1-1959

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SOCIAL ATTITUDES AS REFLECTED IN
EARLY CALIFORNIA LAW

By Leon R. Yankwich*

Society and Law

A historian of modern culture has written:¹

One of the best tests of the quality of the civilization of any given people at any given time is the code of laws enacted and enforced. For, like all other manifestations of social life, the laws are the natural outgrowth of that body of convictions, sentiments, and prejudices which make up the public opinion of a particular era; and, far more plainly than in the case of other social phenomena, the changes of public opinion from age to age and from year to year are written in the statute books and in the records of the courts. Even so, some allowance must be made for the conservatism of all modes of social control. The laws lag always a little behind the prevalent public opinion, just as that lags behind the changes implied in the advance of science and in the evolution of technology and of the economic structure.

This is a proper estimate of modern legal systems and their relation to the social organizations, the needs of which they are intended to satisfy. In brief, they mean that law, except where imposed from above by a conqueror, arises out of the needs of a particular society to formalize into law the principles which govern the relation of the individuals of that society to one another and the relation of the individuals to the community. The ideas which dominate a society, at a particular time, find expression in its legal norms. If, in retrospect, they at times look foolish to later students, it is because men and society have not always been wise. And it is well, in studying the past or its legal systems, to study them in the perspective of their time. Ideas which may be commonly accepted at a later period may have been only dimly discerned in the past. And it is not fair to past generations to apply to them, in all respects, the standards of today. Even as between the various communities of the group composing what we know today as western civilization, there may be differences in acceptance of certain ideas which we consider basic. And, of course, authoritarian and totalitarian regimes openly repudiate some of the fundamentals of our way of life.


The California Heritage

California has a double heritage. Its early colonization was by the Spanish and Mexicans and it was actually a part of Mexico for almost the first half of the nineteenth century. The missionaries and the Mexican officials who governed the land brought with them not only the religion, but also the customs and legal institutions of their land. When communities were established in Spanish California the pattern of organization was, to a great extent, that of the mother country. So was the legal system. And we find that the communities enforced in California the system brought from Spain through Mexico, which was known as the "Alcalde system," as promulgated in a Mexican decree dated March 20, 1837. It, in turn, had its origin in the Decree of the Cortez of Spain, dated 1812. The Alcalde combined in his person the duties of the administrator and the executive, although as general supervisor of the peace of the community he had limited power to impose penalties and administer conciliacion. In addition to this, there prevailed a complete judicial system consisting of justices of peace, superior tribunals, and even a court of appeals. In the memoirs of one of the ablest

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2 The Alcalde System of California, 1 Cal. 559 (1851). The broad scope of the powers of the Alcaldes may be gathered from the following extracts from the Mexican Decree of March 20, 1837, which is reproduced in the article just cited at 560–61:

"Art. 1. The Alcaldes in the places of their usual residence, will take care of good order and public tranquility.

"Art. 2. They will watch over the execution and fulfilment of the police regulations, laws, decrees, and orders which may be communicated to them by the Sub-Prefects, or in their defect, by the Prefects, and they will duly circulate them to the Justices of the Peace of the Municipality.

"Art. 3. For the fulfilment of the objects mentioned in the preceding articles they will ask for the necessary force from the Military Commandant.

"Art. 4. In defect of such force, or if it should not be sufficient, and any citizens should ask assistance in order to secure their persons or property when they are in danger, and in general for the security or apprehension of criminals within their jurisdiction, and for the preservation of public order, they will call upon the citizens, who are strictly obliged to obey them, the same as any other public authority.

"Art. 5. They will cause the culprit, in flagrante, to be secured and within three days will put him at the disposal of the competent Judge.

"Art. 6. They will see that the residents of the place live by useful occupations, and they will reprimand the idle, vagabonds, persons of bad conduct and those who have no known occupation.

"Art. 7. Those who through drunkenness or any other motive, disturb the public tranquility, or who disobey them, or are wanting in respect to them, they may on their own authority fine to the amount of $25, to be applied to the municipal funds, or they may sentence to four days of public works, or double the time of arrest, taking into consideration the circumstances of the individuals, and giving them a trial in case they may require it: but with respect to crimes designated by law the existing regulations must be observed.

"Art. 8. Should any one consider himself aggrieved in the case of the preceding article he may appeal to the immediate superior, who will definitely determine what he may esteem just.

"Art. 9. They will assist and have a vote at the session of the Ayuntamientos, and they will
of the Alcaldes, Walter Colton of Monterey, we have a very detailed de-
scription not only of the wide scope of their powers but also of the society
in which they functioned.

The strength of the Spanish influence is attested by the fact that, prior
to the popular vote on the Constitution of 1849, the debates in the constitu-
tional convention were published and circularized both in Spanish and in
English.

California’s early American settlers personified certain characteristics.
Among these were intrepidity, individualism, and a tolerance for human
weakness. This latter expressed itself in certain attitudes, such as “a man
should be on his own mettle”; “he should live and let live”; and, “he and
others in the community should forget the past.” In addition to this they
considered human life cheap. California’s legal history reflects the qualities
and defects of this ideology. The older ideology of the Spanish gave way
to this spirit.

We find, at the beginning, the conflict between two ideals: the cohesive
Spanish ideal, and the loose, independent, individualistic American ideal.
These two could not coexist. The new settlers brought with them the spirit
of individualism, which is characteristic of pioneer America, and the com-
mon law tradition which embodies it.

Two civilizations clashed and the stronger survived. Later develop-
ments illustrated that the common law tradition was the better. And yet we
have suffered from ruthless individualism. It might have been better had
there been more socialmindedness. We might have husbanded some of our
great resources better.

