

*At the Intersection of Law and Scholarship:*

RECENT APPROACHES TO CALIFORNIA LEGAL HISTORY

One of the rewards of studying California legal history is that the field may be entered from nearly any perspective and pursued in nearly any area of interest. This is so because California legal history is not merely a microcosm of American legal history. It is a special case. California's eventful legal history and its position as a legal innovator have allowed it to be among the few states whose legal history is recognized as a field of study. Unlike the study of American legal history in general, it is exceptional because it has not as yet crystallized into a self-contained academic field.

This circumstance gives rise to both its weaknesses and its strengths. Among the obvious weaknesses are that few university courses are devoted specifically to California legal history, and it is not recognized as a field of publishing apart from the Society's own journal, *California Legal History*. It would be difficult to name a scholar whose career has been devoted entirely to its study. And yet this circumstance also leads to one of the field's less-obvious strengths, its unique diversity of perspectives and subject matter.

The most recent books in California legal history represent, therefore, the seemingly random inquiries of a variety of scholars whose primary "conversations" are with scholars in other disciplines. The books to be mentioned here all stem from recognized traditions of historical scholarship that are independent of California. They also focus on topics that have arisen in many locations. It is the good fortune of readers interested in the legal history of California that such scholars' academic traditions and areas of interest occasionally intersect to illuminate an aspect of California legal history.

It is expected that each of the books mentioned here will be the subject of an individual review by a leading legal historian in the forthcoming 2010 volume of *California Legal History*. The present article provides an opportunity to place these books in their wider context.

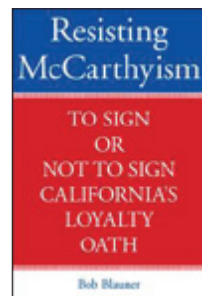
If the most recently published books suggest a trend, it is that current research has turned largely to controversies of the present or recent past. Most of these books concentrate on the events of modern times, commencing with the Great Depression or World War II. Whether this is a momentary coincidence or a shift from the formerly prevailing mix of 19th and 20th century studies remains a question to be answered. It is possible that a survey of the latest periodical literature would reveal a still more recent shift, but it is customary for reviewers

to address only the final stage of a scholar's work, the published book

THE MOST RECENT OF THE BOOKS to be discussed here (published May 30, 2010) derives from the oldest tradition of legal history writing, that of the "Great Man" — or more accurately, the "Great Justice" — perspective that focuses on the judicial philosophy of a single justice. Rarely has a California justice been the subject of a monographic work in the tradition of those devoted to justices of the U.S. Supreme Court. (An exception is the 2003 book, *Activism in Pursuit of the Public Interest: The Jurisprudence of Justice Roger J. Traynor*, by Ben Field, and published by the Society.)

Now, a welcome California corollary to the Great Justice tradition, and also a local version of the Great Dissenter line of research, is found in *The Great Dissents of the "Lone Dissenter": Justice Jesse W. Carter's Tumultuous Twenty Years on the California Supreme Court*, edited by David B. Oppenheimer and Allan Brotsky. This collection of essays focuses the biographic approach to legal history on Carter's prescient dissents, many of which were upheld by the U.S. Supreme Court. During Carter's tenure on the California Supreme Court (1939-1959), his dissents shared the unifying theme of safeguarding individual rights, ranging from privacy to due process to non-discrimination.

CARTER WAS ALSO WELL KNOWN FOR HIS REFUSAL to sign the state anti-communist loyalty oath during the McCarthy era on the ground that the state Constitution allowed only a single oath to be required of state officials. (Carter's oral history, including his full statement on refusing to sign, appears in the 2009 volume of *California Legal History*.) A similar refusal by professors at the University of California, and their eventual vindication by the California Supreme Court, is the subject of Bob Blauner's new book, *Resisting McCarthyism: To Sign or Not to Sign California's Loyalty Oath* (2009). Here, the topic of individual rights is approached from the tradition of social history,



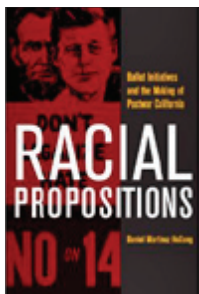
with a narrative style enlivened by interviews of participants and their families, and draws an otherwise broadly American, or specifically “Hollywood,” story into the field of California legal history.

