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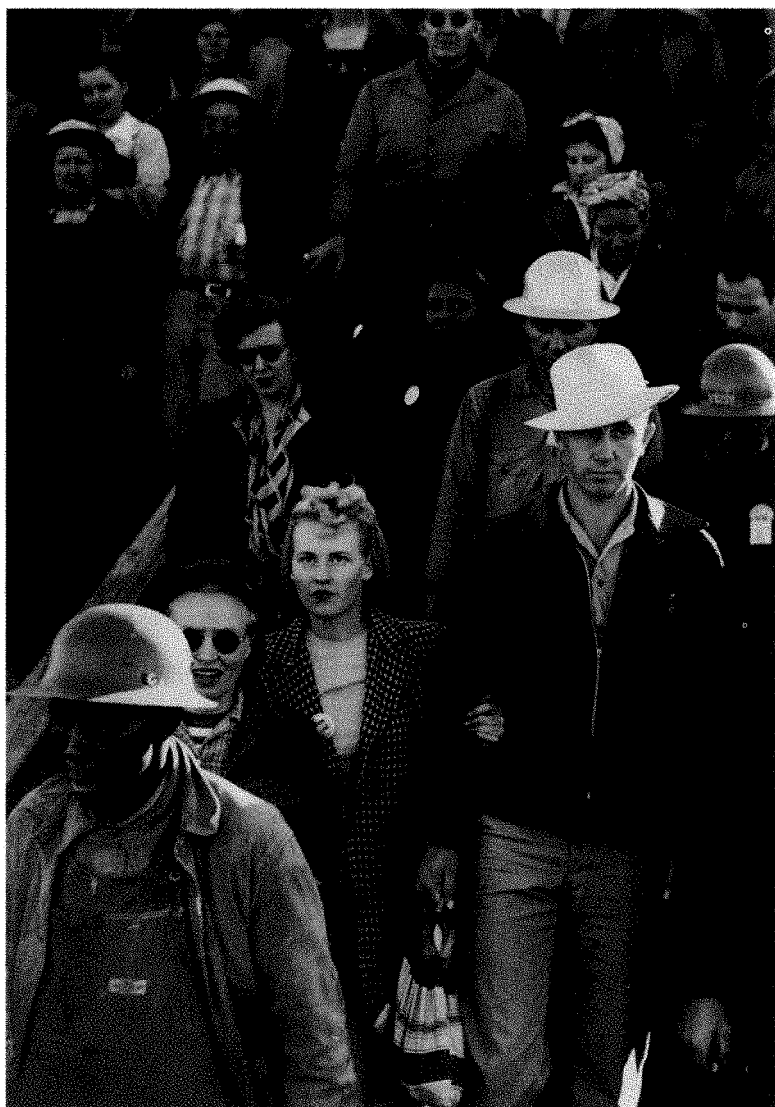
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Cover Photograph: The discovery in 1930 of the East Texas oil field, the largest of the time, led to a legal quagmire that Nicholas Malavis explores in this issue. (Center for American History, University of Texas at Austin)



The wartime shipyards in Richmond and the east San Francisco bay attracted African Americans and other workers from across the nation. (Dorothea Lange Collection, Oakland Museum)

DIRECT ACTION AND FAIR EMPLOYMENT: THE *Hughes* CASE

PAUL MORENO

Historians of the civil-rights movement have only recently turned their attention to discrimination in employment, which has joined the issues of public accommodations, school desegregation, and voting rights.¹ Scholarly treatments of employment policy were common in the postwar years, reaching a peak around the time of the enactment of the Civil Rights Act of 1964,² but few—particularly by historians—have been written since 1965.³ Historians have noted the rapid transformation of the civil-rights movement's goals, from civil rights to "Black Power" in the mid- to late 1960s.⁴ In employment, this transformation appears in our current understanding of civil-rights equality—that racial minorities and women

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¹Hugh Davis Graham, *The Civil Rights Era: Origins of National Policy, 1960-1972* (New York, 1990); Herman Belz, *Equality Transformed: A Quarter Century of Affirmative Action* (New Brunswick, 1991).

²For some salient examples, see Monroe Berger, *Equality By Statute: The Revolution in Civil Rights* (New York, 1952); Paul H. Norgren and Samuel E. Hill, *Toward Fair Employment* (New York, 1964); Michael Sovern, *Legal Restraints on Racial Discrimination in Employment* (New York, 1966).

³Paul Burstein, *Discrimination, Jobs, and Politics: The Struggle for Equal Employment Opportunity in the United States Since the New Deal* (Chicago, 1986); Merl E. Reed, *Seedtime for the Modern Civil Rights Movement: The President's Committee on Fair Employment Practice, 1941-1946* (Baton Rouge, 1991) [hereafter cited as Reed, *Seedtime for the Civil Rights Movement*]; William H. Harris, *The Harder We Run: Black Workers Since the Civil War* (New York, 1982).

⁴Harvard Sitkoff, *The Struggle for Black Equality, 1954-1980* (New York, 1981), 208-22; William Chafe, *The Unfinished Journey: America Since World War II*, 2d ed. (New York, 1991), 302-20; Richard Polenberg, *One Nation Divisible: Class, Race, and Ethnicity in the United States Since 1938* (New York, 1980), 231-43.

should be represented throughout the work force in reasonable proportion to their representation in the relevant labor market—as opposed to the earlier standard of equality of opportunity. The 1930s and 1940s show us that earlier attempts to deal with discrimination in employment articulated today's standard, and that arguments for and against it were well rehearsed by the 1960s.

The origins of modern antidiscrimination law lie in the Depression-era “Don’t Buy Where You Can’t Work” campaigns. In almost every major African-American area in cities in the United States, local groups mounted direct-action campaigns to increase black employment in white-owned businesses. They organized black customers, publicized their grievances, negotiated with white owners, and, when necessary, coordinated boycotts and pickets. The essential demand was for an all-black employment policy, or for some proportional policy based on the estimated racial composition of the employer’s trade.⁵

Often successful in negotiating agreements with larger retailers, the “Don’t Buy” movement failed to secure legal recognition for its picketing efforts, as employers were able to bring the movement to a halt in Baltimore and New York in the early 1930s.⁶ In 1938 the United States Supreme Court helped revive the movement in its *New Negro Alliance* decision, holding that the Norris-LaGuardia Act prohibited federal courts from enjoining picketing to protest racial discrimination in employment. Especially promising was Justice Owen Roberts’s declaration that “Race discrimination by an employer may reasonably be deemed more unfair and less excusable than discrimination against workers on the ground of union affiliation.”⁷ Many state courts, however, continued to enjoin picketing that demanded the discharge of white workers to make room for an all-black work force. The end of the Depression and the opening of production jobs for blacks with the onset of World War II effectively ended the “Don’t Buy” movement.

Although at first the Roosevelt administration pursued an employment policy that was race-conscious and quota-based, it rejected such an approach in wartime.⁸ In response to political

⁵August Meier and Elliot Rudwick, “The Origins of Nonviolent Direct Action,” in *Along the Color Line*, ed. idem (Urbana, 1976), 313-88, remains the best account of the direct-action campaigns of the 1930s.

⁶*Green v. Samuelson*, 99 A.L.R. 529 (1935); *A.S. Beck Shoe Corp. v. Johnson*, 274 N.Y.S. 946 (1934).

⁷*New Negro Alliance v. Sanitary Grocery Co.*, 303 U.S. 552 (1938).

⁸On the PWA quota system, see John B. Kirby, *Black Americans in the Roosevelt Era: Liberalism and Race* (Knoxville, 1980), ch. 2; Mark W. Kruman, “Quotas for Blacks: The PWA and the Black Construction Worker,” *Labor*



The origins of modern antidiscrimination law lie in the “Don’t Buy Where You Can’t Work” campaigns like the one that resulted in the *Hughes* case. (Dorothea Lange Collection, Oakland Museum)

pressure brought by black organizations (principally A. Philip Randolph’s March On Washington movement), President Roosevelt promulgated executive orders that forbade racial discrimination by all government contractors.⁹ The President’s Committee on Fair Employment Practices, commonly known as the FEPC, monitored compliance with the order by defense contractors. The committee did not survive the war, and could not compel recalcitrant employers and unions to end their discriminatory practices, but it succeeded in publicizing a national antidiscrimination policy and in exposing and ending some of the worst discrimination in the defense industries. There is no question that it opened employment to members of minority groups. Above all, it served as the model that equal-employment advocates would pursue for the next twenty years—an administrative agency specifically designed to combat discrimination in employment. Moreover, the wartime FEPC attempted to do what the Public Works Administration

History 16 (1975), 37-49; Raymond Wolters, *Negroes and the Great Depression* (Westport, 1970), 196-209. See also Nancy L. Grant, *TVA and Black Americans: Planning for the Status Quo* (Philadelphia, 1990), 19-24.

⁹Executive Order 8808, 3 C.F.R. (1938-43), 957; Executive Order 9346, 3 C.F.R. (1938-43), 1280.

thought was impossible, to apply standards of equal treatment that did not depend on racial proportions to prove or remedy discrimination.¹⁰

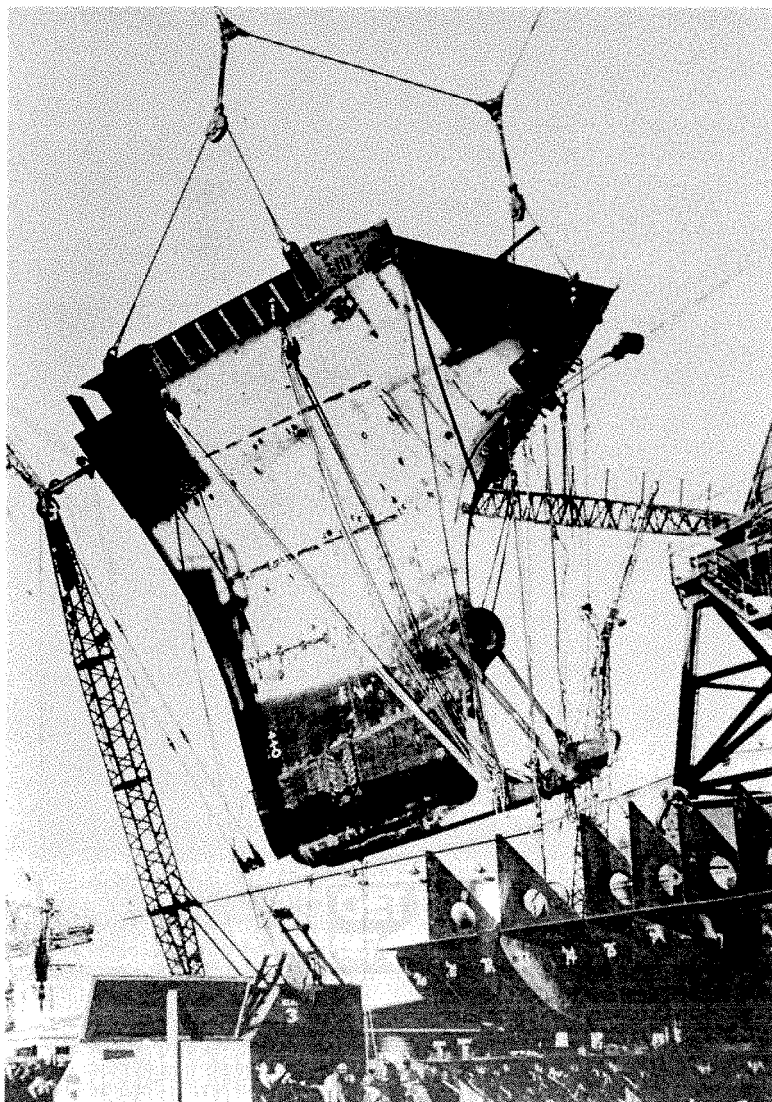
Federal courts built upon the FEPC's efforts, announcing that labor unions were obliged to fulfill a duty of fair representation to their minority-group members.¹¹ State courts, among which the California Supreme Court was conspicuous, also made a contribution to the fair-employment efforts of the federal government during the war. The FEPC had investigated the International Brotherhood of Boilermakers and found it guilty of discrimination. Black workers in California's shipyards had been forced to pay dues to the union while the union refused to extend them full membership. While the FEPC had no enforcement powers, a group of black workers sued in the California courts, and the California Supreme Court ultimately held, in the case of *James v. Marinship*, that a union could not enjoy closed-shop privileges and exclude blacks from membership. The court declared that national and state policies against discrimination existed and were enforceable against labor unions and other organizations that enjoyed publicly granted privileges.¹²

The economic situation for black Americans at the end of World War II was uncertain. Even if prosperity followed the war, at least some of the gains made by blacks during the wartime job glut were bound to be lost, and if the nation lapsed into depression their situation would remain as perilous as during the 1930s. The end of the war also brought the demise of the federal FEPC. Although attempts to secure a permanent, peacetime equivalent failed, several states established FEPCs, and the late 1940s brought a revival of direct action. In the fair-employment framework laid down by the federal and state FEPCs, it was uncertain what the legal status of picketing to promote racial hiring would be. The case of *Hughes v. Superior Court* in the years 1947-50 provided the earliest and fullest legal argument over the place of race-based employment practices in the contemporary United States.

¹⁰Herbert Garfinkel, *When Negroes March: The Organizational Politics of FEPC* (New York, 1969); Louis Ruchames, *Race, Jobs, and Politics: The Story of FEPC* (New York, 1952); Reed, *Seedtime for the Civil Rights Movement*, supra note 3.

¹¹*Steele v. Louisville & Nashville Railroad*, 323 U.S. 192 (1944); George Louis Creamer, "Collective Bargaining and Racial Discrimination," *Rocky Mountain Law Review* 17 (1945), 163-92; William Gould, *Black Workers in White Unions: Job Discrimination in the United States* (Ithaca, 1977), 35-38.

¹²*James v. Marinship Corp.*, 155 P.2d 329 (1945); Albert S. Broussard, *Black San Francisco: The Struggle for Equality in the West, 1900-1954* (Lawrence, 1993), 143-65.



In *James v. Marinship*, the California Supreme Court held that a union could not enjoy closed-shop privileges and exclude blacks from membership. (Kaiser Pictorial Collection, Bancroft Library)

PROPORTIONAL REPRESENTATION IN THE WORK FORCE

Lucky Stores, a chain of groceries, operated a store near the Canal Housing Project in Richmond, California. It was a union shop, and the union was open to blacks. In May 1947, a shop-lifting incident put in motion a long dispute between Lucky and several civic organizations. The manager of the store and another employee apprehended McKinley Jackson, for allegedly stealing six pounds of bacon, and had him arrested. It was alleged that the employees used unnecessary force against Jackson, striking him while his hands were held, and that they recklessly fired a pistol outside the store. A group led by the Progressive Citizens of America, which included the Richmond branch of the National Association for the Advancement of Colored People, protested to Lucky's management. The group's representatives demanded that the employees involved in the arrest be discharged, that Lucky institute a new employment policy, and that only blacks be hired until their proportion in the store's work force approximated the black proportion among Lucky's patronage.¹³

Lucky refused to comply, and the Progressive Citizens picketed the store. Lucky obtained an injunction on June 5, 1947, from the Contra Costa County Superior Court. The trial judge based his order squarely on the 1934 New York *Beck* case, which held that picketing for racial quotas, regardless of how truthful or orderly it was, was contrary to sound public policy. Judge Hugh Donovan noted, "I should very much like to see this position tested in the appellate courts."¹⁴ The picketing continued despite the injunction, and on June 23 John Hughes and Louis Richardson, members of the Progressive Citizens of America and the Richmond NAACP, were cited for contempt of court and sentenced to pay twenty dollars and spend two days in jail. They appealed the conviction to a California appeals court.

Unlike most local branches of the NAACP, which coordinated their activities with the national office, the Richmond branch had been controlled by a group of Communists since the end of the war. Noah Griffin, the association's West Coast regional director, alerted the national office that the Communists were using protests against employment discrimination

¹³Facts of the case may be found in U.S. Supreme Court, *Transcript of Records and File Copies of Briefs*, 1949, vol. 35, no. 61.

¹⁴Decision, *Lucky Stores v. Progressive Citizens of America* [hereafter cited as *Hughes*, California State Archives], May 26, 1947, in California State Archives. I am grateful to the Office of the Contra Costa County Clerk and the California State Archives for providing me with copies of the documents of this case.

protests to attract black organizations to support party activities. Griffin noted that Richmond was the most thoroughly dominated of several California branches, and attempts to regain control from the Communists in December 1947 were unsuccessful.¹⁵ Both Hughes and Richardson were known to be party members. Although the involvement of Communists and the issue of quota hiring made some NAACP officials uncomfortable with the case, Special Counsel Thurgood Marshall told Griffin that the national office was vitally interested in it, and considered it one of the easiest to win because of the *New Negro Alliance* decision.¹⁶

In his appeal, Hughes claimed that the superior court had exceeded its jurisdiction when it issued the preliminary injunction. He defended the goals of the Progressive citizens, arguing that the ten thousand Negroes of Richmond suffered unemployment "greatly disproportionate to the unemployed among the white persons of Richmond." Many industries remained closed to them, and they needed means by which "the Negro people can make effective their demand to obtain equality of opportunity and to prevent economic discrimination against Negroes." Even if the goal were improper, the picketing was peaceful, and was therefore protected by the constitutional guarantee of free speech.¹⁷

Lucky, rather than the superior court, was the real party in interest, and answered the Progressive Citizens' appeal. It denied that Hughes and Richardson called for only prospective hiring of Negroes, and alleged that "the demands made [the company] contemplate the discharge of some of the present personnel of said Canal Store." Safeway Stores, filing an amicus brief on Lucky's behalf, noted that the *New Negro Alliance* case had protected picketing to protest discrimination, but not to compel racially proportionate hiring. Lucky also introduced affidavits to demonstrate that it did not discriminate on the basis of race. Otto Meyer, a vice president of Lucky Stores, told the appeals court that Lucky did not discriminate, and had

¹⁵Griffin to Roy Wilkins, August 7, 1947; Griffin to Gloster B. Current, November 19, 1947; Irene Morgan to West Coast Regional Office, December 2, 1947; NAACP Papers, Group II, Series C, Box 18, Manuscripts Division, Library of Congress [hereafter cited as NAACP II-Series-Box]. Griffin to Walter White, November 8, 1946, White to Griffin, November 11, 1946, White to Committee on Administration, November 16, 1946, Griffin to White, November 18, 1946, Griffin to White, December 12, 1946, NAACP II-A-201. In contrast to their uneasiness with direct-action campaigns in the late 1930s, Communists pressed such campaigns in the late 1940s.

¹⁶Marshall to Griffin, June 13, 1947, NAACP II-B-87.

¹⁷Petition for Writ of Certiorari, June 23, 1947, *Transcript*, 36-43; Memorandum and Points of Authority, June 23, 1947, *Hughes* California State Archives.

never discriminated, against blacks in hiring, and that it had seven Negro employees at the time. The only qualifications Lucky made, he claimed, were based on "physical cleanliness, mental alertness, moral integrity, and qualifications as to experience for a particular job sought to be filled." Albert West, secretary-treasurer of the Retail Clerks Union, said that his union provided the employee pool for Lucky, and that his union did not discriminate on the basis of color. Three black members of the union were then working at Lucky.¹⁸

From the technical questions of the privileges of picketing under the Fourteenth Amendment and California law, Lucky began to pry open the question of the proof of discrimination. The company sought to introduce affidavits testifying to its nondiscriminatory employment policy, but the appellate court refused to consider them as they were not brought before the trial court. Nevertheless, Hughes and Richardson had to answer the question of whether picketing for proportional employment was an illegal object and, if so, whether this made the picketing enjoined. They asserted that California law protected picketing for any purpose, lawful or not, and that proportional hiring was neither unlawful nor unsound. It was distinguishable from a quota system used to limit minority-group entry into professional schools or highly skilled trades, they said, due to the presence of discrimination against Negroes. They argued that percentages were always relevant in the determination of whether discrimination existed. Blacks were discriminated against most in the hiring phase of employment, they said, and "Discrimination in hiring is infinitely more difficult to prove than is discrimination after once having been employed." Proportional representation in grocery-store employment was appropriate because such work did not require skills or training. However, the fact of Lucky's discrimination was not necessary to permit picketing for proportional representation, since picketing was protected regardless of its purpose.¹⁹

¹⁸Answer and Return to Writ of Certiorari, August 15, 1947, *Transcript*, 43-52; Brief on Appeal, Brief of Amici Curiae in Support of Respondent, August 15, 1947, *Hughes California State Archives*. A San Francisco theater and its organized employees who were involved in a picketing dispute with the Communist party filed a brief on behalf of Lucky, August 13, 1947, *Hughes California State Archives*. Safeway was under the same ownership as the Sanitary Grocery Company, which had lost the *New Negro Alliance* case in 1938, and which the New Negro Alliance continued to picket in Washington in the postwar years.

¹⁹Oral Argument on Petition for Writ of Certiorari, August 25, 1947; Supplemental Memorandum of Points and Authorities, September 4, 1947, *Hughes California State Archives*.

Lucky's attorneys argued that Hughes had not made any specific charges of discrimination in the trial court, and that he was asking the appellate court to assume that discrimination existed. The affidavits Lucky wanted to introduce showed that Lucky followed a nondiscriminatory policy. It had to be assumed, they said, that the trial court had determined that Lucky did not discriminate. Although they argued that the national FEPC policy and California policy in *Marinship* made it illegal to consider race at all in hiring decisions, they implied that the presence of Negroes in Lucky's employ proved a non-discrimination policy.²⁰ In later litigation, Lucky's attorneys were to develop a theory of the proof of discrimination that did more than rely on tokenism.²¹

THE COURT UPHOLDS THE RIGHT TO PICKET

On November 20, 1947, the California appeals court vacated the contempt conviction against Hughes and Richardson. Judge Raymond Peters, writing for the three-man court, discounted the claims made by Lucky that it did not discriminate, since these affidavits had not been presented to the trial court. The trial court had based its decision on *Beck* and *Green*. These precedents, the appeals court stated, were all based on the limitation of picketing to narrowly defined labor disputes, on the assumption that racial picketing did not involve a labor dispute, and that the interests forwarded in such disputes were racial and not economic and were contrary to public policy. "In our opinion," the court said, "every one of the premises is demonstrably unsound, both on principle and authority." The court gave a long review of the *New Negro Alliance* decision. Although that case involved the construction of a federal statute, its rationale supported the broad construction of the term "labor dispute." California law was "in exact accord" with the Norris-LaGuardia *New Negro Alliance* line.²²

The court considered it obvious that the Negro pickets had an economic interest in the case: "That they are an economically discriminated-against group is too clear to require discussion." Without referring to any specific evidence, the court

²⁰As mentioned above, *James v. Marinship* (supra note 12) was part of a series of cases at the end of World War II that grew out of the federal FEPC effort, and that confirmed that agency's policy of nondiscrimination without resort to the racial quotas of certain New Deal agencies.

²¹Supplemental Brief of Respondent, September 24, 1947, *Hughes* California State Archives.

²²Opinion, November 20, 1947, *Transcript*, 61-83; 186 P.2d 756 (1947).

noted that the employment policy of Lucky and other employers "has resulted in discrimination in the hiring of Negroes." Blacks were the last hired and the first fired, the court observed, and often were limited to the most menial jobs. The court concluded, "Thus, white employers, operating in Negro districts, economically exploiting this group, making their profits from it, now urge that the Negroes should not be permitted to picket for the purpose of securing economic equality and fairness in employment because, forsooth, such a dispute is not a 'labor dispute', but a 'racial' dispute." The right of blacks to picket was entitled to the same protection accorded to labor unions.²³

The court dismissed the concern about the possibility that violence might result from demands for racial hiring quotas: "The fact, if it be a fact, that such disputes may lead to some violence is no ground to deny the right. While, of course, race conflicts are to be discouraged, so is racial discrimination to be discouraged, and the prevention of the latter is a most important part of our public policy." Raising the living standards of any subjugated group entailed the risk of violence, but it was worth the risk. The courts retained the power to enjoin violence, but should not enjoin picketing to stop potential violence. Here was a calculation of the risk and advantage involved in racial picketing that arrived at a different balance from previous ones. Enabling blacks to improve their economic condition was a key part of public policy, the court held, and peaceful protest against those who denied economic equality was an elementary tool in the effort. "The alternative—the economic shackling of Negroes to their present economic status—is far more dangerous to our social development than the imaginary difficulties envisaged by the trial court in this case." Public policy, therefore, far from forbidding picketing to compel racial hiring, should encourage it.²⁴

The appeals court entertained the question of whether "proportional" hiring was an unlawful demand, as Lucky claimed. The court concluded that this normally unlawful demand was made lawful by Lucky's discriminatory employment policy. Thus the court based its decision on an assumption of Lucky's discrimination against blacks. Proof of discrimination, a point never brought to a conclusion in a racial picketing case, was central to the decision. In short, "Every argument that can and has been made in support of the right of labor to picket can properly be made in support of the right of the Negro race to secure economic equality. The essential public notice behind both demands is identical." As to the frequently made argu-

²³Ibid.

²⁴Ibid.

ment that if blacks could picket for proportional racial hiring, so could whites or other groups, the court answered, "Those questions are not now before us. Each case must be decided on its own facts." For the time being the court was simply holding that Negroes, "a discriminated-against and subjugated group," could picket for the sake of economic equality. "The right is granted not because the pickets are members of a minority group, but because that minority group is economically discriminated against, and is attempting to rectify that condition."²⁵

The decision was a resounding victory for the Progressive Citizens. Its implications were clearly more substantial than those of the *New Negro Alliance* case. The court upheld the right to picket to promote racial hiring on every major point. It forcefully rejected the state law decisions of *Beck* and *Green*, and gave alternative public-policy answers to questions about the propriety of such picketing. The court went so far as to dismiss the risk of racial violence to pursue the goal of economic equality, and was ready to experiment with the possibility that every racial or ethnic group might employ picketing as a method.

Lucky filed for a hearing by the California Supreme Court on December 30, 1947. The court granted the writ of certiorari, moving a direct-action case to the highest court in a state for the first time. At that point the NAACP national office became directly involved. Allan Brotsky, a lawyer in Oakland, notified Robert Carter of the NAACP legal defense team that his office was preparing an amicus brief for the Richmond NAACP before the California Supreme Court. He requested economic data and legal materials from the national office and told them that "The appellants intend to rely upon the demagogic argument that demanding proportional hiring of Negroes constitutes discrimination against the white population."²⁶

NAACP Assistant Special Counsel Marian Wynn Perry worked on the case, while expressing reservations about the association's support of the effort. "I am very disturbed at the object of the picketing," she wrote. "I can think of few things more dangerous than tying Negro employment to Negro patronage since it appears to condone a quota system of hiring and would be, of course, disastrous to any campaign to secure jobs for Negroes outside of Negro areas and Negro patronized stores." Perry suggested that the national office and the Richmond branch discuss their policies in this regard. The NAACP went ahead with its support of the issue in *Hughes*.²⁷

²⁵Ibid.

²⁶Brotsky to Carter, January 30, 1948, NAACP II-B-87.

²⁷Perry to Clarence Mitchell, February 18, 1948, NAACP II-B-87.

When Lucky appealed to the California Supreme Court, it claimed that in November 1946 it had hired two Negro clerks in response to an appeal from a black organization called the Knights' Political League. This information, with the affidavits of Lucky's personnel managers, was meant to establish "that Lucky Stores is not discriminating against Negroes" and that the company employed "both whites and Negroes and that the hiring is accomplished without adverting first to the race or color of the applicant." *Marinship* and public policy in California, noted Lucky, "precluded discrimination in favor of Negroes and against whites. . . . The duty created by the rules in these cases is the general one of refraining from discrimination of any type, and not merely to refrain from discrimination against Negroes."²⁸

Responding to the appellate court's implication that Lucky's token employment of Negroes could not stand as immunity against discrimination charges, Safeway noted in its amicus brief that Lucky made no such claim but, rather, attempted to bring in the presence of discrimination as an arguable point, which had to be proved by evidence. "Absent other facts, an experienced and fair trial judge or lawyer would give little or no weight to such token hirings," Safeway argued. Lucky simply insisted that discrimination could not be assumed, but could be proved as other facts were. The plea of Hughes that discrimination in hiring was too difficult to prove was erroneous, for discrimination was no more difficult to prove than any other fact at trial.²⁹

Hughes responded that the affidavits omitted by the appeals court were irrelevant. The only information these provided was "that Lucky had hired since 1946 two Negro clerks. Apparently, it is [Lucky's] contention that this proves that Lucky did not discriminate against Negroes." This was surely not "adequate proof of a nondiscriminatory policy," Hughes argued. It did not consider how many Negroes applied, or what preference Lucky expressed to the union about the race of clerks. "These questions should be answered before the confusion could follow that the 'token' hiring of two Negroes establishes a non-discriminatory policy on the part of Lucky."³⁰

As to the picketing question, Hughes relied on the *New*

²⁸Respondent's Petition for a Hearing by the Supreme Court, December 30, 1947, *Transcript*, 52-61.

²⁹Brief of Safeway Stores, December 31, 1947, *Hughes California State Archives*.

³⁰Petitioner's Answer to Petition for Hearing by the Supreme Court, January 9, 1948, *Transcript*, 83-90. The American Civil Liberties Union of Northern California supported Hughes.

