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Special Racial Justice Issue

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EQUALITY AND
INCLUSION

Page 59



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Table of Contents

5

From the Section Chair

By Terrance J. Evans

10

Editor's Foreword

At a Crossroads for a Juster System

By Benjamin G. Shatz, Editor-in-Chief

12

Preventing Discrimination in Jury Selection

By William Schlaerth

15

Obtaining Information from Law Enforcement Personnel Files:

A Defense Attorney's Perspective

By Timothy E. Warriner

20

The Guy Miles Case – Race and a Wrongful Conviction

By Alissa Bjerkhoel

25

The Impact of Innocence: **A Lawyer's Perspective**

By Melissa O'Connell

29

Black Votes Matter

By Justice Eileen C. Moore

34

The Greatest of the Greatest Generation

By Justice Eileen C. Moore



Table of Contents continued

40

This Land. Your Land. My Land.

By Dawn Schock

43

Sweet Taste of Liberty: A True Story of Slavery and Restitution in America

By W. Caleb McDaniel

Reviewed by Marc Alexander

47

My Ancestors' Wildest Dreams

By Kirra Jones McDaniel

50

Words Matter. Perhaps Especially Ours as Lawyers.

By Rupa G. Singh

54

The California Supreme Court, 2019-2020:
Continuing Evolution of a Diverse Court

By Kirk Jenkins

59

The Supreme Court's Statement on Equality and Inclusion

FROM THE SECTION CHAIR

By Terrance Evans



Terrance Evans

It is an honor and a privilege to be the Chair of the Litigation Section of the California Lawyers Association during one of the most consequential moments in American history. There are three major challenges facing the legal community and, more broadly, our society. First, we are living through the COVID-19 pandemic, which is the worst global pandemic in the past 100 years. Second, we are facing the most devastating economic crisis to hit the United States since the Great Depression. Third, we are living in a critical moment in the struggle for racial justice, civil rights, diversity, and inclusion. The way that we respond to these challenges could result in life or death consequences that could last for generations.

The unlawful killings of George Floyd, Trayvon Martin, Tamir Rice, Eric Garner, Walter Scott, Terence Crutcher, Sandra Bland, Botham Jean, Breonna Taylor, Philando Castile, Ahmaud Arbery, and Elijah McClain have galvanized people throughout the United States and across the globe in support of the Black Lives Matter Movement. Notably, the video of George Floyd being suffocated under the knee of a police officer for 8 minutes and 46 seconds, while begging for his life, and frantically stating that he could not breathe at least 28 times

inspired calls for racial justice and protests throughout the United States and around the world. Yet, notwithstanding all of the public statements of condemnation, and the proliferation of #BlackLivesMatter hashtags and t-shirts, not much has changed. Numerous unarmed Black people have been executed by law enforcement since George Floyd's death, and, most recently, none of the police officers responsible for Breonna Taylor's death were charged with her murder following a historic \$12 million wrongful death settlement.

For many Black people, including myself, the fight for racial justice is personal. Notwithstanding my Ivy League pedigree or my success as a partner at one of the largest law firms in the United States, I have been subjected to racial profiling and overaggressive policing on several occasions.

During my first year of law school, I was in a coffee shop in Los Angeles, sitting at a table with my laptop and law school books, minding my own business while studying for a criminal law exam. While sitting there, I was approached by 4 police officers who told me that I fit the description of someone who had robbed a store. Before I knew it, I was surrounded by 12 police officers, and 4

of them had their guns drawn and pointed directly at my head.

I tried to explain to the officers that I was just a law student studying for a law school exam. I did not have a criminal record, and I had not robbed any store. Nevertheless, the police officers remained unconvinced. One of the police officers grabbed my computer bag and dumped the contents all over the floor of the coffee shop. Four of the police officers still had their guns pointed directly at my head with their fingers on the trigger. I was afraid to move. I was afraid to breathe. I knew that if I made any sudden movements I would be dead.

I asked the officers if I could show them my law school ID to prove to them that I was a law student because obviously my law school text books and laptop were not enough. My law school ID was in my wallet located in my right front pocket. I was afraid to reach for my wallet because I was concerned that the officers might shoot me thinking that I was reaching for a weapon. So, I calmly asked the officers to lower their guns—which were still aimed at my head—and please allow me take out my wallet from my right front pocket to show them my law school ID. To make a long story short, after being detained for what seemed like an eternity, the officers concluded that I was not their suspect, and they walked out of the coffee shop without apologizing. I narrowly escaped that encounter with the police with my life.

Even after becoming a partner at an AM LAW 100 law firm, I have been subjected to racial profiling on numerous occasions. I specifically recall arriving at the Sonoma County Superior Court to argue a dispositive motion in a multi-million dollar case. I was well dressed in a nice suit. As I made my way through security, one of the sheriff's deputies

asked me what I was doing there. I politely responded that “I am an attorney here to argue a motion.”

The sheriff's deputy said that he did not believe that I was an attorney, and he thought I was there to “cause trouble.” I was in shock. I explained to the sheriff's deputy that I had my state bar card, law firm business cards, and my identity could easily be verified by looking me up on Google or my law firm's website. Additionally, my name appeared on the pleadings of the dispositive motion that I was there to argue. Everything that I said fell on deaf ears. The sheriff's deputy detained me without probable cause for an extended period of time causing me to miss my oral argument. On the bright side, the judge adopted the tentative ruling in my client's favor in my absence. I later explained my unlawful detention to the judge who expressed outrage at the sheriff's deputy's actions.

In addition to the examples above, I have been stopped by the police numerous times simply because I am a Black man driving a nice car, and the police have had a difficult time believing that I am the legal owner. I have encountered numerous opposing counsel who had a difficult time accepting that I am the lead attorney on a particular matter (or an attorney at all). I have lost count of how many times I've been asked, “Are you a REAL lawyer?” “Did you go to law school?” “Did you pass the bar exam?” I doubt that my White colleagues face similar questions.

I have been refused service at restaurants and department stores because I am Black, and the store employees or owners do not believe that I can afford what they are selling. Being a successful attorney at a global law firm has not insulated me from racism or discrimination. Anti-Black racism is alive and well in 2020. Sadly, it does not matter

how well educated you are, how well dressed you are, how much money you make, how much success you achieve, you will still be racially profiled and discriminated against in the United States if you have Black skin like mine.

To better understand racism as it currently exists in California and across the United States in 2020, it is important to reflect on how we got here. California was founded on racism rooted in White supremacy. Between 1850 and 1947, California enacted numerous Jim Crow laws that were enforced until at least 1964, when the Civil Rights Act was passed, and in some instances, well into the 1970's. These racist California Jim Crow laws discriminated in the following ways:

1. Barred non-whites from testifying in any case where a white person was a party;
2. Barred non-whites from serving on a jury;
3. Barred non-whites from voting;
4. Barred non-whites from holding elective office;
5. Barred non-whites from serving as judges;
6. Barred non-white attorneys from questioning white witnesses;
7. Barred non-whites from public schools;
8. Barred non-whites from buying/renting property;
9. Barred non-whites from being buried in certain cemeteries;
10. Barred non-whites from restaurants, hotels, theaters, pools, and beaches;

11. Denied non-whites admission to bar associations;
12. Barred non-whites from public transportation;
13. Barred non-whites from hospitals;
14. Denied non-whites equal pay for equal work; and
15. Prohibited whites from marrying non-whites (Miscegenation)

In addition to the racist California Jim Crow laws listed above, here are examples of two California Supreme Court cases that reinforced the White supremacy upon which California was established.

***People v. Hall* (1854) 4 Cal. 39**

The case involved a White man who had been convicted of murdering a Chinese man in California in the presence of multiple Chinese witnesses. The issue was whether or not the Chinese witnesses were competent to give testimony against the White man based on the color of their skin.

At issue was Section 394 of the California Civil Practice Act, which provided: "No Indian or Negro shall be allowed to testify as a witness in any action in which a White person is a party."

The California Supreme Court concluded that in using the words, "No Black, or Mulatto person, or Indian shall be allowed to give evidence for or against a White person," the Legislature, if any intention can be ascribed to it, adopted the most comprehensive terms to embrace every known class or shade of color, as the apparent design was to protect the White person from the influence of all testimony other than that of persons of the same caste. The use of these terms must,

by every sound rule of construction, exclude every one who is not of white blood.

The California Supreme Court held that the words, Indian, Negro, Black and White, are generic terms, designating race. That, therefore, Chinese and all other people not white, are included in the prohibition from being witnesses against Whites.

***People v. Elyea* (1859) 14 Cal. 144**

This was a criminal case whereby a White criminal defendant was appealing a First Degree Murder conviction. The issue was whether a Turkish witness for the prosecution was competent to testify against the White criminal defendant under Section 394 of the California Civil Practice Act, which provided: “No Indian or Negro shall be allowed to testify as a witness in any action in which a White person is a party.”

The appellant argued that the Turkish witness had brown skin, and was thus not competent to testify against him. Ultimately, the California Supreme Court concluded that if a witness has dark skin but Caucasian features, they are competent to testify in an action where a White person is a party.

These are just some of the many examples of the White supremacy and Jim Crow racism upon which California was built. Notwithstanding California’s racist past and present, I am optimistic about the future. I am the co-founder and one of the co-chairs of the California Lawyers Association’s Racial Justice Committee (the “RJC”) along with Adriannette Ciccone, Leif Dautch, Marjaneh Maroufi, and Ellen Miller. The RJC was actually born in the Litigation Section before becoming a CLA-wide committee.

In partnership with the Litigation Section, the RJC has sponsored, co-sponsored and/or participated in more than 50 racial justice, diversity, and civil rights programs this year. The video recordings of many of these programs are available on the CLA website. I encourage you to check them out. Additionally, the RJC and the Litigation Section have partnered with affinity bar associations throughout California and across the United States to promote racial justice, civil rights, diversity, and inclusion in the legal profession.

As we move forward, I intend to strengthen the Litigation Section’s outreach to affinity bar associations, women lawyers, Black lawyers, Hispanic/Latinx lawyers, Asian lawyers, Native American lawyers, other lawyers of color, LGBTQ lawyers, and lawyers with disabilities. Together, we are stronger and more effective advocates and/or representatives for our clients and the communities that we serve. I also intend to strengthen our outreach to members of the judiciary and the legislature.

Please join me in my lifelong journey to pursue racial justice, civil rights, women’s rights, LGBTQ rights, disability rights, diversity, and inclusion. We are stronger together, and remember that Black Lives Matter.

Sincerely,

Terrance J. Evans

Chair of the Litigation Section of the
California Lawyers Association

Professional Bio of Terrance J. Evans

Terrance J. Evans is a Partner in the San Francisco and Los Angeles offices of Duane Morris LLP, where he serves as the Vice Chair of the firm's Banking Practice for the Western United States. Evans is also the Co-Chair of the Duane Morris San Francisco Diversity and Inclusion Committee. His practice is focused on representing the financial services industry, which includes international, national and community banks; loan service companies; and insurance companies. During his career, Evans has both recovered and saved clients of the firm tens of millions of dollars in settlements, judgments and extrajudicial procedures.

Additionally, Terrance is the Chair of the Litigation Section of the California Lawyers Association; Vice President of the Charles Houston Bar Association; Co-Chair of the American Bar Association ICLC Diversity & Inclusion Committee, an Executive Board Member of the Bar Association of San Francisco; Co-Founder and Co-Chair of the CLA Racial Justice Committee; Deputy Director of Region 9 of the National Bar Association, and an Advisory Board Member of the Minority Corporate Counsel Association (MCCA) where he provides leadership on diversity and inclusion issues throughout the United States.

In 2016, Terrance was honored by the National Bar Association as one of the top African American attorneys in the USA under age 40. In 2017, he was honored by the Charles Houston Bar Association for his work promoting diversity and inclusion in the legal profession. In 2018, Terrance was honored by the Minority Bar Coalition for his contributions to promoting diversity and

inclusion throughout California. In 2019, Terrance was honored by New Dawn Vallejo for his work promoting diversity and inclusion and pro bono legal services. In 2020, Terrance was recognized by Chambers for his efforts to promote diversity and inclusion throughout the United States.

Terrance has been recognized by Super Lawyers of Northern California multiple times. He has also received special honors from the NAACP, the Congressional Black Caucus, the 100 Black Men of Los Angeles, the Young Black Scholars Program, the Association of Business Trial Lawyers, the American Bar Association, the Black Women Lawyers Association of Los Angeles, the American Legion, and many other organizations.

Terrance is a graduate of Loyola Law School in Los Angeles, with recognition. He also graduated from Cornell University, where he was a Cornell Tradition Fellow.

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EDITOR'S FOREWORD

At a Crossroads for a Juster System

By Benjamin G. Shatz



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Our nation is at a crossroads with regard to racial justice issues. Where society and the law will go next is unclear, but significant changes—long overdue—are brewing. This issue of California Litigation focuses on some of these important topics, looking forward, looking back, and examining where we are today.

Included in this issue are substantive pieces about criminal litigation, highlighting our collaboration between the Litigation Section and the Criminal Law Section. We also offer historical articles—both legal and highly personal—that we hope will provide needed context and food for thought. Articles in this issue also focus on failures of our criminal justice system. In particular we feature a pair of pieces not only *about* Guy Miles, who spent over 18 years incarcerated for a crime he did not commit, but also one *by* Mr. Miles himself. Rarely are the voices of actual parties, as opposed to lawyers, heard directly in these pages.

If you have not yet read the California Supreme Court's opinions in *B.B. v. County of Los Angeles*, 10 Cal.5th 1 (Aug. 10, 2020), you

should stop reading this foreword and pull up Justice Chin's opinion and Justice Liu's concurring opinion right now. Early in the concurring opinion (in which Justice Cuéllar concurred), the Court notes that: "we heard oral argument in this case one week after another Black man, George Floyd, was killed by a Minneapolis police officer who pressed his knee into Floyd's neck with the full weight of his body for 8 minutes and 46 seconds — an incident that galvanized protests in every state across the country and throughout the world. [Citations] In all likelihood, the only reason Darren Burley is not a household name is that his killing was not caught on videotape as Floyd's was." On page 59 we reprint our California Supreme Court's Statement on Equality and Inclusion. Supreme Courts across the country have published similar declarations on racial justice. (See National Center for State Courts, *State Court Statements on Racial Justice*, ncsc.org/newsroom/state-court-statements-on-racial-justice.)


As Americans we have a civic duty to strive for a just and fair society. As lawyers, no matter what specific practice area, we are part of the justice system, for better or worse.

We should strive to make it better. “Equal justice under law” should not be merely a marble-etched sentiment to walk by as we head to court. We must bring that credo to life in our practices and in our daily lives.

Topics regarding policing, criminal procedure, and racial justice can spark divergent and emotional opinions. We welcome your viewpoints and encourage you to submit letters to the editor or articles of your own.

* * *

This foreword cannot end without lamenting the passing of Justice Bill Rylaarsdam since our last issue. Justice Rylaarsdam was a founding father of this journal and instrumental in its success, to which he devoted over 25 years of service. He personally wrote 28 articles, spanning volumes 1, 3-4, 6-16, 18, 20, 22, and 25, and was the subject of the cover and lead article (Justice Eileen Moore’s *Dutch Treat*) in volume 28, issue 2. His passing is yet another reason why the year 2020 will bear a black mark for sorrowful events.



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Preventing Discrimination in Jury Selection

By William Schlaerth



William Schlaerth is a Supervising Deputy District Attorney for Kern County, currently assigned to the Prisons Unit. Mr. Schlaerth has 17 years of experience as a prosecutor including 75 trials, 13 of which were murders. He is a graduate of Loyola Law School and holds a bachelor's degree in history from UCLA.

An essential prerequisite to an impartial jury is that it be drawn from a representative cross-section of the community. Courts at the federal and state level have been grappling with this issue for decades in cases where prospective jurors who were members of a minority group (typically based on race or gender) were removed from venires by peremptory challenges. The law has evolved from allowing attorneys to make peremptory challenges without showing a reason (see *Swain v. Alabama* (1964) 380 U.S. 202) to adopting a methodology to test whether members of cognizable groups were improperly removed from juries. The process began with two cases.

In the early 1970s, a jury in Los Angeles composed entirely of White jurors, convicted James Wheeler and Robert Willis (both African Americans) of murder committed in the course of a robbery. The venire contained a number of potential jurors who were African American, each of whom was struck by the prosecution's use of peremptory challenges after he had passed for cause. The Supreme Court reversed the conviction finding that "the use of peremptory challenges to remove prospective jurors on the sole ground of group bias violates the right to a trial by jury drawn from a representative cross-section of the community." (*People v. Wheeler* (1978) 22 Cal.3d 258.)

In 1982, a jury in Louisville, Kentucky, composed entirely of White jurors, convicted

James Batson, an African American, of burglary and receipt of stolen goods. During jury selection, the prosecutor exercised peremptory challenges against the four potential African American jurors in the venire. The U.S. Supreme Court reversed the conviction finding that "the Equal Protection Clause (of the Fourteenth Amendment) forbids the prosecutor to challenge potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant." (*Batson v. Kentucky* (1986) 476 U.S. 79.)