The Common Law System

California was admitted to the Union on September 9, 1850. The legis-
lature which met earlier that year enacted on April 13, 1850, a law which

preside over them according to the order of their appointment neither the Prefect nor Sub-
Prefect assists, and when they do preside their votes shall be decisive.

“Art. 10. The temporary absence of the Alcaldes will be supplied by the Regidores accord-
ing to the order of their appointment. The same will be practised in case of death, etc., until
the person be elected who is to succeed them.”

The author of the article adds at 561: “Clearly, by this Act, Alcaldes were not constituted
judicial officers. The only town in California legally entitled to this class of Magistrates, was
the capital, Monterey; as there was not a town in California which contained a population of
4000 inhabitants, until long after the annexation of the territory to the United States.” How-
ever, the Supreme Court of California has held that where there were no judges of the first
instance, the Alcalde exercised judicial functions. Panaud v. Jones, 1 Cal. 488, 508 (1850);
Mena v. LeRoy, 1 Cal. 216 (1850). Ayuntamientos or town councils were provided for the
capital of the department, ports with a population of 4,000 inhabitants, interior towns of 8,000
inhabitants, or those to whom the right was given by special law.
adopted the common law of England as the rule of decision in the courts of California so far as it is not repugnant to or inconsistent with the Constitution of the United States or the constitution or laws of California. This law is now embodied in the California Civil Code and reads:

The common law of England, so far as it is not repugnant to or inconsistent with the Constitution of the United States, or the Constitution or laws of this State, is the rule of decision in all the courts of this State.

Although adopted prior to the admission of California to the Union, its effectiveness after California's admission has never been questioned.

This provision took effect on April 20, 1850. From July 7, 1846, the day on which the American flag was raised at Monterey, to April 20, 1850, Spanish-Mexican law prevailed as it had before.

By the adoption of the simple declaration just quoted, there was read into the law of California the English common law, both of parliamentary and judicial origin, as it existed at the time and as interpreted by English courts as well as by the courts of other states of the Union which had adopted the English common law. As a rule, California courts will not follow current English cases, preferring American cases interpreting the common law as adapted to American needs. However, whenever a question arises whether, at the time of the adoption of the California statute, certain procedural incidences could be resorted to, the courts will examine the English decisions at about the date, 1850, in order to determine the matter, and go back, if necessary, to the state of the law on American Independence Day, July 4, 1776.

Thus in 1925, in an important water case, one of the superior courts of California had granted a permanent injunction against certain of the parties. In order to secure to the dissatisfied party the benefits of an appeal which would be lost if the injunction prohibiting the defendants from appropriating water were enforced immediately, the trial court made an order suspending the permanent injunction pending appeal. The Tulare Irrigation District, which had won the case, challenged the right of the trial court to do so. They sought a writ of prohibition in the Supreme Court. In denying it, the court went back to the law of England as it existed on July 4, 1776, and concluded that for a long "course of years" prior to 1807, the English Courts of Chancery had exercised the power to stay proceedings in equity pending appeal, and that American courts, in states which had adopted the

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3 Cal. Stats. 1850, ch. 95, at 219.
4 CAL. CIV. CODE § 22.2.
5 Lux v. Haggin, 69 Cal. 255, 337, 10 Pac. 674, 720 (1886).
English equity practice, had done the same. So the court, despite its conclusion that there was no statutory authority in the state for the exercise of such power, nevertheless sustained it as inherent in the equity jurisdiction of English courts, which our equity procedure followed.  

Vestiges of the Old System

The adoption of the common law in California was not achieved without a struggle. Principles of Spanish law, through Mexican occupancy, had become embedded in the way of the life of the people. So, when following the adoption of the Constitution of 1849, the first legislature met in 1850, the protagonists of the two opposite systems, civil law and common law, presented their views. A group of San Francisco lawyers, after several meetings, adopted resolutions urging the adoption of the common law system, which resolutions were placed before the California Assembly. A rival group of nineteen lawyers of the San Francisco Bar petitioned the California Senate to adopt the civil law system. Governor Peter Burnett was an advocate of the civil law system, and in his first message to the same legislature he had urged its adoption. The Senate referred the resolution to a judiciary committee which, on February 27, 1850, filed its report which has been preserved.

The report made an extensive comparison between the two systems, and with true Anglo-Saxon pride, pointed to the excellency and flexibility of the common law, and urged its adoption in these glowing terms:

The Common Law is that system of jurisprudence which, deducing its origin from the traditionary customs and simple laws of the Saxons, becoming blended with many of the customs and laws of the Normans, enriched with the most valuable portions of the Civil Law, modified and enlarged by numerous Acts of the English Parliament, smoothed in its asperities and moulded into shape by a succession of as learned and wise and sagacious intellects as the world ever saw, has grown up, during the lapse of centuries, under the reformed religion and enlightened philosophy and literature of England, and has come down to us, amended and improved by American Legislation, and adapted to the republican principles and energetic character of the American people. To that system the world is indebted for whatever it enjoys of free government, of political and religious liberty, of untrammelled legislation, and unbought administration of justice. To that system do we now owe the institution of trial by jury, and the privileges of the writ of Habeas Corpus, both equally unknown in the Civil Law. Under that system all the great branches of human industry—agriculture, commerce, and manufactures—enjoy equal protection and

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8 Report on Civil and Common Law, 1 Cal. 588, 592 (1850).
9 Id. at 592.
equal favor; and under that, less than under any scheme ever devised by
the wisdom of man, has personal liberty been subject to the restrictions and
assaults of prerogative and arbitrary power.