Negro Alliance case. *Beck*, he contended, had been overruled by *Lifschitz*, and was no longer controlling even in New York.³¹ Regarding Lucky's contention that *Marinship* precluded discrimination in favor of blacks, "When the time comes that employers hire Negroes and discriminate against whites, then [Lucky's] argument might be worthy of consideration. Such is not the case here." Hughes concluded that Lucky's whole case "rests upon its contention that Lucky has a non-discriminatory employment policy." Even if that were the case, he argued, he still had the right to picket. "It cannot be denied that Negroes, as a group, have far more limited employment possibilities than whites," he insisted. Picketing was necessary to increase these opportunities. "Discrimination, or lack of it, does not limit this right." As in cases in which unions picketed for a closed shop, an employment policy that obviously discriminated against nonmembers, "The right to picket was not thereby lost to the union, despite its discriminatory demand." Lucky did discriminate, Hughes asserted, but even if it did not, he still retained the right to picket.³²

Brotsky's brief in support of Hughes made an even stronger defense of proportional hiring. Brotsky warned the court of the "spurious argument that the removal of discriminatory barriers against Negro workers accords them preferential rights." The Emancipation Proclamation did not provide preferential treatment even though it affected blacks only, and *Marinship* elevated black workers who had been segregated without according them racial preference. The proportional hiring that Hughes demanded, Brotsky argued, aimed not at a quota system but at "the clearly proper object of equality of opportunity in employment." There was a reasonable relation between that goal and the means employed. "It is not true that the objective of equality of opportunity in employment is distinct from, and contradicted by, a policy of proportional hiring. The contrary is exactly the case," he maintained.³³

A proportional system would be improper in college admissions, where objective standards of qualification existed. In the

³¹*Lifschitz v. Straughn*, 27 N.Y.S. 2d 193 (1940), held that a trial court had to proceed under New York's "Little Norris LaGuardia Act" assuming that the Amalgamated Labor Union was involved in a "labor dispute." The issue in the case was never decided on its merits and, while *Beck* no longer held, picketing for racial hiring continued to be enjoined in the New York courts. In any case, the New York state law against discrimination, passed in 1945, outlawed hiring on the basis of race.

³²Petitioner's Answer to Petition for Hearing by the Supreme Court, January 9, 1948.

³³Brief of Amici Curiae in Support of Petitioners, April 28, 1948, *Hughes* California State Archives, NAACP II-B-87.

case of retail clerks, however, "An objective means of classifying the applicants according to ability is simply not available." Hughes's proportional scheme, therefore, was the way to "set up some standard which, in the absence of a more objective one, provides a measure for the absence or presence of discrimination." Comparing the proportion of black clerks to the area population, then, served as the test of discrimination. It provided "a judgment concerning what the proportion of Negroes in [Lucky's] working force would be, assuming discriminatory attitudes were completely absent." This argument was an elaboration of the New Negro Alliance's approach ten years earlier, and an anticipation of affirmative-action theory twenty years later.³⁴

The merit of Hughes's approach, Brotsky contended, was that it was concrete rather than abstract, "more meaningful and realistic than an abstract demand that discrimination cease." It prevented the use of "token" policies to hide discrimination. It did not call for a "rigid quota system"; no whites were to be displaced; and there was no deadline. Blacks simply asked the court to "affirm the rights of an economically discriminated-against minority to take the same concerted actions in achieving legitimate goals as have long been accorded labor organizations," by allowing them to picket.³⁵

Brotsky dispensed with the argument that retaliation by whites and other races might result from an endorsement of Hughes. The reverse situation would not be proper because the underlying cause would not justify white picketing against blacks. "If and when such picketing takes place, the court will be guided by the fact that the basic justification for the picketing here is the widely practiced economic discrimination against Negroes in our nation." Hughes had argued that whether Lucky discriminated was irrelevant. That blacks as a group suffered discrimination was the point. Brotsky added to this the idea that since blacks as a group were uniquely victims of discrimination, retaliation feared in previous cases was not an issue. Such retaliation would be unlawful and properly enjoined.³⁶

Together, the briefs by Hughes and Brotsky formed a well-developed defense of proportional racial hiring along the lines laid down by the New Negro Alliance. Proportional hiring was based not only on the fact of discrimination against Negroes, but on the particular theory that Negroes ought to be found in any industry in roughly the same proportion as in the general

³⁴*Ibid.*

³⁵*Ibid.*

³⁶*Ibid.*

population. Proportional hiring was a simple, practical, reasonable formula. The extension of this principle to other racial groups was no longer seen as a problem, since only racial groups that were victims of discrimination would be able to picket for proportional hiring.

In the Supreme Court, Lucky continued to press its argument that it was not guilty of discrimination. It had not even been accused of discrimination in the trial court, yet the appellate decision assumed that Lucky and other employers who supported it discriminated. Lucky repeated that discrimination in employment was not difficult to prove. One need show conduct, not racial prejudice. A scarcity of Negroes might establish a *prima facie* case of discrimination, the company admitted, but other reasons for the scarcity might overcome such a case. Heavy black employment in shipyards and other war-related industries might have accounted for their relative absence in retail establishments, Lucky suggested. "In any case," it said, "the charge of discrimination is one of fact to be established by evidence," and refutable by employers, not to be assumed by courts. The company denied that discrimination in ordinary employment was any different from discrimination in professional education or skilled trades. "In cases in which discrimination exists it is apparent that discrimination can be readily established," it concluded, "and the battery of organizations and volunteer attorneys opposing us in this case makes it apparent that Negroes in making such a charge will not lack for champions in the Courts."³⁷

Hughes and Richardson insisted that the record did disclose discrimination. The affidavits Lucky tried to introduce did not demonstrate a nondiscriminatory policy. Hughes and Richardson asked the court to consider the relative characters of the parties in determining the charge of discrimination: the NAACP and the Progressive Citizens of America, with their concern for the economic welfare of the Negro race, and Lucky Stores, which would not even discuss a program of employment on a fair and nondiscriminatory basis. Proportionalism was a fair policy because, "If there were not discrimination against Negroes, presumably the personnel of a retail store would roughly reflect the composition of the neighborhood it serves." Hughes and Richardson argued that they might justifiably have picketed for completely black work forces in black areas, but that proportional demands were compromises. The idea that proportional hiring was preferential treatment that discriminated against whites could not withstand that fact of

³⁷ Answer to Brief, May 3, 1948, *Hughes* California State Archives.

discrimination against Negroes. "When Negroes are given preferential treatment and whites are discriminated against, then it will be time for this Court to deal with that situation. Only then will the 'equality' hypothesis be worthy of consideration," they concluded.³⁸

Lucky responded that the character of the NAACP or Progressive Citizens of America did not determine the charge of discrimination. "Courts, not volunteers, are established to determine the merits of litigation; and such determination must be on evidence, not on self-serving statements as to the respective characters of the parties," it noted. Moreover, the company's refusal to consider proportional employment was not a refusal to consider a nondiscrimination policy. Above all, the burden of proving discrimination lay on Hughes and Richardson, and they had not met it. Employment by racial quota was an inappropriate response even to proved discrimination "because," concluded Lucky, "it discriminates against individuals, not because it discriminates against the white race."³⁹

THE STATE SUPREME COURT REVERSES

The California Supreme Court reversed the appellate court, reinstating the injunction, on November 1, 1948. Justice B. Rey Schauer, for a four-man majority, wrote a short decision that focused on the issue of the lawfulness of the goal of Hughes's picketing, and found it wanting. The court agreed with Lucky that Hughes's demands were intended "not to induce Lucky not to discriminate, but rather, expressly to compel Lucky to discriminate arbitrarily in favor of one race as against all others in the hiring of a portion of its clerks." As Schauer expressed it, "If Lucky had yielded to the demands of [Hughes], its resultant hiring policy would have constituted, as to a proportion of its employees, the equivalent of both a closed shop and a closed union in favor of the Negro race."⁴⁰

Schauer held that the *Marinship* example provided no support for Hughes. "There was not in that case any contention that the *number of Negroes* admitted to membership in the union or hired by the employer must be proportional, regardless of all other considerations, to the number of Negroes residing in the area or doing business with the employer." *Marinship's* goal was to prohibit consideration of race. "It was just

³⁸Brief of Petitioners, May 19, 1948, *Hughes* California State Archives.

³⁹Answer to Brief, June 4, 1948, *Hughes* California State Archives.

⁴⁰198 P.2d 885 (1948); Opinion, November 1, 1948, *Transcript*, 90-97.

such a situation—an arbitrary discrimination upon the basis of race and color alone, rather than a choice based solely upon individual qualification for the work to be done—which we condemned in the *Marinship* case.” He added that all races would be able to demand racially discriminatory hiring in their favor, “Yet that is precisely the type of discrimination to which [Hughes and Richardson] avowedly object.”⁴¹

Schauer skirted the question of the proof of discrimination. “It may be assumed for the purposes of the present decision, without deciding, that if such discrimination exists, picketing to protest it would not be an unlawful objective,” he wrote, implying that he recognized the *New Negro Alliance* precedent. But Hughes picketed not to protest a discriminatory hiring policy, but to institute one. “The fact that the hiring by Lucky of a small proportion of Negro employees might tend to show discrimination against Negroes is beside the point; likewise it is immaterial here that Lucky denied any such discrimination.” Picketing to compel racial hiring quota’s was unlawful regardless of whether Lucky discriminated.⁴²

Schauer’s decision implied that picketing to compel proportional hiring by race would be illegal in states whose public policy and labor law condemned racial discrimination. Schauer derived this policy not from statute law (California had no fair-employment-practice law) but from the judicial precedent of *Marinship*. While Schauer explicitly disregarded *New Negro Alliance* as a relevant precedent for a state jurisdiction, he did not fall back on *Beck* or *Green*, as the trial court had. The basis of the decision was thus a new departure. It amounted to judicial creation of a fair-employment-practice policy in the absence of a statute insofar as picketing, and perhaps other incidents of labor law, were concerned.

Hughes received the support of two dissenting opinions. Justice Jesse Carter focused on Schauer’s analogy that Hughes’s demands amounted to a closed shop and a closed union by the Negro race. He pointed out that the Progressive Citizens “are quite willing, and would consider their demands fully met if the unemployable qualified Negro clerks, presently members of the union involved[,] were hired.” Nothing in the record supported this, and cases from the 1930s showed that groups like the Progressive Citizens were primarily interested in placing members of their own organizations in positions. Schauer never said that an actual condition of “closed shop and closed union,” prohibited by *Marinship*, would exist. But for white

⁴¹Ibid.

⁴²Ibid.

members of the Retail Clerks Union, or other whites brought into the union, the quota acted as such.⁴³

Carter also struck at the attempt of the majority to try to arrive at a general rule of conduct in an equity case. In equity cases, he argued, the court must "look through form to substance." It was not proper to consider the application of a principle approved in this case to cases involving other races. He was willing to entertain them if and when they arrived. "It might logically follow that in a neighborhood predominantly Chinese or Japanese, or on an Indian reservation that picketing for proportional hiring of members of the particular race would be just, equitable, and entirely in accord with sound public policy." This willingness to entertain the picketing, however, was based on Carter's conviction that Hughes was "seeking non-discrimination, not discrimination." Carter did not consider that the majority had looked "through form to substance" on this issue and reached the opposite conclusion.⁴⁴

A more promising line of inquiry for Carter was based on the social facts of the case. The Progressive Citizens had provided much material on this point, and the example of the *New Negro Alliance* decision presented itself to him. "It must be admitted by every thinking person that Negroes are, and have been constantly discriminated against," he wrote. This justified the extension to the group of the privilege of picketing. Instead of expanding on this point, however, Carter made the dubious argument that the majority's decision denied to Negroes not only the right to picket to induce proportional hiring, but the right to picket to protest discrimination. "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 his employees." According to Carter, token hiring would protect an employer from even the accusation of discrimination. But Schauer had disregarded the issue of proof of discrimination and gone directly to the object of the picketing, admitting (without deciding) that picketing to protest discrimination would be lawful.⁴⁵

The dissenting opinion of Justice Roger Traynor was more cogent. Traynor also argued that *Marinship* was not a relevant precedent for this case, because Hughes sought only a proportion, and not a monopoly, of the jobs at Lucky's. Moreover, the Progressive Citizens did not wield the power that the closed

⁴³198 P.2d 885 (1948); Dissenting Opinion, November 1, 1948, *Transcript*, 98-107.

⁴⁴*Ibid.*

⁴⁵*Ibid.*

union in *Marinship* did. "Rules developed to curb abuses of those already in control of the labor market have no application to situations where the moving party is seeking to gain a foothold in the struggle for economic equality," he wrote. Lack of formal labor-union status had been the chief legal impediment of the New Negro Alliance and other black organizations before 1938. In an ironic twist, Traynor turned this into their main advantage.⁴⁶

Like Carter and the appeals court, Traynor premised his defense of Hughes's methods on the assumption of ubiquitous discrimination, rather than discrimination in the case at hand, and on the goal of advancing economic equality. "Those racial groups against whom discrimination is practiced may seek economic equality either by demanding that hiring be done without reference to race or color, or by demanding a certain number of jobs for members of their group," he reasoned. Minority groups retained this option, he wrote, "in the absence of a statute protecting them from discrimination." The courts had an obligation to preserve the option. "In arbitrating the conflicting interests of different groups in society courts should not impose ideal standards on one side when they are powerless to impose similar standards upon the other," he concluded. Racial discrimination by majority groups was properly condemned by the courts, but minority groups should not be held to this standard if they demanded racial discrimination in their favor.⁴⁷

Perhaps Traynor's most important argument was that the proportional scheme, and any sort of racial discrimination, was not illegal in California. "No law prohibits Lucky from discriminating in favor of or against Negroes. It may legally adopt a policy of proportionate hiring," he pointed out. In another state, with a fair-employment-practice law that "prohibited the consideration of the race of applicants for jobs," it might be said that the demand for proportional hiring was a demand that Lucky violate the law. Traynor noted the absence of such a law in California, and denied that there was any equivalent in the common law.⁴⁸

Traynor's reasoning here is hard to follow. Accepting the fact of discrimination as obvious, he was in sympathy with both the means and ends of the Progressive Citizens. Yet he suggested that such means and ends were only lawful in the absence of fair-employment legislation, which most liberals sought in the fight against racial discrimination and which

⁴⁶198 P.2d 885 (1948); Dissenting Opinion, November 1, 1948, *Transcript*, 107-11.

⁴⁷*Ibid.*

⁴⁸*Ibid.*

seemed to be the logical conclusion to which his sense of racial justice pointed. Moreover, he appeared to deny the attempt of Schauer and the majority to erect the equivalent of a fair-employment-practice law based on judicial precedent (*Marinship*) and a general public policy against discrimination based on race. Traynor has been depicted as a precursor of Warren Court liberalism and judicial activism, and his sympathies for Hughes and his associates in this case seem to confirm this.⁴⁹ His indifference to the means used to combat racial discrimination in employment, that minorities "may seek economic equality either by demanding that hiring be done without reference to race or color or by demanding a certain number of jobs for members of their group," is notable. It indicates an ambivalence on the part of liberals in the postwar period about the proper means to combat racial discrimination in employment.

Hughes asked the California Supreme Court to reconsider the case. Its decision, he claimed, would help to justify racial discrimination. It was regrettable that "this Court, which has been outstanding in striking at the hateful system of discrimination," could take such a step backward. Hughes argued that the demand of proportional hiring was not unlawful, and that, even if it were, his organization had a right to picket peacefully.⁵⁰

Hughes contended that it was impossible for the court to determine what an "arbitrary" demand upon Lucky was. If the NAACP asked Lucky to employ one Negro, would that be arbitrary? Where was the point at which the line of arbitrariness was crossed? Hughes admitted, "If [we] sought all the jobs at the Canal Store for Negroes, perhaps this might be arbitrary. Is it not reasonable, however, to request employment opportunities based upon the racial composition of the customers?" He attempted to impress upon the court the rationality of the work force-patronage ratio. It made sense because discrimination was not mathematically provable. Blacks made up 10 percent of the American population, he noted. "If there were no discrimination in the employ of Negroes, presumably the Negro population would find employment throughout the American economy in approximately the same ratio; that is, of one Negro in each industry to nine whites." Of course, this ratio would increase in places where Negroes made up more than 10 percent of the population. All that the Progressive Citizens demanded of Lucky was that it "conform to the pattern

⁴⁹See, e.g., G. Edward White, *The American Judicial Tradition* (New York, 1988), 292-316.

⁵⁰Petition for Rehearing, November 16, 1948, *Transcript*, 111-21.

that would undoubtedly exist if the admitted fact of economic discrimination against Negroes disappeared from America."⁵¹

Hughes followed up on Traynor's argument that what was demanded of Lucky was legal in California: "Are [we] to understand that this court, under its general equity powers, has incorporated the principles underlying the various Fair Employment Practices Acts, as part of the general law of the state?" This was implied in *Marinship*. If this were so, Hughes asked, "If [we] cannot seek to impose discriminatory hiring practices, does it not follow that employers, such as Lucky, cannot *maintain* discriminatory hiring practices?" He concluded that he should be able to obtain an injunction against Lucky to prevent its discriminatory hiring.⁵²

Lucky continued to insist that what Hughes demanded was "discrimination in favor of the Negro race" and "preferential treatment of a particular race." While blacks were free to pursue jobs for members of their race, "This right when sought to be perfected by the economic device of picketing must be urged in a manner considered lawful by the courts of this state." Lucky placed the issue in the narrower context of picketing and labor law rather than exploring the question of a judge-made fair-employment-practice law. In the immediate setting of the case, the company continued to deny that it practiced discrimination. All of its personnel actions had been based "upon an individual, rather than a racial basis." This clearly denied the demographic model of proof of discrimination advanced by Hughes. The California Supreme Court denied the petition for a rehearing.⁵³

LEGAL OPINION RUNS COUNTER TO THE DECISION

The opinion of the legal community, as expressed in the law reviews, went against the California Supreme Court's decision. A note in the *California Law Review* pointed to the discrepancy of outlawing picketing for discrimination in favor of Negroes in a state that did not prohibit employers from discriminating against them. California "evidently does not consider this discrimination, though against public policy, a serious enough evil to restrain Lucky Stores from practicing it. Yet it is held to be such an evil that picketing to attain it is unlawful." The note suggested that the United States Supreme Court could use this discrepancy to overturn the decision. While ad-

⁵¹Ibid.

⁵²Ibid.

⁵³Ibid.

mitting that "a quota system is concededly discriminatory, and though the proportion of patronage is an arbitrary measure of fair hiring," it was not so unreasonable as to be struck down. It did not call for complete exclusion of whites, the note argued, and was "one objective standard that is reasonable in determining whether discrimination exists in the absence of legislation defining and controlling the practice." Until the problem of racial discrimination in employment was confronted by the state, the courts should not close off this avenue of redress. The *Syracuse Law Review* agreed, arguing that "It is doubtful whether the objective of the picketing . . . , when viewed realistically, should be considered illegal, especially in the absence of a statute or rule of the common law proscribing proportional hiring of racial groups." Such hiring was probably illegal in New York under the 1945 Law Against Discrimination and decisions reached before the enactment of the statute.⁵⁴

George Grover, in the *Southern California Law Review*, recognized the uncertain position of racial quotas in the civil-rights movement. He was troubled that the court had not considered the constitutional, free-speech aspect of the case, which might give the issue a fuller hearing. While the antidiscrimination principle expressed in *Marinship*, disregarding race altogether, was probably preferable, it was not the only antidiscrimination method available. He credited the court for defending the "true nondiscrimination" principle expressed in *Marinship*, but believed that the principle might actually perpetuate inequality. On the other hand, Hughes's compromise of the true principle, while perhaps expedient, "may actually delay the day when consideration of racial origin will be absent from the economic scene." The pickets were "too ready here to accept the fact of discrimination—perhaps their system of openly competing racial groups would even aggravate the situation." In the end, the court should have recognized the honest split of opinion on the subject and allowed the defendants to express their opinion by picketing.⁵⁵

The split opinion in the California Supreme Court on the subject of proportional employment raised a strategic problem for the NAACP. As the national office considered whether it should join in the appeal to the United States Supreme Court by the Richmond branch, a San Francisco lawyer, Cecil Poole, advised against it. Early in 1949 he told Thurgood Marshall that the California Supreme Court's decision prohibited only pick-

⁵⁴"Notes and Recent Decisions," *California Law Review* 37 (1949), 296-301; "Recent Decisions," *Syracuse Law Review* 1 (1949), 153.

⁵⁵George G. Grover, "Comment," *Southern California Law Review* 22 (1949), 442-54.

eting that demanded proportional hiring, and that it left "general picketing for jobs" untouched. Poole called the goal of proportional hiring "unsound both economically, practically and philosophically." The struggle of black Americans for jobs, he said, should appeal to "the democratic principle that we are entitled to equal opportunity based upon merit and ability to compete in the labor market without being prejudged on account of race or color." The goal in *Hughes*, however, was "at variance with this great sustaining principle and in place of the criterion of equality and merit substitutes artificial criteria." The criteria in Richmond could have the effect of excluding blacks from large national industries, and give many local firms license to discriminate. Poole agreed that the decision was a bad one in terms of labor law and free speech, but still advised that the NAACP drop it. In the future, he felt, there would be opportunities to "vindicate the general right of picketing without having also to defend the dubious principle of proportional picketing." Marian Wynn Perry, who had expressed reservations about the case a year earlier, supported Poole. Reiterating her objection to proportional employment, she raised the question of "whether we can support the right to picket for such an aim."⁵⁶

Hughes's attorneys in Richmond had secured support from the Congress of Industrial Organizations, the American Civil Liberties Union, and the National Lawyers Guild for amicus briefs. The NAACP Legal Defense Fund favored a brief "raising simply the point that this was a violation of free speech and a limitation upon the rights of the NAACP and other organizations to seek job opportunities for Negroes." The American Jewish Congress prepared a brief for the case. The congress was "opposed to racial quotas in employment," and generally found the decision "not unreasonable," but decided to follow up on the argument broached by Traynor's dissent: In the absence of a fair-employment statute, the decision, allowing Lucky to use a discriminatory hiring system but prohibiting Hughes from picketing to compel one, was a denial of the equal protection of the laws. Meanwhile, the NAACP remained uncertain. Marshall said the local branch had become involved in the litigation without the knowledge of the national office. He noted that "The NAACP is opposed to proportionate hiring and quotas in general. On the other hand, I believe that all of the legal

⁵⁶Miller to Marshall, November 12, 1948; Poole to Marshall, January 10, 1949; Memorandum of Perry, January 27, 1949; NAACP II-B-87. Only half a year earlier, Poole signed the brief before the California Supreme Court that argued the propriety of proportional hiring, see *supra* note 33.

staff is in favor of peaceful picketing." A decision had to be arrived at soon.⁵⁷

It occurred to Lucky's attorneys that the NAACP's opposition to quotas might induce them to file a brief on their behalf. Loren Miller told Marshall of such a request by Frank Richards, who was handling the appeal for Lucky, and said, "I explained to him that I had no authority to speak for the Association in this instance, but that I felt of course we could not assume his position, even in the face of our opposition to proportionate employment." Richards, disappointed, wrote Marshall, "We are unable, however, to understand how you can contend, as we feel you must support petitioners in this case, that the policy of the State of California against racial discrimination in employment is not sufficiently important to justify state interference with picketing, which might otherwise be protected under the doctrine of *Thornhill v. Alabama*."⁵⁸ Miller, too, advised the association to focus on the free-speech element of the case. "That position is rather admirably set forth in Traynor's dissent. I think that such a brief could dissociate the Association from any support of picketing for proportional employment, and at the same time affirm our stand in favor of free speech," he wrote.⁵⁹

Before the national office made its final decision to support the case, it contacted the Richmond branch, reproaching its members for taking on the case without notifying the national office, especially as it involved the controversial question of quota hiring. Richmond reported that it had not been directly involved in the case since the trial court ruling, but that "other groups ha[d] proceeded with it." Moreover, "The quotas demand was not an issue when our branch was supporting the case and we have no obligations or commitments in so far as the case is concern[ed]." The NAACP therefore decided to drop the issue of proportional racial hiring and proceed with the case on the more important, less controversial free-speech and picketing grounds.⁶⁰

⁵⁷Edises, Treuhaft, and Condon to Marshall, January 22, 1949, NAACP II-B-87, Perry to W. Robert Ming, January 20, 1949; Ming to Perry, February 4, 1949, NAACP II-B-71; Perry to Carter, July 12, 1949, Marshall to Ming, Nabrit, and Johnson, October 26, 1949; NAACP II-B-87.

⁵⁸In this 1940 case, the Supreme Court struck down an Alabama law prohibiting peaceful picketing and confirmed the idea that picketing was a form of free speech.

⁵⁹Miller to Marshall, October 27, 1949; Frank S. Richards to Marshall, October 28, 1949; NAACP II-B-87.

⁶⁰Ming to Marshall, October 28, 1949; Marshall to Juanita Wheeler, October 25, 1949; Wheeler to Marshall, November 9, 1949; NAACP II-B-87.

THE SUPREME COURT HEARS THE CASE

The *Hughes* case was argued before the Supreme Court on November 8 and 9, 1949. Hughes's attorneys, Bertram Edises and Robert Condon, asked the Court to clarify its rulings on picketing as freedom of speech. The Court's apparently strong stand in *Thornhill* had been undermined, and the justices thought *Hughes* presented "the strongest factual justification for constitutional protection of any picketing considered by this court since the *Thornhill* decision in 1937." If the picketing here were not protected, the entire premise of First Amendment protection of picketing would need reconsideration. This case also gave the Court an opportunity to reinforce its position as a firm champion of the "oppressed Negro people" taken in the recent *Steele* case, when it imposed the duty of "fair representation" of racial minorities by labor unions.⁶¹

Edises and Condon also defended proportional hiring. They reviewed the "Depressed Condition of the Negro People," which justified the tactics used in Richmond—tactics that were practical and the result of experience. Negroes were aware that discriminatory "exclusion may be accompanied by a denial of a discriminatory policy," such as Lucky's. Picketing for a proportion of jobs was a concrete goal, rather than "mere wishing, or . . . a denunciation of discrimination in general." Edises and Condon reiterated their premise of proportional representation in employment: "If there is no discrimination against Negroes, one would expect to find them gainfully employed in various pursuits in approximately the same proportion that their population bears to the nation as a whole." Thus Lucky's claim that Hughes called for race-based preference was spurious. Hughes did not demand "more jobs for Negroes as clerks than would have been the case if Lucky had followed a nondiscriminatory hiring policy." The pickets demanded not merely that Lucky live up to its professed nondiscriminatory policy. "They sought not merely to compete on the open market for jobs, an equality shown by experience to be of dubious value to Negroes, but they requested that a definite percentage of Negroes be hired as vacancies occurred."⁶²

The position of black Americans, similar to that of women and children in earlier social legislation, meant that preference for them did not constitute discrimination against any others. In this case, "Special consideration does not become 'discrimination' where its beneficiaries are a uniquely oppressed and

⁶¹Opening Brief for Petitioners, October 22, 1949, *Transcript*.

⁶²*Ibid.*

exploited social group." Even if Negroes were given this consideration—turned into a "closed union," as Schauer put it—they would remain disadvantaged. "Indeed," argued Edises and Condon, "it may legitimately be doubted whether there are many who seek the privilege of incorporation into the ranks of Negro, since that 'privilege' is accompanied by political, social, and economic disenfranchisement. To compare such 'exclusiveness' with that of a union having a deliberate policy of racial discrimination is to play with words and ignore realities."⁶³

Finally, they asked the Court to apply the principles of the *New Negro Alliance* case to California. They pointed out that California's "public policy" against discrimination was judge-made rather than legislated. If the United States Supreme Court accepted the California Supreme Court's decision, it would leave to the states the determination of what "public policy" could prohibit picketing—for racial hiring or for any other goal. "An acceptance of such an interpretation will involve an abdication by this Court of its position as ultimate interpreter of the Constitution," they concluded.⁶⁴

General Counsel Arthur Goldberg, of the Congress of Industrial Organizations, filed a brief on behalf of Hughes, seeing in the California decision a threat to Negro organizations and organized labor in general. Goldberg defended the goal of proportional hiring while admitting that it was perhaps "not the ideal solution" to the problem of employment discrimination. In light of the absence of either state or federal fair-employment laws, however, it was "the only practicable remedy available to negro organizations." The United States Supreme Court had recognized as much in the *New Negro Alliance* case, while California's Supreme Court had "assumed the ideal and ignored the facts." California's condemnation of proportional hiring would make sense only in a world where discrimination did not exist. "It is a mechanical application of formula which treats society as though it consisted of bloodless categories." California applied a color-blind standard to a color-conscious world, argued the CIO, thus letting "its logic obscure the facts of life."⁶⁵

According to the CIO, not only did California give the wrong answer to the question of whether the goal of this picketing was proper, but "it erred even more seriously in even asking the question." California's question assumed that picketing was inherently illegitimate unless legitimized by a "lawful

⁶³Ibid.

⁶⁴Ibid.