These cases preclude the consideration of race in the selection of a potential juror because such considerations violate the Sixth Amendment right to an impartial jury, the Fourteenth Amendment right to Equal Protection, and the right to a trial by jury guaranteed by the California Constitution. Race is no longer the sole basis of a protected cognizable group. Courts have identified not only African Americans (*People v. Gray* (2001) 87 Cal. App.4th 781), Hispanics (*People v. Gonzales* (2008) 165 Cal.App.4th 620), and Caucasians (*People v. Willis* (2002) 27 Cal.4th 811), but also Gays or Lesbians (*People v. Garcia* (2000) 77 Cal.App.4th 1269) as cognizable groups protected by the *Batson* and *Wheeler* cases and their progeny.

Although prosecutors are usually the targets for motions alleging improper excusal of jurors, any party can bring a *Batson/Wheeler* motion if they

suspect opposing counsel are striking prospective jurors based on membership in a cognizable group. (*Georgia v. McCollum* (1992) 505 U.S. 42; *People v. Willis* (2002) 27 Cal.4th 811.) A private litigant in a civil case may not use peremptory challenges to exclude jurors on account of race or membership in any other cognizable group. (*Edmonson v. Leesville Concrete Co.* (1991) 500 U.S. 614.) A judge may also initiate *Batson/Wheeler* proceedings sua sponte. (*People v. Lopez* (1991) 3 Cal.App.4th Supp. 11.)

Courts in California have adopted a three-step process to evaluate a *Batson/Wheeler* motion to determine if there is impermissible discrimination in a peremptory challenge against a member of a cognizable class.

Step One

In Step One, the movant bears the burden to make a prima facie showing that there was impermissible discrimination against a member of a cognizable group in the use of a peremptory challenge. (*People v. Salcido* (2008) 44 Cal.4th 93; *People v. Neuman* (2009) 176 Cal.App.4th 571.)

A prima facie case must show that the totality of relevant facts give rise to an inference of impermissible discrimination. (*Johnson v. California* (2005) 545 U.S. 162.) To make a prima facie showing, the moving party may rely on any information in the record. The basis for a *Batson/Wheeler* motion may include that all or most of the members of a cognizable group have been struck, a disproportionate number of peremptory challenges have been used against members of a cognizable group, that members of the cognizable group were questioned differently than other jurors, or that a defendant is a member of the cognizable group in question. (*People v. Bell* (2007) 40 Cal.4th 582; *People v. Lenix* (2008) 44 Cal.4th 602.)

The standard applied in Step One has changed from the state's "strong likelihood" of discrimination (see *People v. Howard* (1992) 1 Cal.4th

1132) to align with the federal standard of a "reasonable inference" of discrimination. (*Johnson, supra*, 545 U.S. 162.) The burden of establishing a prima facie case in Step One is now "minimal." (*Johnson v. Finn* (9th Cir. 2011) 665 F.3d 1063.) Exclusion of even one prospective juror for reasons impermissible under *Batson/Wheeler* constitutes structural error, requiring reversal. (*People v. Silva* (2001) 25 Cal.4th 345.) Even if the court does not find a prima facie case, it can still invite the non-moving party to place his or her reasons for exercising a peremptory challenge on the record. (*People v. Howard* (2008) 42 Cal.4th 1000.)

Step Two

If the court finds that the moving party meets the threshold for demonstrating a prima facie case, the burden shifts to the opponent of the motion to give an adequate nondiscriminatory explanation for the challenge or challenges. (*Batson, supra*, 476 U.S. 79.) The opponent of the motion must give a "clear and reasonably specific" explanation of their "legitimate reasons" for exercising the peremptory challenge or challenges. There is no burden on the opponent of the motion to "disprove discrimination." (*United States v. Collins* (9th Cir. 2009) 551 F.3d 914.) Reasons will be upheld as long as they do not deny equal protection.

Step Three

In order to prevail, the moving party must show that it was more likely than not that the peremptory challenge was improperly motivated. (*People v. Hutchins* (2007) 147 Cal.App.4th 992; *Johnson, supra*, 545 U.S. 162.) This probabilistic standard is not designed to elicit a definitive finding of deceit or racism. Instead it defines a level of risk that courts cannot tolerate in light of the serious harms that racial discrimination in jury selection can cause. (*Batson, supra*, 476 U.S. 79.) The trial court must make a sincere and reasoned attempt to evaluate the justification made by the party that exercised the peremptory challenge. The trial court may consider the attorney's demeanor,

the reasonableness of the nondiscriminatory explanation from the opposing party, trial strategy, and anything else found in the record. (*Miller-El v. Cockrell* (2003) 537 U.S. 322.)

Trial courts must incorporate Comparative Juror Analysis in their evaluation during Step Three. Comparative Juror Analysis requires a trial court to engage in a comparison between, on the one hand, a challenged panelist, and on the other hand, similarly situated but unchallenged panelists who are not members of the challenged panelist's protected group. (*Miller-El v. Dretke* (2005) 545 U.S. 231.) Evidence of comparative juror analysis *must* be considered in the trial court and even for the first time on appeal if relied upon by the defendant and the record is adequate to permit the urged comparisons. (*People v. Gutierrez* (2017) 2 Cal.5th 1150.)

If an appellate court finds that a prosecutor committed *Batson/Wheeler* error, that error is "structural" and any resulting conviction must be overturned. Where a trial court finds that any party has committed *Batson/Wheeler* error, the targeted jurors must be reincorporated into the venire or a mistrial must be found and an entirely new venire must be seated. (*Powers v. Ohio* (1991) 499 U.S. 400.) When a reviewing court addresses the trial court's ruling on a *Batson/Wheeler* motion, it ordinarily reviews the issue for substantial evidence. (*People v. McDermott* (2002) 28 Cal.4th 986.)

Proposed Changes In The Law

On May 11, 2020, the Judiciary Committee of the California State Assembly passed Assembly Bill 3070 (AB-3070) through its first stage of the legislative process. This proposed legislation codifies much of the *Batson/Wheeler* process outlined above but also makes some changes, most notably to Step Three.

AB-3070 dictates that if there is a "substantial likelihood" that an "objectively reasonable person" would view group bias as "a factor" in the use of

a peremptory challenge, then the objection on *Batson/Wheeler* grounds must be sustained. The trial court does not need to find purposeful discrimination.

AB-3070 further requires the challenged party to show, by *clear and convincing evidence*, a non-discriminatory purpose for the peremptory challenge where it is based on the prospective juror's neighborhood, job status, language ability, marital status, appearance, receipt of state benefits, experiences with law enforcement, or opinions about law enforcement.

AB-3070 would also require the trial court or the objecting party to make independent observations about a prospective juror's attentiveness, body language, demeanor, attitude, and ability to make intelligent and unconfused answers to questions asked of them. The challenged party must still explain why the asserted demeanor, behavior, or manner in which the prospective juror answered the question matters to the case to be tried.

A denial of an objection made pursuant to AB-3070 would be reviewable de novo. If passed, AB-3070 would not apply to civil cases.

Tips

How to watch out for *Batson/Wheeler* error:

- Document peremptory challenges from both parties;
- Make note of similarly situated prospective jurors of different races or classes;
- Watch for any disparity in questioning;
- Make objections outside the presence of the jury, and
- Always act in good faith.

Obtaining Information from Law Enforcement Personnel Files:

A Defense Attorney's Perspective

By Timothy E. Warriner

I have a vivid recollection of the client. He limped into the jail interview room, wincing as he sat on the bench. His face was bruised and swollen. His version of the events stood in stark contrast to the officer's account in the police report. Similar experiences are shared by most, if not all, seasoned defense attorneys. Defense attorneys have an important duty to investigate in circumstances suggesting law enforcement misconduct. This article addresses the legal means of getting records and information from law enforcement officers' personnel files.

Confidentiality of Peace Officer Records

The challenge for defense counsel investigating officer misconduct is that the records of law enforcement officers are cloaked in confidentiality. Penal Code section 832.7, subdivision (a), provides that the "personnel records of peace officers and custodial officers . . . or information obtained from these records, are confidential and shall not be disclosed in any criminal . . . proceeding except by discovery



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pursuant to Sections 1043 and 1046 of the Evidence Code." These provisions codify the *Pitchess* decision, which previously governed the release of law enforcement information.

The term "personnel records" includes complaints or investigations of complaints pertaining to the manner in which an officer performs his or her duties. (Pen. Code, § 832.8, subd. (a)(5).) Law enforcement agencies are required to record and investigate citizen complaints. (Pen. Code, § 832.5.) Such complaints must be retained by an agency for at least five years. Complaints deemed frivolous or unfounded are excluded from the personnel file. (*Ibid.*)

Getting Brady Information

Information in an officer's personnel file may be deemed *Brady* information. (*Brady v. Maryland* (1963) 373 U.S. 83.) Citizen complaints and other material may show bias, patterns of behavior, character and propensity for violence, and dishonesty. So called *Brady*

material is matter that is exculpatory — i.e., tends to show a defendant is not guilty. It includes evidence — such as a finding of dishonesty — that may be used to impeach an officer’s testimony. (*Giglio v. United States* (1979) 405 U.S. 150, 154-155.)

The prosecution has a duty to disclose *Brady* material and to investigate whether a law enforcement agency has *Brady* material. (*Kyles v. Whitley* (1995) 514 U.S. 419, 437.) However, the prosecution’s *Brady* obligation and the officer’s right to confidentiality conflict when there is *Brady* material in an officer’s personnel file. Though a prosecutor has no general right to access police personnel files, the prosecutor may receive a “*Brady* alert” from a law enforcement agency — i.e., notice that an officer’s file may contain *Brady* information. The prosecution can then make its own *Pitchess* motion or provide the “*Brady* alert” to defense counsel. (*People v. Superior Court (Johnson)* (2015) 61 Cal.4th 696.)

PRACTICE TIP: Although the prosecutor’s duty under *Brady* may be deemed self-executing, defense counsel should make both general and specific requests for *Brady* material. In any case where an officer’s conduct is at issue, counsel should begin investigating the officer by asking colleagues if they know anything about the officer’s conduct or reputation, or by using “list serves” or other electronic means to query other defense attorneys about an officer. This is a legitimate and important first step in investigating a law enforcement officer. Google searches and online legal research may also be effective investigative techniques.

Pitchess Motions - the Basics

The *Pitchess* process is governed by Evidence Code sections 1043 through 1046. It is a two step process: First, a noticed *Pitchess*

motion is filed; second, if granted, the court conducts an in camera review of the records.

The motion must establish “good cause for the discovery” of the personnel records. Defense counsel should draft a declaration of counsel explaining the relevance of the material to the action, and articulating a “reasonable belief” that the agency has the records. (*Garcia v. Superior Court* (2007) 42 Cal.4th 63, 71.) The declaration does not need to be based on personal knowledge. “Good cause” is considered a low standard, i.e., a plausible factual foundation for alleged officer misconduct plus an explanation for why the information would support a defense or impeach the officer. (*Warrick v. Superior Court* (2005) 35 Cal.4th 1011, 1021.) A “*Brady* alert” is alone sufficient to establish “good cause” for in camera review. (*Serrano v. Superior Court* (2017) 16 Cal.App.5th 759; see *Johnson, supra*, 61 Cal.4th 696.)

PRACTICE TIP: Defense counsel does not need a declaration signed by the client to get *Pitchess* discovery. (*City of Santa Cruz v. Municipal Court* (1989) 49 Cal.3d 74, 89.) Counsel should take the time to draft a thorough and detailed factual description of the alleged officer misconduct, based upon information and belief. (*Ibid.*) As investigation for the declaration, counsel should gather information from the client, independent witnesses, as well as other defense attorneys and investigators who have had relevant experience with the officer. A well-drafted declaration of counsel will demonstrate to the court that defense counsel is not engaging in a “fishing expedition,” and that there is a well-founded reason to believe that the officer’s personnel file contains relevant discovery.

Defense counsel must be mindful of the notice provisions applying to *Pitchess* motions. Evidence Code section 1043, subdivision (a),

provides that *Pitchess* motions must be noticed and filed at least 10 *court days* prior to the hearing. Oppositions are due 5 *court days* before the hearing, and replies are due 2 *court days* before the hearing. It would be wise for defense counsel to consult the applicable local rules to determine whether any apply to the *Pitchess* process. Remember that the attorney representing the agency will be a civil lawyer, and that in making a *Pitchess* motion, defense counsel is entering a perhaps unfamiliar “civil realm” of legal practice. Courts can deny a motion if insufficient notice is given, if the motion is improperly served, or if the motion fails to attach the relevant police report.

At the *Pitchess* hearing, the agency attorney will bring the custodian of records who will have the officer’s personnel records. If the court finds good cause, an in camera hearing is held. Defense counsel is excluded from the in camera hearing. The only persons in attendance are the judge, custodian of records, the agency’s attorney, and the court reporter. (*People v. Mooc* (2001) 26 Cal.4th 1216.) The court reporter must be present so the court can make a record of what documents were provided to the court and which were reviewed in determining whether disclosure should be ordered. (*Ibid.*) The making of an adequate record by the court is crucial to appellate review. Because defense counsel is not present, defense counsel must rely upon the court to make an adequate offer of proof concerning non-disclosed materials. Counsel should specifically request that the court make a thorough record of non-disclosed materials, and should consider requesting that copies of the non-disclosed records be sealed and kept in the court’s file. Another alternative would be to request that the court make a written list describing the documents reviewed in camera.

The custodian of records is obligated to bring all “potentially relevant” documents. (*Mooc, supra*, 26 Cal.4th 1216.) The court may ask the custodian to explain what documents were not provided and why they were deemed irrelevant. Defense counsel should specifically request that this inquiry be made, and the court should be advised of the *Mooc* requirements.

The end result of a successful *Pitchess* motion is that defense counsel obtains information needed to investigate the officer misconduct, such as a witness’s name, address, and telephone number. The attorney does not get the actual investigative reports, nor does the attorney get the findings and conclusions of the investigating officer (i.e., the result of any internal agency investigation). (Evid. Code, § 1045, subd. (b)(1)-(3).) If, after investigation, a witness is unavailable or cannot be located, a supplemental *Pitchess* motion can be filed requesting additional information. As a result of such supplemental motion, a court can order disclosure of actual complaint records. (*Alvarez v. Superior Court* (2004) 117 Cal. App.4th 1107.)

PRACTICE TIP: It takes time to effectively draft and litigate a *Pitchess* motion. Therefore, counsel should commence any investigation concerning law enforcement misconduct early in the case, even before trial setting.

The court may bar disclosure of facts or incidents that are remote in time, and complaints concerning conduct occurring more than five years before the event that is the subject of the litigation. (Evid. Code, § 1045, subd. (b)(1).) But the case of *City of Los Angeles v. Superior Court* (“*Brandon*”) (2002) 29 Cal.4th 1, 14, provides some relief from this timeline. The court in *Brandon* held that to comply with *Brady*, older citizen complaints

may be subject to disclosure. In counsel's briefing, the trial court should be made aware that *Brandon* allows for the release of older *Brady* information.

If the court orders the release of information from an officer's personnel file, defense counsel should expect the agency counsel to request a protective order. The law provides that the court "shall" "order that the records disclosed or discovered may not be used for any purpose other than a court proceeding pursuant to applicable law." (Evid. Code, § 1045, subd. (e).) Subdivision (d) provides that the court "may make any order which justice requires to protect the officer or agency from unnecessary annoyance, embarrassment or oppression." Defense counsel should be prepared to litigate the scope of the protective order, and should ensure that the terms of an order are not ambiguous. Once an order is made, it should be communicated to the defense investigator.

California Public Records Act (CPRA) Requests

The CPRA (Gov. Code, §§ 6250 et seq.) now provides a simple and powerful means for obtaining information about law enforcement officers. In 2018, Senate Bill 1421 was signed by the governor, going into effect on January 1, 2019. The legislative findings emphasize the public's "right to know," and state that concealing police misconduct "undercuts the public's faith in the legitimacy of law enforcement, makes it harder for tens of thousands of hardworking peace officers to do their jobs, and endangers public safety."

Senate Bill 1421 made significant amendments to Penal Code section 832.7. Now, disclosure of the actual records and information relating to specific categories of officer misconduct is required pursuant to a CPRA request — i.e., without a *Pitchess* motion.

Pursuant to the CPRA, a law enforcement agency must disclose: (1) records relating to the report, investigation, or findings of an incident involving the discharge of a firearm at a person by a peace officer or custodial officer; (2) records relating to the report, investigation, or findings of an incident in which the use of force by a peace officer or custodial officer against a person resulted in death or great bodily injury; (3) records relating to an incident in which a sustained finding was made by any law enforcement agency or oversight agency that a peace officer or custodial officer sexually assaulted a member of the public; and (4) records relating to an incident in which a sustained finding was made by any law enforcement agency or oversight agency of dishonesty by a peace officer or custodial officer directly relating to the reporting, investigation, or prosecution of a crime, or directly relating to the reporting of, or investigation of misconduct by, another peace officer or custodial officer, including, but not limited to, any sustained finding of perjury, false statements, filing false reports, or destruction, falsifying, or concealing of evidence.