The pattern was thus established and for over a century the impress
of the common law has been on California jurisprudence. Nevertheless, ves-
tiges of the old system were carried over. The reason is very obvious. Many
transactions were had under the Mexican legal system, and when they
affected property rights, the courts, in later years, gave full recognition to
them. This is the true tradition of judicial realism. Thus, in determining the
validity of a will, the California-Mexican custom of considering two wit-
tesses sufficient was followed."10

In making these rulings the courts refused to give retroactive effect to
the newly enacted California statute relating to wills so as to invalidate
prior wills executed in conformity with California-Mexican law and cus-
tom. They also gave recognition to grants of land made by Alcaldes, while
the Spanish and Mexican laws were in force, where the recording provisions
of the California-Mexican law had been complied with.11

Indeed, as late as 1901, we find California courts recognizing divisions
of property made in compliance with Mexican law.12

**Conciliacion**

But, while the courts were thus willing to protect rights which had been
acquired under Mexican law, elements of Mexican procedure which were
foreign to our system were not adopted. The best illustration is the refusal
of the early California courts to recognize the procedure known under
Mexican law as *conciliacion* as a condition precedent to instituting a civil
action.

Although the courts have said generally that the Spanish-American
civil law was in force in California at the time of its cession by Mexico to
the United States,13 they have considered *conciliacion* as so alien to the
California way of life, that they did not give it recognition even before the
Codes actually went into effect. Indeed, the Supreme Court of California,
in one of the earliest cases, stated that

since the acquisition of California by the Americans, the proceeding of
*conciliacion* has, in all cases, been deemed a useless formality by the greater

10 Tevis v. Pitcher, 10 Cal. 465, 477 (1858); Castro v. Castro, 6 Cal. 158 (1856); Panaud
v. Jones, 1 Cal. 488 (1850).
11 Sill v. Reese, 47 Cal. 294, 344 (1874); Donner v. Palmer, 31 Cal. 500 (1867). And see,
12 De Castro v. Fellom, 135 Cal. 225, 67 Pac. 142 (1901).
13 Estate of Moffitt, 153 Cal. 359, 363, 95 Pac. 1025, 1026 (1908).
A few observations about the nature of conciliacion.

In the Law of March 23, 1837, it is provided that before any actions, either civil or criminal, for wrongs purely personal, are instituted, the means of conciliacion must first be tried. The Alcalde and the justice of the peace, in places having a population of more than 1000 persons, must exercise the prerogative of conciliacion. Before any complaint can be issued it must be proved that conciliacion has been attempted. A person complaining of an injury appears before the Alcalde or justice of the peace and asks that the defendant be summoned in order to proceed in the trial of conciliacion. The judges act merely as conciliators and endeavor to adjust the matter in a friendly manner.

When this is done the agreement is set forth in a book called “Book of Conciliacion.” When an agreement is reached, the matter is at an end. If none is reached the Alcalde issues a certificate that conciliacion has been attempted but without success.15

In one of the first cases in the American era which involved the right of a corporation to forfeit the stock of one of the stockholders the court, while holding that the matter was one which, under Mexican law, would require conciliacion, ruled that the failure to resort to conciliacion did not prevent the court from entertaining jurisdiction of the suit. The court said:16

Notwithstanding the importance which seems to be attached to the trial of conciliacion by Spanish and Mexican writers... and even conceding that it may operate beneficially in the nations for which it was originally designed, still, amongst the American people it can be looked upon in no other light than as a useless and dilatory formality, unattended by a single profitable result, and not affecting the substantial justice of any case. Viewing, then the absence of a certificate of the failure of conciliacion as a mere formal and technical defect, error or imperfection, we feel ourselves fully justified in overruling the objection founded upon it.

And lest the bar fail to understand that the court was giving a coup de grace to the procedure, it added this very significant statement:17

We have entered thus fully into an examination of the doctrine of conciliacion, and given our views of it at length, in order that the profession may understand, that the objection for the want of conciliatory measures is, so far as the court is concerned, disposed of now, and, as we sincerely hope, forever.

14 Von Schmidt v. Huntington, 1 Cal. 55, 64 (1850).
15 Id. at 62-64; The Alcalde System of California, 1 Cal. 569, 572 (1851).
16 Von Schmidt v. Huntington, 1 Cal. 55, 65 (1850).
17 Ibid.
The only important vestige of Mexican law is the law of community property which was carried over into the law of California. Indeed, the Constitution of 1849 enjoined upon the legislature the duty of passing laws defining the property rights of women more clearly. The system has been a part of the code of California, although the change it has undergone, so as to vest the right of the wife in her portion of the community property, is so great that a student of the original system and some of our early California judges would find it difficult to recognize it.

Prejudice in the Form of Law

In adapting the common law to the California scene both the legislature and judges were children of their day. They possessed the ideas, ideals, limitations and prejudices of the pioneer civilization which they helped start in California, and which supplanted the older and more sedate civilization of Spanish-Mexican origin. If they did not exhibit, at the time, a wisdom which we, their successors, claim to have, it is because they were human. It is not always fair to the past to judge it by the criteria of the present. And this is especially true when we deal with the makers or interpreters of law.

For those who deal with the end product,—the law,—and seek to apply it to particular situations, may, if they have special genius, rise above the mores of the community from which a particular piece of legislation springs. When they do this, we have the creative judicial spirit at its best. If they fail, the mores of the community at the particular time, as expressed in the legislation, hold full sway. And if they are the result of those prejudices which communities, at various times, enshrine into legal principles which they consider absolute, the spectacle, especially in retrospect, is not very enlightening.

