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The Great Dissents of the Lone Dissenter: Preface and Acknowledgments

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PREFACE AND ACKNOWLEDGMENTS

By David B. Oppenheimer and Allan Brotsky

In the spring of 2004, Frederic White, the then newly appointed dean at Golden Gate University School of Law (and now the newly appointed dean at Texas Wesleyan School of Law) asked me what I could tell him about Golden Gate graduate Jesse W. Carter. As I told Fred, all I knew was that Justice Carter was the only Golden Gate graduate to have served on the California Supreme Court, where he was an Associate Justice from 1939–1959. Fred asked me to find out a little more about him; thus began this book.

I first turned to my friend, colleague, and later co-editor of this work, Allan Brotsky. Allan had been practicing law in California for the last fifteen years that Justice Carter was on the bench, and it seemed like he knew every lawyer in California. He told me that Carter had been a great progressive voice in California in the 1940s and 50s, that he had famously refused to sign a loyalty oath as a member of the Court, that he was a “mountain man” in the style of Justice William O. Douglas, that his dissenting opinions on behalf of civil rights and liberties, defendants’ rights and the rights of labor were legendary, and that he wrote so many solo dissenting opinions that he was popularly known as “the lone dissenter.”

My research assistant, Todd Handler (GGU ’06), burrowed his way into the collection of the Bancroft Library at UC Berkeley, where he found an early 1960s biography of Justice Carter’s decisions, in the form of a typewritten manuscript (with hand corrections) by Robert Kenny. Kenny had served as the Attorney General of California from 1943–1947, and then later as a Superior Court judge in Los Angeles. With help from Kenny’s manuscript, I was able to identify some of Justice Carter’s most important dissents.

Todd also found Justice Carter’s grandson and namesake, Jesse “Scott” Carter, who recently retired after many years as a history professor at Shasta College. Scott had a treasure trove of information and memorabilia, much of which he has generously donated to the Golden Gate Law Library, where it has been

archived as the Jesse W. Carter Collection by Collection Development Librarian, Janet Fischer. We also had invaluable help from our former Law Library Director, Margaret Arnold, our current Law Library Director, Michael Daw, and our Associate Law Library Directors, Mohamed Nasralla and Maryanne Gerber. Scott's materials included notes by Justice Carter indicating which of his dissents he thought were the most important, which proved to be a valuable guide in selecting cases for this volume.

In January 2005, when I moved from Associate Dean for Academic Affairs to Associate Dean for Faculty Development, Fred asked me to organize a series of lectures to honor Justice Carter. We began what is now the "Jesse Carter Distinguished Lecture Series" with a presentation on California legal history by retired California Supreme Court Justice Joseph Grodin. Justice Grodin's talk was so inspiring, we persuaded him to write a foreword to this book. That year we also sponsored presentations by Professors Barbara Babcock, Maria Ontiveros, Carrie Menkel-Meadow, and Ian Haney-Lopez. The following year our topic was "dissent," and again one of our speakers became a contributor to the book, when Judge William Fletcher of the U.S. Court of Appeals for the Ninth Circuit gave such a wonderful talk on the value of dissenting opinions that our law review editors asked to publish it; it is also reprinted herein. We have also had the privilege of sponsoring presentations by retired California Supreme Court Justice Cruz Reynoso, Ninth Circuit Judge Marsha Berzon, American Law Institute President Michael Traynor, California P.U.C. Commissioner Timothy Simon, State Bar President Jeffrey Bleich, and ACLU Northern California Executive Director Maya Harris. We are grateful to all of them for their contributions, and to Mateo Jenkins, Sandra Derian, Jill Goetz and Cynthia Childress for organizing and publicizing their visits.

In the fall of 2005, inspired by the material I had read on Justice Carter, I proposed to the Golden Gate faculty that we co-author a book of essays on Justice Carter's dissents, with each participating faculty member taking a single dissent and writing an essay about the opinion. I agreed to serve as editor; Allan Brotsky later agreed to join me as co-editor. The response was enthusiastic. In the end, 12 faculty and our 2008–2009 law review editor-in-chief each wrote a chapter. Soon after, Allan Brotsky joined me in the editing process. The preface from this point forward reflects our work together.