In response to a CPRA request, law enforcement agencies must provide supporting documents such as: investigative reports; photographic, audio, and video evidence; transcripts or recordings of interviews; autopsy reports; materials given to a prosecutor for charging determinations against an officer; documents setting forth findings or recommended findings; and copies of disciplinary records relating to the incident. In this way the CPRA provides much more than the *Pitchess* process, the latter only requiring disclosure of the names and contact information of witnesses.

Making a CPRA request to a law enforcement agency is simple. Defense counsel

need only draft a letter or email requesting information falling within the categories of Penal Code section 832.7, subdivision (b) (1)(A) to (C) (described above). Counsel must specify the officer to whom the request relates. A badge number should be provided. The requestor may be required to pay for the direct costs of duplication. The agency may redact the records (1) to remove personal data or information, (2) to preserve the anonymity of complainants and witnesses, and (3) to protect confidential medical, financial, or other information.

PRACTICE TIP: Trial counsel should identify, early on, officers playing an important role in an investigation and should submit CPRA requests. Both *Pitchess* motions and

CPRA requests should be made as the *Pitchess* process may reach information outside of the Penal Code section 832.7 categories. Counsel conducting a post-judgment investigation preparatory to filing a habeas petition should consider making CPRA requests for significant law enforcement witnesses. The failure of trial counsel to obtain impeachment information readily available through a CPRA request may constitute ineffective assistance of counsel.

Conclusion

Conducting an investigation into officer misconduct, and obtaining material to be used by the defense at trial, can be time consuming and challenging. Fortunately, the *Pitchess* process and the CPRA provide effective avenues of investigation for defense counsel.



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The Guy Miles Case – Race and a Wrongful Conviction

By Alissa Bjerkhoel

It has long been held that “[t]he vagaries of eyewitness identification are well known and the annals of criminal law are rife with instances of mistaken identification.” (*United States v. Wade* (1967) 388 U.S. 218, 228.) Unintentional misidentifications of suspects account for approximately a third of exonerations. (Jackson & Gross (2016) *Tainted Identifications*.) Witnesses often make mistakes when they are asked to make an identification, and they are even worse where the eyewitness is a different race than the perpetrator. Cross-racial identifications, or identifications made by witnesses who identify a perpetrator from a different race, have around a 50% greater chance of error than identifications in which the witness and perpetrator are of the same race. (Connelly, *Race and Wrongful Convictions in the United States* (2015) Mich. J. of Race & Law, p. 126.) Guy Miles’s case was no exception.

The crime in Guy’s case was relatively simple: Two armed black men (one stocky and one skinny) committed an armed robbery of a Fidelity Financial Institution in a strip mall at closing time when only two employees were present. A third man, the getaway driver, was in the parking lot. They absconded with only



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\$400 and a bunch of checks they would never be able to cash. Inexplicably, during the robbery, the getaway driver decided to go shopping for car parts in the neighboring auto store; he had an auto loan with Fidelity on the very same car, which made it easy for police to connect him to the robbery. Without this slip-up, it is unlikely the crime would have ever been solved.

Investigators had more difficulty trying to figure out who the other two perpetrators were. Whether by incompetence or intent, the lead officer put multiple six-pack lineups together without regard for height, weight, or similar characteristics. Anyone who had been associated with the driver or who had lived in the same area as the driver was put into a six-pack, sometimes with up to four suspects in a single six-pack. The two eyewitnesses picked out numerous photos, with varying degrees of certainty. Ultimately, one of the victims positively identified Guy Miles as the stocky robber. He was the only one in the lineup who generally matched the stocky robber’s description. Efforts ceased to find the skinny robber and the case proceeded to trial in Orange County, a jurisdiction notorious for having disproportionately few Blacks serving on

juries up to and through the 1990s. Not surprisingly, Guy was convicted and sentenced to 75 years to life in prison. If he had been White, his sentence would have likely been much less. (U.S. Sentencing Com. (Nov. 2017) Demographic Differences in Sentencing, p. 2.) Although technically parole-eligible, for Guy this was a death sentence. Even with good behavior, he would not be released until he was well into his 80s.

When Guy's case came to the California Innocence Project, several issues in his case immediately stood out. For one, the main eyewitness against him said at trial Guy was not one of the robbers. Of course, she retracted that statement after a meeting with the prosecutor, but nevertheless it was unique. There were also other problems with the eyewitness identifications that increased the chance that they were unreliable. The identifications were cross-racial. The officer did not administer the lineups blindly, which research shows often leads to misidentification, as an investigator who knows where the suspect is in the lineup can influence the witness to selecting the suspect, even without knowing they are doing so. The eyewitnesses were under a tremendous amount of stress at the time of the crime, and the perpetrators used weapons in the crime; studies have repeatedly demonstrated that people in such stressful situations have difficulty accurately recording and relaying information afterwards. The incident itself was brief, giving the witnesses only a few seconds to see the perpetrators and remember their faces. The officer told one of the eyewitnesses that arrests had been made before administering a lineup, unconsciously indicating that the perpetrator was going to be in the lineup. The identifications were belated, extending the time period between the robbery and the identification, and increasing the likelihood that the witnesses' memories would have faded. The main eyewitness was shown multiple photos of Guy, making it more

likely that the witness would identify Guy at trial.

Secondly, and frustratingly, Guy had a solid alibi. In fact, nine alibi witnesses, including people unrelated to him, placed him in Las Vegas at the time of the crime. The fact that shoddy eyewitness identifications could overcome a solid alibi was alarming. Alarming not just because the prosecutor still decided to pursue the prosecution in light of this evidence, but because an all-White jury (there was one Black juror who served as an alternate) convicted Guy, despite the overwhelming evidence of his innocence.

It took years and multiple evidentiary hearings, but the California Innocence Project solved the case and the three true perpetrators confessed to the crime. The Court of Appeal reversed Guy's conviction. *In re Guy Miles* (2017) 213 Cal.Rptr.3d 770 (ordered depublished).

As is the often the case when a wrongful conviction is brought to light, however, the prosecutor threatened retrial and offered Guy a plea deal he could not refuse — take a deal pursuant to *People v. West* for time served and go home immediately, or risk going back to trial, being convicted again, and incurring another sentence of 75 years to life. Although we were confident we would win at the retrial, Guy took the plea. He was released on June 20, 2017, after having served 19 years for someone else's crime.

With the current events, I am hopeful that there will be some changes to the criminal justice system to deal with these issues. Pending right now in California is Assembly Bill 2200, which would establish the California Racial Justice Act. The Act seeks to remedy some of the racial issues present in our justice system. The Act would allow someone who had been charged or convicted to raise a habeas claim of racial bias. Specifically, the claims would pertain to whether: (1) there was racial bias by a critical player in

the case — an attorney, judge, law enforcement officer, expert witness, or juror; (2) there was use of racially discriminatory language during the criminal proceedings — for example, in an unrelated case involving two Black defendants, one Los Angeles County judge “made a remark to the effect that he guessed that the only thing that would make the defendants plead was for the judge to come out in a white sheet and a pointy white hat” (Com. on Jud. Performance (Mar. 16, 2011) *Public Admonishment of Judge Harvey Giss*); (3) there was racial bias in jury selection; or (4) there are statistical disparities in how people of one race are disproportionately charged, convicted, or sentenced. If the person produces evidence of racial bias in their case, their conviction and sentence will be reversed.

What happened to Guy Miles is an embarrassment to our criminal justice system. It is embarrassing that shoddy eyewitness identifications, obtained by shoddy investigative procedures, can trump a solid alibi. It is embarrassing that Black exonerees account for almost half of the exonerations in the United States when they only account of 13% of the country’s population. (Gross, Posely & Stephens (Mar. 17, 2017) *Race and Wrongful Convictions in the United States*, p. 1.) It is embarrassing that, if you are Black, depending on the crime, your chances of being wrongfully convicted are between three and 12 times more likely than your White counterparts. (*Id.* at pp. 4, 12-13, 16-17.) It is embarrassing that Black defendants receive 20% longer sentences than their White counterparts. (U.S. Sentencing Com., *supra*, *Demographic Differences in Sentencing*, at p. 2.) It is embarrassing that Guy’s best option, after fighting his case for 19 years, was to take a plea deal rather than gamble with a racist and unfair criminal justice system. And it is embarrassing that there are more people like Guy Miles out there, some whose cases will never be found nor be undone. But if anything can be learned from Guy Miles,

it is to never give up, no matter high the odds are stacked against you.

Never Give Up

Guy Miles

My name is Guy Miles. I spent 18 years, 8 months, and 29 days incarcerated for a crime I did not commit. I have been through so much pain and hurt that no one should ever have to go through or endure. That pain was shared by my family who, although not incarcerated, were also serving a sentence — a sentence of having their loved one unjustly taken away from them. This is what happened to me.

I grew up in Carson, California, and had moved to Las Vegas, where I was living in the summer of 1998. When I was arrested for a June 29, 1998 robbery that occurred in Orange County, I could not believe it. It really was unbelievable to be accused of a crime that you know you didn’t commit and in a state where you weren’t even living. At first, when officers told me why they were arresting me, I thought they were playing a trick on me. They kept saying they were from Orange County and it was confusing. I had not been to Orange County since a trip to Disneyland in ’83 or ’84.

After they arrested me and put me in a holding cell, I realized this was not a joke. This was really happening. This was for real. It took me a while to settle down and think. I kept trying to put all the pieces together, but I had no idea where to start.

I thought about all the stories you hear on the street about people being wrongfully convicted and being accused of crimes they did not commit. Being arrested for something you didn’t do is one thing. But convicted? I did not believe that actually happened. I always figured someone did something wrong, probably knew something, or had something to do with the

crime. They were not completely innocent. But here I was.

When I was awaiting trial, I asked my girlfriend about what I had been doing on the day of the robbery. She had a really good memory and told me that was the day after I picked my son up from Carson and brought him to Las Vegas for the summer. I had spent the following day visiting family and friends and showing off my son. I talked to my neighbor, my auntie, my friends, any anyone who was around us on the day of the robbery. They also remembered. Unbelievable. Here I was living in Las Vegas and being accused of a crime in a state I know for a fact I wasn't in at the time.

I knew once I went to arraignment, however, that my situation was going to snowball out of control. Everyone in the room was White. The judge was White. The lawyers were all White. The two officers in the room were White. The court staff was White. I felt uncomfortable. I was the only Black person in the room. I knew this was going to be a battle and I was going to have to fight for my life.

My parents sold their house to hire a private lawyer for me. We wanted someone we could trust and who wasn't going to turn on us. So we hired a lawyer who was a family friend. He would later end up disbarred, but we did not know any better. We trusted him.

When it came time for jury selection, I watched them call in the jury. Of maybe 30 jurors, only two were Black. Both Black jurors were dismissed. I expected it. It was as though the DA was searching for an all-White jury. They didn't want anyone to come in who looked like me or talked like me. I felt defeated again and just knew it was going to be a bad outcome.

I got my hopes up when the DA called the first eyewitness. I thought that she would get on

the stand and realize I was not the person who robbed her. The case would be over and I would go home. But when she sat down, she would not look at me. She looked only at the table. She wouldn't look at me. I wanted her to look at me.

During a break while the eyewitness was still on the stand, I asked if she could take a good look at me. And she did. Then she shook her head, and said it was not me. She came off the stand and stood close to me and it was if the calm came over her face. She relaxed. She talked to me. She told me to turn around and to look to the sides. I did. There was no longer any fear in her eyes and she said, "that's not him." As soon as she said those words, she was quickly rushed outside of the courtroom with the DA. When she returned to the stand, she was totally opposite. She was programmed. She identified me as her robber. My stomach sank.

The DA called the second eyewitness. He came in and he was angry. He immediately said it was me, but he too wouldn't look at me. It seemed he was willing to do whatever he had to do to convict someone.

I was not feeling good at all about the trial. I started preparing myself mentally for when I was convicted. But, at the same time, I was still holding onto hope that the truth would come out.

My hopes went up further when the jury was deliberating. They deliberated for weeks. My lawyer told me the longer they were out, the better odds for me. Every day, I would come into the courtroom and there would be no verdict. After the third or fourth day, it just became a habit — come in, check in, no verdict, go back. Now, I was hoping for an acquittal.

When the jury walked in with their verdict, I knew it was over. None of them would look at me. They did not have the eye contact that

they had previously. I knew right then that I had lost. When I actually heard the words “guilty,” I looked directly at my mom. I watched her cry and cry. My father put his arm around her. My sisters came to her aid and took her out to the hallway. She had a breakdown. Then I just blanked out. I was devastated.

It took some time, but I started trying to find out who really committed the crime. My co-defendant said he was innocent and I believed him because, after all, I was too. There was some talk on the street about who really committed the crime, and my co-defendant and his friend were involved. That information was a kick to the gut. I never questioned the fact that he had something to do with it because I thought we were both being wrongfully accused. I was angry. It hurt all over again. Yet another person had let me down.

My parents would spend their retirement savings hiring a new lawyer for a motion for new trial. It was hurtful that my parents had worked their whole lives, saved their money for retirement, and now had to use it to bail me out of something I didn’t do. We tried to present evidence to the court about who we thought did it, but it didn’t work.

When I received a 75-years-to-life sentence, the first thing I thought about was my family, and especially my mother. I thought about the pain that she must be going through, losing a son. I am not going to be able to take her to the store; I am not going to be able to talk to her; I am not going to be able to just be with her. I thought about not being able to be around my kids. Not being able to hug my grandkids. Not being able to go through a drive-through. Not being able to do anything.

The anger and sadness I felt, on the other hand, also gave me the fuel to keep going and keep fighting. I asked everyone I could think of for help. I wrote to the DA, the mayor, the

ACLU, and other organizations. When I got to prison, I heard about the California Innocence Project. I wrote to them and they took on my case.

I was a long road, but they were eventually able to put all the pieces together to find out who did the robbery, and get my conviction reversed. When I got the news that I was going home, I was so happy and excited. I felt alive again. I had not felt that alive in 18 years. The joy was back. The happiness that I would be back with my mother, my father, my kids, and my grandkids all came flooding back.

At the end of the day, I know we live in an unjust world. I know we live in a prejudiced world. I know that the cards are stacked against me. But I never let that be an excuse to give up in life. And for others like me: Don’t give up. Make your anger about your situation and your love for your loved ones be the fuel to work harder, and find a resolve to your situation.



Guy Miles spent 19 years in prison for a crime he did not commit. He was released on June 20, 2017, and now lives in Arlington, Texas with his fiancé. He speaks frequently about wrongful convictions and the impact it has had on his life and those who love him. He has appeared on local and national news shows, podcasts, and at conferences in the hopes to bring awareness to wrongful convictions and affect change.

The Impact of Innocence:

A Lawyer's Perspective

By Melissa O'Connell

"It's like drowning. You sipped the water and then you came back up. Your body keeps going back under, but you keep fighting to rise back up. Your body hurts, but the reality is you either keep fighting and come back up out of the water or you give up and you drown."
— Zavion Johnson*, Innocent man

Imagine being a teenager; not just the awkward moments, but the moments we live to reminisce about. Now imagine being a teenager arrested, accused, convicted, and sentenced to life imprisonment for a murder you did not commit. That was the reality of Zavion, and Franky, Arturo, Obie, Armando, and countless others. We have all seen the articles celebrating an innocent person's homecoming after decades of wrongful incarceration. These articles celebrate freedom but often fail to consider the reality of our client's lives once they leave the cement walls. When an innocent person is freed, our society and our system think that everything is fine because justice was eventually served. But our clients are not fine. This article is an attorney's narrative describing what I have seen our clients and their families experience and heard them say about the reality of the devastating and lasting impact of a wrongful conviction.



Melissa O'Connell received J.D. from Santa Clara University School of Law in 2003. She was one of the early practitioners with FLY, a non-profit working with at-risk youth. She was a public defender and then joined a boutique criminal defense firm practicing in multiple jurisdictions throughout Northern California. In 2010, Melissa returned to SCU and serves as a Staff Attorney and Policy Liaison for the Northern California Innocence Project, where she litigates innocence cases, supervises law students, and lobbies and testifies in Sacramento for reforms inspired by Innocence work. Melissa is also a Lecturer in Law.

Lawyers who work in the criminal system, like us, do so to ensure justice is carried out for the accused and for the victims and survivors of crime. Of course justice is never served when an innocent person is convicted of a crime they did not commit. From the perspective and experience of a lawyer working to free the wrongfully convicted, it is my hope that our system and those practicing within it never become complacent in the search for justice.

The reality is that our system does not always get it right. Since 1989, there have been 2,650 exonerations in the United States. I am a lawyer with the Northern California Innocence Project (NCIP), one of three innocence organizations in the state of California, and one of 68 worldwide. We work to protect the rights of the innocent and advocate for reform in our criminal justice system. Since we opened our doors in 2001, we have helped free 31 innocent men and women who have collectively served 453 years of wrongful incarceration. Our work exposes the many injustices throughout the system.

Our cases often epitomize the problems of racial injustice and police misconduct. Black Americans are only 13% of the population, but represent 47% of those exonerated from a wrongful conviction.