⁶⁵Brief for the Congress of Industrial Organizations as Amicus Curiae, November 3, 1949, *ibid.*

purpose." The issue in *Hughes* for organized labor was between the recent tendency of the United States Supreme Court to regard picketing as "an activity which may be tolerated only if its objectives are such that a court feels may properly be affirmatively supported by the court," and California's "rule which regards picketing as *prima facie* protected, as are other forms of speech, and permits restraint only where some serious violation of law affirmatively appears." For the CIO, the presumption should always be that picketing was lawful and proper.⁶⁶

The ACLU also took an interest in the case, voiced by Arthur Garfield Hays and Osmond Fraenkel. Their concern was limited to the free-speech implications of California's ruling. "At the outset we wish to state that we condemn the purpose of the picketing herein," they stated. They were merely defending the legality of the picketing. "However misguided the theories of the petitioners, their picketing must fall of its own weight. That is the very essence of free speech," they told the Court. Embracing the "marketplace of ideas" principle of Oliver Wendell Holmes, the ACLU also had to come to terms with Holmes's "clear and present danger" dictum. Hays and Fraenkel denied that the advocacy of unpopular ideas constituted such a danger. To affirm the California decision, they said, "would be to hold that the mere advocacy of a distasteful lawful objective represents a clear and present danger of a substantive evil to the State." They pointed out that discriminatory hiring practices were not deemed evil enough by the state of California to bring about a fair-employment-practice law, and that "the majority nowhere indicated that the common law policy of the State prevented discrimination." Thus *Hughes* was "merely an expression by the Courts of the State of California of disapproval of the objective sought by the picketing—the ideas advocated." Courts could not enjoin ideas, the ACLU concluded.⁶⁷

The NAACP, through Robert Carter and Thurgood Marshall, also filed a brief on behalf of *Hughes*. They, too, focused on the free-speech and picketing aspects of the constitutional dispute, and cautiously evaded the issue of proportionalism. They stated that they were "opposed to what has been alleged to be the ultimate objective of the petitioners in this action—proportional or quota hiring of Negroes," but asserted that it was not the main question. Like the CIO and the ACLU, the NAACP asserted that the purpose, even if the organization did not approve of it, was lawful. Moreover, the NAACP doubted

⁶⁶Ibid.

⁶⁷Brief for the American Civil Liberties Union, *Amicus Curiae*, November 7, 1949, *ibid*.

whether Hughes's aims amounted to the advocacy of a quota system. The California Supreme Court misinterpreted the aims of Hughes, suggested the NAACP: "The Court, interpreting 'proportionate' as a mathematical word of art, concluded that petitioners were advocating employment of Negro clerks in strict ratio to whites, probably determined by a census of Richmond's growing and variable population." Carter and Marshall proposed that the Court consider a more realistic, if less precise, interpretation of the demands. Hughes's signs, calling for "Negro clerks in proportion to Negro trade," should not be taken literally. Signs in labor disputes, the Court held in earlier cases, often used "loose language or undefined slogans." Seen against this background of facts, and in light of this Court's standard of interpretation, Hughes's demand "takes on a meaning more hortatory and less artificial, which was the meaning undoubtedly conveyed to those living in the context of the controversy." Rather than seeking an unlawful policy, or even a lawful if undesirable one, the NAACP argued that "they were simply interested in increasing employment opportunities for Negroes and eliminating discrimination against them, something quite in accord with the public policy of the State of California, and of the United States." Except for the dubious determination of proportional demands, they concluded, *Hughes* was substantially the same as the *New Negro Alliance* case, and should be judged accordingly.⁶⁸

The argument of Marshall and Carter, that Hughes did not demand a proportional policy at all, seems disingenuous. It is all but impossible to square with the one made by Hughes's own lawyers, Edises and Condon, who explained and defended the proportional goal. It is not surprising, however, that the local initiators of the picketing and the NAACP national authorities should present such divergent arguments to the Supreme Court. The national office had been tardily informed of the situation in Richmond, and there was considerable internal debate on whether to support the *Hughes* case, and on what strategy to apply. The brief was unconvincing on this new point, and failed to reinforce or supplement Hughes's case before the Supreme Court.

The American Jewish Congress had originally planned to support the Richmond pickets, but ultimately did not. Jack Pearlman, of that organization's Commission on Law and Social Action, prepared a brief in support of Hughes in the summer of 1949. He stated at the outset the congress's objection to proportional hiring, which it regarded as "another form of the

⁶⁸Brief for the National Association for the Advancement of Colored People as Amicus Curiae, November 5, 1949, *ibid*.

quota system" that perpetuated the use of irrelevant considerations such as race and religion, rather than merit, in hiring decisions. The congress directed its efforts toward securing fair-employment-practice legislation at the national and state levels. "Such legislation," said Pearlman, "utilizes the power and authority of the government to insure equality of opportunity in employment and of necessity outlaws quotas."⁶⁹

However, he defended Hughes's constitutional right to picket for the proportional system, and the logic of the demand itself. The quota system constituted the "formula for eliminating the discriminatory hiring policy" of Lucky. This was the most practical formula to achieve the goal of nondiscrimination. Pearlman regarded mere exhortation of Lucky to hire on the basis of merit rather than color as "unenforceable and therefore futile." He also supported the idea that, absent discrimination, the proportion of Negro workers would reflect the proportion of Negroes in the population. As he saw it, "The specific demand made herein indicates that the proportion of Negro clerks in the Canal Street store was lower than the proportion of Negro trade there. Such a situation could reasonably indicate a discrimination against Negroes." Although the American Jewish Congress did not file this brief, the draft of the argument indicates that the logic of population-work force symmetry, advanced by Edises and Condon, had some appeal and was gaining currency.⁷⁰

Pearlman noted that the 50 percent quota not only discriminated against whites, but also against Negroes, to whom the remaining 50 percent was closed. "Thus, by one court's logic, petitioners were seeking to compel a discrimination against both whites and Negroes." Rather than seeing this conclusion as another reason to oppose quotas, he concluded that "This reduces the court's logic to an absurdity." Pearlman's final point concerned the lack of fair-employment legislation in California. This indicated that the state did not consider the prevention of discrimination an important public-policy goal; since constitutional guarantees like free speech and picketing could be abridged only for the sake of the most important state purposes, California had no basis to prohibit picketing that was contrary to such a policy.⁷¹

Lucky's attorneys, Frank Richards and Hugh Fullerton, disputed several of the points made by Hughes and his supporters.

⁶⁹Commission on Law and Social Action of the American Jewish Congress, Draft Brief in Hughes, Prepared by Jack Pearlman, August 7, 1949, NAACP II-B-87.

⁷⁰*Ibid.*

⁷¹*Ibid.*

Above all, they denied that Lucky operated a discriminatory hiring system. Hughes, in fact, never brought this allegation before the trial court. All that could be shown was that if Hughes's demands were met, Lucky would operate a discriminatory policy, "a quota of jobs for Negroes based on skin coloration rather than on individual merit."⁷²

Richards and Fullerton further contended that demands for a quota system did constitute a "clear and present danger" to a vitally important state policy. (The Fourteenth Amendment, too, forbade state discrimination against persons on the basis of race, but state action was not involved in this case.) They disputed the analogy of Edises and Condon to special legislation for women and children that had been approved by the Court. "Petitioners contend . . . that preferential treatment for Negroes is not discrimination because they are a uniquely oppressed and exploited group. . . . But [they] overlook the fact that, while classifications based on sex may be reasonable for such purposes as minimum wage legislation, classifications based on race are seldom justifiable under our Constitution."⁷³

Lucky's attorneys accepted nondiscrimination as a public policy of California under *Marinship*, and argued that Hughes's demands were a substantial threat to that policy. It was impractical as well as illegal, because "Negroes and other minority groups must of necessity depend to a very considerable degree on employment outside the areas where they can exert economic pressure," they said, echoing many black leaders of the 1930s who balked at direct action. Richards and Fullerton accepted that Hughes's long-range goal might be that of nondiscrimination, but the short-term use of discrimination would do more harm than good, and actually encourage discrimination.⁷⁴

Richards argued that the *New Negro Alliance* case did not apply in this instance. Not only was the federal question (construing the Norris-LaGuardia Act) different, but so were the facts. The New Negro Alliance picketed in protest against discrimination, and did not demand a specific hiring quota. The injunction in that case was very broad, while the injunction issued in California acted specifically against the quota demand. Thus the Supreme Court should respect the determination of the California courts that Hughes's demands constituted a clear and present danger to an important state policy.⁷⁵

⁷²Brief for Respondent, October 26, 1949, Transcript.

⁷³*Ibid.*

⁷⁴*Ibid.*

⁷⁵*Ibid.*

FRANKFURTER WRITES THE DECISION

The Supreme Court decided the *Hughes* case on May 8, 1950. Felix Frankfurter wrote the decision for the unanimous court, affirming the decision of the California Supreme Court. He stated the main question of the case: "Does the Fourteenth Amendment . . . bar a State from use of the injunction to prohibit picketing of a place of business solely in order to secure compliance with a demand that its employees be in proportion to the racial origin of its then customers?" He noted that California had been sensitive to the problem of discrimination in employment, and that in this case its Supreme Court decided "that it would encourage discriminatory hiring to give constitutional protection to [Hughes's] efforts to subject the opportunity of getting a job to a quota system." Frankfurter agreed that this decision was especially relevant to the American population, which was "made up of so many diverse groups." To allow Negroes in Richmond to picket for quota hiring would encourage every minority group to do so. "The differences in cultural traditions instead of adding flavor and variety to our common citizenry might well be hardened into hostilities by leave of law," he said. Implicit in this statement was a rejection of the argument by Hughes's attorneys that the particular discrimination suffered by black Americans justified their picketing but not others'.⁷⁶

Frankfurter went on to clarify the extent of the Constitution's protection of picketing as free speech. "It has been amply recognized that picketing, not being the equivalent of speech as a matter of fact, is not its inevitable legal equivalent," he noted. California courts had made a legitimate distinction between picketing against discrimination and picketing to compel discrimination. While the Supreme Court did not interpret *Hughes* as tending to encourage discrimination, it could not overrule California's determination on this point. "We cannot construe the Due Process Clause as precluding California from securing respect for its policy against involuntary employment

⁷⁶339 U.S. 460 (1950); *New York Times*, May 9, 1950. Justices Black, Minton, and Reed concurred in Frankfurter's decision upon the precedent of *Giboney*. William O. Douglas was recovering from a riding accident and took no part in the consideration of the case. While it is impossible to say how he would have judged in 1950, twenty-four years later Douglas cited *Hughes* in his opposition to an affirmative-action admissions program at the University of Washington Law School. *DeFunis v. Odegaard*, 416 U.S. 312 (1974), 337-38. Justice Tom Clark prepared a dissent, but did not publish it. Mark Tushnet, "Change and Continuity in the Concept of Civil Rights: Thurgood Marshall and Affirmative Action," *Social Philosophy and Policy* 8 (1991), 150-71, 154.

on racial lines by prohibiting systematic picketing that would subvert such a policy," Frankfurter wrote. The relevant precedent here was the *Giboney* case, in which a labor union's attempt to compel an employer to violate a state antitrust policy was enjoined.⁷⁷

Frankfurter rejected the argument that California's lack of a fair-employment statute indicated a weak policy, or no policy, against discrimination. "The fact that California's policy is expressed by the judicial organ of the State rather than by the legislature we have repeatedly ruled to be immaterial." The Fourteenth Amendment drew no distinctions as to which branches of state government made the law. Frankfurter stated, "California chose to strike at the discrimination inherent in the quota system by means of the equitable remedy of injunction to protect against unwilling submission to such a system."⁷⁸

Nevertheless he conceded something to the argument for quota hiring, regardless of the "discrimination inherent" in it. He had been careful to focus on "involuntary" and "unwilling submission" to a quota system brought about by picketing. A state's prohibition of picketing to compel proportional hiring did not necessarily imply that the state also prohibited voluntary quota systems by employers.⁷⁹

Here Frankfurter recognized the point that California might permit Lucky to discriminate in favor of, as well as against, racial groups. His decision in this case was limited to the use of picketing to compel quota hiring.

Frankfurter gave some explanation for his judgment that "the discrimination inherent in the quota system" was permissible if private and voluntary, even in a state that had devised some policy against discrimination. "A State is not required to exercise its intervention on the basis of abstract reasoning," he said. "The Constitution commands neither logical symmetry nor exhaustion of a principle." He quoted previous Supreme Court decisions that made room for this sort of flexibility: "The problems of government are practical ones and may justify, if they do not require, rough accommodation—illogical, it may be, and unscientific." A state might "direct its law against what it deems the evil as it actually exists without covering the whole field of possible abuses, and it may do so none the less that the forbidden act does not differ in kind from those that are allowed," he noted, adding that "Lawmaking is essentially empirical and tentative, and in adjudication as in legislation

⁷⁷339 U.S. 460 (1950).

⁷⁸*Ibid.*

⁷⁹*Ibid.*

the Constitution does not forbid 'cautious advance, step by step, and the distrust of generalities.'" He concluded by saying that he would not generalize or go beyond the circumstances of this particular case.⁸⁰

The October 1949 term had been a largely successful one for civil-rights groups. The Court's decisions in *Henderson v. United States*, *Sweatt v. Painter*, and *McLaurin v. Oklahoma State Regents*, although decided on narrow, technical issues, indicated that segregation rested on increasingly insecure constitutional ground. The Court at the time was probably closer than it had ever been to renouncing *Plessy v. Ferguson* and applying a strict color-blind constitutional standard.⁸¹ Although civil-rights and civil-liberties groups saw it as a defeat, *Hughes* may be seen as part of an emerging pattern of decisions by the Supreme Court that disapproved of racial classifications and culminated in the 1954 *Brown* decision. *Hughes* may also be seen as part of the Vinson Court's tendency toward more restrictive organized-labor and picketing decisions but more liberal civil-rights decisions.⁸²

Although Frankfurter rejected most of Hughes's arguments, he ignored several of them, and, overall, the opinion probably raised more questions than it answered. Frankfurter apparently wanted to leave great latitude to states to combat racial discrimination in employment. California, he reasoned, had expressed its disapproval of quota hiring and prohibited picketing to compel it. If California could permit quota hiring, as Frankfurter suggested, could a state by the same principle choose to *compel* quota hiring? What were the consequences for states that did have fair-employment laws? Most commentators, like the American Jewish Congress and the *Syracuse Law Review*, believed that the fair-employment approach precluded quota hiring. But if California, with its judge-made antidiscrimination policy, could permit quotas, could New York? In short, could the race-conscious approach of direct action, rejected by the courts, be pursued in the fair-employment context? This question might become relevant if the experiment in fair-employment states failed to result in the naturally proportional work force envisioned by Hughes's supporters.

Frankfurter chose not to enter into the question of proof of discrimination. Hughes claimed to have proved Lucky's dis-

⁸⁰Frankfurter citing *Metropolis Theatre Co. v. Chicago*, 228 U.S. 61 (1912); *Central Lumber Co. v. South Dakota*, 226 U.S. 157 (1912); *Carroll v. Greenwich Insurance Co.*, 199 U.S. 401 (1904).

⁸¹Andrew Kull, *The Color-Blind Constitution* (Cambridge, Mass., 1992), 147.

⁸²Robert G. McCloskey, *The Modern Supreme Court* (Cambridge, Mass., 1972), 114-17.

criminatory policy by the disparity between the black population and black employees; Lucky claimed to have proved its nondiscrimination by its two or three black employees. Frankfurter left that determination where the California Supreme Court placed it—as being irrelevant beside the point of picketing to compel proportional hiring. This increasingly important question would be taken up outside the courts, in the administrative procedures of state fair-employment-practice commissions, in the next fifteen years.

The direct-action movement virtually died out in the 1950s, due to postwar prosperity, the fair-employment laws enacted by many northern and western states, and the *Hughes* decision. *Hughes* remained a significant precedent, invoked when direct-action tactics were revived in the 1960s.⁸³ The decision's appeal to a color-blind standard of equality fit the aspirations of the early civil-rights movement well, but even then the principle aroused debate. The arguments of the plaintiffs, calling for race-conscious remedies to employment discrimination, based on a model of proportional representation, may be the more enduring legacy of the case.

⁸³"The Common-Law and Constitutional Status of Antidiscrimination Boycotts," *Yale Law Journal* 66 (1957), 397-412; Sanford Jay Rosen, "The Law of Racial Discrimination in Employment," *California Law Review* 53 (1965, 729-99; Harold M. Weiner, "Negro Picketing for Employment Equality," *Howard Law Journal* 13 (1967), 271-302.

"A YEAR AND A SPRING OF MY EXISTENCE": FELIX S. COHEN AND THE HANDBOOK OF FEDERAL INDIAN LAW

JILL E. MARTIN

We referred to Felix Cohen's 1942 Handbook as the Old Testament, the 1982 revision as the New Testament, and as the 1958 version was written by the Bureau of Indian Affairs, it was regarded as the teachings of a false prophet.

—Steven L. Bunch,
Navajo Nation Department of Justice

Every lawyer who handles American-Indian cases at some time or another has turned to Felix S. Cohen's *Handbook of Federal Indian Law*. The *Handbook* is a one-volume hornbook analyzing all issues of American-Indian law, including the relationships between the Indians, the federal government, and the western states. It is on the bookshelf of most lawyers in the western United States, and is viewed by some as the bible of Indian law. It has been cited by the Supreme Court and by other federal courts. Yet it came close to not being written, an undertaking that was almost abandoned. The drafts were accused of being poorly written and an embarrassment to all involved. The project was, in fact, terminated by the Department of Justice. Politics almost destroyed this seminal work.

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Felix S. Cohen arrived at the Department of the Interior in 1932 as part of the New Deal, at a time when lawyers viewed government service as a way to change and improve society. Cohen, who was known as a good legal draftsman and a fine writer, was there expressly to draft Indian legislation. At the age of twenty-five, he was already working as a lawyer, after obtaining doctorates in philosophy from Harvard in 1929 and in jurisprudence from Columbia in 1931. A brilliant thinker, he drafted the Wheeler-Howard Act (also known as the Indian Reorganization Act), which was adopted as the premier Indian legislation of the New Deal in 1934. At the Department of the Interior, he concentrated on Indian affairs and issues, assisting western tribes in writing tribal constitutions as provided for in the Indian Reorganization Act, and he developed a reputation as an expert in Indian law.

In 1938, lawyers at the Department of Justice asked Cohen if he would move to Justice and write a handbook for their use. He refused. He was asked again, and finally agreed. Assistant Attorney General Carl McFarland specifically wanted Cohen for the project, and drew up the agreement loaning him to Justice from Interior. The loan was to be for one year, for the period from February 1, 1939, to January 31, 1940.¹ The agreement states, "Whereas, due to the special training and experience of Felix S. Cohen, such services cannot be conveniently or more cheaply performed by private agencies or by personnel employed from any other source."² Cohen was to receive his regular salary of \$5,800 per year, although McFarland requested, and received, a reclassification of the position to one with a salary of \$6,500 per year.³

McFarland was in the Lands Division of the Department of Justice, and was to be Cohen's supervisor. The division handled all claims involving public land in the United States. Federal ownership of much of the public land in the western states was based on Indian treaty cessions, and litigation in the Lands Division required interpretation of Indian treaties. A compilation of all Indian laws, treaties and statutes, and a general guide to Indian law would be extremely useful to the Department of Justice.

Cohen was the perfect choice for the position. His background in philosophy and jurisprudence and his interest in his-

¹Agreement for Interdepartmental Services, January 31, 1939, Box 11, File 156, Felix S. Cohen Papers, Western Americana Collection, Beinecke Library, Yale University [hereafter cited as "FSC Box/File"].

²Ibid.

³Ibid.

tory and anthropology gave him a broad perspective on Indian law. He was already an accomplished author, having published articles in law reviews and other journals. His title was "Chief, Indian Law Survey."⁴ His responsibilities were twofold: compiling all statutes and cases involving Indian law, and preparing "a general guide or handbook . . . covering the entire subject of all laws relating to the Indian."⁵ This was not to be simply a litigation, or "how-to" book. As conceived, it was to cover every aspect of Indian law.

Cohen had a vision for the handbook. It was to be a book that would last into the future, setting forth how the laws had developed over time and explaining the legal interests of all parties involved. Cohen believed that the country's treatment of its minorities, Indians among them, should exemplify the greatest traits of its democratic institutions.

Not everyone in the Interior and Justice departments agreed with his view. Cohen would be changing the way Indian affairs were assessed and handled by the departments. His vision looked ahead and advocated rights for Indians, but some questioned whether it adequately presented Indian law as it existed in 1939, rather than as Cohen believed it should be. Others questioned whether it was the role of a government publication to expand upon the rights of Indians that could be enforced against the government.

Cohen set about creating a staff for the Indian Law Survey. He was to have nine lawyers, as well as secretarial, stenographic, and filing staff, all subject to his approval and direction. In preparation for hiring the lawyers, he listed his "deficiencies," which were to be remedied by the new hires. These deficiencies, as listed, were: Department of Justice procedure, litigation experience, probate work, water law, and mining law.⁶ Hiring qualified lawyers turned out to be difficult. In a status report of March 22, Cohen wrote that it had been necessary "to spend a considerable amount of time in interviewing applicants for positions, corresponding with Deans of law schools and others in an effort to find suitable personnel."⁷ Even as late as October of 1939, he was still short of lawyers. Some were therefore assigned from the Justice Department, but only for short periods of time. Of the ten who worked for him,

⁴Cohen to Mr. Collett, Acting Attorney General, memorandum, May 3, 1939, FSC 11/156; see also FSC 12/173.

⁵*Ibid.*

⁶Cohen, hand-written notes, FSC 11/154.

⁷Report, Work Done to Date by Indian Research Unit, March 22, 1939, FSC 11/154.



Felix S. Cohen, author of the *Handbook of Federal Indian Law* (The Beinecke Rare Book and Manuscript Library, Yale University)

only four were of his own choosing.⁸ These staff lawyers included women, at a time when the federal government did not generally hire them as lawyers.

Cohen recognized that the survey was not necessarily a plum job for a young lawyer since he or she would once again have to seek employment when the work was completed in a year. Not too many opportunities in Indian law existed, outside the government. Cohen's memorandum to the chief of the administrative section regarding the hiring of a lawyer clearly recognizes this: "In advising him of my intention to recommend his appointment at a probable salary of \$2,600.00, I pointed out that the work of the Survey would be confined to a field that would be of little practical value to him in later practice."⁹ The staff of the survey also worked long hours. Cohen had to request special building passes for all of them, as "A large part of their work . . . is done after hours and on Sundays and holidays."¹⁰

Cohen began his work by writing and preparing an outline of the law governing Indian affairs. This was to serve as a guide to the indexing and analyzing of all legal materials.¹¹ His assistants began by compiling statutes and cases. Every volume of the United States Statutes at Large was combed for any references to matters affecting Indians. Files at the solicitor's office at Interior were searched for opinions, as were the attorney general's files at Justice. Reported cases, treaties, and private acts were copied. Every document found was copied, stenciled, mimeographed, and then indexed. Cohen's staff went to the National Archives to find original copies of Indian treaties and made hand-written copies, which were then typed, stenciled, mimeographed and indexed. Any discrepancy between different copies of the same act or treaty sent someone to find the original document, or the legislative history. This was an exacting task.

A status report from Cohen to Assistant Attorney General Norman Littell on July 1, 1939, reported that 1,337 out of 2,752 public acts and treaties had been indexed, as had 291 out of 1,177 private acts. Additionally, the staff had indexed 1,200 reported cases and 838 Interior Department decisions, and had just begun to index Justice Department materials and other literature.¹² By August 12, over 4,500 acts, cases and decisions

⁸Cohen, Report of Work as Chief of Indian Law Survey, 1939-1940, n.d., attached with February 1940 memo, FSC 12/169.

⁹Cohen to Mr. Provost, memorandum, May 26, 1939, FSC 13/178.

¹⁰Cohen to Mrs. Prince, memorandum, May 16, 1940, FSC 11/155. See also Cohen to Mr. Provost, memorandum, May 10, 1939, FSC 12/172.

¹¹Report, Work Done to Date by Indian Research Unit, March 22, 1939, FSC 13/176.

¹²Cohen to Littell, memorandum, July 1, 1939, FSC 11/158.

had been indexed.¹³ Eventually, more than 8,599 individual items were copied, indexed, and analyzed.¹⁴ These compiled legal materials became the forty-six-volume compilation of Indian law.

Getting competent people to type, stencil, and mimeograph was difficult. Assigned to the Indian Law Survey by the Justice Department, many of them were there for only two- to three-month periods. This required constant learning of the system and procedures by their successors. Cohen was frustrated by this lack of permanent staff, which lengthened the time required for the compilation. Writing the handbook could not begin until the compilation was nearly finished. First drafts of chapters were at last begun in mid-August 1939.¹⁵

Once all the relevant material had been gathered and analyzed, a completed file could be given on any point of law to a lawyer drafting a chapter of the book or writing a brief. The writer of a particular chapter was given a file containing all the indexed materials, cases, and articles, and Interior and Justice departmental decisions on that area of law. The chapter was to be written based on those materials. Thus the actual writing of the handbook would be simplified, yet comprehensive. Cohen recommended that the writer err on the side of inconclusiveness, since there was likely to be some overlap between chapters, with each chapter written by a different lawyer. It was easier to edit material out than to add it later.

POLITICS AFFECT THE SURVEY'S COURSE

Unfortunately, Cohen's supervisor at Justice, Assistant Attorney General Carl McFarland, left the department, and was succeeded by Norman Littell, who lacked McFarland's keen interest in the project. This may explain why the survey had staffing problems. In April 1939, shortly after he had joined the Justice Department, Littell asked Cohen for a statement of expenses and a projection of the total survey costs. Cohen's estimate of \$58,178 for the entire project was based on a one-year completion date, calculated from the time that most of the staff began work.¹⁶ Littell then wrote to the attorney general, recommending that the project go forward, stating:

¹³*Ibid.*, August 12, 1939, FSC 11/158.

¹⁴G. Lobell to Cohen, memorandum, January 29, 1940, FSC 11/158.

¹⁵Cohen to Littell, memorandum, September 23, 1939, FSC 11/158.

¹⁶*Ibid.*, April 11, 1939, FSC 11/154.

A manual on Indian law thoroughly and carefully prepared would be of inestimable value as an aid to government counsel, as well as to administrative officials and legal advisors in the Indian service in seeking to answer a multitude of legal problems arising out of Indian affairs. The present confusion of the law invites litigation, and a clarifying manual currently maintained would seem to be an essential instrument in discharging our legal responsibilities in this matter.¹⁷

Littell did not have a background in Indian law.¹⁸ He appointed four lawyers from Justice to the survey, including Robert Fabian. Cohen's staff believed that Fabian was there to report on the workings of the survey to the Justice Department.¹⁹ Cohen reported to the Interior solicitor in February 1940 that he had been "informed by various attorneys of the Lands Division that Mr. Fabian had been detailed by Mr. Provost to discredit or to take over control of the project," but that he had "rejected such reports as idle gossip."²⁰ However, the survey's former cooperative spirit began to erode. Cohen made notes in preparation for a staff meeting on the need for the staff to work together. He wrote of how their work would be judged by others, including Assistant Attorney General Littell, the attorney general, and attorneys involved with Indian cases. "I do suggest that each of us refrain from ridiculing or misrepresenting to our judges the project on which we are embarked together. I get a great deal of quiet satisfaction when I find that Mr. Miller has taken enough interest in Miss Morris's work to bring to her attention some case or statute that she should know about. That's the kind of spirit that we need to win our case. That's the way any one of us would act in private practice and that is the way I expect our unit to function."²¹ This staff pep talk may have been necessary because of the inclusion of Fabian. In his Indian Law Survey Report, Cohen commented, after the fact, on Fabian's work on the survey: "His attitude of non-cooperation took the form, on occasion, of withholding from his colleagues pertinent information which

¹⁷Littell to Attorney General, memorandum, April 14, 1939, FSC 11/154.

¹⁸After leaving the Department of Justice, Littell was general counsel for the Navajo Tribe from 1947 to 1967. See Norman M. Littell, *My Roosevelt Years*, ed. Jonathan Dembo (Seattle, 1987), introduction [hereafter cited as Littell, *My Roosevelt Years*].

¹⁹Cohen, Report of Work as Chief of Indian Law Survey, 1939-1940, FSC 12/169.

²⁰*Ibid.*

²¹Cohen, hand-written notes, n.d., FSC 17/301.

they needed and which he collected in the course of his work, and of constantly disparaging the work of his colleagues and of the attorneys of the Interior Department."²²

Once the writing of the handbook had begun, differences arose as to the survey's purpose. Why was it needed? Some lawyers at Justice wanted a litigation manual that explained how to win Indian cases—mostly against the Indians themselves. Others wanted to know only about the government's rights and responsibilities, and not about the Indians' rights. Still others felt that history was not important, and that only cases exemplifying the current state of the law should be included. Some believed that the current caseload of the Justice Department's lawyers should determine which topics were included.