In 1948, the Supreme Court of California invalidated a statute against miscegenation which, in one form or another, had been a part of the law of California since 1850. That statute, as codified in 1872, prohibited marriage only between white persons and negroes or mulattoes. As subsequently amended, it read at the time the decision was made:


20 Cal. Stats. 1850, ch. 140, at 424.

21 It was amended twice after its codifications: Cal. Stats. 1901, ch. 157, at 335; Cal. Stats. 1933, ch. 104, at 561.
All marriages of white persons with negroes, Mongolians, members of the Malay race, or mulattoes are illegal and void.\textsuperscript{22}

In invalidating it, the court used this language which can be approved by all who are opposed to any discrimination by law on the basis of race:\textsuperscript{28}

The categorical statement that non-Caucasians are inherently physically inferior is without scientific proof. In recent years scientists have attached great weight to the fact that their segregation in a generally inferior environment greatly increases their liability to physical ailments. In any event, generalizations based on race are untrustworthy in view of the great variations among members of the same race. The rationalization, therefore, that marriage between Caucasians and non-Caucasians is socially undesirable because of the physical disabilities of the latter, fails to take account of the physical disabilities of Caucasians and fails also to take account of variations among non-Caucasians. The Legislature is free to prohibit marriages that are socially dangerous because of the physical disabilities of the parties concerned. (See, Civ. Code §§ 79.01, 79.06.) The miscegenation statute, however, condemns certain races as unfit to marry with Caucasians on the premise of a hypothetical racial disability, regardless of the physical qualifications of the individuals concerned. If this premise were carried to its logical conclusion, non-Caucasians who are now precluded from marrying Caucasians on physical grounds would also be precluded from marrying among themselves on the same grounds. The concern to prevent marriages in the first category and the indifference about marriages in the second reveal the spuriousness of the contention that intermarriages between Caucasians and non-Caucasians is socially dangerous on physical grounds.

The statute was one of a group of statutes passed by the California Legislature of 1850, noted for its strong racial bias.

California's early inhabitants came from the South, and the battle for its first constitutional convention was fought over the limitation or extension of slavery in the Union. So, what we have come to call "racism" was dominant in its early history.

The first Civil Practice Act provided that no Indian or Negro should be allowed to testify as a witness in any action in which a white person is a party.\textsuperscript{24} The corresponding provision in Section 14 of the Criminal Act of 1850 was:\textsuperscript{25}

No black or mulatto person, or Indian, shall be permitted to give evidence in favor of, or against, any white person.

After the passage of these provisions a white Californian was convicted of murder upon the testimony of a Chinese. On appeal, in 1854, the defendant

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\begin{itemize}
\item \textsuperscript{22} Cal. Stats. 1933, ch. 104, at 561.
\item \textsuperscript{23} Perez v. Sharp, 32 Cal. 2d 711, 722–23, 198 P.2d 17, 23–24 (1948).
\item \textsuperscript{24} Cal. Stats. 1851, ch. 1, § 394, at 113.
\item \textsuperscript{25} Cal. Stats. 1850, ch. 99, § 14, at 230.
\end{itemize}
\end{flushright}
raised the question whether such testimony was properly received. The word “Chinese” was not mentioned in either the civil or criminal acts. However, the court found no difficulty in solving the problem. It reached the conclusion, with one of the justices filing a one sentence dissent, that the words were generic and that it was the clear intention to deny to every “person of color” the right to testify against a white person. After referring with dogmatic certainty to the high point of perfection which “the science of ethnology” had attained, the chief justice disposed of the matter in these words:

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.

Confronted with a criminal statute in a community, the judicial system of which stemmed from the common law, one of the cardinal principles of which is equality before the law, an American court stretched the language of a statute and turned a Chinese into a black or mulatto or Indian or “what-have-you,” in order to free a white citizen who had been found guilty of murder on the testimony of a Chinese witness.

Human life was cheap in those pioneer days and Chinese human life was cheapest. When, in order to solve a particular situation, courts establish dubious principles, these have a way of gathering strength as they go along, *Viresque adquirit eundo,*—as Virgil put it.

A few years later, in 1859, the court found no difficulty in applying the principle to a civil case in which Chinese had been excluded as witnesses when offered by the plaintiff. The same year, the court diluted somewhat its stark racism. This, too, was a murder case in which a verdict of murder in the first degree had been returned. The court allowed as a witness one Martin, who was dark—a native of Turkey, born of Turkish parents. While conceding that the previous ruling did not settle the matter, the court said:

We cannot presume that all persons having tawny skins and dark complexions are within the principles of that decision.

So it resolved the doubt in favor of the verdict. But the generous spirit that may have motivated this decision did not last long. In 1860, the court

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26 People v. Hall, 4 Cal. 399, 403 (1854).
27 Speer v. See Yup Co., 13 Cal. 73 (1859).
28 People v. Elyea, 14 Cal. 144, 146 (1859).
had before it the question whether the statute excluding witnesses applied to the injured person. In this case he was a person of "half negro blood" as the opinion calls him, from whom the defendant had stolen a watch. The trial court had received his testimony under the provision of Section 13 of the Criminal Practice Act, which distinctly provided that

the party or parties injured shall, in all cases, be competent witnesses.29

But the Supreme Court held that the language of this section was modified by another section,30 which "creates an exception to the general rule declared in the preceding section."31 Mr. Chief Justice Field delivered the opinion in which Baldwin, J. concurred. Cope, J. would not go along and wrote a simple, yet forceful, opinion in which he applied the familiar rule that an exception to the general rule must be

confined within the narrowest limits which can be assigned to it upon any reasonable hypothesis of the intention of the Legislature.32

He insisted that any other construction would "in many cases, result in entire failure of public justice."33 And that is just what the result of the majority opinion was. It is inconceivable that even a racist-minded court should have aided in making it so easy to escape merited punishment by ruling that the person from whom property is stolen or the person who is injured by a criminal assault was not a competent witness against the thief or the assailant.