These are not just statistics. This inequity and injustice in our system has devastating and lasting effects on those wrongfully convicted, their family members, and their communities. And, we have a front row seat, watching these effects play out in daily life, and seeing the struggles our clients face rebuilding their lives. The years-long battles for our innocent clients do not end when they walk free; these battles extend beyond their years of physical confinement to their years imprisoned by the psychological and emotional impact of their wrongful incarceration.

The System Can Get it Wrong

If you ask most of our clients, they will tell you that because they were innocent, they believed they would be vindicated at trial. Their loved ones shared this hope and believed the legal system would get it right. The guilty verdicts were a nightmare, an inaudible scream, that would last for decades. For our clients, the system that got it wrong is the same system that would need to acknowledge its mistake and help free them.

Innocent men and women spend years challenging their convictions, pursuing brief after brief on their own, and never losing faith that the system corrects its grave errors. They become experts in the facts of their case, savvy with running down legal research, and reliant on the best “jailhouse lawyers” to assist with the crafting of a compelling argument. And as they meet obstacle after obstacle in their legal battles, they never surrender the hope that one day they will be free.

Freedom vs. Actual Innocence

In California there are several legal habeas claims that can result in a reversal of an innocent person’s conviction, including that: the jury relied on material false testimony; counsel was ineffective for failing to investigate evidence of innocence; the prosecution or law enforcement withheld exculpatory evidence; the prosecution presented inherently unreliable evidence; or newly discovered evidence exists that, had the jury known, it more likely than not would have reached a different result.

NCIP has been successful in securing the freedom of our innocent clients based on these legal challenges. But rarely in our work does a court reverse a conviction because the client has presented evidence “that points unerringly to innocence” — the standard required to establish actual innocence in California. (*In re Lawley* (2008) 42 Cal.4th 1231.) In our experience, prosecutors and courts often interpret this to require that we actually identify an alternative perpetrator for our clients to be considered actually innocent. While a person lives the rest of their lives “guilty” of a crime based on proof beyond a reasonable doubt, to be considered “innocent” they must prove that they are “unerringly” so. As a result, few of our exonerated clients are viewed as truly innocent by the system or society. It sounds like semantics, but it is not. When our clients get released from prison after years of wrongful incarceration, few feel truly free without recognition that they are actually innocent.

The Reality of Freedom

Innocent men and women come home facing similar challenges to other formerly incarcerated people. In prison they must survive the most dangerous environment, always looking over their shoulders, ter-

rified for their lives, and stripped of their dignity. They are released with little access to resources to rebuild themselves and must explain large gaps in their work and financial history. They re-enter a world where the injustices that contributed to their wrongful conviction persist, but which have rapidly evolved in other ways while time stood still in prison. A recently exonerated client said, “my past is my present.” Despite being free, our clients are encumbered by their past. “Inside” everything was familiar — there was routine, community, discipline, and basic needs were met. But the harsh reality of living in prison is that there are life or death challenges every day. On the “outside” little is familiar. The place they once called home looks nothing like what they left. Loved ones are often gone — the family that believed in their innocence, never saw them come home. They must rebuild family and community ties, while many struggle to accept the love and affection of which they were deprived during their incarceration. Young children left behind are now adults. These lives are fractured and devastated by injustice.

However, there are also unique challenges. Our clients live the rest of their free lives struggling with PTSD, tensing at the sound of a police or fire siren, paranoid that they could be wrongfully arrested, prosecuted, convicted, and incarcerated again. There is no sense of settling in. They can spend days, and even years “incarcerated” by their own minds, trying to find answers to questions like “why did law enforcement go after me?”; “will they be accountable?”; and “how can I prevent this from happening to my own child?”

Often the greatest impediment to our clients’ complete freedom is their not knowing whose sentence they served and wonder-

ing if the actual perpetrator will ever be held accountable. Too often, once an innocent person is set free, the state chooses to simply let the matter lie, making no effort to find the actual perpetrator, thus leaving the exonerated person forever under a cloud of doubt.

Compensating the Innocent

Nothing can truly make our clients whole after years wrongfully incarcerated. But for those who succeed in convincing our system that they are innocent, our state does recognize an obligation to assist them in reentering the community. California is one of 35 states to have a statute that provides for compensation for the innocent. (Pen. Code, § 4900.) In California, an innocent person is entitled to \$140 per day for every day of wrongful incarceration, amounting to approximately \$51,000 per year. However, this does not come without additional battles for our clients. Despite years of litigation, a court’s reversal of our client’s conviction, and the state’s decision to not retry or a jury’s verdict acquitting them, to be compensated our clients still need to litigate their cases all over again to prove that they are factually innocent by a preponderance of the evidence. (Pen. Code, §§ 4903, subd. (a), 4904.) The process can be arbitrary, frustrating, and unjust. It takes as little as one year to as many as ten to get compensated and sometimes the process results in no compensation at all. Nearly 30% of innocent men and women have not been compensated by our state. For those who succeed, the financial support is vital to their ability to rebuild a life.

Innocent Voices

Despite all the loss, obstacles, and the reality of never truly being viewed as innocent, our client Zavion vows that he and other exonerees will not, in his words, be “stagnant”; that they will continue moving

forward and not become irrelevant in the eyes of the system. They fight for equality and to effect change. Innocent men and women travel to the Capitol to advocate for reform to prevent wrongful convictions and support the innocent in their journey. Our clients have hosted summits for members of our state Legislature, showing our government the faces of wrongful conviction. Wrongfully convicted men and women in California have successfully advocated for laws to create transitional services for the innocent, including the nation's first legislation that provides a stipend and reimbursement for housing for their first four years of freedom. (Pen. Code, § 3007.05, subd. (d)(2).) Innocent men and women advocate to prevent their reality from becoming another's. In doing so, they give meaning to their tragic experience.

Our clients selflessly retell their stories and relive their trauma to fix the very system that almost broke them. We all owe it to them to hear their voices and see their faces. If we close our eyes and ears to the wrongfully convicted, we stop serving justice for all.

Join us in our fight for justice, www.ncip.org.

**Zavion Johnson was convicted of murder and sentenced to life in prison at the age of 18. Based on faulty forensic science, his conviction was reversed and he was exonerated in January 2018 after serving nearly 17 years wrongfully incarcerated.*

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Black Votes Matter

By Justice Eileen C. Moore

“Yes, yes, Hubert. I want all those other things, buses, restaurants, all of that. But the right to vote with no ifs, ands or buts . . . that’s the key. When the Negroes get that, they’ll have every politician North and South, East and West kissing their ass, begging for their support.”
— President Lyndon Johnson to his soon-to-be Vice President Hubert Humphrey from *The Soul of America* by Jon Meacham

Happenings in the United States were frenzied and chaotic after the Civil War. Besides attending to matters of Reconstruction, the country was engaged in wars with Native Americans, a transcontinental railroad was being built, and record numbers of people were immigrating to the Western Territories. Many of the bills Congress passed to aid the freedmen were vetoed by Lincoln’s successor, President Andrew Johnson. Sometimes Congress was able to override those vetoes, but not always. Eventually Johnson was impeached, surviving conviction in the Senate by one vote. Somewhat amazingly, it was amidst such turmoil that the post-Civil War constitutional amendments were written by congressional supporters of recently freed slaves.

The Thirteenth Amendment abolished slavery and was ratified in 1865. The Fourteenth Amendment granted national citizenship to all persons born or naturalized in the United



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States, including former slaves, and was ratified in 1868. The Fifteenth Amendment granted the right to vote to citizens of the United States regardless of their race and was ratified in 1870.

It didn’t take long for tricks and schemes to begin robbing the freedmen of their ballot. Starting in the 1890’s, Alabama, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, and Virginia enacted literacy tests for voter registration and used other methods to prevent African Americans from voting. Besides literacy tests and raw intimidation, trickeries in the ensuing decades included poll taxes, gerrymandering, voter identification, restrictive voter registration periods, good moral character requirements, criminal exclusion laws, and decreased polling places. These tactics were intended to ensure Black voters not impact the important political issues of the day.

Post-Reconstruction to 1965

Oklahoma used a grandfather clause that permitted all men to vote so long as they or a family member had been eligible to vote in 1867. That, of course, was the year before the Fourteenth Amendment’s ratification. In *Guinn v. United States* (1915) 238 U.S. 347, the high court held Oklahoma’s statute violated the Fifteenth Amendment. The year after *Guinn*, Oklahoma passed another statute, providing that those who voted under the grandfather

clause (meaning Whites) remained qualified to vote for life whereas others (Blacks) had to register within a short time period during 1916, or they would be perpetually disenfranchised. In *Lane v. Wilson* (1939) 307 U.S. 268, the Supreme Court issued its opinion in a case involving a Black man who had been banned from voting and who unsuccessfully sued the state. The Supreme Court held that Oklahoma's 1916 registration window and grandfather clause violated the Fifteenth Amendment.

Texas used a different tactic to deprive Blacks of their vote. *Nixon v. Herndon* (1927) 273 U.S. 536, concerned a Black physician in El Paso who was not permitted to vote in the 1924 Texas primary election because Texas had a statute making it illegal for Blacks to vote in a Democratic primary. The Democratic Party claimed it was a private organization not run by the government, so there was no state action involved. The Court said the Fourteenth Amendment was passed with a special intent to protect Blacks, and ruled states may not classify by color when a private party acts on behalf of the state.

Undeterred, Texas simply passed a new statute that provided all political parties should set their own membership qualifications. The Democratic Party promptly adopted a resolution that only White Democrats would be allowed to vote in primary elections. Thus, there was no action by the state when a Black person requested a ballot. The county clerk would refuse the request, explaining he was just following the orders of the (private) Democratic Party. (See *Grovey v. Townsend* (1935) 295 U.S. 45.) The issue was finally determined in *Smith v. Allwright* (1944) 321 U.S. 649, when the Supreme Court ruled it was unconstitutional for a state to delegate its authority over elections to private parties to allow discrimination to fester.

Voting by poor people, including most Blacks, was further jeopardized when states imposed a poll tax. In Georgia, for example, every inhabitant of the state between the ages of 21 and 60 (except the blind and women who did not register to vote) was required to pay \$1 each year. Georgia's Constitution declared that, to be entitled to register to vote in any election, the person shall have paid all poll taxes. The Supreme Court held in *Breedlove v. Suttles* (1937) 302 U.S. 277, that voting rights are conferred by the states and states may determine eligibility as they see fit, bestowing its stamp of approval on Georgia's enterprise.

In 1957, a Black woman tried to register to vote in North Carolina, whereupon the registrar of voters asked her to read certain sections of the Constitutions of the United States and North Carolina. The woman refused to read and was not permitted to register to vote. The matter reached the Supreme Court in *Lassiter v. Northampton County Board of Elections* (1959) 360 U.S. 45. The high court held North Carolina's statute requiring that as a prerequisite to register to vote, a voter must be able to read and write any section of the Constitution, with such requirement applicable to members of all races, was not unconstitutional.

On April 16, 1963, Martin Luther King Jr. wrote a letter in the margins of a newspaper that was smuggled out of the Birmingham jail. About voting, Dr. King said: "Throughout the state of Alabama all types of conniving methods are used to prevent Negroes from becoming registered voters, and there are some counties without a single Negro registered to vote, despite the fact that the Negroes constitute a majority of the population."

According to Meacham's book, President Lyndon Johnson said to his Attorney General Nicholas Katzenbach in 1964: "I want you to

write me the goddamndest, toughest voting rights act that you can devise.”

1965 to 2013

In March 1965, activists organized protest marches from Selma to the state capital of Montgomery to spotlight the issue of Black voting rights. The first march was brutally attacked by police and others on a day that came to be known as “Bloody Sunday.” After a second march was cut short, a throng of thousands finally made the journey, arriving in Montgomery on March 24 and drawing nationwide attention to the issue.

The Voting Rights Act of 1965 (VRA), signed by President Johnson on August 6, 1965, was enacted to address entrenched racial discrimination in voting. Not only did the VRA outlaw literacy tests and poll taxes, it authorized federal officials to examine state registration and election procedures. Section 5 of the Act required certain jurisdictions, chiefly in the Deep South, to submit proposed legislation involving voting for federal approval. Statutes had to be submitted to the Justice Department or the District of Columbia District Court for “preclearance.” The Act mandated approval prior to implementation of the legislation, thus avoiding lengthy and expensive litigation to challenge a voting law after the fact. Section 4 of the Act provided the formula through which section 5 was to be implemented.

A little more than a month later, South Carolina’s Attorney General filed a complaint directly in the United States Supreme Court, asking for an injunction against the VRA’s enforcement. South Carolina argued the VRA was an unconstitutional encroachment on states’ rights. Several states filed amicus curiae briefs. Alabama said its brief was filed on behalf of its Governor, George Wallace, and the reason for its position was “to preserve and protect the rights and interests of Alabama, its citizenry and

electorate from debasement and destruction through Federal legislative preemption of areas that are vital to self government.” Chief Justice Earl Warren authored the opinion in *South Carolina v. Katzenbach* (1966) 383 U.S. 301. The opinion notes that “after enduring nearly a century of widespread resistance to the Fifteenth Amendment, Congress has marshalled an array of potent weapons against the evil,” and found the VRA to be valid. Justice Hugo Black’s dissent declared section 5 treated the covered jurisdictions as “conquered provinces.”

In 1974, a federal trial court presided over a matter involving proposed redistricting of the voting districts in New Orleans. The Black population, 45 percent of the city’s total population and 34.5 percent of the registered voters, was heavily concentrated in a series of neighborhoods, and the rest of the city was overwhelmingly White. No Black had been elected to the city council in the 20th century. In *Beer v. United States* (1974) 374 F.Supp. 363, the district court ruled: “The plan tendered by the City will inexorably have the effect of abridging the right to vote in councilmanic elections on account of race or color.”

The *Beer* case reached the United States Supreme Court in 1976 (425 U.S. 130). The Supreme Court reversed the district court, devising a two-part “retrogression” test. If a proposed apportionment plan did not make matters worse, it was constitutional. In his dissent, Justice Thurgood Marshall rejected the majority’s declared process, stating that the majority did not answer *the* necessary question: “When does a redistricting plan have the effect of ‘abridging’ the right to vote on account of race or color?” He accused the majority of ignoring the statutory language of the VRA, which precludes plans that perpetuate discrimination, not just plans that maintain the status quo.

Another apportionment situation arose in Mobile, where its governing body was a three-person commission whose members were elected at large. Even though 35 percent of the population was Black, no Black had ever been elected to the commission. Black residents of Mobile filed a class action claiming the system abridged the rights of the city's Black citizens. In *Mobile v. Bolden* (1980) 446 U.S. 55, the Supreme Court reversed the lower courts, noting Blacks in Mobile register and vote without hindrance and face no official obstacles to becoming candidates for election to the commission. The Court held that the Fifteenth Amendment prohibits only the purposefully discriminatory denial or abridgement of the right to vote, not voting laws that had a discriminatory effect.

The VRA was amended in 1982. Congress in effect negated *Bolden* by holding that, if the procedure being challenged had the result of denying a minority an equal opportunity to participate in the political process, it was in violation of the VRA.

The Supreme Court affirmed a federal district court's conclusion that five of the six contested districts in North Carolina's redistricting plan discriminated against Blacks by diluting the power of their collective vote in *Thornburg v. Gingles* (1986) 478 U.S. 30. In *Chisom v. Roemer* (1991) 501 U.S. 380, the Supreme Court held that the 1982 amendment to the VRA that prohibited any voting procedure which caused minority voters to "have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice," applied to judicial elections.

Thus, the VRA helped Black voters to achieve many successes, albeit inch by inch. Much changed, however, with a Supreme Court decision in 2013.

2013 to the Present

In *Shelby County v. Holder* (2013) 570 U.S. 529, the Supreme Court said about the VRA that there was no denying "the conditions that originally justified these measures no longer characterize voting in the covered jurisdictions." Thereupon, the high court struck down section 4 of the VRA, and without the preclearance formula in section 4, section 5's preclearance requirements could not be implemented. No longer would there be a need for federal approval prior to enacting voting laws. Justice Ruth Ginsburg wrote in her dissent: "Throwing out preclearance when it has worked and is continuing to work to stop discriminatory changes is like throwing away your umbrella in a rainstorm because you are not getting wet."

Since *Shelby*, matters reverted to the pre-VRA requirement of lengthy and expensive litigation to attack voting statutes after they were enacted. Several cases have reached the high court on gerrymandering issues, having varying results. See *Harris v. Ariz. Independent Redistricting Com.* (2016) 136 S.Ct. 1301; *Ala. Legis. Black Caucus v. Alabama* (2015) 575 U.S. 254; *Golden Bethune-Hill v. Va. State Bd. of Elections* (2017) 137 S.Ct. 788; *Cooper v. Harris* (2017) 137 S.Ct. 1455; *Abbott v. Perez* (2018) 138 S.Ct. 2305.

In 2019, the Supreme Court reached a landmark decision in *Rucho v. Common Cause*, 139 S.Ct. 2484. The opinion recognizes the practice of gerrymandering is unjust and incompatible with democratic principles, but concludes that partisan gerrymandering claims are not justiciable because they present a political question beyond the reach of the federal courts. Justice Elena Kagan's dissent criticizes the majority for sidestepping a critical question involving rights to participate equally in the political process. She wrote that, in effect, the Court's decision encourages dysfunctional polarization.