Cohen addressed these concerns in the same meeting in which he stressed the need for the staff to work together. The handbook was not to be simply a manual of litigation based on what any one group of lawyers wanted: "I intend to disregard vested interests in perpetuating litigation and to judge your work by this test: Does it serve to safeguard our national resources and the rights and property of the nation's wards. Any chapter or paragraph that doesn't do that goes out. Any material that does belongs in, whether it is of value to Trial Section or Appellate Section or Title Section."²³ The current caseload of the Justice Department was not to be the controlling factor. "If we were writing a book to be used 10 years back, this would be important," he said. "But we are writing a book to be used in [the] next 10 or 20 years, or if we do a really good job 50 years. If we're to be worthy of that job, we've got to look ahead, to see how the legal problems of the future will differ from those of the past. Our job is one of prophecy, based on careful observation of present trends."²⁴

The differences in opinion on the goals of the survey caused Littell to convene a meeting on August 2, which included Cohen, Fabian, Theodore Haas (a close associate of Cohen), and lawyers from the Trial Section of Justice. The purpose of the meeting was "to discuss the subject matter of the handbook on Indian law, and to determine the best way in which the Indian Law Survey unit could meet the needs of the Departments of Justice and Interior, in the handling of Indian affairs."²⁵ Cohen

²²Cohen, Report of Work as Chief of Indian Law Survey, 1939-1940, FSC 12/169.

²³Cohen, hand-written notes, FSC 17/301.

²⁴*Ibid.*

²⁵Haas to Littell, memorandum, August 4, 1939, FSC 13/184. This document constitutes the minutes of the meeting held on August 2, 1939.

explained the proposed contents of the handbook, and said that the book would in many ways be like a textbook on Indian law, useful as a reference to agents, federal district attorneys, and others in the field who did not have access to a full library. As those present discussed the various subjects that would be covered, they disagreed on each subject's importance. "Almost invariably," wrote Haas afterward, "when a suggestion was made to delete certain material, another lawyer would indicate its usefulness in his work by showing that the particular problem had arisen in the Department."²⁶ The minutes specifically record Fabian and Cohen as disagreeing on at least two topics.

Littell decided to appoint an advisory committee to study more carefully the issues raised at the meeting, and to make recommendations. The committee was appointed the next day with Fabian as its chairman, with the responsibility to "confer with Mr. Cohen at any time deemed desirable with the object of reaching entire agreement as to the choice and arrangement of subject matter and the distribution of emphasis throughout this manual."²⁷ Fabian was thus in a position to tell Cohen, his immediate supervisor, what he should be doing. This supports the staff's theory that Fabian was there to take over the survey, or at least the survey's direction. Cohen's vision of a comprehensive handbook could now be changed by Fabian. In addition, Cohen noted that four of the five members had at some time "expressed opposition to the preparation of the handbook or disbelief in my capacity to complete it as planned."²⁸

Fabian sent a six-page memo to the advisory committee on September 9, discussing some of the problems of the handbook and suggesting that they be considered as a tentative agenda.²⁹ His emphasis was that the Department of Justice was a litigating agency, and that the first question for a litigator was whether there were jurisdiction. He wanted the approach to be that of a litigating attorney: "What can the United States do in a court in a particular situation?"³⁰ He continued, "In my opinion it would not be amiss to write each chapter, except possibly the introductory ones, from this point of view. For example: chapters 9, 10 and 11 of the attached tentative drafts should be treated as if the title read 'Rights of the United States with re-

²⁶*Ibid.*

²⁷Littell to Indian Law Book Research Unit and Attorneys Working on Indian Matters, memorandum, August 3, 1939, FSC 13/179.

²⁸Cohen, Report of Work as Chief of Indian Law Survey, 1939-1940, FSC 12/169.

²⁹Fabian to the Advisory Committee for the Indian Book, memorandum, September 9, 1939, FSC 12/168.

³⁰*Ibid.*

spect to Property Rights of Individual Indians' instead of 'Property Rights of Individual Indians.'"³¹ The role of the government should be the only focus of the handbook, which should not look at the viewpoint of the Indians. The beneficiaries of the handbook would be government lawyers, not Indians. "The book is not to be written for the purpose of carrying a torch."³²

Fabian could not understand the use of a substantive manual to Justice, and therefore argued that the viewpoint of the litigating attorney should prevail: "My thought is that the book can be written primarily as a litigation manual and still be valuable to the Interior Department as a prophylactic, but that it can't be written as an academic treatise, or as an administrative manual and still retain much value to this Department."³³

Four of the five advisory committee members met and discussed Fabian's proposed agenda. Their report, signed by three of them, made recommendations to Cohen limiting the scope of the manual to the primary interest of the relationship of the federal government to the Indians: "The Committee recommends that the function of the Federal Government should be uppermost in the mind of the writer as each chapter is prepared."³⁴ Historical and scholarly completeness should be sacrificed to address the issues with which the federal government was currently involved.³⁵

Haas dissented from the committee's report.³⁶ He had been working on the survey from the beginning, and saw the need for a broader handbook that would be useful for future as well as present problems: "Some of the New Deal legislation will undoubtedly give rise to much litigation in the near future. The Handbook must anticipate these needs. Like all lawyers, we must in part be prophets."³⁷

Cohen's eleven-page response to Fabian clearly showed the differing views on the handbook.³⁸ He refused to accept Fabian's limiting concept that the federal government was the key concern of the book, referring to it as "an extreme of bureaucratic provincialism."³⁹ The trial lawyers in the Justice Department would not be the only users of the book. The book sug-

³¹Ibid.

³²Ibid.

³³Ibid.

³⁴Fabian to Cohen, memorandum, September 19, 1939, FSC 12/168.

³⁵Ibid.

³⁶Haas to Cohen, memorandum, September 20, 1939, FSC 12/168.

³⁷Ibid.

³⁸Cohen to Fabian, memorandum, September 25, 1939, FSC 12/168.

³⁹Ibid.

gested by the committee was not the book that Cohen had agreed to write and edit when he was first wooed by the Department of Justice. It was not the book upon which the past eight months' work was based. And it was not the book he intended to write. "It is impossible to write a book dealing with questions of substantive law," he stated in his memo, "if, before dealing with any such question, one must consider whether an imaginary United States Attorney will have the time or inclination to assist an imaginary Indian in imaginary litigation which raises the particular question at some unspecified time in the future. Assuming that such a book could be written the arbitrary limitation upon the cases treated would leave the book about as valuable as a treatise on the law of torts as established in cases won by red-headed lawyers."⁴⁰

TERMINATION OF THE PROJECT

The work of the Indian Law Survey continued while this battle of memos and conflicting visions simmered. Cohen, meeting the schedule set in May, submitted the draft of the first completed chapters to the assistant attorney general. He asked that qualified members of the staff review the chapters and comment on them, to improve their form and substance and to set the standards for future work.⁴¹ A month later, he had received no reaction from members of the Department of Justice, with the exception of a short note from Littell, whose hand-written note on chapter 9 reads, "Very interesting, and I can see, quite valuable. We are arranging for review, and for passing on any suggestions. It can doubtless be shortened somewhat."⁴² Cohen suggested that a process be set up for the review of each chapter, in order to try maintain the original schedule. He recommended that each reviewer should "have a previously acquired encyclopedic knowledge of the particular topic or he should recognize the extent of his ignorance and carefully examine the indexed materials, legislative, judicial and administrative, upon which the chapter is based."⁴³

On October 31, 1939, Littell called Cohen into his office and presented him with a fourteen-page, unsigned memo listing criticisms of the chapter drafts. Littell asked for his immediate comments on the memo. Cohen, in a hastily drafted response,

⁴⁰*Ibid.*

⁴¹Cohen to Mr. Mulroney, Acting Assistant Attorney General, memorandum, September 1, 1939, FSC 16/262.

⁴²Littell to Cohen, n.d., FSC 12/168.

⁴³Cohen to Littell, memorandum, October 7, 1939, FSC 11/158.

reported back within three hours. He pointed out that these were first drafts, and in all likelihood were incomplete. The files upon which they were based had not been fully compiled when the draft was begun, missing some Justice Department briefs. Fabian had been responsible for collecting and indexing those briefs, but Fabian "appears to have been too busy on other work to do this job adequately" (a reference to the unsigned memo, which appears to have been Fabian's work).⁴⁴

The unsigned memo, to which were attached the reports of the advisory committee and Haas, and Cohen's response, claimed that "an impasse has been reached."⁴⁵ The memo listed chapter and paragraph criticisms, and included a general observation regarding the material: "All of the material submitted gives evidence of inadequate research and lack of experience in the preparation of a law book designed to serve as a complete and accurate handbook for lawyers engaged in actual litigation."⁴⁶ Here again was the emphasis on the litigation manual. While materials prepared for a comprehensive and scholarly work on Indian law would not necessarily have been complete for a litigation manual, the implication was that the work was shoddy. The writer of the memo suggests that the work is so poor that it would embarrass the Department of Justice: "The drafts submitted are so fundamentally inadequate that, coupled with all other considerations, it would seem advisable to discontinue all further work on the manual forthwith."⁴⁷

On the basis of the unsigned memorandum, Littell informed Cohen that he was ending the entire project. According to Cohen, Littell was annoyed that Cohen would try to justify himself, and "said that my word was not to be trusted and advised me that my attitude for some time had been unsatisfactory."⁴⁸ The next day Littell called all the staff of the Indian Law Survey—lawyers, secretaries, and file clerks—into the conference room, and announced that the survey was to be terminated, effective immediately. All the staff would be reassigned to new positions and the files turned over to different sections for use by lawyers in the office. Cohen was present at the meeting, and felt personally and professionally attacked. His work had always been of the highest quality, and he was unprepared for this assault by bureaucrats and politicians.

⁴⁴*Ibid.*, October 31, 1939, FSC 13/181.

⁴⁵Memorandum to Littell, unsigned, n.d., FSC 12/168.

⁴⁶*Ibid.*

⁴⁷*Ibid.*

⁴⁸Cohen to Solicitor, memorandum, February 10, 1940, FSC 12/169.

In a memorandum to the solicitor of the Interior Department, Nathan Margold, Cohen explained that he could understand if Littell had not the interest in the project that his predecessor, McFarland, had, but why did not Littell simply tell Cohen this? "If the Department of Justice no longer considered my services indispensable," he wrote, "there was no need to conduct an elaborate inquiry, of which I was not apprised, to hear charges which I had no reasonable opportunity to answer, and to seek finally to humiliate me personally before my staff and later to attack my scholarship and my character before my superiors in the Interior Department and before various Senators and other officials on occasions when I was not present to reply."⁴⁹ This personal attack bothered Cohen the most. His integrity and scholarship had not been questioned before.

Cohen sent Littell a four-page memorandum on November 1 to replace the hastily drafted memo of the night before.⁵⁰ He noted that Littell had previously told him the chapter was quite valuable, whereas now he stated that it was so poor that the whole project should be dropped. This change in thinking, Cohen went on, stemmed from criticisms in a memorandum to which he had had no opportunity to reply. This was unprofessional and unfair. Cohen commented that "the most serious criticism that could then fairly be made would be that *one* of the draft chapters submitted requires extensive revision, and that I was mistaken in thinking, after a hasty reading, that this draft needed and merited review,— which opinion you yourself reached on a first reading."⁵¹ He ended his memo with the remark that the first notice of any criticism was when Littell terminated the project. It seemed a hasty and unproductive response to nine months worth of work.

Cohen believed that part of the Justice Department's reason for ending the survey was because the compilation of laws and statutes was completed. Some cross-checking and referencing still needed to be done, and Cohen was assigned to do this clerical work after the meeting on November 1.⁵² This compilation was already being used by Justice Department lawyers, who found it a valuable and time-saving resource. However, they did not foresee the proposed handbook as being particularly useful. They did not want to be told what to do, or have more work created for them by an understanding of the rights of Indians.

⁴⁹Ibid.

⁵⁰Cohen to Littell, memorandum, November 1, 1939, FSC 12/168.

⁵¹Ibid.

⁵²Cohen to Solicitor, memorandum, February 10, 1940, FSC 12/169.

Another reason the project was stopped may well have been based on politics. Littell was active in the factional politics of the Democratic party, and became assistant attorney general because of his political connections.⁵³ In addition, he considered himself a westerner, and, as chief of the Lands Division, was concerned about Indian claims that land had been wrongfully taken from them.⁵⁴ A handbook setting forth Indian rights could encourage Indians to enforce those rights, specifically regarding property. Fabian's emphasis on governmental rights over Indian rights bears out the theory that he was indeed representing Littell on the survey. The handbook's demise may have resulted from these differing political viewpoints on the rights of Indians.

COHEN RETURNS TO INTERIOR

Cohen returned to the Interior Department, and urged the solicitor, Nathan Margold, to continue with the handbook. It was nearing completion, and would not cost much more to finish. The expense would be more than made up by the increased efficiency of lawyers handling Indian matters with the assistance of the handbook. The reasons for which Interior had been willing to loan Cohen were still valid: a handbook would be of use to its own lawyers, as well as to others in Indian affairs. Cohen sums up these reasons in a memo to Margold, pointing out that "a large portion of the time of attorneys and administrators handling Indian matters would be saved by such a manual, that many inconsistencies in memoranda prepared or approved by different attorneys would be eliminated, and that such a manual might serve as a basis for future legislative work, particularly in providing a basis for eliminating the mass of anachronistic laws and regulations that now interfere with efficient administration and cause many needless expenditures of time and energy."⁵⁵

The Department of the Interior agreed to go forward with the handbook, and Cohen tried to devote his energies to its completion. However, the survey's connection with Justice had first to be physically ended. Staff had to be reassigned; some would continue with Interior to complete the handbook. Files had to be transferred. Work that had been started needed to be

⁵³See Littell, *My Roosevelt Years*, *supra* note 18, introduction.

⁵⁴Littell's papers are being indexed and catalogued at the University of Washington, Manuscripts and University Archives.

⁵⁵Cohen to Solicitor, memorandum, November 16, 1939, FSC 13/181.

halted, and restarted. Materials needed by the handbook staff were claimed by the Department of Justice. Interior requested that all pages of the compilation, and the stencils from which they were mimeographed, be sent over. Justice insisted that there were missing pages in the compilation and that the stencils necessary to replace the pages were in such bad shape they could not be reused. Justice blamed Cohen for the poor stenciling; Cohen blamed Justice for giving him inexperienced mimeographers.⁵⁶ Such minor points become hotly contested issues.

The antagonism between Cohen and Justice was palpable. In hand-written notes, Cohen expressed relief that his services with Justice had been terminated, and that he was to work at Interior, "since I much prefer to work and be paid here, where I am treated as a responsible human being."⁵⁷ He was even willing to work without a salary if Interior was unable to pay him while the contract with Justice still existed, and called it "a slight cost to pay for the privilege of working once more with superiors who know enough about my work to appraise it intelligently instead of repeating, in parrot-like fashion, charges of disgruntled employees which show on their face that they emanate from prejudice or ignorance, or both."⁵⁸

Littell and Margold sent memos back and forth regarding the procedures for transferring the files and the rest of the work. The files held not only the compilation of laws and cases, but other opinions, literature, and articles on given topics. Cross-referencing had begun, and some materials could be found in more than one file. If the files were not transferred in the proper order valuable time would be lost, as the papers would need to be reorganized before they could be used. Mimeographing and indexing were still going on at the time of termination, and involved documents that were not filed or analyzed. While these were to some extent purely mechanical tasks, they were necessary and time-consuming. Cohen wrote to Margold that "I think that we should insist that the files be sent over in orderly condition, with sufficient filing cases to hold the files so that we will not have a mass of tens of thousands of loose pages."⁵⁹ He was also concerned that the materials in Fabian's possession be returned. Fabian was to have written two chapters of the handbook, but was already months behind, and Cohen did not trust him. This material was eventually returned

⁵⁶Letters and memos between departments of Justice and Interior, February 15, 16, and 27, 1940, FSC 12/169.

⁵⁷Cohen to Solicitor, memorandum, hand-written, n.d., FSC 12/166.

⁵⁸*Ibid.*, December 21, 1939, FSC 12/168.

⁵⁹*Ibid.*, January 18, 1940, FSC 11/155.

to the Interior Department in April 1940, after correspondence from the acting solicitor, Frederic Kirgis, to Littell.⁶⁰ The chapters were still not completed. By then, Cohen was not corresponding with Justice at all.

Interior conducted its own investigation into the criticisms leveled in the unsigned memo that was the basis for Littell's termination of the project. Assistant Solicitor William H. Flanery was assigned the task of examining each of the criticisms of the memo, referred to as Exhibit 1. The memo had commented on the three drafts that were then circulating: chapter 9, on individual rights in tribal property; part of chapter 12, dealing with Indian education; and chapter 25, on the Pueblos of New Mexico. Flanery submitted a sixteen-page report to the solicitor commenting on the overall criticisms, and looking specifically at one or two.⁶¹ He attached Exhibit A-1, responding point by point to the fifty-six numbered criticisms of the unsigned memorandum, and included forty-four additional defects in an Exhibit A-2. His report was not very positive. He was not supportive of the changes Cohen was trying to make, and found that the major criticisms of chapters 9 and 12 were justified, although this was not true of chapter 25. If the rest of the chapters were completed "with the care, skill and studious analysis of decisions and statutes shown in the preparation of Chapter 25," he wrote, the project as a whole would be valuable to both Interior and Justice.⁶²

Cohen responded by making comments on small pieces of paper and attaching them to the various paragraphs of Flanery's memo. An example of criticisms and comments may be seen in the reactions to a paragraph of the draft chapter 9.

Paragraph 1 of page 28 reads:

Rights of illegitimate children of Indians depend on application of the general rule that the status of illegitimates is that of their mother. It has been held that illegitimate children whose father was Indian and whose mother was not Indian are not members of the tribe and cannot share in a tribal fund payable to the "Chippewa Indians of Minnesota and their issue" in absence of tribal consent or adoption into the tribe as members.⁶³

⁶⁰Littell to Kirgis, letter, April 25, 1940, FSC 14/247.

⁶¹Flanery to Solicitor, memorandum, FSC 14/247.

⁶²Ibid.

⁶³Draft of ch. 9, FSC 14/241.

Exhibit 1, the unsigned memo, criticizes this paragraph:

The proposition stated here is, I believe, the universal rule among Indian tribes. Originally no distinction was made between legitimacy and illegitimacy. It is my recollection that there are cases dealing with the subject.⁶⁴

Cohen's Comments on Exhibit 1 state:

This comment does not involve any criticism of the text, but it is itself subject to criticism, inasmuch as it assumes the existence of a rule of domestic relations that is universal among Indian tribes—something that no student of the subject has ever yet discovered.⁶⁵

Flanery's Exhibit A-1 addresses the same point as follows:

The criticism states that the rule stated in the text concerning the eligibility of illegitimates to share in tribal property is the universal rule among Indian tribes and suggests that there are cases dealing with the subject. There are cases dealing with the right of inheritance on the part of illegitimates but that is not the subject dealt with in the text. In the absence of statutory provision, the right of illegitimates to share in tribal property would be determined by tribal membership and this doubtless would be controlling [*sic*] by the usages and customs of the particular tribe. I doubt if the rule is universal among all the tribes. While the criticism has little merit, attention might be called to the ruling of Acting Solicitor Fahy dated August 28, 1933, in the right of an illegitimate born to an Indian woman and Negro father. Mr. Fahy pointed out that the child being illegitimate, there existed no rule of law which entitled him to enrollment as a matter of right.⁶⁶

Cohen's typed note, attached with a paperclip to Exhibit A-1, adds:

Agree in substance, although I should say this "comment" was not really a "criticism" and I would add

⁶⁴Exhibit 1, FSC 14/242.

⁶⁵Cohen's comments on Exhibit 1, FSC 14/242, 14/247, 12/171.

⁶⁶Exhibit A-1, by Flanery, FSC 14/243.

that the comment is an unjustified over-generalization.⁶⁷

Hand-written on this last comment by Cohen is the notation "O.K., FLK," the initials of Acting Solicitor Frederic Kirgis.⁶⁸ A similar conversation occurred for every one of the original fifty-six criticisms or comments. There also were criticisms of chapters 12 and 25, in Exhibits B and C, respectively. Flanery and Cohen responded to each one. A lot of time went into reviewing specific, and somewhat minor, comments and criticisms.

Additionally, Cohen wrote to Flanery explaining their differing viewpoints. Cohen looked upon the three draft chapters as part of the larger book. Each chapter could not stand by itself; it had to be viewed as part of the whole. He agreed that the draft might include erroneous statements, especially if the writer strayed from his topic. The likelihood that a statement that did not belong in a chapter would be wrong was strong. "The reason for this is that the chapter is written from a file of raw material—cases, statutes, etc.—on point 5.33. On this point the file is reasonably near completion, and kinks get ironed out. But nearly every case or statute or treaty that deals with point 5.33 also deals with other related points, and when the writer goes off on such a point, e.g. the nature of tribal property (6.6) he does not have the benefit of that complete file and therefore is likely to go haywire."⁶⁹

Cohen wanted the chapter to be judged by the material that would normally have been included in it, not on material that was off the point. He differentiated between how he viewed the chapters and how Flanery viewed them:

You judge the whole text very largely by the accuracy of these irrelevant pages and paragraphs. I judge the text by the accuracy of the material that is to be retained. If the writer of this chapter had the habit of interspersing his legal statements with assertions that the earth is flat (and some of his assertions are only slightly less ridiculous) I would not regard that as a serious drawback in the process of getting our book into shape. A little blue pencil takes care of such things. It seems to me that you go to great pains to show that the earth really isn't flat and leave the impression that the shape of the earth is the most important part of the chapter.⁷⁰

⁶⁷Cohen, typed note attached to Exhibit A-1, FSC 14/243.

⁶⁸Attached to Exhibit A-1, FSC 14/243.

⁶⁹Cohen to William [Flanery], memorandum, FSC 13/182, 14/240.

⁷⁰*Ibid.*

Cohen again reminded Flanery that these were merely drafts, which were not expected to be complete, final, or perfect.

Flanery's memo was passed to Kirgis, who reviewed it and issued the Solicitor's Office memorandum to the secretary of the Interior, Harold Ickes. Kirgis's memo of July 13, 1940, to Ickes set out the history of the controversy, and then discussed his independent examination of the criticisms. He felt that the project should go forward: "My general conclusion, flowing from the conclusion in each individual instance, is that the total necessary and desirable revision could be accomplished without substantially more effort and time than could be anticipated of the usual process of revising a normal first draft."⁷¹

Ickes accepted Kirgis's opinion and wrote to the attorney general on July 24, 1940, enclosing Kirgis's memo. He repeatedly referred to the fact that the memorandum on which Littell based his decision was unsigned and the author unknown, implying thereby his questioning of its veracity. Ickes defended Cohen, pointing out that the almost finished project was receiving praise from many people experienced in Indian affairs and law. He found the charges by the Justice Department "inaccurate and unfair."⁷² Attorney General Robert H. Jackson responded to Ickes, "with regret, . . . over the wide difference of opinion which arose between those in our respective Departments who were involved in the Indian Law Survey work."⁷³ He ended by asking for some copies of the handbook for use by the Justice Department.

The Department of the Interior continued with the handbook project. Cohen and his greatly reduced staff were writing chapters and checking and rechecking citations and cross-references. The *Statutory Compilation of the Indian Law Survey: A Compendium of Federal Laws and Treaties Relating to Indians* was published in forty-six volumes in May 1940. Listing Felix Cohen as the editor, it included a foreword by Solicitor Nathan Margold. Margold noted that a compilation had been needed for a long time, and cited the plea in 1855 of the then-commissioner of Indian Affairs, George Manypenny, for such a compilation.⁷⁴

According to Margold, the compilation had two purposes. The first, and primary, one was to provide a complete base for writing a general manual on Indian law. The second was to

⁷¹Kirgis to Secretary, Department of Interior, memorandum, July 13, 1940, FSC 12/170.

⁷²Ickes to Attorney General, letter, July 24, 1940, FSC 12/166.

⁷³Robert H. Jackson to Ickes, letter, August 2, 1940, FSC 12/170.

⁷⁴Foreword, *Statutory Compilation of the Indian Law Survey: A Compendium of Federal Laws and Treaties Relating to Indians*, ed. Felix S. Cohen (Washington, 1940), pt. 1, i-iv, FSC 12/162, 13/192.

reveal the outdated and anachronistic legislation that still regulated both Indians and the Indian service. "If this compilation proves a first step in effecting a general repealer of these outworn laws," he wrote, "it will have amply justified the efforts expended upon this work."⁷⁵ Again, the Interior Department staff were looking to the future. The compilation and the handbook were not to be static documents, but were to be used to effectuate future Indian policy and influence the department's interaction with the Indians. Margold concluded by thanking Cohen, noting that Cohen had had to "overcome both discouragements and obstacles" to finish the work.⁷⁶

The *Handbook of Federal Indian Law* was also ready for publication in mid-1940. The problem was to fund its printing. The Justice Department, which had originally planned to pay half the cost, was no longer willing or involved. Margold started writing to different departments asking if they would be willing to contribute, as the *Handbook* would be of value to them, too. The Geological Survey and the General Land Office both consented.

The actual cost of the printing was another problem. Cohen was working off an oral estimate given him by the General Printing Office of \$2,600 for a thousand-page book. Knowing that the handbook would now run to about sixteen hundred pages, he projected a printing cost of between \$3,600 and \$4,500.⁷⁷ A memo from the public printer on June 26, 1940, was therefore startling—with twelve hundred pages, the book would have to be in two volumes, and a print run of one thousand copies would cost \$12,951.28.⁷⁸ Cohen immediately contacted the Printing Office and told its staff that between \$5,000 and \$6,000 was available, and discussed what could be done with that amount of money.⁷⁹ The number of pages was to be reduced to 408, by reducing the copy and print size and by using two large columns. It would be a one-volume work, and only five hundred copies would be printed. The Printing Office gave Cohen a new estimate of \$5,725.79.⁸⁰

Only a month later, yet another figure came from the public printer, this time for \$10,327.71. The revised figure was based on the cost of printing all the copy received, which made 474

⁷⁵*Ibid.*, iii, FSC 13/192.

⁷⁶*Ibid.*, iv.

⁷⁷Margold to Dotson, memorandum, June 25, 1940, FSC 15/261.

⁷⁸W.A. Mitchell, Superintendent, Planning Division, A.E. Giegengack, Public Printer, to Cohen, letter, June 26, 1940, FSC 15/261.

⁷⁹Cohen to Mr. Ady, memorandum, May 23, 1941, FSC 15/261.

⁸⁰*Ibid.*

pages, as well as a 150-page index.⁸¹ The letter from the Printing Office put the onus on Interior: "[It] should be appreciated that unless the Department can furnish a complete and accurate description accompanied by authentic examples of the copy to be submitted and the finished work desired, no accurate estimate can be made."⁸² The chief clerk of Interior, who had taken over the dealings with the Printing Office, was obviously annoyed that the figure not only kept changing, but increasing. Cohen responded that the Printing Office memo was unjustified. A complete and accurate description had been furnished and samples had been provided.⁸³

THE HANDBOOK IS PUBLISHED AT LAST

The matter of the printing was finally settled a year later, and the *Handbook* was printed and officially released on August 25, 1941. The official press release called it "the most comprehensive survey ever made of laws relating to Indian in the United States."⁸⁴ Complimentary copies were sent to the president, Supreme Court justices, and members of the House and Senate Committees on Indian Affairs.

The *Handbook* contains an introduction by Margold, a foreword by Ickes, and an author's acknowledgment by Cohen. Ickes discusses the purpose of the work, and its place in New Deal policies: "This *Handbook of Federal Indian Law* should give to Indians useful weapons in the continual struggle that every minority must wage to maintain its liberties, and at the same time it should give to those who deal with Indians, whether on behalf of the federal or state governments or as private individuals, the understanding which may present oppression."⁸⁵ Margold commends Cohen for his fine work.

Cohen's acknowledgment looks beyond the book, and talks of the vision that made it possible, the reason he undertook the work. He writes:

What has made this work possible, in the final analysis, is a set of beliefs that form the intellectual equip-

⁸¹R.H. Herrell, Administrative Assistant, A.E. Giegengack, Public Printer, to Floyd Dotson, Chief Clerk, Department of Interior, letter, June 20, 1941, FSC 15/261.

⁸²*Ibid.*

⁸³Cohen to Chief Clerk, memorandum, July 7, 1941, FSC 15/261.

⁸⁴Department of Interior, Information Service, August 25, 1941, FSC 15/265.

⁸⁵Felix S. Cohen, *Handbook of Federal Indian Law* (Washington, 1941), v, FSC 72/1143.

ment of a generation—a belief that our treatment of the Indians in the past is not something of which a democracy can be proud, a belief that the protection of minority rights and the substitution of reason and agreement for force and dictation represent a contribution to civilization, a belief that confusion and ignorance in fields of law are allies of despotism, a belief that it is the duty of the Government to aid oppressed groups in the understanding and appreciation of their legal rights, a belief that understanding of the law, in Indian fields as elsewhere, requires more than textual exegesis, requires appreciation of history and understanding of economic, political, social and moral problems. These beliefs represent, I think, the American mind in our generation as it impinges upon one tiny segment of the many problems which modern democracy faces.⁸⁶

No mere litigation manual would have this kind of impact.

Cohen was both relieved and proud that the *Handbook* had been published. He sent copies to many friends, with accompanying letters. To one friend he referred to mailing the book as sending “a year and a spring of my existence all wrapped up neatly in buckram and with thousands of footnotes.”⁸⁷ To the lawyers on his staff he wrote, “In retrospect the satisfactions derived from doing a pioneer job with loyal collaborators like yourself more than make up for all our difficulties.”⁸⁸

Cohen also sent a copy to Carl McFarland, the assistant attorney general who had originally brought him to Justice to head the survey and who was by then in private practice. Cohen told him, “I am sure that if you had continued as Assistant Attorney General I would have been able, some time ago, to have presented you with something better than this. Unfortunately, as you undoubtedly realize, much of the effort that might have gone into an attack on the problem was diverted to the defense of supply lines and when the whole project was abruptly broken up and the Department of the Interior picked up the pieces we had to complete the job on the basis of a budget that was only a small fraction of the original budget for the project. This, of course, necessitated omissions and abridgments, although I hope that these circumstances have not affected the substantial accuracy of the work as a whole.”⁸⁹

⁸⁶*Ibid.*, xviii.