The legislature of 1863 amended the section to read:34

No Indian or person having one half or more of Indian blood, or Mongolian, or Chinese, shall be permitted to give evidence in favor of or against, any white man.

The Civil War ended. Even before its end, the Negroes were emancipated. The first Civil Rights Bill, which preceded the adoption of the Fourteenth Amendment, was adopted.35

In 1869, the Supreme Court of California was again confronted with this old witness statute. A native American Negro was indicted for robbing a Chinese, who was the sole witness to the offense. Upon a stipulation that no other testimony was available at the trial, the trial court set aside the indictment and discharged the defendant.36 The Supreme Court sustained the order upon the ground that the Civil Rights Bill had modified the state

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30 People v. Howard, 17 Cal. 65 (1860).
31 Id. at 66.
32 Cal. Stats. 1863, ch. 70, at 69.
33 Civil Rights Act, 14 Stat. 27 (1866).
34 People v. Washington, 36 Cal. 658 (1869).
statute so as to place the native Negro, as regards his civil rights, on the same footing with white persons. The defendant was, therefore, given the immunity which the statute had given to white persons. So, to all intents and purposes, a Negro became a white person.

In 1870, the court repudiated this case, but only to hold that even the fourteenth amendment to the Constitution of the United States did not affect the validity of the anti-Chinese witness exclusion statute. The statute was finally given its coup de grace by the promulgation of the codes in 1872, but not without the Supreme Court freeing another white man who had been convicted of an assault to commit murder on a Chinese. The court held that the prior rulings were binding upon the trial courts which are not at liberty to set aside or disregard the decisions of this Court because it may seem to them that the decisions are unsound.

The fact that the new codes had abolished the rule was not considered by the court as a ground for deviation. Indeed, they pointed to it as rendering the whole question of the correctness of its prior decisions of no practical importance. Thus, consistency came to the aid of entrenched prejudice.

If we are inclined to be critical, it is well to bear in mind that the Supreme Court of the United States, more than half a century later, disregarding known anthropological and ethnological data, held that a high caste Hindu was not a white person, under the Naturalization statute. So doing, they interpreted the words “white person” as the term is used in common parlance, saying:

What we now hold is that the words “free white persons” are words of common speech, to be interpreted in accordance with the understanding of the common man, synonymous with the word “Caucasian” only as that word is popularly understood. As so understood and used, whatever may be the speculations of the ethnologist, it does not include the body of people to whom the appellee belongs. It is a matter of familiar observation and knowledge that the physical group characteristic of the Hindus render them readily distinguishable from the various groups of persons in this country commonly recognized as white. The children of English, French, German, Italian, Scandinavian, and other European parentage, quickly merge into the mass of our population and lose the distinctive hallmarks of their European origin. On the other hand, it cannot be doubted that the children born in this country of Hindu parents would retain indefinitely the clear evidence of their ancestry. It is very far from our thought to suggest the slightest question of racial superiority or inferiority. What we suggest is merely

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36 People v. Brady, 40 Cal. 198 (1870).
37 People v. McGuire, 45 Cal. 56, 57 (1872).
38 Naturalization Act, 2 Stat. 153 (1802).
racial difference, and it is of such character and extent that the great body of our people instinctively recognize it and reject the thought of assimilation.

Thus, *non-assimilability*—ever the racist’s appeal—is adopted as a rule of statutory interpretation. And as late as 1934, the Court, speaking through Mr. Justice Cardozo, reaffirmed this popular conception of race by stating emphatically that

men are not white if the strain of colored blood in them is a half or a quarter, or not improbably, even less, the governing test always . . . being that of common understanding.\(^{40}\)

Add to all this the fact that the legislature of California, on February 13, 1880, endeavored to carry into effect the anti-alien mandate of the new constitution\(^{41}\) by prohibiting the employment of even native Chinese or Mongolians, by any corporation, public or private, and the picture is wretched indeed.

The reverse of it, however, shows that the federal courts declared the particular non-employment act unconstitutional.\(^{42}\) And we have the noble words of the Supreme Court of California in more recent years, already referred to, in repudiating racism and invalidating the eighty-year old California miscegenation statute,\(^{43}\) and those of the Supreme Court of the United States condemning restrictive covenants and exclusion of Negroes from state higher institutions of learning.\(^{44}\)

Above all, there towers the great unanimous decision of the Supreme Court of the United States in the school desegregation cases\(^{45}\) in which the Court gave the *coup de grace* to the “separate but equal doctrine” it had declared many years before.\(^{46}\) The Court came at last to grips with the fundamental doctrine, which Mr. Justice Harlan had anticipated, that segregation in public schools is *constitutionally* indefensible. His words were:\(^{47}\)

But in view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here.

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\(^{40}\) *Morrison v. California*, 291 U.S. 82, 86 (1934).

\(^{41}\) *Cal. Const.* art. XIX, § 2 (1879) (repealed November 4, 1952).

\(^{42}\) *In re Tiburcio Parrott*, 1 Fed. 481 (C.C.D. Cal. 1880).


\(^{44}\) *Shelley v. Kraemer*, 334 U.S. 1 (1948); *Hurd v. Hodge*, 334 U.S. 24 (1948). And see the decision of the United States Court of Appeals for the Ninth Circuit condemning the racist theories which led to the segregation of the native Japanese in *Acheson v. Murakami*, 176 F.2d 953 (9th Cir. 1949), and *Sweatt v. Painter*, 339 U.S. 629 (1950), and *McLaurin v. Oklahoma Regents*, 339 U.S. 637 (1950) (invalidating the segregation of Negroes in the Southern state-supported schools and their exclusion from certain schools, under the so-called “separate but equal” doctrine). This section of the article is an abridgment, with some modifications, of a portion of my article *Limitations of Law and Judicature*, 99 U. Pa. L. Rev. 171, 184–89 (1950).