Conclusion

From its beginning, this country was different from others. In his book *Empire of Liberty: A History of the Early Republic*, historian Gordon Wood notes early America was a distinctly democratic culture that needed a government suited for its diverse and footloose people. Individuals wanted a say in how they were governed. It would be the only nation that was free and democratic in a world of monarchies. By the early 19th century, however, Wood says many came to realize that their future as a free and democratic people was being thwarted by the continuing pressure of slavery in their midst, and that the grand experiment in republicanism was not over after all, and would have to be further tested.

This country is quite familiar with conferring and expanding voting rights, and the only thing stopping America from safeguarding the votes of African Americans is the will to do so. After Black men got the right to vote in 1870, women of all races were enfranchised in 1920. The 26th Amendment, ratified in 1971, gave the right to vote to anyone 18 years of age or older. In 1982, when Congress reauthorized the VRA for another 25 years, it also required states to take steps to make voting more accessible for the elderly and people with disabilities. Congress passed a law in 1993 known as “Motor Voter,” requiring states to allow citizens to register to vote when they apply for drivers’ licenses. In 2002, Congress passed another law that placed new mandates on states and localities to replace outdated voting equipment, create statewide voter registration lists, and provide provisional ballots. Currently, several states have lifted their bans on voting for people with felony criminal records.

Just like the early 1800’s when Americans realized their grand experiment in democracy was still being tested by the presence of slavery,

present-day Americans are realizing the moral magnitude of racial issues in this country resulting from America’s remaining manifestations of slavery. On June 25, 2013, the very same day the Supreme Court issued its decision in *Shelby*, gutting the preclearance requirement, Texas officials instituted a strict voter identification law that previously had been blocked under the VRA. On August 11, 2013, North Carolina’s governor signed a similar law, causing a federal judge to remark the law targeted African Americans with “almost surgical precision.” (*N.C. State Conf. of the NAACP v. Cooper* (M.D.N.C. 2019) 430 F.Supp.3d 15.) A 2018 USA Today analysis found election officials had closed thousands of polling places around the country with a disproportionate impact on communities of color. Georgia passed bills cutting voting hours in places where African Americans are a majority of the population, and restricting early voting on weekends. The Carnegie Corporation’s November 18, 2019 voting report states this latter measure was seen by many as a not-so-subtle attempt to target nonpartisan “Souls to the Polls” events organized by Black churches to get their parishioners to vote on Sunday after church.

Indeed, America is still being tested. We will never come close to the moral ideals envisioned by our founding fathers until *all* people are able to vote without obstacles and interference.

There is an apocryphal story about a question that was asked of Benjamin Franklin as he was walking out of Independence Hall after the Constitutional Convention in 1787. Someone shouted, “Doctor, what have we got? A republic or a monarchy?” To which Franklin supposedly responded with an ominous rejoinder: “A republic, if you can keep it.”

The Greatest of the Greatest Generation

By Justice Eileen C. Moore

The greatest generation grew up during the depression and fought in World War II. The greatest of the greatest did all that and battled Jim Crow as well.

Since pre-revolutionary times and during America's wars, African Americans have been true patriots, always defending America. Enduring indignities and dangers Whites did not face, Blacks improved their circumstances bit by bit after each war. Many of their major achievements followed World War II.

World War I

In the book, *The Unsteady March*, historians Klinkner and Smith describe how fully invested African Americans served in the first World War. Almost 400,000 volunteered in the military. Black clergy led bond drives and Blacks contributed over \$250 million in Liberty Loan drives.

In Europe, Black soldiers often fought alongside French troops as equals and comrades, which was a new experience for them. But the U.S. military remained segregated. Blacks were assigned menial jobs and suffered the bite of Jim Crow.

The African American Registry describes how Blacks fought with bravery, courage,



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and selflessness. Freddie Stowers, the grandson of slaves, was drafted into the Army in 1917 and sent to France in a segregated unit nicknamed Buffalo Soldiers. His unit was attached to a French division and saw sustained combat. In a brutal battle with the Germans, Stowers ended up in command when his unit was reduced by half. He led a charge into the German trench line and was wounded. He died on September 28, 1918 at the age of 22. He is buried in the Meuse-Argonne American Cemetery in France. Stowers was recommended for the Medal of Honor, but the recommendation was "misplaced." Congress launched an investigation and in 1991, Stowers' descendants received the award from President George H.W. Bush. The outcome of the investigation led to an Army study in 1992, which found several Black soldiers were not awarded Medals of Honor because of racial bias on the Army Decorations Board. Medals of Honor were eventually presented to their survivors by President Bill Clinton.

In 1917, Needham Roberts enlisted in the Army and was assigned to the New York Fifteenth Infantry Harlem Hellfighters. He was also sent to France and placed under French Army control. Roberts and a fellow member of the regiment, Henry Johnson, were on watch in the Argonne Forest when Germans attacked them. Though both were wounded, they continued to fight. Germans attempted to drag Roberts away as a prisoner. Johnson attacked the Germans with a bolo knife, rescuing Roberts. For these events, Roberts and Johnson were the first Americans honored with the Croix de Guerre medal. However, neither received recognition from the U.S. upon their return. It was not until decades after his death that Roberts was awarded the Purple Heart in 1996.

When the war was won, African American veterans, knowing they faithfully fought for their country, expected a grateful nation but came home to hostility, resentment, and violence.

Coming Home

Blacks' nobility in battle meant naught to Jim Crow. According to Klinkner and Smith, Whites wanted "normalcy" and lashed out at Blacks. The Ku Klux Klan expanded to over 100,000 members nationwide. One of the worst periods of interracial violence in American ensued. History.com describes great violence against Blacks following World War I. Centers of Black economic independence and success were targeted. During the summer of 1919, Black veterans grabbed their guns and stationed on rooftops in Washington D.C. to protect themselves from mob violence. (<www.history.com/new/red-summer-1919-riots-chicago-dc-great-migration>.) In 1921, a White mob spent 18 hours attacking and killing Blacks in the Greenwood neighborhood of Tulsa,

Oklahoma. (<www.history.com/this-day-in-history/tulsa-race-massacre-begins>.) In 1923, crowds of White aggressors obliterated the African American town of Rosewood, Florida. (<www.history.com/topics/early-20th-century-us/rosewood-masacre>.)

World War II

Despite the nation's lack of appreciation for African Americans in World War I, almost a million Blacks served during World War II. While defeating Nazi persecution, they realized the hypocrisy of segregation in the U.S.

Langston Hughes penned his poem "Beaumont to Detroit: 1943," with the stanza:

"You tell me that Hitler
Is a mighty bad man.
I guess he took lessons
From the ku klux klan."

Black veteran Charles W. Dryden published his memoirs in 1997. He related how German prisoners of war, easily identifiable by the letters PW painted on the back of their fatigues, entered the "Whites only" entrance to the post exchange cafeteria, but Blacks could not. In another incident, Blacks had to eat out of the back window of a train where they saw Italian prisoners of war sitting inside, chatting with the staff while enjoying their meal.

On the home front, the National Association for the Advancement of Colored People scrutinized the military's treatment of Blacks. Historians North and Holton describe in their book, *Hard Road to Freedom*, how the NAACP found racial bias in the grading of tests administered to potential draftees. Whites needed a score of 15 on the

Army intelligence test, while Blacks needed a 39.

A Black chaplain was not permitted in half-empty officers' quarters; instead, the Army built "colored officers' barracks" for him. Decades later, entertainer Sammy Davis Jr., who served in World War II, said when he visited Black soldiers in Vietnam, "They're regarding men as individuals. When I was in the Army, I was on a post where a colored guy couldn't get his hair cut." The Army excluded from its baseball team a Black lieutenant from California who had been a multisport star athlete at UCLA. He would later break the color barrier in major league baseball. Daringly, Lieutenant Jackie Robinson refused to move to the back of the bus in Colleen, Texas. He faced a court martial and was found not guilty.

Despite receiving despicable treatment in the armed forces, African Americans served with honor and gallantry during the Second World War. Leonard Harmon enlisted in the Navy in 1939. He was killed in 1942 when he placed himself between enemy fire and a mate who was caring for a wounded sailor. As part of the newly named Women's Army Corps, Charity Adams served in Europe, commanding the first unit of African American WACs to go overseas. She reached the rank of Lieutenant Colonel. Sailor Dorie Miller was the USS West Virginia's heavy-weight boxing champion. When the Japanese attacked Pearl Harbor, even though he was assigned to the laundry and had no machine gun training, Miller manned an anti-aircraft gun and shot down several enemy aircraft. Miller died in action a few years later.

Coming Home

At the end of World War II, many Black veterans came home with racial improvements on their minds. They faced the same

violence and resentment shown those who returned from World War I. But this time, change was in the air. African American veterans flexed their collective muscles and found minor defiances helped fight Jim Crow.

Richard Gergel's book, *Unexampled Courage*, describes how former Corporal Marguerite Nicholson was dragged off a railroad coach and arrested in Hamlet, North Carolina after she refused to move to a segregated section when the train crossed into the South. The Hamlet Police Chief beat the 120-pound woman and charged her with violating a local ordinance. She spent two days in jail and paid a fine and court costs.

World War II veteran Wilson Head's trip on a Greyhound bus is described in Ralph LaRossa's book *Of War and Men*. Head undertook his own personal freedom ride from Atlanta to Washington in 1946. He sat in the front of the bus, braving angry drivers and enraged passengers. He somehow made it to his destination without being arrested or injured.

Some veterans fared much worse when they challenged Jim Crow while traveling by bus, even when the challenge was slight. Gergel relates the horrific experience of Sergeant Isaac Woodard. Woodard returned to the U.S. in early 1946 after surviving 15 months in the Pacific theater where he earned a Battle Star and other medals. He was discharged in Georgia and was still in his Army uniform traveling home to South Carolina on a Greyhound bus. He asked a bus driver for time to relieve himself during a stop. The driver replied, "Boy, go on back and sit down and keep quiet." Woodard responded, "God damn it, talk to me like I'm talking to you. I'm a man just like you." In response, the driver summoned police. The Police Chief of

Batesburg, South Carolina violently smashed his billy club into Woodard's eye socket, blinding him for life.

Bobby L. Lovett's book, *The Civil Rights Movement in Tennessee*, recounts a February 1946 incident involving Navy veteran James Stephenson and his mother. Both did something Black patrons in their time would not have dared to do. They complained to a White clerk about the faulty repair of a radio in a store in Columbia, Tennessee. The clerk assaulted Stephenson's mother and Stephenson pushed back, sending the clerk through a storefront window. Crowds of Blacks and Whites gathered, and two Black men were shot and killed. The *Tennessee Encyclopedia* says the race riot that broke out, involving 5,000 Whites and 3,000 Blacks was like many outbreaks of violence after the war involving Black veterans who rejected the prevailing racial norms. In the end, Stephenson and more than 100 other Blacks were arrested. None was granted bail or allowed legal counsel.

Ralph Abernathy enlisted in the Army during World War II and rose to the rank of platoon sergeant. In his book, *The Civil Rights Movement*, Bruce J. Dierenfield describes how Abernathy became a preacher when he came home, using his pulpit to demand racial equality. He later collaborated with Martin Luther King Jr. to form the Montgomery Improvement Association, the group that organized the Montgomery Bus Boycott after Rosa Parks' arrest for refusing to give up her seat on a city bus. The *New World Encyclopedia* says Reverend Abernathy and Dr. King were best friends, partners, and colleagues and shared many a jail cell together for their peaceful protests.

Marine Robert Franklin Williams came home convinced that Blacks could achieve

racial equality. He later wrote the book *Negroes With Guns*. Another Black veteran, Bennie Montgomery, working as a sharecropper in 1946, defended himself after a White landowner attacked him. The White man died. Montgomery was executed by the state of North Carolina. The Ku Klux Klan wanted to lynch Montgomery, and feeling robbed of the opportunity, stormed the funeral home to claim Montgomery's body. The Klan was met by 40 Black veterans with guns. Using their military prowess, Williams and the others defended their fellow veteran's body. Not a shot was fired, and the Klansmen retreated. When the Klan tried to burn down the home of another Black man trying to integrate the county swimming pool, Williams and other veterans again rebuffed the Klan. International notoriety of Williams was achieved when he raised protests over the arrest of two little Black boys, aged seven and nine, after they kissed a little White girl. The boys were prosecuted and sent to a state reformatory in 1958. Williams' NAACP chapter hired an experienced appellate lawyer from New York. A London newspaper reported on the incident throughout Europe and Asia. Eleanor Roosevelt tried to intervene. Demonstrations against the United States over the case were held in Paris, Rome, Vienna, and Rotterdam. In 1959, the Governor of North Carolina pardoned and released the boys.

Hosea Williams served in a Black unit attached to General George Patton's Third Army from 1941 to 1945. He earned a Purple Heart after he was seriously wounded in battle and left with a lifelong limp. According to the *New Georgia Encyclopedia*, Dr. Martin Luther King acknowledged Williams for making Savannah the most integrated city in the South. But Williams' civil rights journey was fraught with danger. During the 1950's, he took a drink from a "Whites only"

water fountain and was beaten so badly, he spent five weeks in the hospital. He later served as the vice president of the Savannah chapter of the NAACP. He was jailed for 65 days after leading protests in a crusade to register voters. In 1965, along with John Lewis, Williams led a peaceful march from Selma to Montgomery to deliver to Alabama Governor George Wallace a petition for African American voting rights. In this protest known as “Bloody Sunday,” Williams and Lewis were beaten with clubs and whips and fired upon with tear gas while crossing the Edmund Pettus Bridge.

Medgar Evers served in the Army from 1943 to 1945, reaching the rank of sergeant and fought in the Battle of Normandy in June 1944. A law review article describes how Evers gathered a group of young Black veterans and headed for the courthouse intending to vote in the Democratic Party primary in Decatur, Mississippi in 1946. They were prevented from voting by armed White men. (Lyons, *Courage and Political Resistance* (2010) 90 Boston U. L.Rev. 1755.) Evers spent the rest of his life fighting for civil rights. He and his brother spearheaded boycotts against gas stations that refused to let Blacks use their restrooms. In 1963, when he was the field secretary for the NAACP, he was shot in the back by Byron De La Beckwith, a member of the White Citizens’ Council in Jackson, Mississippi. A 2007 article in the *Journal of Law and Religion* quotes what the minister said at Evers’ memorial service: “Our generation can claim Medgar Evers as a star of destiny, its martyr of our age. For Medgar helped in a dramatic way to bring about the changes he will never see. Like Moses, he saw from afar that Promised Land into which his people must enter.” A 2007 article in *Prosecutor* relates how Evers was the most respected civil rights leader in Mississippi and how De La

Beckwith was tried to two deadlocked White juries in 1964. Decades later, Mississippi District Attorney Bobby DeLaughter devoted himself to reopening the case. In 1994, 30 years after De La Beckwith murdered Evers, a jury of eight Blacks and four Whites found him guilty. He died in prison in 2001.

The Mississippi Historical Society website has an article about veteran Clyde Kennard, who ended up a civil rights pioneer from Hattiesburg, Mississippi. After serving in the Army for seven years, he was honorably discharged. He studied at the University of Chicago for three years. But when his father died, he returned to Mississippi to help his mother run the family farm, intending to finish his studies at the University of Southern Mississippi. Local Whites prevented Kennard’s attending the university, including trumping up criminal charges. The last time he was arrested, it was for burglary, a felony. A White jury took 10 minutes to convict him. Kennard was sent to the penitentiary where he worked long days on the prison’s cotton plantation and died a few years later. Two years after his death, the first Black students were admitted to the University of Southern Mississippi. (<mshistorynow.mdah.ms.gov/articles/349/clyde-kennard-a-little-known-civil-rights-pioneer>.) In 1991, the *Clarion-Ledger* published documents showing Kennard had been framed. The Mississippi Senate unanimously passed a resolution honoring Kennard as the “forgotten civil rights pioneer,” and a circuit judge declared him innocent of the “bogus charges” in 2006.

Civil Rights Achievements in Post-World War II Era

Many civil rights were achieved by African Americans in the post-World War II era. Here are some highlights.

In 1946, the Supreme Court issued *Morgan v. Virginia*, 328 U.S. 373. The case concerned a Virginia statute that required a woman on a bus in Virginia on her way to Maryland to move to the back of the bus while in Virginia. She refused and was arrested. Morgan was represented by Thurgood Marshall, who was later appointed the first Black justice of the nation's highest court. In *Morgan*, the Supreme Court held Virginia's statute interfered with interstate commerce and was invalid. So widely known was the *Morgan* case, there was a ditty that went:

*"You don't have to ride jim crow,
You don't have to ride jim crow,
Get on the bus, set any place,
'Cause Irene Morgan won her case,
You don't have to ride jim crow."*

In 1948, the Supreme Court issued *Shelley v. Kraemer*, 334 U.S. 1, holding that courts would no longer enforce restrictive covenants excluding persons of a designated race from ownership or occupancy of real property. The plaintiffs were represented by Thurgood Marshall and Loren Miller, who later became a judge on the Los Angeles Superior Court. *Brown v. Board of Education*, 347 U.S. 483, came down in 1954, ordering the desegregation of public schools.