⁸⁷Cohen to Justice Bernard L. Shientag, August 23, 1941, FSC 15/265.

⁸⁸Cohen to members of the survey and handbook staff, September 2, 1941, FSC 15/266.

⁸⁹Cohen to McFarland, September 4, 1941, FSC 15/266.

The first printing of the *Handbook* was distributed by the Interior Department. A second one came out in 1942, and was made available for general circulation at the price of two dollars. It contained all the materials in the first edition, as well as reference tables, a tribal index, a bibliography, and a comprehensive index. The supplements were also printed as a separate volume, so that those with the first edition could get one without having to purchase the second. Interior Department lawyers were given the option of having the supplement or exchanging the first edition for the second.⁹⁰ At the time of the second printing, the *Handbook* had already been cited in two Supreme Court cases.⁹¹ Recognized as the source for understanding the complexities of Indian law, it has since been cited more than fifty times by the United States Supreme Court, and more than 340 times by all levels of federal courts. In the 1956 case of *Squire v. Capoeman*, Chief Justice Earl Warren referred to Cohen as "an acknowledged expert in Indian law."⁹²

Theodore Haas received a new edition of the *Handbook*, and wrote to Cohen to thank him. He recalled the pleasure he had had in working under Cohen. This was a common theme among Cohen's staff, who found him to be fair and intelligent, with a warm sense of humor. Haas wrote: "To few of us is given the honor of working with a genius who is also a great and warm character. To have assisted such a person for a year while he was writing a book which will help a suffering minority is an unforgettable experience to be treasured always."⁹³

EFFECTS AND LATER DEVELOPMENTS

The *Handbook* finally began to gain the recognition by the public that it had not received from the Department of Justice. Book reviews were positive. The *Commonweal* reviewed it in its August 1942 edition. The reviewer, a lawyer, stated: "The 'Handbook of Federal Indian Law' is a monumental work representing diligent, painstaking labor, and is indeed valuable to the legal practitioner having questions of Indian practice to solve. But it is much more than this. It contains matters of great historical interest, and is, in general, a mine of information re. Indian Affairs—in fact, it is a small library of Indian

⁹⁰Cohen to Members of the Solicitor's Staff Handling Indian Questions, memorandum, June 22, 1942, FSC 15/268.

⁹¹Department of Interior, Information Service, June 15, 1942, FSC 16/284. See also *United States v. Santa Fe Pacific R.R. Co.*, 314 U.S. 339 (1941); *Sioux Tribe of Indians v. United States*, 316 U.S. 317 (1942).

⁹²*Squire v. Capoeman*, 351 U.S. 1, 76 S. Ct. 611, 100 L. Ed. 883 (1956).

⁹³Haas to Cohen, July 15, 1942, FSC 16/281.

history, Law, Treaties, Customs, treated from a philosophical point of view."⁹⁴ The *American Political Science Review* called it a "scholarly study" and Cohen "an eminent authority in the field of jurisprudence."⁹⁵ The *American Bar Association Journal* referred to it as "a first class text on Indian Law."⁹⁶ The *Yale Law Journal* found it "thorough and comprehensive."⁹⁷ Here was a book that had a readership far greater than the legal profession, a book that was more interesting and informative than a litigation manual. Cohen's vision had resulted in a book that was no mere recitation of government policy toward Indians. Published by the government, it was so reflective and scholarly as to recognize that the government was not always right in its dealings with the Indians, and indicated where federal power was limited by Indian rights.⁹⁸ Cohen had produced a work to survive the ages.

But politics had changed in the government at large and in the Department of the Interior. The ideals embodied in the Indian Reorganization Act and the vision of the New Deal were no longer the guiding force in Indian policy. The Eisenhower administration's Indian policy was one of termination, once again breaking down tribal ties and ending federal recognition of the tribes as sovereign nations. Cohen's *Handbook* was proving embarrassing to the Interior Department, especially when it was used as the basis for interpretation of many court cases.

The Department of the Interior published a revised version in 1958, titling it *Federal Indian Law*.⁹⁹ It eliminated much of the historical background and earlier federal law and treaties, which were viewed as no longer relevant to current issues in Indian law. Duties of Indians toward the federal and state governments, both on the individual and tribal level, were stressed, with less emphasis given to rights of Indians. The revised edition noted that the federal government was a trustee of the rights of all citizens, not only Indians.¹⁰⁰

Practitioners were urged look to current interpretations of Indian law and to forget the past. The department specifically

⁹⁴*Commonweal* 36 (August 1942), 425-26, FSC 16/288.

⁹⁵*American Political Science Review* 36 (December 1942), 1181-82, FSC 17/289.

⁹⁶*American Bar Association Journal* 29 (April 1943), FSC 17/389.

⁹⁷*Yale Law Journal* 54 (March 1945), 487-88, FSC 16/285.

⁹⁸See Felix S. Cohen's *Handbook of Federal Indian Law*, Rennard Strickland, editor in chief (Charlottesville, Va., 1982), introduction [hereafter cited as *Felix Cohen's Handbook*].

⁹⁹*Federal Indian Law* (Washington, 1958).

¹⁰⁰*Ibid.* at 2.

wanted them to dismiss anything they had read in Cohen's original *Handbook*. "As national development and progress continue and as new patterns of policy evolve, legal answers to questions of Federal Indian law will be found predominantly in the latest statutory law and judicial determinations of justiciable issues. Those are stressed in this revision for the purpose not only of seeking balance, to the extent practicable, but also for the purpose of foreclosing, if possible, further uncritical use of the earlier edition by judges, lawyers, and laymen."¹⁰¹

Cohen had died in 1953, and there was no one else as prominent to respond to these changes. However, lawyers did not stop using Cohen's *Handbook*. It is cited in at least fifteen Supreme Court cases between 1960 and 1982. The Interior Department version is cited nineteen times in the same period, and some cases cite both.¹⁰² But Cohen's *Handbook* was no longer in print. In 1972 the University of New Mexico Press, together with the American Indian Law Center, published a facsimile edition of it.¹⁰³

In 1982, an updated version of Cohen's *Handbook* was published.¹⁰⁴ This came about through the joint efforts of the Department of the Interior and law professors at several law schools. The Indian Civil Rights Act of 1968 had mandated that the department revise and republish its 1958 version, *Federal Indian Law*, so that "the constitutional rights of Indians might be fully protected."¹⁰⁵ The department contracted with legal scholars to revise the book. This version, written with the endorsement of Cohen's widow, Lucy Kramer, followed his vision of federal Indian law and retained the historical and analytical discussions. The updated version included all the new cases and statutes since 1942, which consisted of more decisions than had been decided from 1787 to 1942.¹⁰⁶ Additionally, some of Cohen's carefully thought out arguments had become accepted case law, and no longer needed to be made in detail. Issues between Indian tribes and federal authority had tended to be resolved, and new issues of claims between state and tribal authority were prevalent.

¹⁰¹*Ibid.* at 1.

¹⁰²See, for example, *Organized Kake v. Egan*, 369 U.S. 60, 82 S. Ct. 562, 7 L. Ed. 573 (1962), in which Justice Frankfurter cites both *Felix Cohen's Handbook* and the Interior Department's edition. See also *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 93 S. Ct. 1267, 36 L. Ed. 114 (1973).

¹⁰³*Felix S. Cohen's Handbook of Federal Indian Law*, Unabridged, Uncensored Reprint of Original 1942 Edition.

¹⁰⁴*Felix Cohen's Handbook*, *supra* note 98.

¹⁰⁵25 U.S.C.A. 1341.

¹⁰⁶*Felix Cohen's Handbook*, *supra* note 98 at x.

The introduction in the 1982 edition summarizes the praise heaped upon Cohen and his *Handbook*: "Cohen was the Blackstone of American Indian law. He brought organization and conceptual clarity to the field. Although the 1942 work was prefaced with the disclaimer that 'this handbook does not purport to be a cyclopedia,' it was in fact a thorough and comprehensive treatise that attended to virtually every nook and cranny of the field. The 1942 Handbook was also blessed with a philosophical breadth that only a scholar of Cohen's background and vision could provide."¹⁰⁷

Cohen's scholarship made the *Handbook of Federal Indian Law* the Bible for Indian lawyers throughout the United States. Its efficacy is demonstrated by the fact that a new edition is now being prepared, which also takes as its starting point Cohen's original analysis of the issues. His vision has endured, undimmed by the bureaucrats and politicians at the Department of Justice. Cohen wrote a book for the ages. His legacy to the next generation of all those concerned with Indian law continues.

¹⁰⁷*Ibid.* at viii.

SWORD OR CONSTITUTION?: MARTIAL LAW IN THE OIL PATCH

NICHOLAS G. MALAVIS

The governor [of Texas] is guilty of high treason to the state and has shown himself a tyrant and an enemy to constitutional law . . . soldiers were not sent . . . to shut down wells—they were sent . . . to meet the hungry cry of those unemployed, hungry men.

—Gladewater Gusher, August 19, 1931¹

Legal battles over petroleum in the early 1930s illustrate the tension between the persistence of nineteenth-century concepts of law and economics and the Progressive faith in scientific solutions for social, political, and economic problems.² What lawyers called the “rule of capture” had defined private property rights in subterranean petroleum since its inception in 1875 by the Pennsylvania Supreme Court. Lacking legal precedents or knowledge of the peculiar nature of underground petroleum, which behaved neither like water nor solid minerals, the Pennsylvania judges had likened oil and gas to things *ferae naturae*.³ Their analogy to wild animals

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¹Cited in James Presley, *A Saga of Wealth: The Rise of the Texas Oilmen* (Austin, 1983), 141 [hereafter cited as Presley, *Saga of Wealth*].

²Morton Keller, *Affairs of State: Public Life in Late Nineteenth Century America* (Cambridge, Mass., 1977); idem, *Regulating a New Economy: Public Policy and Economic Change in America, 1900-1933* (Cambridge, Mass., 1990).

³In 1875, the Pennsylvania Supreme Court decided the first of three cases that gave birth to the rule of capture: *Brown v. Vandergrift, et al.*, 80 Penn. St. R. 142 (1875); *Westmoreland Natural Gas Company v. DeWitt, et al.*, 130 Penn. St. R. 235, 18 Atl. 724 (1889); *Barnard v. Monongahela Gas Company*, 216

reflected their individualistic concept of neighboring landowners' rights in a common oil reservoir, a notion that largely disregarded the public interest.

Courts in other oil-producing states subsequently adopted the rule of capture and awarded title to whoever first appropriated underground oil and gas, without regard to its ultimate use or conservation. The rule imposed no restriction on production and merely limited landowners to the extraction of oil or gas on their own land. To secure their share and protect their property interests, landowners vied to produce as much oil and gas as possible, regardless of market demand.⁴

The rule of capture helped to promote economic growth and prosperity at a time when conservation was of secondary importance.⁵ With the discovery of new reserves in the late 1920s, the problem of petroleum was no longer one of scarcity but one of abundance. Early-twentieth-century scientific and technological advances in production had vitiated the capture theory, but had outpaced the willingness of judges to sanction their application to alleviate inefficiency and waste. Federal and state judges imbued with states'-rights and laissez-faire ideologies repudiated conservation laws enacted by state legislatures to control the irrational and wasteful overproduction of petroleum. Armed with review powers and shielded from change by the doctrine of *stare decisis*, judges wielded a potent veto over legislative efforts to restore order and stability to the oil industry.⁶

Penn. St. R. 362, 65 Atl. 801 (1907); see James A. Veasey, "The Law of Oil and Gas," *Michigan Law Review* 18 (April 1920), 451; A.B. Walker, Jr., "Property Rights and Their Effect Upon Police Regulation of Production," *Texas Law Review* 16 (1938), 371, n. 6; Robert E. Hardwicke, Jr., "The Rule of Capture and Its Implications as Applied to Oil and Gas," *Texas Law Review* 13 (June 1935), 391-422; D. Edward Greer, "The Ownership of Petroleum Oil and Natural Gas in Place," *Texas Law Review* 1 (1923), 162-87.

⁴Ibid.

⁵James Willard Hurst, *Law and Conditions of Freedom in the Nineteenth-Century United States* (Madison, 1967); Stanley I. Kutler, *Privilege and Creative Destruction: The Charles River Bridge Case* (Philadelphia, 1971); Morton J. Horowitz, *The Transformation of American Law, 1780-1860* (Cambridge, Mass., 1977); idem, *The Transformation of American Law, 1870-1960: The Crisis of Legal Orthodoxy* (New York, 1992).

⁶See Arnold M. Paul, *Conservative Crisis and the Rule of Law: Attitudes of Bar and Bench, 1887-1895* (Ithaca, 1960); Thomas M. Cooley, *Constitutional Limitations Which Rest Upon the Legislative Powers of the States of the American Union* (Boston, 1883); Christopher G. Tiedeman, *A Treatise on the Limitations of Police Power in the United States* (St. Louis, 1886); Herbert Hovenkamp, *Enterprise and American Law, 1836-1937* (Cambridge, Mass., 1991); Harold Hyman and William M. Wiecek, *Equal Justice Under Law: Constitutional Development, 1835-1875* (New York, 1982); and Peter H. Irons, *The New Deal Lawyers* (Princeton, 1982).

As engineers and lawyers struggled to reconcile the latest scientific production methods with the strictures of constitutional law, overproduction was glutting the oil market and driving down the price of crude oil below operating costs for most producers.⁷

Meanwhile, states enacted conservation statutes that conferred authority on administrative agencies, or commissions, to promulgate and enforce orders curtailing oil production to a percentage of the potential production of each well, a type of regulation known as prorationing.⁸ Oil producers challenged the statutes' constitutionality, objecting to government interference in the use of their private property. Since penalties could not be assessed for violation of proration orders during pending litigation, state laws were not enforced. More oil was being produced than could be sold, and prices declined below production costs.

The discovery in October 1930 of a one-hundred-and-fifteen-thousand-acre oil field in East Texas, the largest in the world, came at the worst possible time. By 1931 the field was producing a million barrels of crude oil per day. Prices collapsed, but

⁷Earl Oliver, "Lawyers Hear of Industry's Problems," *Oil and Gas Journal* 30 (September 24, 1931), 22, 122 [hereafter cited as Oliver, "Industry's Problems"]. Oliver, a lawyer, served as chairman of the American Institute of Mining and Metallurgical Engineers in 1931. He advocated the adoption of scientific oil production, arguing, "The laws of nature are unchanging and unchangeable. They are inexorable. The engineer should discover them and the lawyer must find the means of adjusting human relationships to them."

⁸Prorationing, or "ratable taking," is a means of regulating oil production. The state government sets a statewide production quota that is distributed among oil fields within the state. Field quotas are then allocated among individuals operators in each oil field. See Max W. Ball, *This Fascinating Oil Business* (New York, 1940), 147-48. The first petroleum regulation was passed in Kansas in 1891, requiring the casing of oil and gas wells and plugging them when abandoned. *General Statutes of Kansas, 1935*, Sections 55-115 and 55-116; Robert A. Shepherd, Sr., "Memorandum on Proration Laws of Texas," Pure Oil Company—Legal Committee, Legal Opinions, Etc. File, Vinson and Elkins Archives, Houston [hereafter cited as VEA], Closed File 14963-6 [hereafter cited as CF], 1-8, noted that Oklahoma enacted the first prorationing statute in 1915, but did not promulgate its first proration order until June 30, 1930. Texas enacted its first petroleum conservation statutes in 1905, 1913, and 1917. The 1917 statute designated the Texas Railroad Commission as the agency to administer petroleum conservation laws. In 1919, the Texas Legislature passed a comprehensive conservation act that gave the Railroad Commission broad regulatory and enforcement powers to prevent physical waste such as the escape or wasteful burning of natural gas and the drowning of gas strata with water. The commission issued thirty-eight rules designed to minimize waste of oil and gas. Rule 37 regulated the spacing of wells. In 1925, serious defects were found to exist in the conservation laws, mainly the absence of penalties for violations. The legislature revised the act in 1929 and defined waste so as not to include "economic waste." Texas issued its first proration order on August 27, 1930.

although the petroleum industry was on the brink of disaster, public interest was not easily aroused by natural gas escaping into the open air or the daily loss of underground oil equivalent to a thousand burning gushers.⁹

In the summer of 1931, Governor Ross Sterling called a special session of the Texas Legislature to strengthen the state oil-conservation statute.¹⁰ The legislature was deeply divided between proponents and opponents of prorationing as a method of enforcing oil conservation. Sterling urged its members to act quickly, "sincerely trust[ing]" that it would "not be necessary to use the militia to protect the oil people from having the conservation laws trampled under foot." The "entire nation is affected by the wild scramble now going on to dissipate and deplete the natural resources of this state," he told legislators, "and the nation is looking anxiously to Texas to remedy the chaotic situation existing within her borders." He exhibited a hundred telegrams signed by five hundred oilmen requesting the imposition of martial law to restore order and stability in the East Texas oil field.¹¹

Lawmakers exchanged blows over proposed legislation while the situation in East Texas deteriorated. Deep-seated prejudices and emotions surfaced in the debate over prorationing. The Tyler newspaper editor, Carl Estes, a fiery opponent of regulation (who later advocated oil conservation), attacked the "big boys" and "slick lawyers." Waving his crutch at the Dallas oilman and conservationist Robert Penn, he shouted, "Come on, you son-of-a-bitch, I'll knock your brains out!" One eyewitness was appalled by the way "shyster lawyers, two-bit politicians, and other home-grown scalawags . . . cheated and connived gullible East Texas farmers out of their croplands

⁹For the history of American petroleum industry during the late-nineteenth and early-twentieth centuries, see Harold F. Williamson, Ralph L. Andreano, Arnold R. Daum, and Gilbert C. Klose, *The American Industry* (Evanston, 1963), vol. 2, *The Age of Energy, 1899-1959*; Gerald D. Nash, *United States Oil Policy, 1890-1964: Business and Government in Twentieth Century America* (Pittsburgh, 1968); Daniel Yergin, *The Prize: The Epic Quest for Oil, Money, and Power* (New York, 1991).

¹⁰James A. Clark, *Three Stars for the Colonel* (New York, 1954), 65 [hereafter cited as Clark, *Three Stars for the Colonel*], noted that Ross Sterling and his brother, Frank, helped organize the Humble Oil and Refining Company in 1911. Sterling resigned as Humble board director in 1925 after Standard Oil of New Jersey purchased a majority of Humble's stock. He was elected governor of Texas in 1930 and assumed office in January 1931.

¹¹*New York Times*, July 19, 1931; "Texas Legislature Fails to Take Action: Deadlock on Measures between Houses Brings Threat from Governor Sterling to Use Militia as Last Resort," *Oil and Gas Journal* 30 (August 13, 1931), 13, 134.

and fortunes" and "framed, maligned, and even plotted the murder of anyone bold enough to stand up to their unprincipled drive for wealth and power." Crude-oil prices continued to fall as greedy oilmen defied the Texas Railroad Commission's efforts to alleviate the crisis by enforcing state oil-conservation regulations.¹²

On August 12, the legislature finally passed the so-called Anti-Market Demand Act. The new oil-conservation law prohibited virtually every conceivable kind of physical waste in petroleum production.¹³ It authorized prorationing as long as the Texas Railroad Commission did not limit oil production to market demand or other economic factors. Enforcement of the new act was expected to reduce production by 20 percent. However, the commission did not plan to issue regulations until September 1, and on August 15 the price of East Texas crude fell to two-and-a-half cents a barrel. Major oil companies ceased posting prices. As the August heat intensified toward September, tempers flared into social unrest, with threats of dynamiting oil wells and pipelines. One disgruntled producer complained, "Hell, I sell a barrel of oil for ten cents and a bowl of chilli costs me fifteen."¹⁴

On August 14, twelve hundred East Texas petroleum producers and royalty owners urged the governor to declare martial law, as Oklahoma's governor, William "Alfalfa Bill" Murray, had in the Oklahoma City and Seminole oil fields. Murray vowed to keep those fields shut down until the price of crude

¹²James A. Clark and Michel T. Halbouty, *The Last Boom* (New York, 1972), 123-43 [hereafter cited as Clark and Halbouty, *Last Boom*]; Clark, *Three Stars for the Colonel*, supra note 10 at 7-10.

¹³"Waste" in the petroleum industry refers to both "physical" and "economic" waste. Physical waste can occur above-ground and underground. Above-ground physical waste includes oil production in excess of storage capacity, loss through natural evaporation, and natural fire hazards posed by unnecessary storage of large quantities of oil. Underground physical waste is caused by premature dissipation of reservoir natural-gas pressure and by rapid water encroachment, which significantly decrease the ultimate recovery of subterranean oil. Economic waste refers to production in excess of market demand that forces the price of crude oil down below a reasonable profit level for producers. It also includes excessively high production costs resulting from drilling more wells than necessary to offset drainage by other producers in the same field. See Stuart Buckley, ed., *Petroleum Conservation* (Dallas, 1951), 248-50.

¹⁴*General and Special Laws of the State of Texas*, Acts of the Forty-second Legislature, First-called Session, 1931, 46; David Prindle, *Petroleum Politics and the Texas Railroad Commission* (Austin, 1981), 31; Ruth Sheldon Knowles, *The Greatest Gamblers: The Epic of American Oil Exploration* (Norman, 1959), 264-65; Carl Coke Rister, *Oil! Titan of the Southwest* (Norman, 1949), 319; *New York Times*, August 13, 15, 1931.

oil rose to one dollar per barrel.¹⁵ Texas oilmen congratulated him, lamenting "that the same fine character of leadership and courage has not been shown in the State of Texas." They decried recent sales of millions of East Texas oil at ridiculously low prices as the "largest steal in the history of the industry," imploring Sterling to invoke martial law in the East Texas field until production could be stabilized.¹⁶

Sterling yielded to the mounting pressure. On August 17, he declared martial law in the East Texas field. Brigadier-General Jacob Wolters, general counsel of the Texas Company, who commanded a state militia force of thirteen hundred, was ordered to shut down every oil well in the field.¹⁷ The governor displayed nineteen petitions signed by nearly a thousand oilmen demanding martial law, and proclaimed:

A state of insurrection, tumult, and riot and breach of peace exist in the [area] which threaten to spread to other oil and gas fields where operators are still obeying the law. . . . There exists an organized and entrenched group of crude petroleum oil and natural gas producers in said East Texas oil field . . . who are in a state of insurrection against the conservation laws of the state relating to the prevention of crude petroleum oil and natural gas and are in open rebellion against the efforts of constituted civil authorities in the state to enforce such laws.¹⁸

¹⁵Garret Logan, in "The Use of Martial Law to Regulate the Economic Welfare of the State and Its Citizens: A Recent Instance," *Iowa Law Review* 17 (November 1931), 40-49, noted that on August 4, 1931, the governor of Oklahoma declared martial law and ordered the state militia to shut down oil wells.

¹⁶Roger M. Olien and Diana Davids Olien, *Wildcatters: Texas Independent Oilmen* (Austin, 1984), 59-60; L.E. Bredberg, "East Texas Meeting Asks Martial Law," *Oil and Gas Journal* 30 (August 20, 1931), 20, 103-104; *New York Times*, August 15, 1931.

¹⁷In June 1919, Wolters had led the militia into Longview to quell violent racial clashes and later that year commanded troops sent to Corpus Christi to maintain order after a hurricane. In 1920 he led a militia force to Galveston to break-up a shipping strike, and in 1922 and 1926, commanded troops sent to the oil-boom towns of Mexia and Borger to assist local law-enforcement officials in maintaining order. Clark and Halbouty, *Last Boom*, supra note 12 at 167-69.

¹⁸Wallace M. Lovejoy, "Conservation Regulation: The Economic and Legal Setting," in *Essays on Petroleum Conservation Regulation*, ed. Wallace M. Lovejoy and I. James Pikel (Dallas, 1960), 26; "Martial Law in Four Counties Declared by Governor Sterling; Wells Closed Without Disorder; None Expected," *Oil and Gas Journal* 30 (August 20, 1931), 15, 104; "Troops Shut Down East Texas Field," *ibid.* [hereafter cited as "Troops Shut Down Field"]; *New York Times*, August 16, 17, 18, 1931.



Governor Ross Sterling, shown here on the gubernatorial campaign trail, declared martial law in the East Texas field on August 17, 1931. (Center for American History, University of Texas at Austin)

Sterling hoped that martial law would maintain order and stability until the Texas Railroad Commission could issue proration orders under the new Anti-Market Demand Act.¹⁹

Wolters wasted no time in enforcing the governor's decree. On the day it was issued, Texas National Guard Troop A of the 124th Cavalry arrived in the anxiously awaiting town of Kilgore to take control of 2,815 square miles of oil-producing country in East Texas. The troops bivouacked on "Proration Hill" outside town. All oil and gas wells were shut down by noon the next day. "It's jail for those who haven't quit," Wolters warned a crowd of surly producers, boasting that his authority was "beyond the power of the courts." It would be foolish, he explained, "to release prisoners of war and let them go back to the firing line."²⁰

¹⁹Robert E. Hardwicke, Jr., "Legal History of Conservation of Oil in Texas," in *Legal History of Conservation of Oil and Gas*, ed. Blakely Murphy (Chicago, 1938), 233 [hereafter cited as Hardwicke, "Legal History"]; Warner E. Mills, Jr., *Martial Law in East Texas* (Indianapolis, 1960), 22-23.

²⁰L.E. Bredberg, "East Texas Fields Under Military Rule," *Oil and Gas Journal* 30 (August 27, 1931), 13, 106-109; "Troops Shut Down Field," *supra* note 18 at 104; *New York Times*, August 18, 23, 1931, reported that militiamen were placed on alert in Kilgore following an outbreak of incendiary fires and threats



Kilgore, Texas, in the heart of the East Texas oil field, during the boom of the 1930s (Permian Basin Museum)

He attempted to cheer the local populace by ordering the militia band to perform in towns and oil-field camps. "I trust our wives and sweethearts are busy at home knitting sweaters and making fudge," the general proclaimed, although he was disturbed by "painted women" in "beach pajamas" gallivanting in public. He banned the attire frequently worn by local prostitutes, since the nearest beach was over a hundred miles away and the "ladies of the night" were distracting militiamen who "had their duties" to perform. Young lovers who courted near the Tyler airfield complained about gawking soldiers who were supposed to be guarding military aircraft. Wolters responded that "the war could not bend itself to the whims of the lovelorn."²¹

of others. A Methodist and a Presbyterian church in Kilgore were destroyed by "mysterious" fires within two hours of each other. That same day, gasoline-soaked rags were used to start fires at a seed house, a gin, and a wholesale grocery store on the town's main street. The *Times* of August 31, 1931, reported that Wolters ordered militiamen to "shoot at the waistline" after a combination rooming house-morgue and a grain warehouse were burned in the town. Wolters blamed "Reds" for the incendiarism.

²¹Clark and Halbouty, *Last Boom*, supra note 12 at 170-71.



Brigadier-General Jacob Wolters and Texas Ranger Captain Tom Hickman read the martial-law order from the Kilgore City Hall steps. (Permian Basin Museum)

ARGUMENTS FOR AND AGAINST REGULATION

With the East Texas field under martial law, oilmen and lawyers debated whether the sword or the Constitution would rule their household. "Whatever the final judgment of legal technicians may be," argued Earl Oliver, a lawyer, "public sentiment is disposed to react favorably to its rulers who regard the obligations to serve the functions of the State of greater moment than forms and technicalities of law." He cited communism and fascism as "mere present day examples of the direct action that society takes, and has always taken, to correct its ills when the regular established procedure becomes too slow and cumbersome," and warned that mob action would supplant legal procedure if the law lagged behind society's need for change. The crisis in the East Texas oil field demonstrated the necessity for radical state action to avert complete chaos and the destruction of vital petroleum resources. "Before we condemn indiscriminately all assumptions of dictatorial power," Oliver said in reference to martial law in East Texas, "it is well that we ascertain whether there are in fact existing due processes of law by which grave crises might be avoided."

He asked, "What is a chief executive to do when faced with such a situation?"²²

The president of the Pure Oil Company, Henry Dawes, suggested that, in lieu of the finder's-keepers law occasioned by the rule of capture, oil fields should be developed under a unitization plan much like the one Pure had successfully put into practice at Van.²³ D.J. Moran, the president of Continental Oil, saw unitization as the key to the industry's future stability and prosperity. He complained that too many oilmen living in the past either did not realize, or refused to admit, that petroleum had "passed through a revolution . . . in which brains and science [had] vanquished luck and brawn." American Petroleum Industry's president, E.B. Reeser, argued that free market forces did not apply neatly to petroleum, a resource that could not be reproduced like cotton, wheat, sugar, or rubber if an entire crop were wasted or destroyed. The American Petroleum Industry advocated prorationing as the most plausible and equitable solution to overproduction.²⁴

William Farish, the president of Humble Oil and Refining, asserted that prorationing would permit the industry to march in step with the public interest beyond the immediate concerns of a few selfish and misguided oilmen. He criticized Sterling for threatening to veto a market-demand bill, warning that Texas "might have to go through the terrific pressure of low prices again in order to get the necessary legislation." However, he appreciated the difficulties in persuading skeptical oilmen and lawmakers of the need for rational planning. "If an inhabitant from Mars, assuming the Martians to be rational creatures, were to visit us," he explained, "he could hardly escape a feeling of bewilderment if not actual dismay at the manner we earthlings carry on this great enterprise." Farish believed that "our hypothetical celestial visitor" would be astonished by the vast excesses of supply being poured into a surfeited market regardless of legitimate demand. "Possibly we could explain," he surmised, "but try as we might we could never justify to our friendly observer this irrational condition." He called for adequate laws "requiring the performance of those things which

²²Oliver, "Industry's Problems," *supra* note 7 at 122; *idem*, "Why Adequate Oil Legislation Failed," *Oil and Gas Journal* 30 (September 17, 1931), 15, 100 [hereafter cited as Oliver, "Why Adequate Oil Legislation Failed"].