The book begins with a foreword by Justice Grodin. He succinctly tells us why we should care about Justice Carter's dissents, and perhaps why they have been largely forgotten. As this volume will reveal, the dissents were, in Justice Grodin's words, at times "vitriolic" and filled with "righteous indignation." But they exhibited prescience on the direction of constitutional rights, and "the expression of a fiercely independent spirit."

Following the foreword, we present a biography of Justice Carter by California lawyer and legal historian J. Edward Johnson, published in 1966 by Bancroft Whitney on behalf of the State Bar Committee on the History of Law in California. Johnson relates Justice Carter's service as a trial lawyer (having tried over 1,000 cases), district attorney, city attorney, state bar governor and member of the California Legislature before his appointment to the Supreme Court by Governor Culbert Olson. The discussion of Justice Carter's service on the Court focuses on his dissenting opinions, and on an exchange between Justice Carter and Dean Roscoe Pound of the Harvard Law School, in which Dean Pound criticized the frequency, and what he viewed as intemperate language, of Justice Carter's lone dissents. Justice Carter, of course, dissented.

Next, Justice Brennan and Judge Fletcher eloquently defend the importance of the dissenting opinion against critics like Dean Pound. Both judges assert that in addition to pointing out flaws in the majority opinion, dissents provide a roadmap for future change.

Justice Brennan's essay was delivered at Hastings College of the Law as a Mathew Tobriner Memorial Lecture. As Justice Brennan noted, Justice Tobriner, like Justice Carter before him, was a frequent dissenter on the California Supreme Court, and like Justice Carter, he saw many of his dissents embraced by the United States Supreme Court. Borrowing from Joan Didion's essay, "Why I Write," which in turn was borrowed by Didion from George Orwell, Brennan argues that the dissenter writes not as an "egoist act," but as an act of judicial necessity. He asserts that each justice "must be an active participant, and, when necessary, must write separately to record his or her thinking."

Justice Brennan explains how dissenting opinions developed and evolved from the early view that all opinions must be unanimous (which is still the rule in some systems). He describes the justification for a judge's authority to dissent as central to the nature of the Supreme Court itself, as it evolved from its brief tradition of unanimity to the first true dissent in 1806. While often judges are encouraged to yield to the view of the majority in order to present a united front, Justice Brennan's essay argues that unanimity should never be achieved through a sacrifice of conviction; it is more important for judges to maintain their independence.

In addition to allowing a dissenter to take a stand as an individual by interacting and sharing ideas among present court members, Justice Brennan explains that a dissent has the broader purpose of ensuring the relevance of the Constitution by creating a dialogue across time with future courts. Even if the dissent never ripens into a later majority opinion, it can still improve judicial decision-making by forcing a later court to reconsider fundamental questions when it revisits an issue. "A dissent challenges the reasoning of the majority, tests its authority and establishes a benchmark against which the majority's reason-

ing can continue to be evaluated, and perhaps, in time, superseded.” In so doing, dissents prevent the judicial decision-making process from becoming stale.

In response to those who believe dissents undermine public confidence in the court, he quotes from Chief Justice Charles Evan Hughes to explain that it is more important to maintain the character and independence of the judges. He states, “where significant and deeply held disagreement exists, members of the court have a responsibility to articulate it.” This duty, as he calls it, is not limited to the judiciary. He encourages all Americans to “speak up when we are convinced that the fundamental law of our Constitution requires a given result.”

Judge Fletcher’s essay was delivered at Golden Gate University School of Law as a Jesse Carter Memorial Lecture. Fittingly, the theme of the lecture series that year was “Dissent.” Judge Fletcher argues that dissents make majority opinion writers improve their opinions, by challenging them. Even when a dissenter cannot persuade the majority to adopt his or her point of view, a dissent may still help improve the majority opinion by getting its author to change the analysis or the description of the facts. Also, dissenters force majority opinion writers to confront facts and law they would otherwise ignore, which is a dissenter’s way of keeping the majority “honest.” A dissent can also point out the legal and practical consequences of the majority opinion, which can help explain the significance of the majority opinion, and thus predict the future direction of the law. Other purposes of dissent are to make it clear to the losing party that its arguments were heard and understood, to encourage legislators to reform the law by legislative amendment, or to appeal to the judgment of other judges. And, echoing the primary justification offered by Justice Carter, dissents by intermediate appellate judges encourage higher courts to review the majority’s decision. Finally, Judge Fletcher, taking up the principal justification offered by Justice Brennan (for whom he clerked), states that “a dissent can appeal to the judgment of a later time.” In thus describing dissenting judges as “secular prophets,” Judge Fletcher explains that this is what he regards as the most important function of dissent; dissenting judges “have pointed the way to our future, showing us what we and our government can and should become.”