President Harry S. Truman issued Executive Order 9808 in 1946, establishing his President's Committee on Civil Rights. In 1948, he issued Executive Orders 9980 and 9981, desegregating the federal work force and abolishing discrimination in the Armed Forces.

President Dwight D. Eisenhower ordered federal troops into Little Rock, Arkansas in 1957 in response to violent public hostility when Black children tried to integrate a high school. That same year, he signed the first

civil rights legislation since the Civil Rights Act of 1875, and elevated the Civil Rights Section within the Department of Justice to a full-blown division.

In 1962, President John F. Kennedy issued Executive Order 11063, banning segregation in federally funded housing. In 1963, he delivered a speech calling for Americans to recognize civil rights as a moral cause.

President Lyndon B. Johnson signed both the Civil Rights Act of 1964 and the Voting Rights Act of 1965. According to the think tank Capital Research Center, Johnson supposedly told an aide after the bills passed, "We've lost the South for a generation."

Conclusion

After serving in Europe in both World Wars, African Americans gained awareness their lives at home could be much improved. Those who served in World War I returned home to disdain and violence. Those who served in World War II were on notice their situation in American life would not improve merely as a result of their military service, no matter how noble and patriotic. If matters were to progress, they would have to take concerted action. Working within the system they fought so hard to protect, Black veterans waged peaceful campaigns to defeat Jim Crow. So much happened in the advancement of civil rights after World War II, that it's hard not to connect the dots between the actions of Black veterans and those developments.

This Land. Your Land. My Land.

By Dawn Schock

Like me, some 46 million Americans — roughly 20% of the adult population — trace their roots to settlers under the Homestead Act. Like my family, the vast majority of homesteaders were White. (Keri Leigh Merritt, *Masterless Men: Poor Whites, Slavery and Capitalism in the Deep South* (2017) p. 38.) As an heir to homestead land, I cannot ignore the role race has played in my family's generational upward mobility. My immigrant forbearers established their citizenship while they perfected their claims by living on and cultivating their 160-acre parcels. As they did so, Native Americans, who had inhabited the lands for millennia, continued to be dispossessed. And emancipated African Americans, who had labored over two-and-a-half centuries to bring land in the American South into productivity, remained destitute.

Our Whiteness is not a feature reckoned in my family's stories about my German-Russian forbearers who left what is now Ukraine to homestead the Dakota Territory in the late 1880s. We celebrate instead the settlers' courage, tenacity, and work ethic; all true and worthy of celebration. But failing to account for race in our family myths renders them as incomplete as those of the country that deeded us our land.



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The Black Lives Matter movement, the recent Supreme Court decision in *McGirt v. United States*, and the times in general call for a re-examination of our shared history. The path toward greater equality is not yet clear and will require a broad societal discussion. But movement activists are clear on first steps for White allies, among whose ranks I hope to be counted: Look again at your own privilege.

The Homestead Act of 1862

Called “the most comprehensive form of wealth redistribution that has ever taken place in America,” 246 million acres of the American West — nearly the size of California and Texas combined — were granted to 1.6 million homestead households between 1868 and 1934. (Merritt, *supra*, p. 38.) Only about 3500 of those were Black households. (Nat. Park Service, *African American Homesteaders in the Great Plains* <www.nps.gov/articles/african-american-homesteader-in-the-great-plains.htm> [as of Aug. 8, 2020].)

Versions of the Homestead Act were introduced in Congress annually beginning in 1845, but Southern slaveholder politicians blocked its passage, fearful that the population of western lands by non-slaveholding reformers would tip the balance of federal

power against them. (Merritt, *supra*, pp. 42, 56.) Secession of the Confederate states in 1861 paved the way for the Act's passage. Because it furthered his vision of a national goal "to give everyone an unfettered start and a fair chance in the race of life," President Lincoln signed it in 1862. (Nat. Park Service, President Abraham Lincoln (July 4, 1861) <www.nps.gov/home/learn/historyculture/index.htm [as of Aug. 8, 2020]>.)

But by that time, Native Americans had already been dislocated through a combination of force, fraud, purchase, and encroachment from the public lands now laid open to homesteading. They were largely confined to reservations except for a small number of tribes still in open resistance. (Richard Edwards, Jacob K. Friefeld and Rebecca S. Wingo, *Homesteading the Plains: Toward a New History* (2017) pp. 93-95.) Enslaved African Americans were not eligible to homestead until after the Civil War, when their citizenship was legally recognized. The Act's initial promise of a fair chance, therefore, was limited to a majority White population comprising American citizens and foreign immigrants who could earn citizenship while fulfilling the homesteading requirements of living on and cultivating their 160-acre parcel for five years (later three).

The Southern Homestead Act of 1866

While the post-bellum recognition of citizenship allowed emancipated Black Americans to claim land under the original Homestead Act, the vast majority of freed persons could not afford to travel to a claim, build a rudimentary home, cultivate the land, and plant a crop. Moreover, the fabled promise of forty acres and a mule had instilled the expectation that freedmen would be granted property rights in the South. Congress ostensibly attempted to address

the freedmen's desperate need for resources in 1866 through the so-called Southern Homestead Act (SHA). The SHA applied to public lands in five states of the former Confederacy. (Richard Edwards, *African Americans and the Southern Homestead Act* (2019) 39 Great Plains Q., pp. 103, 105-107.) As with the original Homestead Act, the public lands included the ancestral lands of Native American tribes that had already been subjected to a successful centuries-long, often brutal, campaign of displacement and encroachment. (Merritt, *supra*, p. 46.)

Unlike the original, the SHA was generally a failure. Of the 3.9 million freed persons, only around 6,000 Black households, representing roughly 36,000 people or less than 1% of the Black population, successfully claimed title to Southern homesteads (Edwards, *supra*, p. 124.) After President Lincoln's assassination, Andrew Johnson pardoned disloyal Confederates, returning their confiscated lands. This reduced the quantity of high-quality agrarian land available for homesteading, leaving land that required prohibitively expensive preparation before any production or profit was possible. (Edwards, *supra*, pp. 105, 107.) During its first year, the SHA was exclusive to freed persons and loyal whites. However, many freed persons had signed labor contracts with their former owners as their only available source for earning a living. Those contracts extended through the Act's exclusivity period, obviating any advantage. (Merritt, *supra*, p. 330 (citing Claude F. Oubre, *Forty Acres and a Mule: The Freedmen's Bureau and Black Land Ownership* (1979) p. 31.) While the SHA required a lower filing fee than the original act and initially granted 80-acre parcels rather than 160 acres, reducing the costs of homesteading, freed persons, excluded utterly from the economy could not afford

even the SHA's reduced costs. (Edwards, *supra*, pp. 108, 115.) Continued racism and violence against freed Blacks in the South also worked at every juncture to curtail the promise of land ownership under the SHA. (Edwards, *supra*, pp. 115-117.) The SHA was repealed in 1876, leaving most Southern African-Americans unpropertied and entangled by racist policies and circumstances not dissimilar to their former enslavement. (Merritt, *supra*, p. 324.)

The General Allotment Act of 1887

White settlement in America subjected the indigenous peoples to ever increasing encroachment, official policies of coercive removal, and outright warfare that rendered their lives unbearable and forced their relocation. As they were removed to reservations, much of their aboriginal territory was eventually claimed as public land of the United States and opened to homesteading. (See, K-Sue Park, *Self-Deportation Nation* (2019) 132 Harv.L.Rev. 1878, 1888-1904; Edwards, Friefeld & Wingo, *supra*, pp. 91-93.)

Congress undertook a new policy of social engineering with the General Allotment Act of 1887 that aimed to assimilate Native Americans into the White agrarian society by transferring the ownership of tribal lands to individual Indians. (Judith V. Royster, *The Legacy of Allotment* (1995) 27 Ariz. State L.J. 1, 7-9; Kathleen R. Guzman, *Give or Take an Acre: Property Norms and the Indian Land Consolidation Act* (2000) 85 Iowa L.Rev. 595, 597.) Tribal land was allotted to families and individuals in 160- and 80-acre parcels. Reservation land that exceeded

the members' allocation needs was deemed "surplus." While some well-meaning reformers believed the Act would benefit Native Americans, others saw a nefarious purpose in the Act's provision opening surplus parcels to general homesteading. As feared, that provision exposed more reservation land to White settlement. By 1934, Indian lands had dropped from 138 million acres to 48 million, 20 million of which were considered undesirable. (Guzman, *supra*, p. 605.)

My great-great-grandparents began staking claims in what is now North Dakota in 1886. They likely did not know that Native Americans had been massacred 23 years before at Whitestone Hill, just 40 miles from their homestead. They likely gave little thought to the fact that millions of freed African Americans remained landless in the land of their forefathers, while they and their immigrant compatriots established the legal precursors to American citizenship and land ownership. Given the existential challenges the settlers faced on their isolated, windswept parcels, an imperfect understanding of civic affairs is, perhaps, excusable.

Not so three generations later. The homestead claims provided my family with the stable economic foundation to allow the purchase of more land, the starting of businesses, the earning of degrees, and the passing on of inheritances. I have had the good fortune of those benefits because my family is White. A calcified telling of my origin story without that critical fact cannot be excused. Indeed, its retelling is long overdue.

Sweet Taste of Liberty: A True Story of Slavery and Restitution in America

By W. Caleb McDaniel

Reviewed by Marc Alexander

“A rather interesting case has been commenced in the Superior Court of this city,” reported the *Cincinnati Enquirer* in 1870, “out of the custom of slavery, now supposed to be extinct.” The plaintiff, Henrietta Wood, a former resident of Cincinnati, had sued Zebulon Ward, alleging she had been abducted by Ward’s slave trading agent, and delivered to Kentucky from Cincinnati, the place where she had enjoyed her “sweet taste of liberty.” She was then reenslaved in Kentucky and sold to subsequent plantation owners, “remaining there in the bonds of slavery until her shackles were knocked off by the lamented Mr. Lincoln.” She asked for \$20,000 in damages, including years of lost wages.

The most amazing thing about this story is that it is told at all. As triumphalists remind us, history is written by the winners. Born in slavery, Wood was illiterate and signed her name with an X. Wood’s story is told thanks to the dedication and ability



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of its author Caleb McDaniel, a historian at Rice University, who ferreted out dusty court property and other civil records, as well as newspaper interviews by the journalist Lafcadio Hearn, who interviewed Wood in 1870, and by another journalist in 1879.

Blind in his left eye, myopic in his right, the son of an Irish surgeon in the British army and a Greek woman of noble descent, a born outsider, the journalist Lafcadio Hearn was known as a sensationalistic writer, with a taste for the grotesque and horrible. He also had an interest in the underclass and he latched on to the story of Henrietta Wood.

Wood was born into slavery in Kentucky, though she did not exactly know when, or who her father was, sometime between 1818 and 1820. In 1848, she crossed the Ohio River, moving with her mistress from the slave state Kentucky to the free state Ohio. In Ohio, she received “freedom papers” when her mistress declared her free. She then be-

came employed in boarding houses. Perhaps it was tension between her and an employer she worked for, or sheer greed on the part of the employer, that led her employer in 1853 to conspire with a slave broker in Kentucky to have Wood sent in a carriage with blinds drawn, boarded on a ferry, and returned to Kentucky. Once in Kentucky, Wood found herself enslaved again.

Wood found a supportive attorney to initiate a “freedom suit,” while she was held in a slave pen, waiting for an outcome. She had no voice in court, and lost her suit, perhaps because she could not produce her freedom papers, which had been stolen from her at the time of her kidnapping. Even if she could have produced those papers, she would likely have lost her suit in Kentucky. The defendant, Zebulon Ward, argued successfully that he had bought Wood for \$300 from the beneficiary of the estate that owned her in Kentucky and that he was therefore allowed to capture her in Ohio and bring her back to Kentucky. For Wood, the outcome was calamitous. She would be sold for \$1050 and resold, living in captivity for 16 years in Kentucky, Louisiana, Mississippi, and Texas.

The villainous Ward was a charming and hardened rogue who became wealthy as the warden of three state prisons, using primarily Black prison labor to produce hemp products and to work on construction projects. He was a gambler and he was audacious. He ran prisons as businesses for his financial benefit. He became notorious for squeezing his prison laborers, concerned solely about their productivity and his bottom line, rather than their welfare. As post-Civil War historians rehabilitated the rebel and slave owner Robert E. Lee as the handsome Southern gentleman of impeccable honor, bravery, and bearing, so Ward became a sort of Colonel

Sanders figure, bearded, wearing white hat and suit, a dedicated “turf man” devoted to his racehorses, and an entertaining raconteur. He came with his story as “the last man in this country to pay for a negro slave.”

McDaniel’s writing is fluid, vivid, and clear, yet thick with context and interesting details. One gets a sinking feeling from what it must have been like to have no control over one’s body or destiny, to live in fear that one could be sold and resold, to know family members could be separated, to serve at the whim of a master, to see and experience whippings and beatings, to experience sexual abuse, to sweat in the heat of a cotton field, to constantly hold one’s tongue, to work in the master’s house cooking and ironing all day long, and to be unable to read or write.

While the historical background is fascinating, the main attraction for lawyers may well be the legal process itself. The Fugitive Slave Act of 1850, negotiated between Southern slaveholders, and Northerners, attempted to save the union at the cost of enforcing the return of slaves from free states to slaveholding states. It placed major burdens on the person seeking freedom, for the former slave was not allowed a voice or a jury trial, a federal commissioner enforced the law, the black person was presumed to be a slave in a slaveholding state, and the commissioner was paid more for finding the person to be a slave than for finding the person to have been released from slavery. In slaveholding Kentucky, Wood could not sustain her burden in court in 1853.

After the Civil War, Wood eventually returned to Cincinnati, where she brought a new suit in 1870, with the help of a Kentucky lawyer in whose house she had worked, a “lawyer’s lawyer” named Harvey Myers. Cincinnati lawyers joined in her representation,

and the ensuing legal machinations will seem familiar to a contemporary litigator. There were service issues. The defendant removed the case from state to federal court. The defendant challenged the pleadings as defective for the obscure reason that Wood had sued in trespass on the case, rather than in simple trespass, evidently seeking to achieve more than damages for the single act of abduction. The demurrer was sustained, and there were further rounds of amendment, demurrer, court rulings, and amendment, until the issue was joined by Ward's filing of affirmative defenses. During the pendency of Wood's case, her attorney Myers was shot dead by the estranged husband in a nasty divorce case involving a client of Myers, placing the representation squarely in the hands of the Cincinnati attorneys, who did not move the case forward with alacrity.

The trial itself was short, and the newspaper reporter describing Wood wrote that "Henrietta Woods [sic], waiting for the jury, sat like a black marble statue." Her impassivity was warranted, given the disappointing result of the first trial.

After a short trial, an all-white jury returned an award in Wood's favor, but only awarded \$2,500 — raising questions for observers, and for the reader, of how this amount was ever arrived at. One suggestion was that she was being repaid for her sale price of \$1,050, plus interest for her years of captivity.

There were only three substantial issues in the case: (1) Was suit barred by the statutes of limitation? (2) Was she free in 1853, or still a slave and in Ohio without consent of her owner?; (3) Was the Kentucky case that failed to free her in 1853 binding on the court in Ohio? Evidently the jury decided all questions in Wood's favor.

But then the case was appealed. On appeal the key issue was whether Ohio was bound by the Kentucky court. And here there was an irony and a legal twist, for the Circuit Judge treated the question purely as one of law, explaining why the Kentucky court lacked jurisdiction to rule on the merits. Having failed to establish her freedom in Kentucky, Wood remained a slave. And a slave had no standing to bring suit. And lacking a competent plaintiff, the Kentucky court had dismissed the freedom suit. And because Wood lacked standing to bring a suit, and her claim could not be adjudicated on the merits, the Kentucky court dismissal did not bind other courts. Thus, by failing to establish her freedom in Kentucky, Wood was allowed to establish that she had been free in 1853 at the time of her abduction.

The case had taken nine years to resolve.

McDaniel carefully separates the factual history from an epilogue that addresses the question of contemporary relevance. It is impossible to separate Wood's life and legal battle from the issue of reparations. How much were her years of slavery worth? \$2,500? Is it too late to seek compensation for wrongs long ago? Given Wood's extraordinary efforts to obtain reparations in 1870, and a nine-year legal battle, can one fairly conclude that it would have been easier to obtain reparations in 1870 than today? And does reparation simply mean money, or rather, "the things that many advocates for reparations most desire: apology, respect, recognition, truth-telling, and truth-hearing"?

All eight pillars of caste described in Isabel Wilkerson's new book *Caste* existed in the world Wood lived in: religious support for slavery, the heritability of caste, control of marriage and mating, purity versus pollution, occupational hierarchy, dehumaniza-

tion, terror as enforcement of control, and inherent superiority. For this reader, McDaniel's book raises a question about the extent to which the residue and shadow of the caste system exist today. It was only in the 1960s that formal Jim Crow laws were swept aside. Yet a vast system of incarceration, voter suppression, economic inequality, the problem of capital accumulation, neighborhood separation, and White nationalism burden the present.