²³Jacqueline Lang Weaver, *Unitization of Oil and Gas Fields in Texas: A Study of Legislative, Administrative, and Judicial Policies* (Washington, 1986), 1, defines unitization as "the joint, coordinated operation of all or large parts of an oil or gas reservoir by the owners of the separate tracts overlying the reservoir."

²⁴A.E. Mockler, "Oil Industry Getting Its House in Order," *Oil and Gas Journal* 30 (January 8, 1932), 23, 116-17; J. Edgar Pew, "Time Is Ripe for Unitization," *ibid.* (November 12, 1931), 38, 89 [hereafter cited as Pew, "Time Is Ripe"].

science and engineering have found to be essential to conservation, to efficient oil production, and to the protection of the correlative rights of the common owners of an oil pool."²⁵

The vice president of Sun Oil, J. Edgar Pew, believed that ruthless crushing of the weaker units "would drive out all those splendid forces of adventure, initiative, individual effort, and bull-necked courage on which the industry depends for finding the hidden stores of crude."²⁶ He maintained that the oil industry had been straddled by statutes and injunctions that were as responsive to supply and demand "as Sir Isaac Newton's apple was to the gravitational pull of the planet Neptune." The time was ripe for an alternative to the rule of capture, since science had proven that "the only 'rivers of oil' in motion under a property [were] those created by the extraction of oil itself." Pew could not understand how reasonable-minded, twentieth-century oilmen could countenance "legalized piracy," and likened the rule of capture to a "Frankenstein which bids fair to ruin its creator and destroy a most important national resource." He concluded, "It is no longer of any use to inveigh against governmental interference with business, or to denounce as revolutionists any who disagree with us," for "the country, the world, looks upon us as trustees for a vital resource."²⁷

J.R. Parten, who succeeded Tom Cranfill as the president of the Independent Petroleum Association of Texas in 1932 and led the organization through the crucial thirties, believed that prorationing had more to do with helping the majors manipulate price through production control than conservation. Claiming to speak for a majority of large and small independents, he argued that "the only way to the return of prosperity and normalcy in the oil business is through the medium of free operation of that time honored economic law that supply and demand must govern." Although they favored higher prices and stabilization, Parten and his independent followers opposed state and federal production controls, fearing that they would lead to monopoly by large integrated oil companies. The association drew a line in the sand against production controls and

²⁵William S. Farish, "A Rational Program for the Oil Industry," address before the Petroleum Division of the American Institute of Mining and Metallurgical Engineers, October 3, 1931, Ponca City, Oklahoma, copy in Pure Oil Company Files, VEA, CF 10923; see idem, "Problems of Preventing Waste of Oil and Gas and Stabilizing the Petroleum Industry," *Oil and Gas Journal* 31 (June 30, 1932), 10-12.

²⁶Pew, "Time Is Ripe," supra note 24 at 38, 89; see August W. Giebelhaus, *Business and Government in the Oil Industry: A Case Study of Sun Oil, 1876-1945* (Greenwich, 1980), 202-205.

²⁷Ibid.

portrayed itself as the protector of the "little man" against corporate wealth and power.²⁸

The Texas Oil and Gas Conservation Association represented Texas independents who supported the majors' demand for market-demand prorationing. Organized in Dallas on September 12, 1931, it attracted small and large independents from all over the state who blamed their economic woes on low crude-oil prices depressed by overproduction in the East Texas field. They were disenchanted with the Independent Petroleum Association, which had become an organ of independent resistance to market-demand prorationing and compulsory unitization. Texas Oil and Gas Conservation supported a new agency to supersede the Texas Railroad Commission's responsibility for regulating oil and gas production, and spread its message through a bimonthly newsletter, the *Conservationist*. The president of Texas Oil and Gas Conservation, Charles Roeser, condemned the Texas Railroad Commission for "writing the worst law possible" for the East Texas field, and called for the creation of a new, appointed oil and gas commission. The Independent Petroleum and the Texas Oil and Gas Conservation associations became embroiled in a free-for-all to become the mouthpiece for the independents. Rather than a struggle of all majors versus all independents, Roeser viewed the fight as between those independents and majors who wanted order and stability against others who opposed any form of conservation.²⁹

"Now is the time to stop preaching," and to change the law

²⁸Barbara Thompson Day, "The Oil and Gas Industry and Texas Politics, 1930-1935" (Ph.D. diss., Rice University, 1973), 137-40, noted that Parten entered the oil business in Louisiana after World War I. In 1922, he helped organize the Woodley Petroleum Company and served as its president and general manager from 1927 until 1960. In the 1930s, Woodley moved its headquarters to Texas, where it held oil properties throughout the state, including the East Texas field. Parten became a leading spokesman for independents.

²⁹L.E. Bredberg, "Five East Texas Associations Affiliate in One Organization," *Oil and Gas Journal* 30 (September 17, 1931), 13, 32, reported that the Texas Oil and Gas Conservation Association was organized by merging five associations of Texas independent oilmen: The Texas Oil Emergency Committee; the East Texas Steering Committee; the North Texas Oil and Gas Association; the San Antonio Petroleum Club; and the East Texas Home and Land Owners Association; idem, "Texans Organize to Conserve Oil and Gas," *ibid.* (November 12, 1931), 156; Henrietta M. Larson and Kenneth Wiggins Porter, *History of Humble Oil & Refining Company: A Study in Industrial Growth* (New York, 1959), 465 [hereafter cited as Larson and Porter, *History of Humble Oil*], noted that the Texas Oil and Gas Conservation Association's membership reached five thousand in June 1932, but that the association broke up in 1933, apparently over disagreements among members regarding state versus federal regulation of petroleum production; "IPA of Texas Opposes Present Proration Rules," *Oil and Gas Journal* 31 (December 15, 1932), 31.

to permit market-demand prorationing, declared Robert Penn, who attributed the industry's plight to the rule of capture. He cited a passage from John Stuart Mill's *Principles of Political Economy* to describe the legal mentality behind the capture theory:

With the unwise practices of men as with the convulsions and disaster of nature, the longer they remain unrepaired the greater become the obstacles to repairing them, arising from the aftergrowths which would have to be torn up or broken through. . . . A bad law or usage is not one bad act in the remote past, but a perpetual repetition of bad acts as long as the law or usage lasts.³⁰

Penn wanted the law to afford as much protection to the public interest in petroleum as it did to private property.³¹

A Tulsa lawyer, Henry M. Gray, blamed the petroleum problem on greed, ignorance, and an inadequate legal system. He accused state judges, "perhaps more concerned with local crowd emotion and the next election than with the correctness of the law, or the good of the state, and nation," of thwarting efforts to enforce petroleum conservation. "Were it not for the doubtful wisdom of men long since dead," he said, "society could protect itself by any measures believed to be expedient." Judges had wide latitude to interpret constitutional restraints, framed in broad and general language, according to their personal ideologies. As Federal Judge Joseph Hutcheson, Jr., had demonstrated in the *MacMillan* case, the more novel the remedy, the less likely it was to survive judicial scrutiny. Gray believed that experimentation was as essential to the progress of law as anything else.³²

Citing prior court decisions that sustained municipal zoning laws, Gray insisted that constitutional law did not bar public authorities from restricting the use of private property in the public interest. City zoning ordinances and wartime rent controls were approvable temporary laws designed to cope with

³⁰Earl Oliver, in "Changes Needed in Oil Ownership Law," *Oil and Gas Journal* 30 (July 23, 1931), 15, 181, cited the quotation from Mills. See Robert Penn's address to the Production Division of the American Petroleum Institute meeting in Dallas in June 1931, in Samuel B. Pettengill, *Hot Oil!: The Problem of Petroleum* (New York, 1936), 97-98.

³¹*Ibid.*

³²Henry M. Gray, "Need Extension of Conservation Laws: Concrete Statutes Must Replace Court-Made Law," *Oil and Gas Journal* 30 (July 23, 1931), 24, 98; *Alfred MacMillan, et al v. Railroad Commission of Texas*, 41 F.2d 400 (W. D. Tex. 1931).

temporary situations. Peace as well as war had its dangers, Gray argued, and petroleum was vital to the nation's defense and economic well-being. The oil industry affected a public interest and thereby subjected the former to government regulation.³³

Federal regulation was inevitable, Gray predicted, if the states failed to devise oil-conservation laws capable of being sustained by the courts. He deplored the numerous injunctions restraining enforcement of production controls and hoped that "society [was] not so helpless against the local judge menace that it [could] not prevent legitimate power from degenerating into a matter of arbitrary license." He advocated unitization as the most effective and practical remedy to overproduction, and believed that the constitutionality of compulsory unitization statutes could be upheld on the same basis as irrigation, drainage, and municipal public improvement districts. Supreme Court rulings in *Ohio Oil Company v. Indiana*, upholding use of state police power to protect owners' correlative property rights in a common pool, and in *Munn v. Illinois*, sustaining government regulations designed to protect a public interest, gave ample authority for regulating petroleum production. Moreover, in *Marrs v. City of Oxford*, the Eighth Circuit Court of Appeals had upheld a Kansas city's ordinance permitting only one oil well on each city block and providing for the division of royalties among individual lot owners and lessees. The ordinance clearly required unit development to protect the public interest in petroleum conservation rather than the private property interests of individual lot owners.³⁴

W.P.Z. German, general counsel of the Skelly Oil Company in Tulsa, Oklahoma, argued that prorationing could be justified as an exercise of state police power to protect the public interest in petroleum conservation and to safeguard private property rights by ensuring an equitable distribution of a common pool among individual owners. He agreed with Gray that previous Supreme Court decisions furnished ample legal precedent to sustain state regulation of petroleum production.³⁵

Robert Hardwicke, Jr., a lawyer from Fort Worth, believed that American law on oil and gas had not kept pace with the

³³Gray cited the following United States Supreme Court decisions: *Block v. Hirsch*, 256 U.S. 135 (1921); *Levy Leasing Company v. Siegel*, 258 U.S. 242 (1921), in which the Supreme Court held, "A limit in time, to tide over a passing trouble, well may justify a law that could not be upheld as a permanent change."

³⁴Gray cited *Ohio Oil Company v. Indiana*, 177 U.S. 190 (1900); *Munn v. Illinois*, 94 U.S. 113 (1876); *Marrs v. City of Oxford*, 24 F.2d 541 (D.C.-Kansas 1928), *aff'd* in 32 F.2d 134 (8th Cir. 1929).

³⁵*Ibid.*

latest facts and principles established by petroleum engineers and geologists. He blamed inconsistent and contradictory petroleum laws, "replete with property rules based upon assumptions of fact which had been disproved," for the instability in the industry. Unlike the wild animals that nineteenth-century jurists had likened to petroleum, oil and gas remained stationary, in a state of equilibrium, until penetration of the reservoir released natural gas pressure and caused movement. Hardwicke pointed out that the analogy between petroleum and water was inappropriate because water movement was not affected by gas pressure and, unlike oil and gas, water was replenishable.³⁶

Hardwicke exposed the rule of capture as a legal anomaly brought about by the earlier judges' inability to ascertain the precise location and quantity of underground petroleum. Yet those same judges accepted proof of the source and extent of subterranean oil and gas, to almost the exact barrel or cubic foot, in awarding damages to lease and royalty owners against producers for delinquent drilling. Nevertheless, Hardwicke argued that the overriding public interest in conservation justified the exercise of state police power to prevent wasteful petroleum production, believing that scientific knowledge had advanced enough to employ production controls that guaranteed each owner an equitable share of the whole.³⁷

Responding to criticism that prorationing was a price-fixing scheme, he argued that it was "perfectly obvious" that limited production would affect price, but that physical waste did not always equate with economic waste, and vice versa. He noted the use of high-grade petroleum for settling dust as an example of physical, but not economic, waste. The relevance of economic waste to conservation, he explained, was a matter of policy rather than a legal issue, and he cited a Supreme Court decision that upheld a Wyoming statute banning the use of natural gas to produce carbon black to show that states could regulate production of an important natural resource in order to raise the price and discourage consumption or less beneficial uses.³⁸

³⁶Robert E. Hardwicke, Jr., "Ratable Taking API Meeting Keynote," *Oil and Gas Journal* 30 (June 11, 1931), 15, 104; idem, "Legal Aspects of Gas Conservation," *ibid.* (June 25, 1931), 17, 125 [hereafter cited as Hardwicke, "Legal Aspects of Gas Conservation"].

³⁷Hardwicke, "Legal Aspects of Gas Conservation," *supra* note 36 at 17, 125; idem, "Limitation of Oil Production to Market Demand; Review of Legislation Shows Confusion," *Oil and Gas Journal* 31 (October 6, 1932), 54 [hereafter cited as Hardwicke, "Limitation of Oil Production"].

³⁸Hardwicke, "Limitation of Oil Production," *supra* note 37 at 54, cited *Walls v. Midland Carbon Company*, 254 U.S. 300 (1920); Donald H. Ford, "Controlling the Production of Oil," *Michigan Law Review* 30 (June 1932), 1170-82.

Hardwicke posed a hypothetical situation in which a refiner or retailer, by evading payment of state gasoline taxes, gained an advantage of four cents a gallon over a competitor who paid the tax. The tax evader could thereby cut prices and still earn a profit. To remain competitive, the taxpayer could either reduce prices or lose business, and therefore insisted that the tax law be rigidly enforced. "Surely a court would not be justified in declaring the law unconstitutional on the ground that economic motives were involved," Hardwicke argued, "or because the enforcement officers gladly stopped the tax evasion knowing that the price of gasoline would likely be increased by such act." His point was that states should be able to regulate petroleum production to market demand regardless of the economic consequences. He admitted that conservation laws designed to protect private correlative rights rather than the public interest would have a better chance of being sustained by the courts.³⁹

Opinions and attitudes concerning the causes and solutions of the petroleum problem varied like the Texas weather, yet most oilmen and lawyers agreed that legal issues, especially the rule of capture, posed the main obstacle to alleviating wasteful overproduction. The courts refused to sanction the kind of radical state action that they had sustained in putting down labor strikes during the late nineteenth century for the sake of restoring order and stability to the oil business.⁴⁰ For this reason, in part, Sterling concluded that martial law was the only viable alternative. Unlike state and federal judges in Texas, he admitted that existing laws were inadequate to cope with the magnitude of destruction in the oil patch. More progressive-minded jurists could have applied equitable remedies to deal with a twentieth-century problem rather than the disproven nineteenth-century analogy between petroleum and wild animals. The failure of the legal system to respond quickly enough to change resulted in the same ruthless and inane exploitation of America's petroleum as its wildlife and other precious natural resources, restricted only by the maxim that the hunter stay on his own land.⁴¹

America's vital petroleum resources became hostage to a legal duel between those who adhered to the notion of survival

³⁹Ibid.

⁴⁰William E. Forbath, in *Law and the Shaping of the American Labor Movement* (Cambridge, Mass., 1991), 94, stated, "By the mid-1890s, both federal and state high courts had made plain that the law was implacably opposed to broad unionism and the kinds of aggressive, industry-, community-, and class-based tactics it often entailed." He noted, "In all, federal troops were employed in more than 500 disputes between 1877 and 1903, or nearly once every sixty strikes" (118).

⁴¹Oliver, "Why Adequate Oil Legislation Failed," *supra* note 22 at 15, 100.

of the fittest, confident in their own ability to come out on top, and progressive-minded professionals who believed that the increasing complexity of twentieth-century industrialization demanded a new *modus operandi* to ensure peace, order, and stability. Efforts by scientists and engineers to educate judges and laymen about the need to revise the law to sanction sound operating methods like prorationing and unitization, and to achieve and maintain efficient and stable oil production, had been muddled by propaganda. Anti-conservationists redefined the issue as a struggle involving individual liberty against government control; private property rights opposed to the public interest; competition or monopoly; and states' rights versus national power. Conservationists responded that "nothing . . . will destroy [the individual] more quickly than perpetuation of the law of the jungle under which the industry is now being operated." By the 1930s, each side had gained a greater appreciation for the significant role of law in promoting its cause. Both realized that the courts ultimately decided whether equity or "might-makes-right" prevailed as the fate of the petroleum industry hung in the balance.⁴²

WORDS AND DEEDS GROW MORE DESPERATE

While the debate raged, the continued military occupation of the East Texas oil field stemmed violence that had become as commonplace along country roads as gang wars on Chicago streets. Fortunately, words were exchanged more often than gunfire. The Gladewater *Gusher*, a local newspaper that lasted only a week, took verbal potshots at "the pompous jelly-bellied representatives of this terrible thing called the oil industry" and accused Sterling of "high treason" and of being "a tyrant and an enemy to constitutional law." The paper demanded Sterling's impeachment and an end to martial law, even though the shutdown had helped raise crude-oil prices to one dollar per barrel.⁴³

Sterling warned East Texas operators of "the folly of sinking more wells . . . causing the allowable in wells already completed to be reduced" to as low as fifty barrels apiece, to keep total field production within the four-hundred-thousand-barrel daily allowance. He failed to dissuade some small independents

⁴²Ibid.

⁴³Richard O'Connor, *The Oil Barons: Men of Greed and Grandeur* (Boston, 1971), 309; *Oil and Gas Journal* 30 (September 24, 1931), 17 (October 1, 1931), 11 (October 8, 1931), 11, 30 (October 15, 1931), 13; *New York Times*, September 6, 12, 22, 24, 1931.

from bootlegging oil out of the area in spite of martial law. At the time, tank trucks could carry from five hundred to a thousand gallons of gasoline, and drivers willing to incur the risk could earn as much as one hundred dollars a night hauling bootleg gasoline. Runners devised elaborate tactics to elude roadblocks and military patrols. Decoy trucks distracted guards while convoys of tank trucks proceeded unmolested to their destination. One independent oilman named Tom Patten earned notoriety for outmaneuvering the authorities. He drilled three oil wells on a quarter-acre lot along the main street of London, Texas, erected a one-room "penthouse" over one of the wells, declared it his legal homestead under state law, and obtained an injunction to keep soldiers away, boasting, "It's my oil, and if I want to drink it, that's none of your damned business."⁴⁴

Patten needed a market for his oil and negotiated a deal with Jack Wrather, a small independent refiner in Kilgore. Under cover of darkness, he laid an underground pipeline to Wrather's refinery. Militiamen discovered the pipeline with a metal detector and severed it. Patten defiantly constructed another pipeline, using firehose made of nonmetallic fabric. The militiamen eventually discovered and destroyed it. Patten then laid another subterranean pipeline, which remained undetected for four months, allowing him to run about a million barrels of bootleg oil to Wrather's refinery. Tired of the tug-of-war with the military, Wrather and his partner, Eugene Constantin, filed suit in federal district court on October 13 to enjoin the Texas Railroad Commission, the military, the governor, and other state officials from restraining their production. They alleged that the commission had conspired with the major companies, under the pretext of oil conservation, to limit production arbitrarily and thereby raise prices, which deprived the oilmen of their property without due process of law. Sterling responded that the issue involved states' rights and that the federal courts should not "throttle the will of the people."⁴⁵

Federal District Judge Randolph Bryant, sitting in Tyler, issued a temporary injunction restraining the militia from interfering with Constantin and Wrather's production until a hear-

⁴⁴Sterling quoted in *Oil and Gas Journal* 30 (October 15, 1931), 13; Clark and Halbouty, *Last Boom*, supra note 12 at 172-79; Presley, *Saga of Wealth*, supra note 1 at 141-42.

⁴⁵Harry Harter, *East Texas Oil Parade* (San Antonio, 1934), 110-14; Clark and Halbouty, *Last Boom*, supra note 12 at 173-79, 182-83; Presley, *Saga of Wealth*, supra note 1 at 142; Petition for Injunction filed by E. Constantin and J.D. Wrather, In the District Court of the United States for the Eastern District of Texas, Tyler Division [hereafter cited as Plaintiff's Petition], October 29, 1931, VEA, CF 14963-6; Sterling quoted in *New York Times*, October 15, 1931.

ing before a three-judge panel on October 29. Under protection of the injunction, the two partners resumed full-scale production of some five thousand barrels per well daily. Confident that the court would grant a permanent injunction, other East Texas operators ran their wells wide open. "They enjoined the wrong fellows," boasted Sterling, who was not named in Bryant's injunction decree, as he ordered Wolters to continue enforcing the daily limit of 165 barrels per well, with the exception of Constantin and Wrather. Bryant held Wolters in contempt of court, but delayed further legal action until a three-judge federal court heard the case. However, an engineer for the Texas Railroad Commission took matters into his own hands and had cement poured into a pipeline that fed Wrather's refinery, knocking it out of commission for some time.⁴⁶

Judge Hutcheson presided over a three-judge federal court that heard the *Constantin* case on October 29.⁴⁷ Joseph Bailey, Jr., representing Constantin and Wrather, argued that the Texas Railroad Commission's authority contravened the contracts clause of Article I, Section 19, of the Texas Constitution and the due-process clause of the Fourteenth Amendment of the United States Constitution. He claimed that the Texas Railroad Commission's restrictions had inflicted at least fifteen hundred dollars a day in irreparable damages on his clients, who insisted they could market all of the oil they produced without waste.⁴⁸

During the trial, the militia attempted to restrain Constantin, Wrather, and other East Texas operators from resuming full production under protection of Bryant's injunction. As governor, acting under the war powers of the Texas Constitution,

⁴⁶*Oil and Gas Journal* 30 (October 15, 1931), 13; "Martial Law Needed in East Texas," *ibid.* (October 22, 1931), 14, 96 [hereafter cited as "Martial Law Needed"], reported that Wolters advised Sterling that an injunction had been issued restraining enforcement of the Texas Railroad Commission's proration orders against Constantin and Wrather's five oil wells. He told Sterling that, in his judgment as a military officer in charge of law enforcement in a military district, disorder and violence would immediately result if the oil wells were allowed to run wide open. Sterling ordered Wolters to limit production from each of Constantin and Wrather's wells to 165 barrels daily, as ordered by the Texas Railroad Commission; *New York Times*, October 15, 1931.

⁴⁷A three-judge court, consisting of two district court judges and one circuit court judge, was impanelled to decide the constitutionality of a state law. Its decision could be appealed directly to the United States Supreme Court. See Joseph C. Hutcheson, Jr., "A Case for Three Judges," *Harvard Law Review* 47 (March 1934), 795-826. The panel in the *Constantin* case consisted of Fifth Circuit Chief Judge Joseph C. Hutcheson, Jr. [Houston, Texas], and District Court Judges Randolph C. Bryant [Sherman, Texas] and William I. Grubb [Birmingham, Alabama].

⁴⁸"Martial Law Needed," *supra* note 46 at 14.

Sterling claimed that he had authority to use military force to put down insurrection and riot. Wolters warned that if martial law were lifted, law-abiding East Texans would resort to armed force to shut down illegal production. Sterling likened the situation to a state of war, putting him and the militia beyond the law's reach. He issued Special Order 48, appointing a board of inquiry composed of military officers, to investigate violations of proration orders. A special military court would try violators under military law. Constantin and Wrather amended their original petition challenging the constitutionality of the Texas Railroad Commission's proration orders to attack the governor's martial-law decree as an arbitrary and tyrannical deprivation of their property rights without due process of law.⁴⁹

Paul Page and E. F. Smith assisted Dan Moody in defending Sterling. They responded that state constitutional and statutory law authorized the governor's action. Sterling had not suspended any laws or the writ of habeas corpus, and civil authorities in the four East Texas counties (Gregg, Rusk, Smith, and Upshur) affected by martial law continued to function. Page argued that the governor's martial-law decree was conclusive and was unlike the situation in *Ex Parte Milligan*, when military authority had been asserted in a peaceful locality where no executive, pursuant to constitutional and statutory authority, had proclaimed a state of riot or insurrection. "Tacitly it has been conceded by all," Page explained, "that the *Milligan* case does not apply where martial law has been declared and is operative under lawful sanction."⁵⁰

⁴⁹*Ibid.*, quoting Sterling and Wolters. Wolters further stated: "The military forces did not arrive one day too soon to prevent outraged land and royalty owners from taking possession of the field and by force of arms shutting down the wells that were running wide open. . . . The talk is more or less openly made that if the wells cannot be held down by the State of Texas, that they will be shut in by citizens, and if this cannot be done by reason of guards around them, the pipe lines and storage tanks will be blown up . . . and therefore by that means force a shut down. . . . On August 7 when the military forces took charge of the field oil was selling for 10 cents a barrel, less the gathering charge of 5 cents. . . . Today oil is selling for not less than 68 cents in the East Texas field. The imposition of martial law has saved not only the landowners and the operators, but is bringing into the State treasury approximately \$3,500 per day from the production tax alone, and the royalty owners are now being paid their royalties." Under Special Order 48, the special military court was authorized to sit with the board and interrogate witnesses. The provost marshal was directed to issue a summons or attachment, or summons *duces tecum*, requiring any designated person to appear or produce before the board any books, records, or papers for examination by the board. The *New York Times* of October 15, 1931, reported that Sterling held the East Texas oil field under control with troops despite a federal court injunction restraining state officials from interfering with the operation of certain wells.

⁵⁰Argument for Defendants Ross S. Sterling, W.W. Sterling, and Jacob F. Wolters by Paul D. Page, Jr., In the District Court of the United States for

Page cited "decided cases from the Supreme Court of the United States to the District Courts of Texas" upholding a governor's declaration, pursuant to constitutional and statutory authority, of a state of war or insurrection. The insurrection in the East Texas oil field had been "as real as if every pine tree in that [field] hid an armed man and every derrick stood above a dead one," he maintained, and a governor's authority to determine the existence of riot or insurrection necessarily implied the power to take appropriate action to suppress or head it off. Although a governor could not violate every provision of the state or federal constitutions (like suspending the writ of habeas corpus), he could seize property, if necessary, without violating due process of law. In defense of Sterling's martial-law decree, Page quoted Supreme Court Justice Oliver Wendell Holmes: "Public danger warrants the substitution of executive process for judicial process."⁵¹

Moody and Smith argued that the courts lacked jurisdiction to enjoin a governor's martial-law decree. State constitutional and statutory provisions empowered the governor, not the courts, to take necessary action to protect public peace and safety. The public interest, they said, was no more vitally concerned or affected in any way than by the oil industry. As America's largest producer of crude oil and natural gas, the Texas state government derived substantial revenue from various forms of petroleum taxes and royalties from state-owned oil-producing lands.⁵²

the Eastern District of Texas, Tyler Division [hereafter cited as Defendants' Argument by Page], *E. Constantin, et al. v. Lon Smith, et al.*, October 29, 1931, in the Pure Oil Company—Briefs, Legal Opinions, Etc. File, VEA, CF 17771, 4-12. Page cited Article 4, sections 7 and 10 of the Texas Constitution, Article 5778 of the Revised Civil Statutes of the State of Texas, and the United States Supreme Court decision in *Ex Parte Milligan*, 4 Wallace 2 (1866). Referring to *Milligan*, he argued that five members of the United States Supreme Court exceeded proper bounds and delivered, through Justice David Davis, several generalities regarding the powers of Congress under facts and circumstances unlike those in *Milligan's* case. In broad terms, Page pointed out, David stated that "Martial rule can never exist where the courts are open and in the proper and unobstructed exercise of their jurisdiction"—a test that, according to Page, had been subsequently ignored as "unsound dicta" by every court, including the Supreme Court of the United States.

⁵¹Defendant's Argument by Page, 17-42, VEA, CF 17771, cited *Moyer v. Peabody*, 212 U.S. 78 (1909).