The remainder of the book is principally organized around Justice Carter’s leading dissenting opinions. The first chapter, by Professor Susan Rutberg of Golden Gate, concerns Justice Carter’s dissents in the several appeals and stay requests filed by Caryl Chessman. Chessman had been convicted of rape and kidnapping, and sentenced to death, in a case that galvanized support for and opposition to the death penalty. Without Justice Carter’s intervention, his 12 years on death row would undoubtedly have been much shorter. (One might speculate that if Justice Carter hadn’t died in 1959, Chessman might have lived even longer; he was executed soon after, in 1960.) As Professor Rutberg ex-

plains, “Chessman’s legal claims came before California Supreme Court Justice Jesse W. Carter five times. On two occasions, Carter dissented from the majority opinions which denied Chessman’s due process claims regarding the accuracy of the trial transcript and the fairness of his trial (Chessman I and II). In 1952, and again, in 1954 (Chessman III), Carter granted stays of Chessman’s execution. The last time Chessman’s case came before Justice Carter, in 1955, he again dissented and excoriated the majority for denying Chessman the right of access to legal materials and counsel while incarcerated (Chessman IV).” Professor Rutberg brings the Chessman controversy forward to our current debates on the death penalty and particularly the problem of wrongful conviction, pointing to the relevance of Justice Carter’s views today.

Other chapters concerned with the criminal justice system include essays by Professor and Associate Dean Rachel A. Van Cleave and Professor Helen Chang. Professor Rachel A. Van Cleave’s chapter concerns Justice Carter’s 1942 dissent in *People v. Gonzales*, 20 Cal. 2d 165 (1942). The majority rejected Mr. Gonzales’ appeal to adopt an exclusionary rule to prevent the state from using illegally seized evidence in a criminal prosecution. Professor Van Cleave explains that in his dissent Justice Carter’s “analysis provided an initial spark to the modern state constitutional law movement in California, as well as a strong caution against allowing state officials to ignore the law with impunity.” In time, the Court adopted Justice Carter’s view. As Professor Van Cleave explains, “Thirteen years after *Gonzales* the California Supreme Court adopted Justice Carter’s position in *People v. Cahan*, 44 Cal. 2d 434 (1955), in an opinion written by Justice Traynor, who had written the majority opinion in *Gonzales*.”

Professor Helen Y. Chang’s chapter tells the story of Justice Carter’s dissent in *People v. Crooker*, 47 Cal. 2d 348 (1956). Mr. Crooker was arrested as a murder suspect. He asked to speak with a lawyer, but the police denied the request and questioned him for 14 hours until he confessed. His confession was read to the jury, which convicted him. On appeal from his conviction and death sentence, the Court rejected his argument to exclude the confession, affirming his sentence. Justice Carter dissented, arguing that the confession should have been suppressed. As Professor Chang explains, Justice Carter’s dissent “marks the beginning of the judiciary’s unwillingness to allow unfettered police interrogation and sets the stage for the United States Supreme Court’s 1966 decision in *Miranda v. Arizona*” [384 U.S. 436 (1966)].

On the civil rights and civil liberties side, chapters by Professor Marc Stickgold, former Dean Frederic White, Professor Cliff Rechtschaffen, writing with David Zizmor (GGU ’07), and Golden Gate University Law Review Editor-in-Chief Jessica Beeler, illustrate the importance of Justice Carter’s dissents to the development of civil rights and liberties in California.