McDaniel raises an intriguing question: Did Wood win? On the one hand, she obtained vindication that Ward had wronged her. On the other hand, even in 1879, \$2,500 after nine years of trial and an appeal seems a pittance for conspiracy, a kidnapping, removing Wood's freedom papers, and returning her to slavery and captivity for 16 years. Indeed, Wood herself may have been disappointed with the result. One clue is that her lawyer sued for fees.

That is not the end of the story, however. Wood had a son named Arthur. Henrietta and Arthur joined the Great Migration north to Chicago, and McDaniel speculates that the monetary award played an important role in the future fortunes of the family. In Chicago, Arthur worked as a Pullman porter, purchasing a house in 1885 for \$1,150 outright, money that he likely could not have saved as a young Pullman porter. In 1887, he began law school, becoming a successful attorney who borrowed against his first property and purchased more property. Dying at age 95, Arthur "was memorialized in *Jet* magazine as the 'nation's oldest practicing Negro lawyer.'" It is not much of a stretch to surmise that his mother's modest monetary victory helped Arthur purchase that house and launch his successful legal career. Future family generations would include a Tuskegee

airman, a jazz musician, and a host of professionals, "including a librarian, a doctor, and a great-granddaughter ... who graduated from the University of Chicago, and died in 2018, after a long career in computers." So perhaps the legal system, which often can only provide money as compensation for injury, did provide a measure of relief that proved to be meaningful to Henrietta, Arthur, and Arthur's progeny. However, the shortcomings of the legal system also point to the conclusion that the project of truth and reconciliation transcends monetary awards.

In "An Essay on Sources" at the end of the book, McDaniel creates an innovative experiment in "open notebook history," providing readers access to all his sources.

In 2020, *Sweet Taste of Liberty* won the Pulitzer Prize for history.



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My Ancestors' Wildest Dreams

By Kirra Jones McDaniel

I am the great-great-great-granddaughter of Isadora Thompson, a Black woman who survived chattel slavery in the United States, and died free. In 1855, Isadora was listed in the property inventory of Baker Boswell Degraffenreid, one of the largest slaveholders in Fayette County, Tennessee. When Baker Degraffenreid's daughter, Sarah, married Dr. Solomon Green, Baker's wedding gift to his daughter consisted of various land holdings as well as 14 human beings, including Isadora. Baker drew up a "Deed of Gift" attempting to convey the women, men, and children, and their issue, to Sarah, as separate property, out of reach of her husband.

As the Civil War was fought and the South plunged into economic ruin, the event Baker Degraffenreid had sought to avoid occurred. My great-great-great-grandmother was pledged as collateral to secure Dr. Green's debt, and his creditors wanted to collect. This is how my grandmother's name came to be listed in a Tennessee Supreme Court case. *Smith v. Green*, a case filed in Memphis trial court before the Civil War's end, but ultimately decided after the war ended in 1867, addressed the creditors' ability to seize my grandmother to satisfy Dr. Green's debt. The court held that since she had been emancipated in 1865, during the pendency

of the case, the court could no longer hold her as property, and the debt was cancelled.

My great-great-great-grandfather Phil McBride was born in Missouri. At some point he was purchased by the slave trading firm Ware & McCorrey of Brownsville, Tennessee and then sold to Daniel G. McBride, a blacksmith. His "bill of sale" states "[f]or and in consideration of the sum of Six hundred and fifty Dollars to us in hand paid we have this day bargained and Sold unto Daniel G. McBride a negro boy Slave named Filmore of yellow Complexion about Sixteen years of age, the title of which said Boy we bind ourselves to warrant and forever defend. We also warrant him to be sound in body and mind and a slave for life."

Isadora, born into slavery and freed in 1865, raised my grandmother Elvis Smith Jones, who was born in the summer of 1899. My grandmother told the oral family history to all her children and to anyone else interested in Tennessee history or a colorful yarn or two. In fact, she spent hours telling her West Tennessee stories to a man named John Marshall, a Tennessee magistrate and historian who found the supporting documentation, and used it to write two books and to assist in compiling the history of Tennessee's first Black legislators, one of whom also came from the Degraffenreid plantation.



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Those Black legislators from West Tennessee, who took part in government nearly as soon as the 15th Amendment gave them the right in 1870, numbered 14 by the end of the 45th General Assembly in March of 1887. After that, it would be another 78 years before Tennessee seated another Black legislator, in 1965. That “bright spot” in Tennessee state history is a familiar testament to the fact that opportunity for Black Americans has never been constant, but has come in fits and starts.

Although the years begin with “18” and not “20,” it must be considered that these events are not far removed in time if measured by lifetimes and generations. The inequality created by slavery and entrenched by Jim Crow reaches its tentacles into my generation. Although I could use numerous examples such as real estate, banking, or generational wealth, to illustrate, I will use the one I have the most experience with — the institutions of education. My parents attended segregated schools growing up. When “*separate but equal*” was the law of the land, my grandfather Curtis Jones purchased a school bus to transport Black children to a single-room schoolhouse, where students used second-hand textbooks with missing pages and outdated information. When *Brown v. Board of Education* integrated schools, my parents faced various forms of racism from White instructors, students, and guidance counselors who did not take their aspirations seriously and, among other things, steered them into vocational trades instead of college. Many Black people of their generation had such terrible experiences in newly integrated schools they ultimately wished their all-Black schools had been given equal resources, instead of being forced to attend schools with administrators and students who perceived and treated them

as inferior. Although I did not experience those same educational hardships, there were considerable barriers to my siblings and I receiving a quality education. But for the courage and advocacy of my mother, we would not have. When my family lived in New Orleans, a school administrator at an elite private school (whose tuition was \$5,000 per year) informed my mother the lack of diversity at the school was because “Blacks are not interested in a quality education for their children.” In Dallas, my elementary school principal admitted he intentionally placed the Black and Latinx students into the homeroom of one of the worst teachers in the district, because he “thought they’d feel more comfortable around people they knew.”

As Frederick Douglass said in his famous July 5, 1852 speech to the Rochester Ladies’ Anti-Slavery Society, “[w]e have to do with the past only as we can make it useful to the present and the future.” I tell my story and the story of my ancestors to help people understand the reason for a continued civil rights movement and the necessity for drastic changes to the way the country operates. The vestiges of slavery were entrenched by the Jim Crow era, weaponized by the War on Drugs and mandatory minimum criminal sentences, and are perpetuated by voter suppression, mass incarceration, privatized prisons, and police lynchings.

My mother is approximately three years younger than Emmett Till would have been this year had he lived. And she, like her mother before her, and undoubtedly like my great-great-great-grandmother, has witnessed Black men, women, and children being murdered on a White person’s whim. As a little girl, I remember finding one of my grandmother’s old Jet magazines and looking at Emmett Till’s mutilated face in horror and

disbelief, unaware it remained “open season” on Black lives, and I would myself witness the deaths of so many, including the children Trayvon Martin, Tamir Rice, and Aiyana Jones.

The fact that I, an officer of the court, stand on the shoulders of Isadora Thompson, once considered a “possession,” magnifies her words, “you are as good as anybody and better than most.” This signified her refusal to allow others to define her. It is this resilient spirit, plus the sacrifices she and my ancestors

endured that propel me to push the ceiling, and establish new or no boundaries.

The time for change is now. I do not want another generation of my family to endure the ills of racist violence perpetrated on our sons and daughters, or to suffer from the systemic oppression that permeates every facet of Black lives in America. The time is now to make the ceiling of our ancestors the foundation for our movement so the arc of history can now take a sharp turn toward true justice, equality, and liberty for all.

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Words Matter. Perhaps Especially Ours as Lawyers.

By Rupa G. Singh

Words matter, and the right words matter most of all. In the end, they're all that remain of us. — John Birmingham

My grandfather was a well-respected, reasonably successful lawyer in post-colonial India. Lawyers also seem disproportionately likely to lead nation-states, movements, and revolutions, and to transition seamlessly into politics and government. But I didn't become a lawyer to pay homage to family tradition. Nor did I aspire to lead a movement or rise through the ranks in the public sector.

Rather, I gravitated towards the law because of how it quietly empowers words over weapons. Whether it's determining who owns a parcel of land, what criminal act warrants life in prison, or how to award custody of children after a contentious divorce, the law represents our agreement to forsake fists, swords, and guns in favor of words to resolve the most intractable of human disputes.

Recently, though, I have been forced to think more deeply about the power of our pen as lawyers. In her thought-provoking presentation, Professor Leslie P. Culver used anthropological, legal, and academic research to explain persuasively that our



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implicit biases affect the words we choose in our legal advocacy, allowing us to either unconsciously reinforce or consciously exploit prevalent stereotypes. (Leslie P. Culver, *White Doors, Black Footsteps: Implicit Bias & Cultural Consciousness in Legal Writing*, SD-CBA App. Prac. Sec. Presentation (June 24, 2020); see also <www.law.uci.edu/faculty/visiting/culver/>.)

Wait, what? The implicit biases that decades of research shows we all harbor are somehow reflected in our oral and written advocacy on behalf of clients? Yes, and let me count the ways. *Confirmation bias* causes us to pay more attention to information that confirms our existing belief system and to disregard information that is contradictory, for example, discounting the possibility of women perpetrating sexual harassment. (Kathleen Nalty, *Strategies for Confronting Unconscious Bias* (2017) The Fed. Law. 26, 28.) *Attribution bias* causes us to make more favorable assessments of behaviors by those in our “in groups” while judging those in our “out groups” by less favorable group stereotypes, for example excusing analytical errors by White males as mistakes while believing the same mistakes by their Black counterparts are intellectual inferiority. (*Ibid.*) *Availability bias* causes

us to default to “top of mind” information, such as automatically picturing a man when describing a “leader” and a woman when describing a “support person.” (*Id.* at p. 27.) *Affinity bias* — the tendency to gravitate toward people who are more like ourselves in interest and background — leads us to invest more energy and resources in those in our affinity group while unintentionally leaving others out. (*Id.* at p. 28.) *Narrative bias* — the “pervasive bias of stories, manners, sensitivities, and paradigms” — allows us to discuss as “neutral” information that dredges conflict for others. (Leslie Espinoza, *The LSAT: Narratives and Bias* (1993) 1 Am.U.J. Gender & L. 121, 131-135.) For example, we may argue that women’s entry into the workforce is harmful to children or that the Obama presidency established that we live in a post-racial world while.

As one researcher puts it, “[w]e are mistaken if we treat law as an objective and neutral body of rules and values, and fail to recognize how white, male, middle-class experience and values dominate the legal system.” (Espinoza, *supra*, at pp. 131-135.) And it’s not just in the much-studied arena of criminal justice, but at every level and in every area of the law. (E.g., Sheri Lynn Johnson, *Unconscious Racism and the Criminal Law* (1988) 73 Cornell L.Rev. 1016, 1018; Jody Armour, *Stereotypes and Prejudice: Helping Legal Decisionmakers Break the Prejudice Habit* (1995) 83 Cal.L.Rev. 733, 743 & fn. 42; Thomas W. Joo, *Presumed Disloyal: Executive Power, Judicial Deference, and the Construction of Race Before and After September 11* (2002) 34 Colum. Hum. Rts. L.Rev. 1, 4.)

In my field of civil litigation and appeals, for example, consider the motion to recuse an African-American district court

judge to whom a case by Black plaintiffs alleging racial discrimination was assigned; according to defendants, the judge was biased because he had given a speech to Black historians and had an “intimate tie with and emotional attachment to the advancement of black civil rights.” (*Penn. v. Local Union 542, Int’l Union of Operating Engr’s* (E.D.Pa. 1974) 388 F.Supp. 155, 157.) In denying defendant’s motion, the court called out its racist premise — that black judges, unlike their white colleagues, could not be impartial in deciding a case involving parties of their own ethnic background. (*Id.* at pp. 163-165.)

Notably, scholars argue that we cannot be, and should not strive to be, blind to issues of race, gender, age, sexual orientation, socio-economic class, physical disability, or mental health; these issues and our unconscious reaction to them are *always* present. (Stephanie M. Wildman, et al., *Privilege Revealed: How Invisible Preference Undermines America* (1996); Arthur S. Miller, *The Myth of Objectivity in Legal Research & Writing* (1969) 18 Catholic U.L.Rev. 290, 299, 304.) But, in addition to becoming aware of our biases and how they might make us act, we are also urged do the same in our words. (Culver, *supra*, at p. 37.)

Reflection on this advice leads to my next revelation: We are obligated as lawyers to choose our words in briefs and arguments based on concerns *beyond* our duty to credibly yet zealously advocate for our clients. In fact, being an officer of the court requires us to be more than just truthful; we must also try to dispel bias, and, if possible, plant counter-stereotypes while pursuing our client’s interests. How do we do this?

First, we can strive to use gender-neutral language, which rules suggest some

courts to aspire to already — for example, calling a party a firefighter, not a fireman; a police officer, not a policeman; chair, not chairman; flight attendant, not stewardess. (E.g., Cal. Rules Court, rule 10.612; Marilyn Schwartz, *Guidelines For Bias-Free Writing* (1995) p. 1; Casey Miller & Kate Swift, *The Handbook of Nonsexist Writing: For Writers, Editors and Speakers* (2d ed. 1988).)

Second, we can be precise in using terms of cultural or ethnic identity, assuming they are relevant to the discussion — for example, the terms “Hispanic,” “Spanish,” “Latino/Latina,” and “Chicano/Chicana” are not interchangeable, but mean different things. (Lorraine Bannai & Anne Enquist, *(Un)Examined Assumptions and (Un)Intended Messages: Teaching Students to Recognize Bias in Legal Analysis and Language* (2003) 27 Seattle U.L.Rev. 15-18 & fns. 60-68.) Third, we can examine vocabulary specific to our area of practice for terms that seem ubiquitous but carry cultural baggage we may not mean to employ — for example, we attach different cultural meaning to “fathering” a child verses “mothering” a child, and also exclude same-sex parents when using these terms, so family law practitioners might describe “parenting” efforts when advocating for custody or visitation in a child’s best interests. (*Id.* at pp. 11-13.)

Fourth, we can examine how to frame the issues to a tribunal. Take a defamation case: We can choose to frame the issue around the erroneous determination that a female plaintiff is only damaged because of her heightened sensitivity or lack of thick skin, subtly naming and reinforcing the stereotype that women lack the ability to loosen up or laugh at themselves. Or take

a personal injury case: We could plausibly note, during our discussion of the facts, that plaintiff is a female construction worker or a male receptionist; even though these facts are not necessary the issue of liability or damages, we can put a name to, and challenge, cultural stereotypes about “male” and “female” professions. As USCD cognitive scientist Lera Boroditsky has explained, “[t]hings that are named are the ones most likely to be thought about and to be visible in our consciousness” but “what isn’t named can’t be counted ... [or] be acted upon.” (Dina Fine Maron, *Why Words Matter: What Cognitive Science Says About Prohibiting Certain Terms* (Dec. 19, 2017) Sci. Am.)

This brings up the question, of course, of how to balance such efforts with our duty to only include “legally significant facts,” that is, facts “a court would consider significant either in deciding that a statute or rule is applicable or in applying that statute or rule.” (Laurel Currie Oates, et al., *The Legal Writing Handbook* (3d ed. Aspen L. & Bus. 2002) p. 708-13.910.) Take the debate over whether to mention a Black defendant’s race in a statement of facts when it is not relevant to applying any criminal statute or rule. (*The Redbook: A Manual on Legal Style* (Bryan A. Garner ed. 2002) pp. 272-273.) Because its only relevance is to evoke the decision-maker’s unconscious bias, this fact seems best left out even under the rule of “legally significant” facts. Plus, zealous advocacy does not mean unprincipled advocacy; we just need to decide which principles are important enough to uphold even as zealous advocates. Navigating this issue is a complicated question, with a disfavored yet predictable answer — it depends, both on the advocate and the case.

That brings me to a final question — does this excruciating exercise in self-examination, thoughtful research, and careful advocacy really matter? Can we as individuals really battle sexism, racism, agism, xenophobia, or homophobia with a few word choices in legal advocacy? This time the answer is not a dissatisfying “it depends,” but a resounding yes.

“Implicit biases are malleable; therefore, the implicit associations that we have formed can be gradually unlearned and replaced with new mental associations.” (Cheryl Staats et al., *State of the Science: Implicit Bias Review* (Kirwan Inst. 2015) p. 63.) Reading about successful female leaders or merely viewing photographs of women leaders has been shown to reduce implicit gender bias, while findings in “neuroplasticity” suggest that our thoughts can force our brains to alter their structure and function, and even generate new neurons to adapt, heal, and renew after trauma or disability. (Sharon Begley, *Train Your Mind, Change Your Brain: How a New Science Reveals Our Extraordinary Potential to Transform Ourselves* (2007).) As Dr. Kara Lyons-Pardue, an associate professor at Point Loma Nazarine University, puts it, “[o]ur words have the potential to create imaginative spaces.” (<<https://viewpoint.pointloma.edu/how-much-do-our-words-matter>>.) Biologist Dr. Mark Pagel has even suggested that language is “the most powerful, dangerous and subversive trait that natural selection has ever devised” because it allows us to “implant” our ideas other people’s

minds, “rewiring” them, while another scientist has called words and the ideas they convey “one of the most resilient parasites.” (Compare <www.ted.com/talks/mark_pagel_how_language_transformed_humanity/transcript#t-153638> with <https://www.youtube.com/watch?v=joj7_brYWt8>.)