Illustrating the process by which differing historical traditions may help to distinguish between superficially similar phenomena in California legal history are two new books, both devoted to the practice of direct democracy through the California initiative process. One examines the property tax limitation initiative, Proposition 13 of 1978, and the other examines the post-war ballot initiatives that have curtailed immigrant and minority group rights in recent decades.

IF APPROACHED FROM THE TRADITIONAL, social-history perspective, both topics might be discussed in terms of conflicting social classes or interests. A traditional approach to Proposition 13 would place it within the long context of American tax revolt and anti-government movements. *After the Tax Revolt: California's Proposition 13 Turns Thirty*, edited by Jack Citrin and Isaac William Martin (2009), instead takes a multidisciplinary approach. This collection of conference papers analyzes not the causes of the tax revolt, but rather its ongoing social, political, and economic consequences.



SIMILARLY, THE TRADITIONAL APPROACH to the history of race relations in California would present this topic as an ongoing conservative-liberal conflict between movements agitating for the status quo or equality. Another perspective is taken by Daniel Martinez HoSang in his forthcoming *Racial Propositions: Ballot Initiatives and the Making of Postwar California*, due to appear in October 2010. This work by a young scholar (it is the published version of his dissertation) proposes instead a reexamination of the meaning of race and racism, the creation of racial identity, and the effects of inequality and authority. Contrary to most works of legal history, his approach places the law and its evolution not at the focal point of the study, but as the background against which social and cultural attitudes are observed.

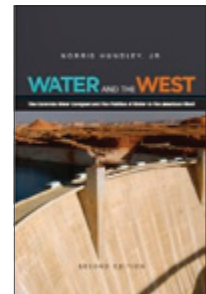


A BRANCH OF SOCIAL HISTORY that has evolved from tabloid coverage into a search for larger meaning in historical events is that of the

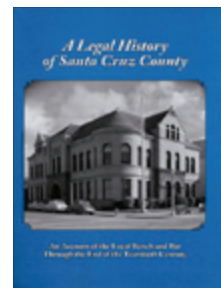


“True Crime” narrative. Its emergence into the field of California legal history is exemplified by *Women Who Kill Men: California Courts, Gender and the Press* (2009) by Gordon Morris Bakken and Brenda Farrington. In this work, the authors discuss eighteen sensational murder trials of women defendants as indications of the changing role of women. It enters into the field of legal history through its focus on the perceptions of that role held by the lawyers, judges, and juries, who are the protagonists in the legal process. (One such trial is the subject of *The Enigma Woman: The Death Sentence of Nellie May Madison* by Kathleen Cairns, reviewed in the 2008 volume of *California Legal History*.)

A SIGNIFICANT, BUT LESS FREQUENT, path by which a topic enters into the field is the instance in which the state itself becomes a protagonist in the story. A now-classic study of such an instance is Norris Hundley's *Water and the West: The Colorado River Compact and the Politics of Water in the American West*, first published in 1975 and available in an updated second edition (2009). Using the traditional tools of American political and economic history, the first edition analyzed the continuing attempts from 1922 to 1963 to settle, and then litigate, the conflicting water claims of seven states, Mexico, and the American Indians. Consistent with the trope that much current research focuses on recent legal history, the second edition presents a comprehensive epilogue that explores a broader range of actual and potential causes of discontent that continue to foster this conflict.



ANOTHER APPROACH TO THE WRITING of legal history, and one of the oldest, comes from the school of local or regional history that arose in the mid-19th century. As the writing of history has become increasingly professionalized (all of the books mentioned so far are the work of university professors) one of the few areas of research remaining for the dedicated lay historian is that of local history. An example in the field of law is the collaborative work, *A Legal History of Santa Cruz County: An Account of the Local Bench and Bar Through the End of the Twentieth Century* (2007), edited by Alyce E. Prudden. The virtue of such a work is that it brings together information on a region's legal personalities and significant trials, both for their own sake and as the building blocks by which their place in larger trends may be analyzed. This is the most recent California work in the respected



but lately less common genre of local legal histories, and it may serve to stimulate similar studies in other locations.

