 34 Cal. 211, 213–14 (1867).

12 *People v. Bealoba*, 17 Cal. 389, 398 (1861); *see also People v. Foren*, 25 Cal. 361 (1864).

13 *People v. Pool*, 27 Cal. 572 (1867). The killing of the deputy occurred after the robbery of two coaches of the Pioneer Stage Line on June 30, 1864, by a gang led by bushwhacker Rufus Henry Ingram, who presented the stagecoach owner with a receipt indicating the funds were to be used for the Confederate army. The event was infamously known as the Bullion Bend Robbery.

14 *Id.* at 581.

15 *People v. Vasquez*, 49 Cal. 560, 563 (1875).

16 *Origins*, 57 Stan. L. Rev. at 102. *See also People v. Aaron*, 299 N.W.2d 304, 312 (Mich. 1980) ("the doctrine is of doubtful origin. Derived from the misinterpretation of case law, it went unchallenged because of circumstances which no longer exist.").

17 *Id.* at 133.

18 *Id.* at 141.

19 *Id.* at 164, 167.

for felony murder in the nineteenth century,[20] with *Olsen* the sole nineteenth-century American case in which the convicted felons did not personally participate in fatal violence but only in a felony that "may necessitate violence, depending on the circumstances."[21]

The felony murder rule that *Olsen* helped place in California law took firm hold in the twentieth century, such that it became standard to state that "accomplice liability attaches . . . for any killing committed while the accomplice and killer are 'jointly engaged' in the robbery."[22] Though applying the rule, our Supreme Court would at times condemn it, arguing that "the felony-murder doctrine expresses a highly artificial concept" that "has been subjected to severe and sweeping criticism."[23] It stated that the rule "erodes the relation between criminal liability and moral culpability."[24]

That sensibility was in the El Dorado County air as Olsen and Drager approached their ends, as the district attorney and 427 other men in 1888 and 1889 signed petitions seeking the commutation of their sentences. Nevertheless, Governor Robert W. Waterman's contrary view—that the two men were "equally guilty" with the killer Meyers—removed the last legal barrier in the way of their drop from the Placerville gallows on October 16, 1889.

In 2018, the Legislature finally rejected that "equally guilty" view. It tempered the felony murder law such that those guilty of murder when a victim dies during one of the felonies listed in Penal Code 189 are only (1) the actual killer, (2) a person who aids the killer with intent to kill, and (3) a major participant in the felony who acted with reckless indifference to human life. It even made that change retroactive—although only to those convicts still alive and in custody. With such limitations, the California felony murder doctrine, nascent in *Olsen*, entered its twilight.

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20 *Id*. at 197–98.

21 *Id*. at 200. Nine nineteenth-century American cases involved coparticipants in the violence who were not the killers. Seven cases involved coparticipants who did not participate in the violence but in a felony that "necessarily" involved violence or risk.

22 *People v. Pulido*, 15 Cal.4th 713, 722 (1997).

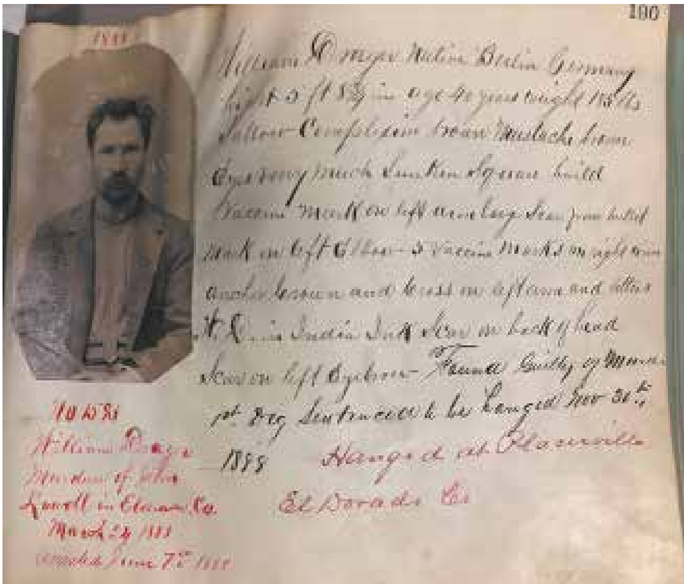
23 *People v. Phillips*, 64 Cal.2d 574, 582–83 (1966).

24 *People v. Washington*, 62 Cal.2d 777, 783 (1965).

Mug Shots and Booking Sheets

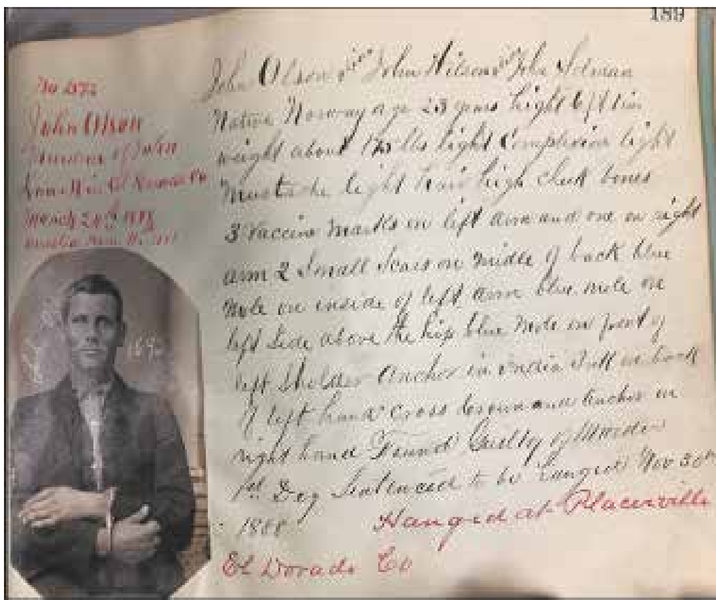
The actual mug shots and booking sheets for Willam Drager and John Olsen are reproduced below. Note the austere, final red entries in the booking sheets, "Hanged at Placerville El Dorado Co." A photo of Sheriff James Madison Anderson is also reproduced below.

William Drager (close up), Sacramento Police Department Mugbook, 1885–1889, Booking #1593, p. 190. (Photo by M. G. Rawls. Permission to photograph and publish here, Center for Sacramento History.)



William Drager, Sacramento Police Department Mugbook, 1885–1889, Booking #1593, p. 190. (Photo by M. G. Rawls. Permission to photograph and publish here, Center for Sacramento History.)

John Olsen (close up), Sacramento Police Department Mugbook, 1885–1889, Booking #1592, p. 189. (Photo by M. G. Rawls. Permission to photograph and publish here, Center for Sacramento History.)



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John Olsen

John Olsen alias John Nilson alias John Selman
Native Norway age 23 years height 6 ft 1 in
weight about 175 lbs light Complexion light
Mustache light hair high cheek bones
3 Vaccine marks on left arm and one on right
arm 2 small scars on middle of back blue
mole on inside of left arm blue mole on
left side above the hip blue mole in front of
left shoulder Anchor in India Ink on back
of left hand Cross [illegible] anchor on
right hand Found Guilty of Murder
1st Deg Sentenced to be hanged Nov 30th
1888 Hanged at Placerville
El Dorado Co

John Olsen, Sacramento Police Department Mugbook, 1885–1889, Booking #1592, p. 189. (Photo by M. G. Rawls. Permission to photograph and publish here, Center for Sacramento History.)

Sheriff James Madison Anderson, date unknown. (Photo by M. G. Rawls. Permission to photograph and publish here, Collection of David and Patricia Gregg.)

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