And so, I come full circle, recognizing the tremendous power of words, especially in the law, and especially to me in becoming a lawyer. I may not have chosen this profession because of my grandfather, but I hope at least one of my children or grandchildren will also choose it, and make striving for meaningful advocacy a family tradition, perhaps the only thing that remains of me.

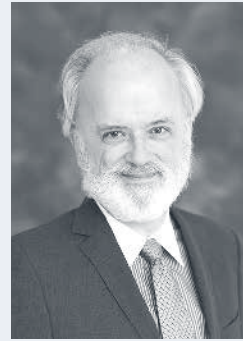


The California Supreme Court, 2019-2020: Continuing Evolution of a Diverse Court

By Kirk Jenkins

America has always rested upon the proposition that “all [persons] are created equal.” Judicial analytics have a crucial role to play in redeeming that promise by showing the degree to which extra-legal factors such as judges’ personal values, ideology, life experiences, race, and gender impact decision making — a study which has never been more important than now, with the fight for racial and gender equality dominating the news this year.

Academic analysts have studied those issues for nearly a century. In 1922, Charles Grove Haines published a study of over 15,000 public intoxication cases from the New York magistrate courts. He demonstrated that one judge discharged only one of 566 cases, another 18 percent of his cases, and still another 54 percent of his cases — all for precisely the same offense. Robert Erickson showed in a major study that female judges are substantially more likely to vote to find liability in a gender discrimination case than male judges — but that the difference disappears for male judges sitting with at least one female panel member. Another study by Christina Boyd, Lee Epstein, and Andrew Martin reviewed thousands of de-



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cisions and came to the same conclusion. Jennifer Peresie has shown that gender of the judge and for men, sitting with at least one woman, is a more significant predictor of votes for the plaintiff in discrimination and harassment cases than whether the judge was a Democratic appointee. Many studies have concluded that members of racial and ethnic minorities are on average sentenced more harshly, holding constant for legal sentencing factors, than White defendants. Other studies have demonstrated racial disparities in the seriousness of charges, the number of companion charges, and bail and bond decisions.

To the credit of our state and our recent governors, the California Supreme Court is one of the most diverse state Supreme Courts in the country. Four of the seven Justices who served in JY2020 were women. For the past two judicial years, the Court’s story has been dominated by the Court’s changing membership. Two years ago, it was the Court functioning with a lengthy vacancy arising from the retirement of Justice Kathryn Werdegar. Last year, it was the possible impact of former Governor Jerry Brown’s fourth appointee, Joshua Groban.

In the coming year, it will be the story of the Court adjusting to the retirement of Justice Ming Chin, whose successor has not yet been named. That led us to ask two questions last year: (1) was the Court holding an unusual number of cases during the Werdegarr vacancy to await a seventh permanent Justice; and (2) would the Court turn leftwards with the addition of a fourth Brown Justice?

There is little evidence that the Court was holding any significant number of closely divided cases to await Justice Groban's arrival. In the 2019 judicial year following his arrival, there were only two 4-3 decisions. In JY2020, there have been two civil and one criminal. In contrast, there were four 4-3 decisions in JY2018 and six in JY2017.

For JY2019 before Justice Groban's arrival, the average lag time from the end of briefing to oral argument in civil cases was 231.4 days. After his arrival, it was 234.73 days. On the criminal side in JY2019, the lag time increased after Justice Groban's arrival, from 560 to 778 days. In JY2020, the lag time in civil cases was 320.67 days and on the criminal side, it was 594.21 days.

For JY2020, the Court decided 78 cases — 34 civil and 44 criminal. This was a slight increase from last year when the Court decided 32 civil cases and 43 criminal. It's a significant drop from JY2018 however, when the Court decided 36 civil cases and 49 criminal cases. In JY2017, the Court decided 90 cases — 46 civil and 44 criminal.

The Court decided 17 death penalty appeals, a slight decrease from 20 last year. The Court affirmed 76.47% of those judgments, a slight increase from last year's 70% affirmance rate. The Court reversed the judgment entirely in one case and affirmed the judgment while reversing the penalty once (the Scott Peterson

case). This represents a penalty reversal rate of 11.76% for JY2020. For JY2019, 20% of death penalties were reversed, but in JY2018, the penalty reversal rate was only 5.26%.

Although Los Angeles County was the most frequent origination point for both the civil and criminal docket, the county's share was significantly down on both sides. For JY2020, Los Angeles originated 18.18% of the civil cases and 16.28% of the criminal cases. Last year, those figures were 31% and 20.93%. Only three other California counties produced more than one case this year: Alameda (12.12%), Orange (9.09%), and San Diego County (6.06%). The criminal docket was more scattered. San Bernardino was second, producing 9.3% of the cases. Six counties accounted for 6.98% apiece: Orange, Riverside, Sacramento, San Diego, Santa Clara, and Ventura. Alameda, San Mateo, and Santa Barbara counties produced 4.65% of the docket.

Last year's article mentioned that it's unfair to speak of a one-year "reversal rate" for any intermediate appellate court, since no court of last resort hears more than a few cases a year from any intermediate court. It's misleading for a second reason — it's a biased data set. Many of the Supreme Court's cases are on the docket because the Court is at least initially dubious about some aspect of the Court of Appeal decision. A much more realistic Court of Appeal reversal rate would be to speak of the percentage of a given district's cases for which a petition for review is filed, granted, *and* the decision is then reversed. Compared to "review denied" orders, the percentage is quite small for every district and division.

On the civil side, the Court decided eight cases from the First District: three from Division One, one each from Divisions Two, Three, and Four, and two from Division Five. The Court reversed all three cases from Division

One, the cases from Divisions Three and Four, and one of the two cases from Division Five. The Court reversed the decision from Division Two. The Court decided six civil cases from the Second District: four from Division Three and one each from Divisions Two and Four. The Court reversed all six. The Court decided four civil cases from the Third District, reversing only one. The Court decided three cases each from Divisions One and Three of the Fourth District, reversing two of three in each division. The Court decided two cases from the Fifth District, reversing both.

On the criminal side, the Court decided three cases from the First District, one each from Divisions One, Three, and Four. The Court reversed the Division Three and Four cases. The Court decided seven cases from the Second District: four from Division Six and one each from Divisions Three, Five, and Eight. The Court reversed three of the Division Six cases and the single cases from Divisions Five and Eight. The Court decided two cases from the Third District, reversing both. The Court decided three cases from the Fourth District, Division One, reversing only one, three cases from Division Two, reversing them all, and one case from Division Three, which the Court affirmed. The Court decided three cases from the Fifth District and two from the Sixth, reversing one case from each.

Nine of the Court's civil decisions arose from final judgments. Eight were petitions for writs of administrative mandate, and there were six cases each on the docket arising from petitions for mandate and certified questions from the Ninth Circuit. Eighteen of the Court's criminal cases arose under Penal Code section 1239, subdivision (b) - death penalty judgments. Eleven criminal appeals were taken from judgments of conviction under Penal Code section 1237, subdivision (a). Five cases

were Proposition 47 appeals. Two appeals were brought under Penal Code section 1237.5 following a plea of guilty.

Court of Appeal dissents continue to be at least slightly more important on the criminal side than in the civil docket. Two of the 26 civil cases that arose from the Court of Appeal in JY2020 had dissents. Two of 21 Court of Appeal criminal cases had dissents. Five of 29 civil cases arising from the Court of Appeal in JY2019 had dissents, while 5 of 27 criminal cases did. Five of 32 civil cases in JY2018 had dissents, and 4 of 29 criminal cases did.

Similarly, publication was less important on the criminal side than among civil cases. In JY2020, 24 of 26 civil cases that arose from the Court of Appeal were published below. In JY2019, 27 of 29 Court of Appeal cases were published. In JY2018, 28 of 32 Court of Appeal cases were published. Turning to the criminal docket, in JY2020, 19 of 24 Court of Appeal cases were published. Only 14 of 21 cases arising from the Court of Appeal were published in JY2019. In JY2018, 20 of 27 Court of Appeal cases were published.

There still does not appear to be a consistent decrease in the speed with which the Court processes death penalty cases. For JY2020, the average time from filing of the last brief to oral argument was 1117.29 days — higher than in JY2019 (809.1) or JY2018 (1078.94). Non-death criminal cases, on the other hand, moved more quickly this year. The average lag time from close of briefing to oral argument was 216.68 days, and the average lag from grant of review to argument was 603.12 days. In JY2019, the corresponding numbers were 412.43 days and 1009.87 days.

The civil docket slowed down a bit this year. In JY2020, the average wait from the end of briefing (usually meaning a response to an

amicus brief) and oral argument was 320.67 days. The previous year, the average lag time was 233.69 days. On average, 619.97 days passed in civil cases between the order granting review and the oral argument.

For most of the JY2020, the Court's unanimity rate in civil cases was at historically high levels. But with divided decisions in four of the Court's last five cases, the Court's civil unanimity rate for JY2020 fell to 82.35%. The rate was somewhat higher in each of the previous two years: 90.63% in JY2019 and 91.67% in JY2018. That two-year jump was a limited phenomenon, however; for most of the years from JY2011 to JY2017, the civil unanimity rate was between 75% and 85%. The reversal rate in criminal cases for JY2020 was 88.37% — an increase over JY2019 (81.4%) and JY2018 (73.47%).

The Court decided issues in a wide variety of civil areas of law in JY2020. Like last year, the most frequent area was civil procedure with 9 cases. There were 6 cases in government and administrative law, 4 tort cases and 3 each in constitutional and employment law. The Court decided 2 civil cases involving commercial law and 1 each in arbitration, domestic relations, election law, environmental law, insurance, and workers compensation.

As usual, the most common area on the criminal docket was death penalty law, with 17 cases. The Court decided 10 issues involving criminal procedure, 8 involving the law of sentencing, 3 cases in criminal constitutional law, 2 habeas corpus cases, and one case each involving process crimes, juvenile issues, and mental health.

Justices Corrigan, Kruger, and Liu led the Court this year, writing 6 majority opinions apiece in civil cases. Justice Cuellar wrote 5 opinions. The Chief Justice and Justice Chin

wrote 4 majorities and Justice Groban wrote 3 majority opinions. On the criminal side, Justice Kruger led with 9 majority opinions. The Chief Justice wrote for the Court 8 times. Justices Chin and Liu wrote 6 opinions each. Justices Groban and Corrigan wrote 5 criminal majorities and Justice Cuellar wrote 4.

Concurring opinions were once again rare. On the civil side Justices Cuellar and Kruger wrote 3 apiece and Justice Liu wrote 2. Justice Liu led with 4 concurring opinions in criminal cases. Justice Cuellar wrote 3 and the Chief Justice and Justice Kruger wrote 1 apiece.

Dissents were up slightly. On the civil side, the Chief Justice wrote 4. Justice Liu led in criminal cases with 4 dissents. Justices Chin and Cuellar each wrote one.

Agreement rates were uniformly high this year, given the unanimity rate. The Court handed down one 6-1 civil decision this year, with the Chief Justice in dissent. There were three 5-2 civil decisions — one with Justices Groban and Chin dissenting, one with the Chief Justice and Justice Liu, and one with Justices Cuellar and Liu. Finally, there were two 4-3 decisions: one with the Chief Justice and Justices Corrigan and Kruger in dissent, and one with the three remaining Republican appointees — the Chief and Justices Corrigan and Chin — dissenting.

Amicus filings were down substantially this year, presumably due to the economic conditions in the final five months of the judicial year. The Court accepted 106 amicus briefs in civil cases — an average of 1.91 supporting appellants, one supporting the respondent, and 0.21 supporting neither party. The data on how much amicus support helped was mixed. In affirmances, winners averaged 0.75 amicus briefs in support of their position to 2.5 for losing appellants. In reversals, winning appellants

averaged 1.6 amicus briefs to 0.9 for losing respondents.

At oral arguments for civil cases decided in JY2020, the Court asked 625 questions of appellants and 576 questions of respondents, averaging 18.94 to appellants and 17.45 to respondents. Once again, counting questions had at least some predictive value for anticipating the ultimate result in cases. In affirmances, losing appellants averaged 19.5 questions and winning respondents received only 14 questions. Matters were considerably closer in civil reversals. Winning appellants averaged 20.35 questions and losing respondents averaged 20.55.

On the criminal side, winning respondents averaged 9.73 questions in affirmances to 15.91 for losing appellants. In partial reversals, respondents averaged 13.5 questions to 22.5 for appellants. In outright reversals, the usual signal was reversed, as winning appellants averaged 17.75 questions to 15.94 for respondents.

The Court has held oral arguments by video since April, a trend that will continue through at least calendar year 2020. So far, the Court has been significantly less active on video than it typically is when all seven Justices are in the courtroom. The data bears that out. For JY2020 in civil oral arguments prior to the pandemic lockdown, appellants received an average of 25.71 questions. Respondents averaged 23.29. Since the beginning of video arguments, appellants have averaged only 11.75 questions and respondents 11.25.

The change is even more noticeable in criminal cases. Before the lockdown, appellants in criminal cases averaged 22.38 questions to 16.24 for respondents. In video oral arguments, appellants have averaged 5.71 questions to 4.36 for respondents.

We conclude with the question we reserved at the outset: Is there evidence of a Brown Court emerging with a more liberal bent? On the civil side of the docket, the answer is no. Plaintiffs won only one of six civil constitutional law cases in JY2019 and 2020, compared to four of five in JY2018. Plaintiffs won one of five tort cases in JY2019 and 2020, but four of seven in JY2018. Plaintiffs won five of eight government and administrative law cases during the past two judicial years while splitting four cases in JY2018.

On the other hand, there is at least some indication of a subtle shift on the criminal side of the docket. Since Justice Groban joined the Court, the Court has affirmed death penalties 85.71% of the time. In JY2019 prior to Justice Groban's arrival, the Court affirmed death penalties 92.59% of the time. In JY2018, the penalty affirmance rate was 94.74%. Since Justice Groban took his seat, criminal defendants have won five of six constitutional law cases and six of ten sentencing law cases. In JY2018 and the portion of JY2019 before Justice Groban arrived, criminal constitutional law defendants won three of five cases. Criminal defendants won only three of eleven sentencing cases during that year and a half.

With Justice Chin's retirement effective at the end of JY2020, the Court will soon experience another personnel shift, this time to five appointees of Democratic governors to only two Republican appointees. Once Justice Chin's successor is appointed, we will have the most heavily Democratic Supreme Court since January 1987, when Chief Justice Rose Bird and Justices Cruz Reynoso and Joseph Grodin lost their retention elections. However, given the ideological distinctions between the six remaining Justices, it remains to be seen whether the Court's jurisprudence will shift further.

Supreme Court of California

Statement on Equality

June 11, 2020

In view of recent events in our communities and through the nation, we are at an inflection point in our history. It is all too clear that the legacy of past injustices inflicted on African Americans persists powerfully and tragically to this day. Each of us has a duty to recognize there is much unfinished and essential work that must be done to make equality and inclusion an everyday reality for all.

We must, as a society, honestly recognize our unacceptable failings and continue to build on our shared strengths. We must acknowledge that, in addition to overt bigotry, inattention and complacency have allowed tacit toleration of the intolerable. These are burdens particularly borne by African Americans as well as Indigenous Peoples singled out for disparate treatment in the United States Constitution when it was ratified. We have an opportunity, in this moment, to overcome division, accept responsibility for our troubled past, and forge a unified future for all who share devotion to this country and its ideals.

We state clearly and without equivocation that we condemn racism in all its forms: conscious, unconscious, institutional, structural, historic, and continuing. We say this as persons who believe all members of humanity deserve equal respect and dignity; as citizens committed to building a more perfect Union; and as leaders of an institution whose fundamental mission is to ensure equal justice under the law for every single person.

In our profession and in our daily lives, we must confront the injustices that have led millions to call for a justice system that works fairly for everyone. Each member of this court, along with the court as a whole, embraces this obligation. As members of the legal profession sworn to uphold our fundamental constitutional values, we will not and must not rest until the promise of equal justice under law is, for all our people, a living truth.

Sincerely,

Tani Cantil-Sakauye, Chief Justice

Ming Chin, Associate Justice

Carol Corrigan, Associate Justice

Goodwin Liu, Associate Justice

Mariano-Florentino Cuéllar, Associate Justice

Leondra Kruger, Associate Justice

Joshua Groban, Associate Justice

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RACIAL JUSTICE COMMITTEE

The Racial Justice Committee addresses issues regarding racial injustice and reform. All CLA members are welcome to join. We focus on four main areas of content: public education, member education, member engagement, and legislative/other advocacy efforts.

We thank the Criminal Law Section, the Litigation Section and the CLA's DEI Outreach Council (DOC) for taking the lead.

*Join the discussion and
check out our events at*

calawyers.org/rjc