\(^{46}\) See *Fessy v. Ferguson*, 163 U.S. 537 (1896).

\(^{47}\) *Id.* at 539.
Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful. The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved.

There has been some tendency to criticise the opinion of the Supreme Court in the desegregation case because it referred to sociological data. Perhaps it might have been better if the Court, following Mr. Justice Harlan, had based it upon the more abstract concept of that equality before the law which is at the basis of our constitutional heritage. But in these pragmatic days it was well to emphasize to a practical-minded people that, aside from devotion to abstract principles, as a practical proposition, segregation must, of necessity, have a deleterious effect upon those to whom it applies, creating a divisive attitude. In this respect the words of Mr. Chief Justice Warren, in their simplicity, are as magnificent in their scope as those of Mr. Justice Harlan. To quote him: 48

To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.

The significance of this decision is heightened by the more recent decision of the Supreme Court emphasizing that in enforcing the right of all to integrated schools the Court will not listen to absurd appeals of local authorities to the “state rights” doctrine, or the various attempts to revive the outmoded doctrine of “interposition” to which the South resorted at various times in its attempts to preserve slavery. 49 Particularly significant is the Court’s rejection of the idea that threat of mob violence is an excuse for disobeying the order of a federal court: 50

The constitutional rights of respondents are not to be sacrificed or yielded to the violence and disorder which have followed upon the actions of the Governor and Legislature. As this Court said some 41 years ago in a unanimous opinion in a case involving another aspect of racial segregation: “It is urged that this proposed segregation will promote the public peace by preventing race conflicts. Desirable as this is, and important as is the preservation of the public peace, this aim cannot be accomplished by laws or ordinances which deny rights created or protected by the Federal Constitution.” . . . Thus law and order are not here to be preserved by depriving the Negro children of their constitutional rights.

49 See the excellent address by Mr. Justice Douglas commenting on a famous state attempt to nullify a federal court decision (United States v. Peters, 9 U.S. (5 Cranch) 115 (1809)), 19 F.R.D. 185 (1956).
50 Cooper v. Aaron, 358 U.S. 1, 16 (1958).
And in the concluding portion of the opinion there is almost the echo of Mr. Justice Harlan's words that non-segregation in schools is "embraced in the concept of due process." This is the other side of the shield.

**An Old Loyalty Oath—And Some New Ones**

The fact that in our country more and more restraints on personal liberty are sought in the name of national security reveals a pattern which is old in the history of freedom of expression in the English-speaking world. In English law the aim was achieved by broadening the law of criminal libel. The argument used is that inherent in every government is the right to defend its existence. But granted this to be so, it must do it by democratic means and not resort to the methods of totalitarianism.

One writer has summed up the democratic view in this manner:  

We deliberately subject our government to the rigorous test of toleration of criticism of our basic constitutional processes, because we regard such toleration as our best assurance that the criticism will never be valid.

The problem becomes acute after every period of crisis and especially war. Reaction follows in the wake of war. An atmosphere is created which is a fruitful ground for official thinking and official legislation, aiming at thought control. Many of the measures allegedly taken in the name of national security result in restraints that impair the real sources of security—freedom to think and choose.

California furnishes an old precedent for the recent loyalty oath statutes—the loyalty oath statute of 1863. The pro-slavery background of many early inhabitants of California makes it very easy to understand why the legislature of 1863 adopted a loyalty statute requiring attorneys and litigants who sought the aid of courts, either as plaintiffs or as defendants by way of a counterclaim, to give proof of loyalty. The litigant was required to sign an oath which read:  

I, (here insert the name of the plaintiff) do solemnly swear that I will support the Constitution of the United States and the Constitution of the State of California; that I will bear true faith and allegiance to the Government of the United States, any ordinance, resolution, or law of any State or Territory, or of any Convention or Legislature thereof, to the contrary notwithstanding; that I have not, since the (here insert the date of the passage of this act) knowingly aided, encouraged, countenanced, or assisted, nor will I hereafter, in any manner aid, encourage, countenance, or assist the so-called Confederate States, or any of them, in their rebellion against the lawful

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83 Cal. Stats. 1863, ch. 365, at 566.
Government of the United States; and this I do without any qualification or mental reservation whatsoever. So help me God.

The attorney was required to file a similar oath. Failure to file it was punished as a misdemeanor and was also made a ground for denying him the right to appear. The constitutionality of this enactment was challenged. But the Supreme Court of California, in language which is reminiscent of some of the arguments that are being used now, could see no constitutional infringement in the requirement of the oath, either as a ground for denial of the right to practice law, or as a denial of the right of a litigant to use the courts of the state. Its ground for sustaining the law as applied to lawyers was stated in this language:64

We have carefully considered the constitutional objections to this law, and we see nothing in the Constitution of this State prohibiting the Legislature from requiring public officers, or those exercising special privileges, like attorneys at law, to take an expurgatory oath of the character of that prescribed by this act, and it is clearly within their general legislative powers, unless so prohibited. It is no answer to say that the power is liable to abuse, for that is an objection which lies to the use of every power.