Professor Marc Stickgold uses Justice Carter's dissent in *Steinmetz v. Board of Education*, 44 Cal. 2d 816 (1955) to discuss Justice Carter's broad aversion to loyalty oaths, which became a ubiquitous feature of American society in the late 1940s and 1950s. Professor Stickgold discusses what Justice Carter aptly described as the "hysteria" of the period, and several cases in which Justice Carter dissented as the Court permitted civil servants and university professors to be fired, and churches to lose their tax deductions, for refusing to sign loyalty oaths. In the *Steinmetz* case, Professor Stickgold explains that, "Professor Harry Steinmetz had become a professor of psychology at San Diego State College in 1930. He had, throughout his career, been an outspoken liberal in the then strongly conservative city of San Diego. Efforts to get him fired for various political reasons dated back to before World War II. Finally, he was fired in 1954 after ostensibly failing to answer questions concerning his politics and memberships under oath." The Court upheld the termination, with only Justice Carter dissenting. Professor Stickgold continues, "In *Slochower v. Board of Education*, the [U.S. Supreme] Court reversed the dismissal of a college professor discharged under almost identical circumstances to Dr. Steinmetz. Echoing Justice Carter, the Court said, 'At the outset we must condemn the practice of imputing a sinister meaning to the exercise of a person's constitutional right under the Fifth Amendment. The right of an accused to refuse to testify ... has been recognized as "one of the most valuable prerogatives of the citizen." ... The privilege against self-incrimination would be reduced to a hollow mockery if its exercise could be taken as the equivalent either to a confession of guilt or a conclusive presumption of perjury.' Justice Carter's views in his *Steinmetz* dissent had been vindicated." Professor Stickgold goes on to explain how *Slochower* was the beginning of a long line of U.S. Supreme Court cases, in which the Court (and in time the California Supreme Court) began to chip away at the legal justifications for loyalty oaths, eventually adopting Justice Carter's broad objections to the logic and constitutional validity of the oaths. As Professor Stickgold concludes, "Nowhere was [Justice Carter's] forward looking view more courageous, and ultimately successful, than in his fight against the tyranny of loyalty oaths."

Former GGU Dean Frederic White has contributed an essay describing Justice Carter's dissent in *Hughes v. Superior Court of Contra Costa County*, 32 Cal. 2d 850 (1948). In *Hughes*, a group of black civil rights activists picketed at a Lucky's Stores retail grocery store, demanding that the company hire black workers in rough proportion to its percentage of black customers. The company sued to restrain the protesters, and after the Superior Court issued an injunction the picketers continued their protest, leading to their arrest for violating the injunction. The protesters offered a due process, free speech and right to peacefully picket defense, which the Court rejected, with Justice Carter as one of the two dissenters. As Dean White

writes, “Carter took the position that ‘the end result of the majority decision is to establish a rule which may be applied to prevent picketing for the purpose of publicizing the fact that an employer is discriminating against persons because of race or color in the selection of employees.... [I]f the picketing is truthful and peaceful, it may be resorted to as the exercise of the constitutional right of freedom of speech or press, and that is all petitioners did in this case.’” Carter’s position, Dean White explains, was a harbinger of the coming legal disputes over affirmative action, and his views on the right to demonstrate in the face of an injunction violating free speech remain controversial.

Professor Cliff Rechtschaffen, writing with David Zizmor (GGU ’07), has written a chapter on Justice Carter’s dissent in *Payroll Guarantee Association v. The Board of Education of the San Francisco Unified School Dist.*, 27 Cal. 2d 197 (1945). The case concerned a decision by the Board to deny a speaker’s permit to Gerald L. K. Smith, described by Justice Carter as a “master rabble-rouser of the extreme right wing” [known for his] “fiery bigotry, aimed chiefly at blacks and Jews.” The Board reasoned that Smith’s speech would provoke disruptive protests, raising the problem of the “heckler’s veto.” The Court affirmed the board’s decision, with Justice Carter again dissenting alone. In his dissent, as described by Professor Rechtschaffen and Mr. Zizmor, Justice Carter explained that “even if Smith’s speech did prove provocative, it was the job of the proper authorities to control any adverse reaction by the audience and protect Smith’s constitutional right to speak (if ‘there is a threat or assumption of noise, commotion, rioting or violence ... [it] should be and presumably will be controlled by the proper authorities.’)” Four years later, the U.S. Supreme Court affirmed Justice Carter’s position, holding in *Terminiello v. Chicago*, 337 U.S. 1 (1949), a strikingly similar case involving a supporter of Smith, that “a function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech, though not absolute ... is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest.”