THE PROFESSIONALIZING OF CALIFORNIA LEGAL HISTORY is a modern development, but the field itself has a long tradition of noteworthy scholarship. Access to that scholarship has been facilitated by the recent phenomenon of reprinting earlier works, both by publishing houses and on-demand presses. Many reprints are poorly produced character scans that insert random errors into the text. Others are faithful visual reproductions of the original works. One such reproduction is the 1901 compendium, *History of the Bench and Bar in California: . . . The Judicial History of the State* (reprint, 2007), which was edited by Oscar T. Shuck, a lawyer, journalist, and veteran author of California legal histories. (Several of his earlier, shorter volumes of 1887 to 1889 are now available in on-demand formats and as e-books, but the 1901 volume is his definitive work.)

This volume of 1152 pages, with three dozen articles by the editor and other authors, is valuable not only for the information it conveys on specific topics, which is considerable, but also for the constancy it demonstrates in the areas of research that have animated the field from his time to the present. Readers of recent works, including the books noted above as well as the various



volumes of *California Legal History*, will find themselves among familiar and enduring topics.

The subject of civil rights appears in the article, “Citizenship of Chinamen” — water conflict appears in “Our First Water Rights Decision” — miners’ vigilante justice in “Lynch Law in California” — and local legal history in “The Early Bench and Bar of San Jose.” Articles on notable civil and criminal matters range from the seemingly quaint (“Historic Duels”) to those ever-present in the writing of California legal history (“The Death Penalty for Larceny” and “Treaty of Guadalupe Hidalgo and Private Land Claims”). A fifty-year review of “The State Supreme Court From its Organization” may be seen as an early precursor of the comprehensive history of the California Supreme Court currently in preparation for the Society by Harry S. Scheiber of UC Berkeley School of Law.

The diversity of perspectives and of research topics that has characterized the writing of California legal history is inherent in the field and has not diminished. This diversity has been augmented by the range of disciplines from which its researchers have come, and by the breadth of events that constitute California history.

As a companion to this survey of recent books, and as a reminder that the field is growing but not new, the following pages present two articles of historical interest from Shuck’s 1901 *History of the Bench and Bar in California*. As a reminder that reviews of such works are also not a new occurrence, a 1902 review of Shuck’s book appears in the box on this page. ☆

*The following review of Oscar T. Shuck’s HISTORY OF THE BENCH AND BAR OF CALIFORNIA (1901) is presented as it appeared in THE GREEN BAG, 14:2 (Boston, Feb. 1902), p. 97.*

A History of any State bench and bar is apt to be dull reading to the lawyer outside of that particular jurisdiction; but if that is the general rule, exception must be made in favor of the recently published *History of the Bench and Bar of California*. Without detracting from the cleverness of the contributors and the ability of the editor, it is fair to say that the elements which make the legal history of California interesting to the outside reader, are the romance and adventure which form so essential a part of all the early life of that State. What other State can furnish such exciting tales as some of those in the present volume — the history of lynch law, particularly that form of it practised by the Committee of Vigilance of San Francisco; an account of celebrated meetings on the field of honor, — for the duel seems to have been an important factor in the early annals of California law and politics; and the tragic tale of the Sharon cases?

But if articles such as these will find readers both in and out of the profession, there are other articles, of a more serious character, which are of professional interest in that they show the growth and development of California law. Some of these treat of special branches of the law, such as the law of Irrigation and of Mining, subjects which are of especial interest to the student of law, because they show well the strength and the weakness of our system of law in adapting itself to new facts; while others, of a historic nature, starting from the old Spanish and Mexican systems of jurisprudence, trace the progress of California law down through the military-civil government, the birth of the Commonwealth and the adoption of the Common Law to the present Code.

Roughly speaking, one third of this large volume is devoted to special articles on the above-mentioned and kindred subjects; the rest of the volume is given over to reminiscences and biographical sketches, of past and present members of the California Bench and Bar, where, sandwiched in between the more or less prosy dates and facts, are many good stories. ☆