This is rather sedate language compared with the purple patch the court used in defending the indefensible position that a litigant should be denied the use of the courts of the state unless he took a loyalty oath. I quote this language:65

There is nothing in the Constitution which prohibits the Legislature from closing the doors of the Courts against traitors and their aiders and abettors; or which requires that this shall not be done until after conviction of the crime, in a regular criminal trial; or that prohibits the Legislature from requiring of those litigating in the Courts that they shall purge themselves, by their own oath, of the imputed offense, before they shall claim their aid. The treasonable acts may be so extensively and secretly con-

64 Cohen v. Wright, 22 Cal. 293, 322 (1863).
65 Id. at 325-26. When we compare this language with the ruling of the Supreme Court in Ex parte Kawato, 317 U.S. 69 (1942), in upholding the right of interned Japanese to use the courts of the United States, and the noble language of Mr. Justice Black in Johnson v. Eisentrager, 339 U.S. 763, 791 (1950), in insisting that even non-resident alien enemies should have access to our courts to question their conviction by occupation military tribunals, we are forced to admit that some progress is being made in our approach. A brief quotation from Mr. Justice Black's opinion, at 798, is worth reproducing: "Our Constitution has led people everywhere to hope and believe that wherever our laws control, all people, whether our citizens or not, would have an equal chance before the bar of criminal justice. Conquest by the United States, unlike conquest by many other nations, does not mean tyranny. For our people 'choose to maintain their greatness by justice rather than violence.' Our constitutional principles are such that their mandate of equal justice under law should be applied as well when we occupy lands across the sea as when our flag flew only over thirteen colonies. Our nation proclaims a belief in the dignity of human beings as such, no matter what their nationality or where they happen to live."
mitted, that the ordinary course of a criminal trial would be entirely ineffectual to stay the evil. The litigant has no just right to complain, for it is his own voluntary or willful act that closes the doors against him. The law warned him what the result would be, and although it may be severe, it is a consequence of his own voluntary violation of the fundamental rights of society. The law may be a very efficient means of preventing the spread of treason and rebellion. It brings one of the consequences of treasonable conduct directly home to those who have something at stake—something to lose if the Government is overthrown—something to gain if it is sustained. Without it, traitors might recover, by the aid of the Courts, the very means to destroy the Government, by aiding and assisting the rebellion, and thus the Government would be furnishing the instruments to assist in its own destruction. The objection that it is treason against the United States, and not the State, that is made the ground for excluding the litigant, is not valid. We are one nation, one people, and the States are but parts of one whole; and whatever tends to destroy the nation affects equally each State.

In 1864 the California Supreme Court reaffirmed this decision and declined to allow an attorney to practice, although he had taken “the oath to support the Constitution of the United States and of the State of California.”

Here, again, as students of history we can see how patterns of thought and action have a way of reappearing historically, and we can draw an interesting parallelism between what took place in these cases and what took place in 1950 at the University of California. For the teachers who objected to the special oath took the same stand, i.e., that taking the oath required of all public officers to support the Constitution of the United States and of the state should be sufficient. This time they won. But at the cost of many blasted academic careers.

The California loyalty oath act of 1863, the loyalty oath requirement of the University of California in 1950, which the court had before it in the case just cited, and the general California loyalty statute of 1952 applicable to all state employees are direct attempts to control the loyalty of public servants. But there have not been lacking indirect legislative assaults on guaranteed freedoms. Indeed, they have become a common practice which is not limited to California. So we have had attempts to limit free speech through state or local laws requiring official permission before circulating printed material or exercising indirect censorship. Laws have been enacted restricting the right to peaceful assembly if a meeting be held

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56 Ex parte Yale, 24 Cal. 241 (1864).
under suspect auspices.\textsuperscript{64} And there have been efforts to control freedom of the press through taxation,\textsuperscript{65} and to control the thinking of the members of the Bar by denying admission to the Bar to persons who professed heterodox doctrines.\textsuperscript{66} It was, therefore, to be expected that legislators, in endeavoring to secure conformity to standard beliefs, would resort to similar methods of indirection. So we have the California statute of 1954 which carried into effect the provisions of section 19 of article XX, of the California Constitution, adopted on November 4, 1952, which denied tax exemptions to persons or organizations entitled to them unless they subscribed to an oath that they did not advocate the overthrow of the government by force.\textsuperscript{67} As in the past, the California Supreme Court found no difficulty in sustaining this statute.\textsuperscript{68} However, in a joint opinion involving the claims of churches and that of a soldier, the United States Supreme Court unanimously struck down these limitations.\textsuperscript{69} The majority opinion, while upholding the denial of tax exemption to persons who engaged in proscribed speech for which they might be criminally prosecuted, held that a state could not place the burden upon the claimant to prove himself not guilty of an offense before seeking the exemption.\textsuperscript{70}

The State clearly has no such compelling interest at stake as to justify a short-cut procedure which must inevitably result in suppressing protected speech. Accordingly, though the validity of § 19 of Art. XX of the State Constitution be conceded arguendo, its enforcement through procedures which place the burdens of proof and persuasion on the taxpayer is a violation of due process.

The concurring opinion of Mr. Justice Black contained a broad attack on the entire loyalty oath incidence.\textsuperscript{71}

Loyalty oaths, as well as other contemporary "security measures," tend to stifle all forms of unorthodox or unpopular thinking or expression—the kind of thought and expression which has played such a vital and beneficial role in the history of this Nation. The result is a stultifying conformity which in the end may well turn out to be more destructive to our free society than foreign agents could ever hope to be. The course which we have been following the last decade is not the course of a strong, free, secure people, but that of the frightened, the insecure, the intolerant.