In the final chapter on civil rights and liberties, Golden Gate University Law Review Editor-in-Chief Jessica L. Beeler (GGU ’09), reveals the story of *Takahashi v. Fish & Game Commission*, 30 Cal. 2d 719 (1947). Torao Takahashi immigrated to the United States from Japan in 1907, and worked as a commercial fisherman until 1941, when he was pulled off his boat along with all other Japan-

ese fishermen and imprisoned as a potential spy. In 1943 he was cleared of any suspicion of espionage and sent to the internment camp at Manzanar, where he was reunited with his wife and children, who had also been interned. In 1945 they were permitted to return home to Southern California, but Mr. Takahashi was denied a license to resume commercial fishing because of a new California statute that, in effect (and evident intent), prohibited granting such licenses to Japanese immigrants. When Mr. Takahashi challenged this racial restriction on constitutional grounds, the California Supreme Court upheld the rule, holding that it was a reasonable restriction on the use of natural resources. Justice Carter dissented, joined by Chief Justice Gibson and Justice Traynor, arguing that this was race discrimination in violation of the Fourteenth Amendment. In 1948, in *Takahashi v. Fish & Game Commission*, 334 U.S. 410 (1948), the U.S. Supreme Court vindicated Justice Carter, reversing the California Supreme Court. In drafting her essay, Ms. Beeler was in touch with Mr. Takahashi's granddaughter Lilian Takahashi Hoffecker, who has generously donated a photo of her grandfather to the Jesse Carter collection at the GGU Law Library.

Turning to labor law issues, Justice Carter often advocated on behalf of the rights of workers. As Professor Marci Seville relates in her chapter, he expressed that support forcefully in two 1953 decisions, *Mercer-Fraser v. Indus. Accident Commission*, 40 Cal. 2d 102 (1953) and *Hawaiian Pineapple Co. Ltd. v. Indus. Accident Commission*, 40 Cal. 2d 656 (1953). In both cases, the California Supreme Court had the job of deciding how to interpret a section of the Workers Compensation Act that allowed additional monetary awards when an employee was injured because of an employer's "serious and willful misconduct." The Court pulled back from its prior expansive readings, setting forth a restrictive view that, in Justice Carter's dissent, he described as "blotting out four decades of progress in the field of social legislation for the benefit of the working men and women of this state." As Professor Seville explains, "subsequent opinions of the Supreme Court and the lower appellate courts have artfully distinguished *Mercer-Fraser* and *Hawaiian Pineapple*, in order to uphold increased awards to injured workers in certain circumstances. And, while the Court has not adopted Justice Carter's liberal interpretation of Labor Code section 4553, his eloquent dissents in *Mercer-Fraser* and *Hawaiian Pineapple* stand as a moving tribute to the sacrifices of the working men and women of California."

On the rights of consumers and personal injury victims, Professor Michael A. Zamperini's chapter concerns Justice Carter's opposition to the doctrine of contributory negligence in *Buckley v. Chadwick* 45 Cal. 2d 183 (1955). Buckley was killed when a cable broke on a crane owned by Chadwick and operated by Buckley's business partner. His widow sued the crane owner for wrongful death. Following an instruction on imputed contributory negligence as a complete defense,

the jury returned a verdict for Chadwick, which the Court affirmed. Justice Carter dissented, objecting to the application of contributory negligence in wrongful death actions. As Professor Zamperini explains, Justice Carter “criticized the use of common law contributory negligence principles in a statutory cause of action for wrongful death, [and further] he also underscored the basic unfairness of contributory negligence itself as a legal concept.” His views would be adopted by the full Court in *Li v. Yellow Cab Company of California*, 13 Cal. 3d 804 (1975), where “the California Supreme Court by judicial decision, instead of the Legislature by statute, abandoned contributory negligence, for reasons of ‘logic, practical experience, and fundamental justice’ in favor of comparative negligence, ‘a system under which liability for damage will be borne by those whose negligence caused it in direct proportion to their respective fault.’” As Professor Zamperini concludes, “All of these basic tort concepts, defendant’s negligence, imputed negligence from a third party, plaintiff’s negligence (whether contributory or comparative), and the role all play in wrongful death are woven together in Justice Carter’s dissent. While on this issue he was ‘the lone dissenter,’ half a century later he is truly the voice of the majority.”