⁵²Argument for Defendants Ross S. Sterling, W.W. Sterling, and Jacob F. Wolters by Dan Moody and E.F. Smith, in the District Court of the United States for the Eastern District of Texas, Tyler Division [hereafter cited as Defendants' Argument by Moody and Smith], *E. Constantin, et al. v. Lon Smith, et al.*, October 29, 1931, VEA, CF 17771. Moody and Smith also challenged the court's jurisdiction to hear the case on the ground that the

Sterling's lawyers cited Chief Justice Joseph Story's ruling in *Martin v. Mott* upholding a governor's authority to determine the existence of an emergency and the need to use military force to restore order and peace. The justice refrained from exercising judicial review to inquire into the discretionary powers of a chief executive officer or to substitute his judgment. Citizens claiming injury from abuse of executive discretion could sue for damages after the emergency had passed and military operations had ceased. Violation of criminal laws subjected an offending official to indictment by a grand jury or impeachment by the legislature. Moody and Smith maintained that frequent elections allowed citizens to remove offending public officials, and that the Guarantee Clause of the Constitution protected the people from "a tyrant who fills the office of chief executive officer . . . and by his acts and conduct deprives the state of a republican form of government."⁵³

The two lawyers also asked, "Would any court have attempted to substitute its judgment for that of the President [Grover Cleveland] as to what steps were necessary to suppress the insurrection and outlawry that existed during that great [Pullman] strike?" They compared Sterling's response to the East Texas crisis to the Dorr Rebellion in Rhode Island in 1842. In the related case of *Luther v. Borden*, Supreme Court Chief Justice Roger B. Taney refused to question the actions of the government of Rhode Island, which had "deemed the armed opposition so formidable . . . as to require the use of its military force and the declaration of martial law." Whether Constantin and Wrather's property was impaired or temporarily taken was immaterial, asserted Moody and Smith, since individual rights could not impede the government's necessary and implied powers to preserve the public welfare. As Judge Thomas Cooley held in *Weimer v. Bunbury*, "nothing . . . implies that due process of law must be judicial process," and "much of the process by means of which the government is carried on and the order of society maintained is purely executive or administrative," sometimes necessitating temporary deprivations of liberty or property by ministerial or executive officers. Moody and Smith insisted that Sterling had acted within his constitutional and statutory powers by invoking martial law in the East Texas oil

Eleventh Amendment to the United States Constitution barred suits by citizens against a state. Constantin and Wrather responded that Sterling had acted beyond the scope of his official duties as governor by illegally declaring martial law, which placed the case outside the strictures of the Eleventh Amendment.

⁵³*Ibid.* at 13-16 cited *Martin v. Mott*, 12 Wheaton 19 (1827).

field after determining the existence of a state of insurrection, riot, tumult, and breach of the peace.⁵⁴

STATES MUST BOW TO SUPERIOR LAW

Judge Hutcheson announced the court's decision on February 18, 1932. He cited only two theories of state action that could deprive the court of jurisdiction: either the governor was ad hoc the state and could not be sued; or a declaration of martial law superseded the federal Constitution as supreme law of the land and placed the governor and the military beyond judicial review. Hutcheson found that Sterling and Wolters had acted illegally as individuals under color of law to deprive Constantin and Wrather of their constitutional rights in violation of the supreme authority of federal constitutional and statutory law. He reiterated a long-standing principle that a state could never immunize officials from the superior authority of the United States.⁵⁵

Invoking the federal courts' chancery jurisdiction, "exercised uniformly throughout the nation unaffected by statutes, usages, or customs of the several states," Hutcheson proceeded to determine whether the *Constantin* case presented a matter of equitable cognizance.⁵⁶ Acknowledging a governor's power to

⁵⁴Ibid. at 24-50 cited *Luther v. Borden*, 7 Howard 1 (1849) and Michigan Supreme Court Justice Thomas M. Cooley's opinion in *Weimer v. Bunbury*, 30 Mich. 201 (1874); see Harold M. Hyman, *A More Perfect Union: The Impact of the Civil War and Reconstruction on the Constitution* (New York, 1973), ch. 10 [hereafter cited as Hyman, *A More Perfect Union*], for a discussion of legal and constitutional aspects of military occupation and martial law up to and during the American Civil War and Reconstruction.

⁵⁵*Constantin, et al. v. Smith, et al.*, 57 F.2d 227, 229-30 [E.D. Texas—Tyler, 1932]; "No Injunction Issued in East Texas," *Oil and Gas Journal* 30 (February 25, 1932), 13, 93-95 [hereafter cited as "No Injunction Issued"].

⁵⁶Tony Freyer, *Harmony and Dissonance: The Swift and Erie Cases in American Federalism* (New York, 1981), maintained that since the Supreme Court's decision in *Swift v. Tyson*, 16 Pet. 1 (1842), federal district court judges could base their decisions on a national common law that existed independently of state court decisions. Federal judges could apply their own conceptions of the common law to decide cases even if the result was in opposition to precedents established by state court decisions on similar issues. This power effectively made federal district courts as an alternative forum to state courts. Federal judges had the power to interpret the law as they saw fit. For example, federal judges employed the *Swift* doctrine to protect large corporations from local discriminatory regulations. The result fostered economic growth and domination of large corporations in the twentieth century. The *Swift* doctrine was overturned by the Supreme Court in *Erie Railroad Company v. Tompkins*, 304 U.S. 64 (1938). See Freyer, *Forums of Order: The Federal Courts and Business in American History* (Greenwich, 1979); Charles Zelden, "Regional Growth

take appropriate action, including use of armed force, to protect the public welfare, he rejected the notion that state officials could, by proclamation or otherwise, insulate their actions from judicial review.⁵⁷

Hutcheson refused to countenance the theory that Texas constitutional and statutory law permitted the governor to override judicial authority during emergencies. He interpreted Article I of the Texas Constitution as expressly forbidding the governor from suspending constitutional law, even in an emergency, as long as the civil courts remained open and functioning. "Martial law, the law of war, in territory where courts are open and civil processes run," declared the judge, was "totally incompatible" with constitutional provisions written by "men who had suffered under the imposition of martial law, with its suspension of civil authority, and the ousting of the courts during reconstruction in Texas" and by those who, in 1689, "wrote limitations upon the power of the crown to suspend laws."⁵⁸

Conceding a governor's power to invoke martial law in times of emergency, Hutcheson explained that this power derived from the civil law, making the governor and militia civil officers whose conduct could never be above judicial review.

"Ours is a government of civil, not military, forces," he pronounced, in which "soldier and citizen stand alike under the law," and "both must obey its commands and be obedient to its mandates." Citing *Ex Parte Milligan*, he ruled that "Martial law and civil law are mutually contradictory; they may not coexist," and that martial law could never supplant the courts unless the latter had been incapacitated. He cautioned that martial law was drastic and oppressive and should not be imposed except under dire circumstances, and then only to rehabilitate—not destroy—the courts or usurp their powers. He found no legal precedent to support Sterling's martial-law decree, and noted that *Luther v. Borden* arose before passage of the Fourteenth Amendment, and involved a damage suit over an arrest made under the authority of a legislative act declaring

and the Federal District Courts: The Impact of Judge Joseph C. Hutcheson," *Houston Review* 10 (1989), 89-90, stated, "The power of the federal district courts at this time were broad, and Hutcheson never hesitated to use them. He also used the considerable force of this personality to underscore his ideas of justice. He did not like disrespect for the law at any time, and when his own decisions were not heeded he was swift to act. . . . Hutcheson's opposition to those who ignored the law shows up at its most extreme in the 1932 case of *Constantin v. Smith*."

⁵⁷*Constantin v. Smith*, 233-40, cited 28 U.S.C.A., Section 380; "No Injunction Issued," supra note 55 at 13.

⁵⁸*Ibid.*

martial law during a rebellion and civil war in Rhode Island. Without the Fourteenth Amendment, the Supreme Court was bound by the laws of Rhode Island. Hutcheson believed that Louisiana Judge Rufus Foster, while sitting in the Southern District of Texas, had incorrectly ruled that a governor, in addition to possessing power to declare martial law, could set aside the laws and institute a military government in lieu of civil law. Hutcheson insisted that military dictatorships could never be established by executive fiat under the American constitutional system.⁵⁹

The judge concluded that Sterling and Wolters had, "without warrant of law," illegally deprived Constantin and Wrather of their private property. He found no proof of insurrection, riot, and tumult in the East Texas field, with the exception of producers trying to get their oil out of the ground. He suspected that the militia might have been taking orders from major oil companies, since its actions (which raised crude oil prices) fitted their needs. The fact that Sterling had been president of Humble did nothing to ease the judge's suspicion. Hutcheson held that Sterling had overstepped the bounds of legitimate executive power, and issued an injunction restraining enforcement of martial law against Constantin and Wrather's properties.⁶⁰

The injunction did not apply to the Texas Railroad Commission, since Constantin and Wrather had not pressed their case against the agency. Hutcheson took judicial notice of the enormous production capability of the East Texas field and the potential for waste as well as the Texas Railroad Commission's authority to enforce state conservation laws. He implied that

⁵⁹*Ibid*; *Luther v. Borden*, 7 How. 1 (1849), was a damage suit involving an arrest during the Dorr Rebellion in Rhode Island. The case was subsequently cited as affirmative authority for the legality of martial law. However, Taney held that the issue of whichever two factions constituted the legitimate government of Rhode Island was a political question, but did not necessitate martial law. Taney's opinion in *Luther v. Borden* was generally interpreted to mean that the Supreme Court would tolerate martial law rule in times of emergency. Taney took precisely the opposite view in his ruling as circuit justice in *Ex Parte Merryman*, 17 Fed. Cas. no. 9,487 (1861). See Hyman, *A More Perfect Union*, supra note 54 at 81-98; *United States v. Wolters*, 28 Fed. 69 (S.D. Tex. 1920), involved a petition for writ of habeas corpus for release from imprisonment for failing to pay a fine imposed by a military court set up in Galveston after martial law had been proclaimed. Civil magistrates had been removed from office and a military court set up in their stead. The relator conceded the governor's power to declare martial law. Judge Foster carried the point further and held that the governor could do anything necessary to make his proclamation effective; Charles Fairman, in "Martial Rule, In Light of *Sterling v. Constantin*," *Cornell Law Quarterly* 19 (December 1933), 29, noted that martial law had been invoked in Texas seven times between 1919 and 1932.

⁶⁰*Constantin v. Smith*, 240-42; "No Injunction Issued," supra note 55 at 94-95; *New York Times*, February 19, 1932.

producers could not resume full production until the Texas Railroad Commission had an opportunity to determine how much oil could be produced without waste and issued new proration orders. Sterling and Wolters appealed to the United States Supreme Court.⁶¹

Commissioner Terrell announced that the Texas Railroad Commission would temporarily withhold issuance of a new proration order for the East Texas field, pending the outcome of the appeal. Sterling had fifteen days to secure a stay of the injunction decree. Considerable confusion abounded. Smith had advised Sterling to restrain the militia from interfering with production on the Constantin-Wrather properties. Hutcheson told Smith that "any fourteen year old child could understand that no injunction" would take effect until Constantin and Wrather had presented an order for the court to sign. Until then, no court decree was in effect. Sterling immediately ordered the militia to seize control of Constantin and Wrather's wells.⁶²

On February 25, the Texas Railroad Commission resumed regulation of the East Texas field and limited daily production to seventy-five barrels per well. Upon expiration of the order on March 15, the field allowable would be reduced to three hundred twenty-five thousand barrels a day, to prevent premature dissipation of the reservoir's natural-gas pressure. The Texas Railroad Commission retained its flat per-well allocation formula, which only encouraged additional drilling. Sterling announced that martial law would continue except on the Constantin-Wrather properties, since the court finally signed the injunction order on February 26. The governor ordered the militia to refrain from enforcing prorationing but to remain in East Texas to maintain peace.⁶³

Rebellious operators took advantage of the uncertainty and ambiguity of protracted litigation and resumed full-scale production. The Texas Railroad Commission's flat per-well allocation formula dissatisfied many producers because it failed to account for variations in the productive potential of individual wells or acreage. Some operators simply ignored the Texas Railroad Commission and continued producing at will, while others between them filed nineteen lawsuits attacking the validity of the new proration order on the grounds that it violated the

⁶¹*Ibid.*

⁶²"Railroad Commission Ready to Issue New Proration Rules," *Oil and Gas Journal* 30 (February 25, 1932), 13; *New York Times*, February 21, 1932.

⁶³"Commission Rule Back in Texas," *Oil and Gas Journal* 31 (March 3, 1932), 13, 87 [hereafter cited as "Commission Rule Back"]; *New York Times*, February 26, 27, 1932.

Anti-Market Demand Act and that the per-well allocation formula was discriminatory. The Anti-Market Demand Act reinforced the legal position of opponents of market-demand proportioning who argued that it bore no reasonable relation to physical waste. It also provided a convenient way for jurists like Hutcheson to avoid overturning "time-honored" legal precedents in the face of recent scientific and technological advances that had rendered past decisions obsolete.⁶⁴

On November 26, 1932, Moody and Smith delivered oral arguments in the United States Supreme Court in the *Constantin* case.⁶⁵ They urged the Court to set aside the injunction restraining Sterling's martial-law decree in the East Texas field. Both lawyers argued that federal courts had no jurisdiction to interfere with a governor's power to take necessary action to restore peace and order, including the restriction of oil production. On behalf of Constantin and Wrather, Bailey responded that there had been no riot or insurrection in the East Texas field to justify martial law and that Sterling had exceeded his legal authority.⁶⁶

On December 12, Chief Justice Charles Evans Hughes announced the United States Supreme Court's unanimous decision in the *Constantin* case. He chastised Sterling severely for infringing on Constantin and Wrather's federal due-process rights, and rejected Moody and Smith's contention that federal courts lacked jurisdiction because the suit was one by citizens against the state. State officials purporting to act under legal authority who interfered with rights secured by the federal Constitution remained subject to judicial review.⁶⁷

The chief justice agreed with the lower federal court that "there was no exigency or state of war which justified the Governor in attempting to enforce by executive or military order the restriction which the District Judge had restrained pending

⁶⁴Hardwicke, "Legal History," *supra* note 19 at 235-36; "Commission Rule Back," *supra* note 63 at 13, 87.

⁶⁵*Houston Post-Dispatch*, November 15, 1932.

⁶⁶Appellants' Brief, *Sterling, et al. v. Constantin, et al.*, In the Supreme Court of the United States, October Term 1932, filed by E.F. Smith, Paul D. Page, and Dan Moody, Attorneys for Appellants, copy in Pure Oil Company—Briefs, Memoranda, Etc. File, VEA, CF 17771; *Houston Post-Dispatch*, November 16, 17, 1932; the *New York Times*, December 7, 1932, reported that the Supreme Court had refused to hear arguments in the MacMillan case since the issues had been mooted by passage of the Market Demand Act.

⁶⁷*Sterling, et al. v. Constantin, et al.*, 287 U.S. 387, 393-404 (1932); "Supreme Court of the United States Sets Aside the Orders of Governor Sterling of Texas," *Oil and Gas Journal* 31 (December 15, 1932), 10, 30; "Historic Decision on Martial Law in East Texas Defines the Power of Governor and Courts," *ibid.*, 13-14, 30-32; *New York Times*, December 8, 13, 14, 18, 1932.

proper judicial inquiry." Even if "the Governor was entitled to declare a state of insurrection and to bring military force to the aid of civil authority," he ruled, "the proper use of that power in this instance was to maintain the Federal court in the exercise of its jurisdiction and not attempt to override it." As long as the courts and civil processes continued to function, Hughes cautioned, a governor could not, by mere executive fiat, override rights secured by the federal Constitution or substitute dictatorship for the rule of law. Rather than protecting Constantin and Wrather "in the lawful exercise of their rights as determined by the courts," he held that Sterling had "sought, by his executive orders, to make that exercise impossible."⁶⁸

Hughes sustained the federal district court injunction on the grounds that Constantin and Wrather had no adequate remedy at law to redress their injury and that Sterling's martial-law decree had illegally invaded their federal constitutional rights. The Court did not define "martial law" or the permissible scope of military rule in all conceivable emergencies, but clearly held that judicial control was not deferred until an emergency or exigent circumstance had passed.⁶⁹

The *Constantin* decision affected a significant though little-noticed trend in American public law. State governors had invoked martial law before, but only once since adoption of the Fourteenth Amendment had their actions been reviewed by the Supreme Court. In the 1909 *Moyer v. Peabody* decision, the Court denied relief to a union leader who filed a writ of habeas corpus contesting his arrest and detention for seventy-six days under martial law in the suppression of an insurrection. The Court sustained preventive detentions made in good faith to reasonably accomplish a governor's constitutional duty to suppress insurrection. The *Moyer* decision and subsequent federal district and state supreme court rulings offered precedent supporting the proposition that the courts would not question a governor's determination of the existence of an emergency and the need to invoke martial law.⁷⁰

⁶⁸Ibid.

⁶⁹Ibid.

⁷⁰*Sterling, et al. v. Constantin, et al.*, 287 U.S. 378 (1932); *Moyer v. Peabody*, 148 Fed. 870 (C.C.D. Colo. 190); *Moyer v. Peabody*, 212 U.S. 78, 84-85 29 S.Ct. 227, 235-36 (1909); Fairman, in "Martial Rule, In the Light of Sterling v. Constantin," 20-34, cited cases where state and lower federal courts denied habeas corpus relief to persons held in military custody under martial law. In Texas, martial law had been invoked seven times between 1919 and 1933; for relevant state court decisions, see Henry Winthrop Ballantine, "Unconstitutional Claims of Military Authority," *Yale Law Journal* 24 (1915), 189-216; idem, "Military Dictatorship in California and West Virginia," *California Law Review* 1 (July 1913), 413-26.

In *Constantin*, the Supreme Court rejected that idea. Although it recognized that wide discretion must be reserved to state governments to maintain law and order, the Court clearly emphasized that such discretion was not absolute and was subject to judicial review for reasonableness.⁷¹

The Texas Railroad Commission praised the *Constantin* decision as a "just one." Sterling refused to comment, but indicated that he would not immediately revoke martial law or withdraw the forty-six remaining militiamen from the East Texas oil field. The American Petroleum Institute president, C.B. Ames, pointed out that the ruling did not impair a governor's authority to use military force to enforce valid state laws or court orders, and that the Court had merely held that a governor could not forcefully override judicial determinations.⁷²

On the same day that the Supreme Court handed down its decision in *Constantin*, the Texas Railroad Commission reduced statewide production by 60,000 barrels to 789,745 barrels a day and cut the East Texas allowable from 325,000 to 310,000 barrels per day. It cited the need to adjust production to purchasers' actual requirements and to stimulate pipeline connections to wells lacking outlets.⁷³ But the reduction failed to bring production into line with market demand, and the price of East Texas crude fell. Major purchasers like Humble lowered their offering price for East Texas crude from one dollar to seventy-five cents a barrel. Shell and the Texas Company slashed their prices to sixty-five cents a barrel. Bootlegged oil sold for fifty cents a barrel. Small operators blamed Humble for instigating the price drop just before Christmas and "robbing Santa Claus."⁷⁴ Faced with overproduction, lower crude oil prices, and protest from small operators complaining about the inclusion of bottom-hole pressure as a factor in determining allowables, the Texas Railroad Commission ordered a complete shutdown of the approximately ninety-three hundred East Texas oil wells on December 17. The shutdown would remain in effect until January 1 to provide a breathing spell before determining a future strategy. On December 21, national guardsmen left the East Texas field after sixteen months of occupa-

⁷¹*Ibid.*

⁷²"Sterling Considering Position," *Oil and Gas Journal* 31 (December 15, 1932), 30; *New York Times*, December 13, 1932; "Ames Holds State Power Is Unimpaired by Decision of the Supreme Court," *Oil and Gas Journal* 31 (December 22, 1932), 13.

⁷³"Texas Allowable Revised by Railroad Commission," *Oil and Gas Journal* 31 (December 15, 1932), 32, reported that the Van allowable had been increased from 42,500 to 45,000 barrels a day.

⁷⁴Larson and Porter, *History of Humble Oil*, *supra* note 29 at 474-75.

tion, leaving the silent oil wells to the Texas Railroad Commission and the courts.⁷⁵

A year and a half of litigation and military rule left the East Texas oil field in disarray. Small independents persistently and stubbornly defied all voluntary and state government efforts to alleviate inefficient and wasteful overproduction. They had been aided and abetted by judges like Hutcheson and Bryant, whose injunction decrees reflected their ideology more than sympathy for the underdog. They used their judicial power strictly to scrutinize governmental interference with private property. While they did not go as far as upholding absolute private property rights, Hutcheson and Bryant refused to countenance "unreasonable" governmental restraints on individuals' rights to use their property as they desired. After implying that they would uphold Texas Railroad Commission market-demand prorationing orders if expressly authorized by state law, Hutcheson and Bryant struck them down as "unreasonable."

By the end of 1932, the fifty-year reign of the rule of capture had brought the oil industry to near collapse. The courts had invited state legislatures to do better, but they had the final word and what they gave they took away. Legislators and jurists knew little or nothing about the physical characteristics of petroleum or oil reservoirs and too many of them, moored to their nineteenth-century roots, failed to absorb and comprehend the latest scientific and technological discoveries that had proven the absurdity of the capture theory. As Hutcheson and Bryant demonstrated in Texas, local federal judges persistently thwarted legislative attempts to alleviate the inefficiency and waste in petroleum production occasioned by judge-made law. Judicial obstinacy had relegated the oil patch to the law of the jungle while a younger generation helplessly witnessed the plunder of an inestimable amount of their natural resource by "legalized piracy." As the problem of petroleum bounced back and forth like a table-tennis ball between legislatures and the courts, it remained a legal issue to be worked out by lawyers and judges.⁷⁶

⁷⁵*New York Times*, December 18, 22, 1932.

⁷⁶William S. Farish, "What the Oil Industry Needs," Address delivered to the Twentieth Annual Meeting of the Chamber of Commerce of the United States of America, May 19, 1932, San Francisco, copy in Pure Oil Company—Proration Matters, Legal Briefs, Memoranda, Etc. File, VEA, CF 17771.

THE HONORABLE JACQUELINE TABER: AN ORAL HISTORY

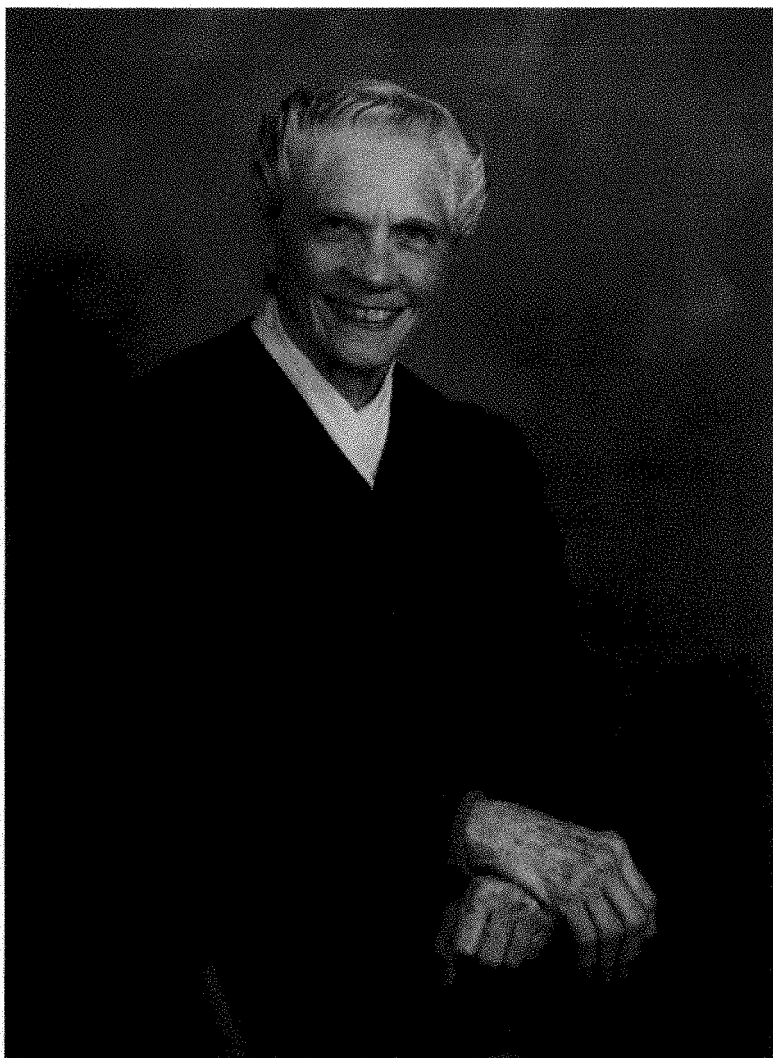
Jacqueline Taber was born on November 21, 1922, in Portland, Oregon, and raised in San Jose, California. She learned early the lessons of hard work and perseverance imposed by the Great Depression—lessons that have culminated in her nearly thirty years on the bench in Alameda County, with service first as a municipal court judge for thirteen years and then as a judge in the superior court for sixteen more.

After attending the University of California at Berkeley as an undergraduate, Taber entered the university's Boalt Hall School of Law in 1945. She received her law degree in 1947, and was hired by Justice William Healy of the United States Court of Appeals for the Ninth Circuit as a research attorney. She then worked briefly in her own practice, after which she took a position in 1949 with Brown, Smith and Ferguson, an Oakland firm. There she became an experienced litigator and, eventually, a partner.

In 1965 Governor Edmund "Pat" Brown appointed her to the Alameda County Municipal Court. Taber was the first woman on that court, although the distinction of being the first female judge in the county belongs to Judge Cecil Mosbacher, who preceded her on the superior court. In 1978 Taber was elected to the Superior Court of Alameda County and took the bench on January 1, 1979. She still presides there, hearing a wide range of criminal and civil cases.

This oral-history interview was conducted by Eve M. Felitti over several sessions from December 8, 1993, to February 7, 1994. Felitti is a lawyer practicing with the firm of Gudmundson, Siggins, Stone, and Skinner in San Francisco. The portions of the interview excerpted here include Judge Taber's legal education, early career, and subsequent rise to the California state court bench.

Taber: I sit on the Alameda County Superior Court at the present time. I originally came on the bench in the Oakland-Piedmont-Emeryville Municipal Court. I've been here in superior court since January 1 of 1979.



Hon. Jacqueline Taber

Felitti: How long did you sit on the municipal court?

Taber: Thirteen years. I originally went on the bench December 1, 1965.

Felitti: Can you tell me what your first memory is regarding pursuing a career in law?

Taber: I was about seven years old, I think in the second grade, and I was trying to figure out what I wanted to do when I grew up, and I wanted something that would be challenging and wouldn't get tiresome doing the same thing over and over again; I wanted something that I could do all my life; I wouldn't have to retire; that I could make a decent living, I thought, and somehow I arrived at the conclusion that being a lawyer would do those things. I had no idea where I picked that up because we don't have lawyers in the family, but to this very day, those are all items that are very significant with me. I, at a tender age, seemed to have discerned things that were very important to me and law fulfilled them. No disappointments; I'd do it all over again.

I suspect a lot of my motivation must have come from the fact that my father passed away when I was seven and my mother had not been employed out of the home, and it [was] the depth of the Depression, and I was so shocked about earning a living, and how hard it could be, that I was determined that I wanted to earn a living when I grew up. And so I think these things impressed themselves very much on me.

Felitti: Was [your mother] compelled to go to work after [your father's] death?

Taber: Yes; she was sick for a while and almost died. My father was ill for a year, and when he did pass away, her health was very precarious, but she survived, and then started taking jobs where she could have me with her—that is, caring for elderly people and sick people. She did that first, then, trying to earn more money, she went to work in the cannery, and in the summertime—I think I was about nine or ten—I wouldn't see her for several weeks because it was seven days a week. She got to be floor lady, but she had to be on the floor at quarter to six in the morning, and wasn't released until quarter after midnight.

When I was in high school, I started working in the cannery, but by then the unions had become very effective and our hours were much less. We never worked more than twelve hours, I believe. [My mother] worked eighteen, but the pay raise got so great it became prohibitive, so the canneries kind of changed their *modus operandi*. But both of us have seen very

difficult work, and that, by the way, motivates people to do other types of work.

Felitti: How did you determine where you would go to college?

Taber: Well, I read in the paper where Barbara Armstrong, the only woman on the faculty at Boalt Hall, was going to come and speak to the town hall meeting. So I got in my best dress and went down to the meeting that was held in the auditorium of Horace Mann School [in San Jose], where I had gone to school in the second grade. I was now in high school.

I had never even met a woman lawyer before. She spoke, and there was a recess, and I didn't know what to do. I saw her go out to the water faucet, and so I ran out there and just introduced myself, scared to death, and she was very nice. And she invited me to come up and see her, and I did. I went up there and she told me that women had two strikes against them, and the best way to combat it was to go to the best law school you could.

At that time, Boalt was one of the top three, and I thought I would have a better chance if I went to Cal as an undergraduate. Didn't know how I was going to do it, because financially money was a big problem—but I went to Cal and I worked. By this time my mother was running a boardinghouse for college girls. I went back to help her and do the cooking and things, and stayed out a year. Then I came back, and when I came back I found I could get into law school and take my last year of undergraduate work and my first year of law school [together]. Well, that was a godsend because I just didn't know what we were going to do for money.

Felitti: How did you find Boalt Hall to be?

Taber: Well, I thought I'd find prejudice—absolutely none. In those days, they hated the women just like they hated the fellas. [Laughter.] And it left very deep wounds that have not healed to this time. They treated us fine, but when it came time to seek work, they acted as if (frankly, if I don't shock you), they acted as if we were asking for a reference to work in a whorehouse, and it was only later that I read in books why this was true.

In the twenties it became very chic, or "in," for progressive universities to welcome women into their graduate schools, and Cal was certainly progressive, and so they welcomed the women, but what I learned was that Boalt was delighted—or at least I read between the lines—that Boalt was delighted to have the women, as some of the progressive graduate schools were, so that the men in their graduate schools would meet them,

and marry, and have more scintillating conversation in their drawing rooms than those who married high school graduates and just plain college graduates. Very, very disgusting, in my opinion; but it certainly was reflected in not only the lack of help they gave all their women, but the discouragement in work.