\textsuperscript{64} De Jonge v. Oregon, 299 U.S. 353 (1937).
\textsuperscript{67} CAL. REV. & TAX. CODE § 32.
\textsuperscript{68} Id. at 513.
\textsuperscript{69} Id. at 529.
\textsuperscript{70} Id. at 532.
Mr. Justice Douglas in his concurring opinion drew strongly upon the framers of the Constitution, especially Alexander Hamilton, for his conclusion that the attempt by the state to impose loyalty in the guise of the denial of taxation is violative of due process.\footnote{id}{Id. at 535–36. An extensive literature on the subject of loyalty measures and the investigations which have preceded them has grown up. Reference should be made to the following in which the various facets of the problem are discussed from the traditional liberal point of view: \textit{Taylor, Grand Inquest} (1955); \textit{Mason, Security Through Freedom} (1955); \textit{Bart}, \textit{Government by Investigation} (1955); \textit{Wiggins, Freedom or Secrecy} (1956); \textit{Brown, Loyalty and Security} (1958).}

Today what one thinks or believes, what one utters and says have the full protection of the First Amendment. It is only his actions that government may examine and penalize. When we allow government to probe his beliefs and withhold from him some of the privileges of citizenship because of what he thinks, we do indeed “invert the order of things,” to use Hamilton’s phrase. All public officials—state and federal—must take an oath to support the Constitution by the express command of Article VI of the Constitution. . . . But otherwise the domains of conscience and belief have been set aside and protected from government intrusion. . . . What a man thinks is of no concern to government. “The First Amendment gives freedom of mind the same security as freedom of conscience.” . . . Advocacy and belief go hand in hand. For there can be no true freedom of mind if thoughts are secure only when they are pent up.

Once more the Court resorts to the due process clause of the fourteenth amendment to impose upon a state the freedoms guaranteed by the first amendment, a process begun many years ago.\footnote{Whitney v. California, 274 U.S. 357, 371–72 (1927); \textit{Gitlow v. New York}, 268 U.S. 652, 666–68 (1923).} Here again California had to be called to account for being engulfed in the wave of obscurantism which was sweeping the country at the time. And the lesson to be drawn from these recurrences of attempts to force conformity is this: perhaps, after all, it might be well to look at the problem of loyalty as Roger Williams looked at religious conformity. He considered it so much a question of voluntary assent that he dismissed all attempts at coercion in the field with the emphatic statement:

\begin{quote}
Enforced worship stinks in God’s nostrils.
\end{quote}

As the essence of democracy is voluntarism, free assent may hold greater hope for us than compulsive conformity in the realm of loyalty as in other realms.

\textbf{Conclusion}

So we come to the end of our discussion. It can be summarized briefly. The Senate Judiciary Committee of the California Legislature of 1850, the report of which formed the basis for the rejection by California of the civil
law system and the adoption of the English common law as the basis of
decision in California, with an almost divinatory prescience saw the im-
portance of the common law system for a California destined to become a
populous state with a very diversified economy. For they spoke even then
of the future "millions," whose activities were to be regulated by the legal
system to be adopted. They wrote:71

A choice between these two different, and in many respects conflicting
systems, devolves upon this Legislature; and, we think, we do not over-
estimate the importance of the subject, in expressing our conviction, that
this choice is the most grave and serious duty which the present Legislature
will be called upon to perform. It is, in truth, nothing less than laying the
foundation of a system of Laws, which, if adapted to the wants and wishes
of the People, will, in all probability, endure through generations to come,—
which will control the business transactions of a great community,—which
will direct and guide millions of human beings in their personal relations,
—protect them in the enjoyment of liberty and property,—guard them
through life, and dispose of their estates after death.

The common law system, with its insistence on individual rights, has
no doubt helped the development of the state. In retrospect, one wishes that
some of the expressions of individualistic judicial thinking, such as the
recognition of riparian rights in California, an arid state, had not taken
place.72 The ruthless deforestation of the state might have been halted
sooner by a people more interested in envisaging the needs of the future
than the desire to achieve quickly results beneficial to a small group. But
the Californians of the past were certain of the correctness of their atti-
tudes, although to us today they may appear to be based on an absolutism
which was unwarranted. It is well to have definite convictions. But in the
realm of human affairs some of the ideas of the day may seen as indefensi-
ble to later generations as some of the ideas in past California legislation
and judicial thinking appear to us now.

In addressing the Scotch Presbyterians, Cromwell warned them:73

I beseech you, brethren, that you pray God to show you that it is possible
for you to be mistaken.

This is wise counsel. For humility becomes a group as well as an individual.

We should resent the self-assurance and the feeling of self-righteous-
ness of past generations which induced them to enshrine temporary aims
and prejudices, racial and other, into law and deny access to courts to per-
sons who were on (what they considered) the wrong side of the War Be-
tween the States.

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71 Report on Civil and Common Law, 1 Cal. 588 (1850).
But indignation, no matter how righteous, is not enough. Our study of the past is helpful only if it enables us to avoid similar attitudes. So all those who are a part of the legal system, whether as legislators, administrators, interpreters, or members of the community (which is the primary source of the legal system) should heed the warning of Shakespeare's Isabella: 74

O, it is excellent
To have a giant's strength, but it is tyrannous
To use it like a giant!

And the administrators of the law should heed another warning of the same noblewoman: 75

Not the King's crown, nor the deputed sword,
The marshal's truncheon, nor the judge's robe
Become them with one half so good a grace
As mercy does.

Humility, compassion, mercy, understanding, unselfishness, socialmindedness—these are the most fundamental needs of any society. They should temper our use of power. For they are the true foundation stones of a society which, like ours, aims to achieve freedom and equality. The future will use them to test our actions.

And only by living up to their true implications can we avoid the mistakes of the past and be true to our democratic ideals.

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74 Shakespeare, Measure for Measure, act II, scene 2.
75 Ibid.