Another field where Justice Carter’s dissents have now been vindicated is intellectual property law. Professor Marc H. Greenberg’s chapter demonstrates how prescient Justice Carter was in his dissent in *Kurlan v. CBS*, 40 Cal. 2d 799 (1953). As Professor Greenberg explains, “Arthur Kurlan was a California-based independent writer and producer of motion pictures, television and radio shows during the 1940s and 50s. In the early 1940s he became interested in a popular book written by Ruth McKenny, entitled *My Sister Eileen*, which had spawned a popular theatrical production that ran on Broadway, a motion picture photoplay, as well as other copyrighted writings which had also featured the main characters from the book.... In March 1946, he entered into a license agreement with Ruth McKenny in which she assigned the radio and television rights to her stories and characters to him.... Kurlan produced ... [a pilot] and submitted it in June 1946, to the Columbia Broadcasting System (CBS) for consideration of their acquisition of the program. According to Kurlan, after extensive negotiation, CBS declined to acquire the program, and instead informed Kurlan that they “‘intended to use’” his idea, characters, and format “‘without compensation therefore by merely changing the names of the characters and describing the leading female characters as girl friends instead of sisters’; and, in this way, CBS intended to be free of any obligation to pay Kurlan for the rights to the work. A month later CBS announced its forthcoming new radio and television show, entitled *My Friend Irma*, a show CBS ultimately released in both of those formats in April 1947.” In the subsequent lawsuit, the trial court held, and the California Supreme Court agreed, that by allowing her story to be published in various formats, the story itself had

entered the public domain. Justice Carter dissented, arguing that the publication of the story did not place it in the public domain, relying on several innovative principles of intellectual property law, which have been subsequently broadly adopted. As Professor Greenberg concludes, “What is . . . rare is for a judge, in a dissenting opinion, to express prescient views regarding important issues that were in their nascent stages at the time of the drafting of his opinion. Justice Carter’s well deserved reputation for insightful and creative approaches to the law is further burnished by his dissent in the Kurlan case.”

Justice Carter’s dissenting views have not all been vindicated by time. For example, consider his views on the tort of privacy. As Professor Markita D. Cooper, now Associate Dean at Florida A & M University College of Law explains, Justice Carter’s solo dissent in *Gill v. Hearst Publishing Co.*, 40 Cal. 2d 224 (1953) remains a voice in the wilderness. As Professor Cooper explains, “John and Sheila Gill, a married couple, were photographed in an affectionate embrace at their place of business in the Los Angeles Farmer’s Market. The photograph, taken without the couple’s knowledge or consent, later appeared in the magazines *Ladies Home Journal* and *Harper’s Bazaar* as illustrations for articles about love.” When the couple sued for invasion of privacy, the Court initially found merit in their claim, but following rehearing, the Court ruled 6–1 against them, with Justice Carter dissenting. In his view, “Members of opposite sexes engaging in amorous demonstrations should be protected from broadcast of that most intimate relation. Nothing could be more intrinsically personal or more within the area of a person’s private affairs than expressions of the emotions and feelings existing between such persons. That should be true even though the display is in a public place.” Cementing the majority’s view, Professor Cooper writes, “In 1960, Dean William Prosser wrote what would become one of the definitive articles on tort privacy law. The article included the declaration that there could be no privacy in a public place, using *Hearst* as a key example. Later, the Second Restatement of Torts adopted the rule in its comments, also citing *Hearst*.” Professor Cooper concludes that if Justice Carter’s views had prevailed in *Hearst*, “tort law might have developed a different, more nuanced view of whether a right of privacy should apply in public spaces.”

Turning from privacy to stockholders’ rights, Professor Michele Benedetto Neitz has written a chapter on *Hogan v. Ingold*, 38 Cal. 2d 802 (1952). “With the current renewed focus on the ability of individual shareholders to monitor corporate governance,” Professor Benedetto Neitz writes, “Justice Jesse Carter’s focus on the substantive rights of shareholders renders his dissent in *Hogan v. Ingold* particularly relevant today.” As Professor Benedetto Neitz explains, Mr. Hogan “purchased shares in the Washington Holding Company in 1949, and subsequently became concerned that members of the board of directors had engaged

in fraud. Hogan's allegations of fraudulent activity committed by Washington's officers and directors may appear strikingly familiar to individuals living in today's post-Enron era. Among other things, Hogan accused the defendants of issuing false financial statements on behalf of the company, leasing company property to organizations under defendants' control for less than its market rental value (and subsequently failing to collect rental payments), and providing a lease with an option to purchase at below-market value to an organization controlled by defendants." As a result, he brought a shareholder's derivative action against the officers and directors. The Court held that he was required to post a substantial security bond before going forward, resulting in the dismissal of his action. Professor Benedetto Neitz writes, "Justice Carter's dissenting opinion demonstrates his concern for the plight of the derivative plaintiff. While the majority viewed a derivative plaintiff as merely a representative of the corporation, Justice Carter espoused the view that a shareholder plaintiff has much at stake in derivative litigation.... Subsequent developments in California law relating to derivative lawsuits acknowledge some, but not all, of Justice Carter's concerns.... If Justice Carter's vision of a rights-based approach for derivative plaintiffs could be realized, individual rights would be strengthened and access to justice for derivative plaintiffs would be assured."

Our final faculty chapter looks ahead to where one of Justice Carter's dissents may yet influence a growing movement in American law. Professor Janice Kosel argues that Justice Carter's dissent in *Simpson v. City of Los Angeles*, 40 Cal. 2d 271 (1953) supplies the roots of the now-blossoming animal rights movement. In *Simpson*, a group of Los Angeles dog owners sued to overturn a city ordinance that permitted the City to sell impounded dogs for medical research with minimal notice to the owners. The Court upheld the ordinance, with Justice Carter dissenting alone, on the ground that the notice provisions were insufficient to meet the requirements of due process of law. Professor Kosel argues that we should recognize a more significant argument embedded in his opinion: "The basic distinction between the majority and dissenting opinions in *Simpson* is phrased as a disagreement over what due process means for the owner of an impounded dog, what notice is due. At bottom, though, the controversy is more profound. It is rooted in Justice Carter's keen understanding of human nature and animal behavior and his appreciation of the relationship between a person and her pet. His analysis was confined by the traditional notion that animals are property—even the most activist judge is limited by the tools at hand. That was the only theory by which he could offer protection to an impounded pet and her owner. But surely Justice Carter's opinion evinces the conviction that animals are something more than property. In a very real sense, then, Justice Carter's impassioned dissent augured the birth of the animal rights movement."

Following the faculty essays, we reproduce a speech delivered by Justice Carter on the question of loyalty oaths. The speech was delivered on October 30, 1950, as the loyalty oath craze was spinning out of control. Justice Carter, with his usual common sense and uncompromising style, spoke to the absurdity of these oaths as a device for ferreting out traitors.

We conclude our volume with a contribution from Collection Development Librarian Janet Fischer of the Golden Gate Law Library, who has written a guide to the library's Jesse W. Carter Collection.

We could not have written and edited this material without the efforts of several faculty support staff at Golden Gate, including Whitney Nicoley, Benjamin Mayr, and Pat Paulson. Allan Brotsky relied on Michael Minkus (GGU '08) for additional editing help. And Rachael Buckman (GGU '08) pulled together all of the prior work, made hundreds of editing suggestions, persuaded our colleagues to approve our changes, and worked tirelessly to turn its many parts into a unified whole. Jessica Beeler and Kelly Miller did a final edit that uncovered scores of errors. Elaine Elison and Stan Yogi sent us some very helpful files on the loyalty oath controversy. Those that remain are our responsibility entirely.

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As we prepare the final manuscript for publication, we are also preparing to leave Golden Gate. Allan is retiring; David is moving to Berkeley Law. We are thankful to Justice Carter for inspiring us with his courage, to Dean Fred-eric White for his vision in seeing the value of the project, to Dean Alan Ramo for his commitment to continue the project, to incoming Dean Drucilla Ramey for her continuing commitment to Justice Carter's memory, to our colleagues at Golden Gate for their contributions to the book and long-standing support for the project, and to our wives Muriel Brotsky and Marcy Kates, for their love and support, and for putting up with us.

July 2009

San Francisco, California