Felitti: Can you give me examples?

Taber: Just the tone of voice they used; the reference . . . the people they would suggest that you interview. And of course during those days—which I don't think any of the women thought inappropriate, but later women did—people that came to interview right on campus that wouldn't hire women. If you interview other women, I think you will find from my generation that that was unanimously felt to be the case. It was no thanks to the school that I got my first job as a research attorney for a justice in the Ninth Circuit Court of Appeals.

Felitti: What percentage of your class at Boalt were women?

Taber: Oh, there were—women were not unique or rare—and also, I was a war class. We started with fifty-six in our class, and they got us down to fourteen, so we were all hanging on to each other with sheer terror. But I would say, though, it was certainly a heavy percentage of women graduated who started. I think the women's batting average was maybe a little better than the fellas' because there was so much self-selectivity before ever getting in. But we had a goodly number of women. There must have been four, five, six in our class originally out of the fifty-six.

The only way you could ethically drum up business was to speak to various civic clubs, and organizations, and always they [would] ask, "Are you the first woman lawyer?" No! I said, "If I could have a whistle and blow it and bring out of the hills all of the women who are licensed to practice law, I think there would be two hundred of them."

But it's hard to practice law, to get started. You have to have clients. Hopefully, you can get an opportunity to get some training in someone else's office, and most did not hire women, and it was very easy to get siphoned off from money demands to become the office manager. Now, office manager in those days meant something different than it does today. Office manager in those days meant getting the flow of work out through the clerical staff, and by and large it was only secretaries; paralegals were unheard of. So it meant being a supersecretary, and there was a big demand for that. But many of us, one, didn't have the typing skills, and two, would not do that. We would rather go into other line[s] of work. So many got siphoned off

that way; but you never knew but that [that] very efficient, capable secretary held a law degree.

Then also many siphoned off through marriage. In my opinion, the practice of law is not a great combination with marriage and motherhood. Now, I know it's done, but I marvel [at] and respect the women who do it successfully. It's a terrible drain. It's not an occupation that melds easily with the demands of being a good wife and, particularly, being a good mother, in my opinion.

In my day, it was generally believed that women should either have careers or marriage. That was an easier choice, I believe, than today's choice of where you're supposed to have all things and be the best in all of them.

Felitti: Back to law school: Was the law school curriculum of your year similar to modern law school? Did they have a first year where they taught the basics of torts and criminal law and so on?

Taber: Yes, and I think maybe in the second year we got one elective or something like that. Third year, more electives, although, again, not only did I get my fourth year of college and my first year of law school together, we went through on an accelerated program. And as Barbara Armstrong [said], "It seems to me in our great war effort the last thing we need are more lawyers." But nevertheless, it was speeded up. I remember attending class on Thanksgiving Day. So we would go to class on holidays and then full time in the summertime, which generally wasn't done before and wasn't done shortly after the war ended. And that way we got through faster; so we were basically taking every course that was available to us and I think there was less objective selecting because of that kind of pressure.

Felitti: Did they have internships that you could do during law school?

Taber: Not at Boalt. Boalt—again this is crudely put, and there is a place for schools like this—but we used to kid that Boalt taught us what law used to be, what it should be, what it could be, and, if we had any intellectual curiosity, we'd find out what it was. But they would not sully their hands with that. Now, those are students talking. But I did think Boalt gave us a good education. I don't have any quarrel with the quality of the teaching there in those days.

Felitti: Did you have a particular subject that you were really wild about?

Taber: No, I wanted to pass the bar exam to be able to earn a

living. They had preparatory courses, and do you know who my instructor was? Bernie Witkin! It was Bernie Witkin who taught it, which he did for many, many years and he's the one that most of us felt organized things in a practical manner to get us through the bar exam. We're indebted to him in many ways.

Felitti: He helps us to get organized now. Any other law professors of note?

Taber: Well, Barbara Armstrong was a very outstanding woman, and, I always felt, way ahead of her times. . . . She was much more personal than some of the professors to both men and women. But, no, the professors kept very distant from us—the Dean set. In my opinion, a very poor example of not fraternizing with the students, which is totally different today. I don't know that they have to be chums, but I do like some recognition that we share the same human species.

Felitti: Did you pass the bar on your first try?

Taber: I did! Oh, I did, and I was so terrified. . . . I was terrified of going in and telling my judge that "Gee, I'm sorry, I didn't pass the bar."

Felitti: So you had secured a position clerking for a judge?

Taber: Oh, yes, beforehand, because I had to, right away—I had to get work because by then my mother was sick again and we were trying to live on whatever I could pick up. She had sold her home that she'd bought and we were living on those payments, and that's the only thing that got us through. But it was running out, and I just had to earn a salary. She'd come up to be with me and I had a little two-room apartment.

Felitti: Which judge did you clerk for?

Taber: [William] Healy. From Idaho.

Felitti: Was it "Judge" or "Justice"?

Taber: Well, it would be "Justice." But we usually referred to him as "Judge." He had been a trial judge, too.

Felitti: Where did he sit when you clerked for him?

Taber: Well, the Ninth Circuit was located in the post office building at Seventh and Mission, on the third floor, in San Francisco. And all of the district courts were housed there also. You got more than postage stamps.

Felitti: Did you share chambers with the judge?

Taber: Well, the layout was elegant. I expected never again to

have such a nice layout. The justice had a very large chamber. Next to him was the secretary/receptionist office, then my chambers were equally [sized] with a restroom in [them]; nicely appointed, very large.

Felitti: Did you enjoy working for the justice?

Taber: Oh, no, I didn't. Unfortunately he had a secretary, who, the day we were introduced, said she didn't want another woman in the office. And she would hide my briefs, mix the new ones with the ones I'd already done, and it made it very difficult. I never had any problem with him; he was very kind and understanding.

But I also was worried; I looked around me and there were a number of research attorneys who were women, working for the justices, and in the federal civil service the pay wasn't so great when you started, but you worked up in grade, and it could become very good, and I was afraid to get trapped.

I wanted to be what I perceived to be the real lawyer, practicing in the courts, and so, after I bought a couple of suits so I looked like an adult, I went in and gave him my resignation. I had gone around to a number of law offices, because they were open then Saturday mornings, to see if I could just do some work on Saturday morning, to see what a law office was like, and Ed Martin [who was a sole practitioner] in Berkeley let me hang around his office.

He only had two rooms, the secretaries' reception office and his private office, but he would show me things to do, give me process to serve, tell me about cases and law on Saturdays.

Then he told me that he would get this little room that was now available, if I wanted to open my own practice, as I had made it very clear to everyone that I wanted to do, and I could work for my overhead, which I did do. [I] stayed there for [a] little over a year, when I had an invitation to come work for a firm in Oakland on "either an awfully good or awfully bad case." But I'd never even seen what might be an awfully good case. So I closed my office and came down, and that case ultimately resulted in what was then the largest non-jury judgment in Alameda County.

Felitti: What kind of case was it?

Taber: Breach of contract. And it looks insignificant with today's figures and inflation, but it went up on appeal and was affirmed, and so I got something over and above my usual, very small, salary, and that was the down payment on the house I still live in.

Felitti: Let me go back to your clerkship, if I may. How long did you stay working for the justice?

Taber: It was less than a year, I think.

Felitti: Can you remember your duties?

Taber: To read the briefs, review the briefs for the judge, and one of the things I distinctly remember was that we used to get a lot of writs, petitions, from the "Birdman of Alcatraz," and he wrote this old Spencerian writing.

Felitti: What kind of relief did he seek?

Taber: Oh, I can't even recall that. I don't recall that. But he always had a bunch of writs in there. I don't think he got very far.

Felitti: Never made it off the Rock?

Taber: No, I don't think so; maybe later.*

Felitti: Tell me about the members of the first firm with whom you practiced.

Taber: Well, I started out alone and then I had an opportunity to go down to Oakland and do work for a firm of three men, and they had a case which they explained to me they wanted me to take and develop. It was either awfully good or awfully bad and they didn't know which.

I plotted the strategy and then sat as second attorney during the trial. So that kind of gave me a head start with the firm, but I remained on and then worked on another case. It was a very mutually satisfying relationship and so then it turned into a permanent arrangement.

Felitti: What was the name of this firm?

Taber: It was Brown, Smith and Ferguson. They were three Mormon men who had never employed a woman before, and what was remarkable, I'm not Mormon and was not then, and they were very active Mormons. They had been bishops, or were currently bishops, and lived their religion, and their secretaries at that time, all but one, [were] Mormon also. But no one was ever treated more fairly, and, if anything, they gave me more credit than I deserved for things. They never overshadowed

*Ed. note—The "Birdman of Alcatraz," Robert F. Stroud, spent fifty-four years in prisons, nearly seventeen of which were in Alcatraz. In 1959 he was transferred from there to the medical center for prisoners in Springfield, Missouri, where he died in 1963. His pioneering *Digest of Diseases of Birds*, which he researched and wrote in his prison cell, is considered a classic.

owed me, and I just find it so interesting because so often the Mormon religion is criticized for not giving equal business opportunities to women; whether it's true or not, that's the way it's often seen.

And yet no one could have asked for finer men. They were just such good people to be around, and, I thought, set high standards for [a] young lawyer in their own personal deportment, their caring about family life and keeping their priorities in order. And so I just found it very reassuring.

Then one time I was handling a personal-injury case and the attorney for the insurance company was in Santa Cruz County, he was an assemblyman, and every time we'd get almost close to settlement, then he'd call the senior partner and *he'd* say, "No, no, Miss Taber's handling that." And the man kept saying, "She can't settle it. She's a woman." And it made the men so mad they made me a partner.

And I just think it's typical of early, if you will, pioneers, women. They get in the back door. There's nothing desirable about it. It's getting in that counts and then what you do after you get in.

Ultimately, the firm, one man left and then the other two men who had been very close had a falling out and I had to decide which one I'd stay with, and I did, and then he was hurt and I had to run our office by myself for six months. And at that time one of our good personal-injury cases came up and I not only had to come back and handle divorces and unlawful detainers and all of that junk at the end of the day, but try the case with no backup at all. And that resulted in what was considered a very large judgment for a black person. We represented a lot of blacks. My partners had a feeling for underdogs and I think maybe that explained why they took me aboard.

That gave me quite a head start because a very prominent personal-injury firm from the Bay Area was chasing the case, and they had brought pressure on the client that if she didn't get another attorney for her husband, he'd lose his civil service job. They play rough.

And so it got known about town generally and a lot of small attorneys resented this very much. There were far more individual practitioners in that day. In fact, the big firms of both San Francisco and certainly of Oakland would be laughed at as little firms today. And so when I brought home the bacon, it was kind of a blow for individual small attorneys that they, too, could do it.

And in fact the head of the firm that had [been pressuring my client] called me up to congratulate me and told me he had been following the case with interest. And I said I was aware that he was interested in the case and we just stayed on

friendly terms. You know, it's the name of the game and you kind of roll with the punches.

But, anyway, Earl Warren had been governor for a million years, you know; Democrats thought he was a Democrat and Republicans thought he was a Republican. Well, then [Edmund] Pat Brown had come along and I was, and am, a Democrat. And so I had sought an appointment and I'd had to run first. In 1964 I ran for muni court and did very well. But I lost in the runoff with the next top-getter. I hadn't gotten 50 percent of the vote plus one, but I had done well, so it looked like it might be possible.

And when I was appointed, I was well received by the small practitioners because Governor Warren had appointed out of the DA's office and even Pat Brown had appointed [from] some of the bigger offices, and there wasn't anybody smaller than me. I think it was seen as a chance for just hard-working lawyers to make it.

Felitti: How long had you practiced law before you became a judge?

Taber: I practiced almost eighteen years.

Felitti: And the appointment process: does it resemble that of today?

Taber: No. No; California, for all the years I've been aware, has been felt to have the finest judiciary; I felt that as a lawyer. And I said it. The Democrats, you always tell who wanted an appointment because they were always washing dishes and doing the chore work for political functions. You could just look around and spot the line. The Republicans did it differently, in my opinion. Very often someone was selected who took no part politically but they had a sponsor or somebody that believed in them and liked them and admired them and would urge the governor to do it.

But in any event, for the Democrats, at least, you got known to the governor. And I see nothing wrong in doing political work. As a matter of fact, I don't know how politics got the bad name because I think politics [is] the action part of democracy. But generally our political work enabled the governor to at least have a speaking knowledge of you and what kind of person you were and what kind of work you did.

And there was no Jenning Commission then. I have a lot of reservations about the commission. I don't know that we get better quality judges. I think it's awfully easy for a committee to do terrible things and I've heard some stories, particularly in the early days of the commission, where personal feelings perhaps asserted themselves.

I never heard a governor say that judicial appointments were insignificant to him. In fact, to the contrary, every governor I ever heard said that is the single most important thing he does, because long after he's left office, those judges will carry on his name and dispense justice. So I happen to favor the procedure of where the appointment is really made by the governor. Then you know who's doing it or not doing it. When a commission intervenes, I don't know really what's going on.

Felitti: Can you describe some modes of practice during your career as a lawyer which no longer exist?

Taber: Well, there [were] more practitioners. Also, as the ease of reproducing the written work has increased, so has the proliferation of words, to where they're almost valueless. The other thing that's happened that I don't necessarily like, that's the high specialization. I felt like, just like medicine, the family practitioner who obviously couldn't have the extreme skill that a specialist did, but in the overall picture where he knew his client and represented him in many courts, criminal, civil, juvie, whatever, did a better all-around job than the expensive specialists that only do criminal.

The other thing I'm sorry to see happen—and I've always kind of identified with Alexander Hamilton, but I'm beginning to appreciate Jefferson more and more—I'm sorry to see the great influx of federal jurisdiction. When I was practicing, they couldn't even get six or seven people together who did federal practice. There just weren't that many around. There were a couple that occasionally got to federal court, but, frankly, I liked to see the states left to do their state law. I know each individual has federal protection; I understand it in criminal cases, but I think there is the movement of federal law intervening more and more and more into state. Maybe someday, some time, we won't have states. I don't know, but we do have them now and I'm not at all comfortable that things are better with more federal intervention. I think that becomes a strategy in and of itself.

Felitti: Something else that has obviously changed in the years since you've been a lawyer is the number of women who are entering the practice. When we spoke off the record I mentioned that more than half the enrollees in law schools are now women and you commented that that's not necessarily a good thing. Could you elaborate on that?

Taber: Well, what I mean by that is, look at the Civil War; before the Civil War all nurses, just about, were men. And then when women became nurses, it became a lesser occupation. Women tend to get the short end of a number of economic sticks.

After World War Two almost all the doctors in Russia were women and I thought, "Gee, look at Russia, that country, imagine, [that] recognizes the resources of women more than the United States [does]" until I learned the reason they were women: the men had been killed. And the only doctors that had standing were doctors in the universities, professors; they were men. And so you got this lesser category.

And I'm just afraid that if women predominate in the industry, that there will be two types of lawyers. There will be the rainmakers, the big money-getters, which may not be open to very many women, and then the peons that pore over the text, because now, with this instant communication, as you know, it's not good enough to have read a case in law school and rely on it as Lincoln might have done in his day. You've got to have the latest thing off the press and that is tedious work, and it's always this fallacy that somehow women don't mind tedious work. Well, we do it, but we also like to get some of the goodies in whatever the occupation is, and I just worry about that.

Felitti: I'd like to talk to you about your time on the bench. Could you please tell me the year that you were elevated to the bench?

Taber: Yes. I was sworn in December 1, 1965.

Felitti: What court was that?

Taber: Oakland-Piedmont Municipal Court. It's now called the Oakland-Piedmont-Emeryville Municipal Court.

Felitti: At that time were there other women on the bench?

Taber: No, that was the first for the municipal courts in our county. I was the second woman [overall] in the county. Judge Cecil Mosbacher [superior court] preceded me. She had been appointed by Justice—I'm sorry—by then-Governor Earl Warren.

Felitti: Were you appointed, as opposed to elected?

Taber: Yes. I was appointed, although I had run for election, which is an odd twist. I had done all the things that, at least, Democratic appointees are supposed to do to get an appointment, and from my point of view should have been appointed about a year earlier but wasn't.

The Democrats were real interested to have a judge run for the vacancy in the Oakland-Piedmont Municipal Court, and because there was an assembly district that was swinging from Republican to Democratic and they didn't want a lot of lawyer money to be poured into that race, which they felt would tilt it toward the Republican side, they wanted a Democrat to run. And the fellas that should have gone, for one reason or another, felt they couldn't and it ended up with me, much to my . . . I

was rather quite opposed to it but we just couldn't get anyone else, so it was clear to me if I was ever going to get an appointment, I had to step forward and accept the challenge, which I did.

It was a field of four men and myself, and I prevailed in the primary, but, as you know, it takes 50 percent of the vote plus one. And so the top man and I ran off against each other. I think I had all the other opponents' endorsement. I had the bar endorsement as well as leading members of the bar.

Interestingly enough, I couldn't get an appointment to be even interviewed by the [Oakland] *Tribune*; that was then under the ownership of the Knowlands, and they were strongly Republican. My remaining opponent [Stafford Buckley] was a registered Democrat but he had always been house Democrat, if I can use the term. Nice man, I don't have anything against him, but he had always been close to the Republicans and had been part of them and it was just convenient that he be registered a Democrat and so they endorsed him.

That presented a very interesting situation in Alameda County. As far as I know, it was the first time a conservative newspaper came out in opposition to the bar endorsement, because they'd always backed up the bar endorsement. Very frankly, we hadn't had many Democrats with bar endorsements. We hadn't had many judicial races and so this was something new and the bar was fit to be tied.

Anyway, I lost, but I made a good professional showing and it was close, and for any number of reasons it was felt that I'd waged a good battle and so the following year, then, I was appointed by Governor Brown, and I must say it was only because of the persistent backing of Senator [Nicholas] Petris, who was very early in supporting women.

But what I found interesting in that race was someone from Mills College—I think it was Mills, maybe Cal, I'm not sure—told me, I can't quite recall accurately the statistics but it was something like: being a woman running for public office (this was 1964), one had a handicap of 17 percent of the vote; and the slogan of my opponent who had a paid professional person, which I did not, a paid PR campaign manager, was "The Man for the Job" or "It Takes a Man."

And then, when I ran for my present position in the superior court, it had gone from a -17, for a woman to run for office, to a +7 percent. The County of Alameda [is] divided into small districts, for the ease of counting. I won every single one of them, and there were over a hundred, I believe, except one, and it was just kind of a landslide. So I thought that was just kind of an interesting commentary on how times had changed for women, because my opponent was a sitting judge at that time.

Felitti: When did you get on the superior court?

Taber: I was elected in 1978 and took office in January of '79. I want to add this, because I feel very strongly that no one should run against a sitting judge. I have always felt that way as an attorney, as a judge; unless there's some very compelling reasons, and my opponent in that superior court race gave me very good reasons. He had problems with authority, and I had been asked to run when he'd only been on the bench ten months and I refused and no one ran against him and he was obviously elected.

But the second election after the full term of six years, I was again asked to go, and I said no. And then an attorney filed and the attorneys were very worried that he was not going to make it, and I was popular in the county. I had been out and very active in community activities and they felt that it was worse to have someone file against him and lose than if they hadn't filed in the first place, so at the last day I agreed to go. But it should never be done by anyone except for the very best reasons. There must be substantial unacceptance by both the public and practicing lawyers before anyone should file against a judge. This business of limiting their terms or filing against them just willy-nilly is one of the greatest jeopardies to the continued high caliber of our judiciary, I think, that's faced the state in a long time.

Felitti: Does it cause problems for management throughout the whole system?

Taber: Well, the real problem is [that] you don't attract competent attorneys. Who wants to give up a successful law practice to take on a contested election because somebody wants that job? The only ones that are going to do that are the people either that are retiring and have nothing to lose, which isn't a good healthy situation, or from public offices, and that's a very selected small segment of the lawyer population, or they're not making a living and have nothing to lose by it.

Governor Brown started with younger appointments, purely because of the bankruptcy condition of the judges' retirement fund, and that was followed by Reagan and by Jerry Brown; even younger and younger. And I think what happened then, instead of being a reward for a full life as an attorney, successful attorney, as a capping achievement, it turned into a new career which so many attorneys that were very young had never established in their practice and were very motivated to make a fine name for themselves as judges. It was shortly after this time that the judges' college was established and so they continue to take courses and training; judging is quite different than being a lawyer.

Felitti: Have you gone to judges' school?

Taber: Yes, I went to the very first judges' college [California Judicial College] and then I taught for a number of years there and I think it was the forerunner in the United States. The state college is considered to this time to be one of the finest, maybe the finest.

Felitti: Is it required for judges, or voluntary?

Taber: Oh, it's voluntary but the pressure is there. I'm sure there are some that haven't gone, but that's very unusual. Most judges are, appointees are, so eager to learn things. There's so much. Now, I had been a trial attorney for most of the eighteen years in practice and I thought I knew everything about what went on in the courtroom, and I'll be the first to tell you I didn't.

Felitti: Can you recall your first day on the job as a judge of the municipal court?

Taber: Gee, the first day, scared, I know that. No, I don't have any distinct recollections, it's too long ago. Just frightened and feeling very conspicuous.

I'll never forget one day, I hadn't been on too long, and our courtrooms at that time were indetical but sometimes reversed plans and I was filling in for a judge in the traffic court and that was a big courtroom, tremendous. At recess I got off the bench and tried to proceed with dignity and step down and go into my chambers, and couldn't find the blankety-blank doorknob. It finally became evident to me I had turned the wrong way. [Laughter] And my clerk, who was George Meese, the brother of Ed Meese, turned around and said, "Well, I'll have to hand it to you. You went back with all the dignity you left with." [Laughter] But anyway, those are things that strike panic in your heart when you're a new judge. When you've been around a while, you just learn to chuckle and take it in stride.

Felitti: Do you like being on superior court better than municipal?

Taber: Yes; I was on municipal for thirteen years and I think maybe I'd [have] been a better judge in superior court had I moved on more quickly. There's a saturation point. I came from civil practice and at that time there were almost no civil cases of any challenge at all. I continued in criminal, though, of course, when I came to superior court and then only more recently, I think five or six years ago, switched over to civil. But I'm thoroughly enjoying it—far more challenging, far more difficult, and I would have liked more years to be able to do that.

Felitti: Can you tell me what you do in a typical day as a superior court judge?

Taber: Well, sometimes my day starts quite early. We're a business too, you know, and we conduct our business through court committees. It's difficult to get the judges together and so what it usually means are early morning meetings. Sometimes they'll be late in the day but all of us have demands at the last minute that we don't expect: a witness that has to finish because he's leaving for Europe the next day or whatever, and so we don't have as much control as we do over our starting times.

Another thing we do is search warrants. Very often in superior court, where generally there isn't the time-of-the-essence problem, so either the police or the DA's investigator makes an appointment, and that's again often early in the morning or they may bring their search warrant in that preceding night if it's very long, as many of ours are that we sign in superior court. We'll take it home and read it at night.

In our court, court officially begins at nine. Then from nine to ten, if you're in a civil department, you have short causes which will be short trials, an hour or less, or more likely uncontested and small-claims appeals, change of names, and then every judge just about carries an ancillary assignment that may do one day a week or part of one day. Adoptions; I do mental health all day on Tuesday. So that's interspersed with our regular assignment.

Then basically, criminal law from nine to ten is sentencing time also. Then from ten 'til twelve or twelve-thirty, and generally most of us take an hour and a half for lunch, then the afternoon session, which—four, four-thirty, depending on the judge—is trial time for whatever the primary trial is going on. Then sometimes again at the end of the day there are some leftover motions or motions to make out of the presence of the jury.

Felitti: So your day is somewhat of a patchwork.

Taber: It is. I remember one of my clearest emotional responses to coming on the bench was that my feet were in concrete. When you're in the law office, if you have a well-run office, you leave messages with your secretary and she knows you inside out and sometimes writes better letters than the lawyer does, and she can just do almost anything.

When you come on the bench, you don't have that secretarial service. We don't have a secretary. The one who does our secretarial work is our reporter. Well, she's out there in court with us.

Felitti: Do you find you can ever socialize with other judges?

Taber: I don't; very rarely; and I like my colleagues very much and some of them I know do socialize; for instance, some were DAs together, and that friendship obviously continues, but one of the complaints that has been here over the years is that we just don't see each other. I'm very friendly with [Judge] Joe Carson, who's now my next-door neighbor, but usually my recesses are full of things that require my attention, as are his, but once in a while he'll wander over and we have a nice chat or we'll go to a meeting together.

But there isn't as much opportunity to socialize here, and I think we all regret it. When Judge [Allen E.] Broussard was presiding judge, he even found a spare room and furnished it as a lounge, trying to get us all to meet, but, you know, you have time and you relax in your own chambers. In the municipal court—and this is what he was trying to recapture, because I served with him in the municipal court also—we had coffee rooms on each floor and both the clerks and the judges used them and that was wonderful, because we would talk over things and learn a lot of things, just by happenstance sometimes.

Felitti: Since becoming a judge, are you able to fraternize with attorneys?

Taber: I don't. I had always heard that judges live a lonely life, and I thought, that won't apply to me because I had made friends outside of law when I was an attorney, and so I thought, that won't bother me, but that wasn't what they were talking about. I do think, though, that as time goes by, unless it's a very special type of close friend, you tend to drift apart, just because your paths don't cross that much any more and your interests are different.

I have not ever made an attempt to secure more attorney friends because I think it thwarts their style. I don't particularly want to make a friend with a lawyer, [so] that I [can] still feel free to decide his case and decide against him, and he's projected more onto our acquaintanceship than should have been projected. I don't want to disappoint him, and it can make a very sticky situation.

Felitti: Have you ever had situations where you had to recuse yourself from a given case?

Taber: Oh, sure. I think every judge has. Most of the time it isn't too hard to arrive at a decision, but it's not only that we do things properly but we appear to be doing them properly, and if it's somebody you know, even laying aside the fact you'll probably lose that person as a friend unless you rule with them,

and then you may lose their respect even if you rule for them, but the appearance of it is atrocious, and nobody who loses a case in that situation can believe it's on the merits.

So I think it behooves a judge to be, well, circumspect in his or her deportment and circle of friends. I think it's very hard when a judge has maybe let down his or her hair a little bit too much or, I suppose, had something to drink more than they should or lost their better judgment. It's very difficult to then show respect for that person in their business profession, whether it's the lawyer who's done it or the judge who's done it.

Felitti: So you have to keep up your good image even in your off time.

Taber: I think so, when you're fraternizing; I just don't think there's an off time. When you see somebody do something that's unpleasant or unacceptable; it's very difficult not to lower your estimate of that person.

Felitti: Have you seen, over the twenty-eight years that you've been on the bench, a marked change in the way cases are handled, perhaps in the sense of encouraging settlement more these days?

Taber: Oh yes, oh tremendous, tremendous. [But] we certainly always were interested in settling our cases. I remember that at one time here in Oakland, I swear three-quarters of the cases were settled at Dick Williams's Health Studio for Men, who was on the other half of the floor we were on, so I'd see them come out of there with their settlements, but women, of course, weren't allowed. Well, as health clubs opened to women, I think it became less [of] an opportunity.

The other place in Oakland that cases were settled often is Johnny's Coffee Shop, at Thirteenth and Franklin. I remember I had a case that I just had to settle. The doctor backed out at the last minute because he was going on vacation and he wouldn't appear, oh dear, and so I sat there almost the whole day drinking coffee, waiting for the attorney to show up and he finally did and we settled the case.

It used to be you could walk through the courthouse on any given day and hardly find a court in session because cases would settle and nobody was hurting. I think probably the quality of justice might have been a little better where judges had more time to read and think and reflect.

Be that as it may, pretty soon we needed the judges' time and the courtrooms so desperately to just handle the volume of cases that it was considered you were a slacker if you weren't out there presiding every minute of the trial day.

The courts reflect society generally, in my opinion. We just

don't concoct something here and change our procedure in a vacuum. Society in the mid-sixties became very permissive. Somebody was your peer, and never your superior and never your inferior, and by that I mean employment-wise or authority-wise. And as a result, the attorneys started running the courts, and it may have had something to do with younger judges. For one reason or another, lawyers took a much greater part, in my opinion, in running the [courts] and they'd ask for a continuance—"Your honor, we've stipulated for a continuance"—fine, and the courts were being pressed; they got one off their back, but at a terrible price.

And under Joe Carson, Judge Carson, where he's put a stop to all of that, I think the most grateful portion of our business comes from the trial attorneys, because now when they get a trial date, they know they're going to go.

And so, as the judges have returned to running the courts in an efficient manner, I think it's produced more justice. But I have seen that big transition of lawyers having much greater control over the court and I don't think it's a good idea. We have a business to run, to provide a good, businesslike forum for attorneys and litigants and I think it should be in the hands of the judges, and I'm glad to see this change.

Also, there was a period where—all part of this freedom of speech and everything else—where I swear in law school they must have been telling them, "Never mind the judge, that old fogey doesn't know what's goin' on," and they came out talking like social-welfare workers. Many times I'd like to get where they were going but they wouldn't spout law to show me how to get there. Just utter disdain of the judge, and that wasn't good, that wasn't good, and I don't think it was something unique to me. As a matter of fact, I had an edge on some of the judges because I'd been around a little longer but it happened, and that, I think, is disappearing very rapidly. It doesn't work well.

Felitti: Can you recall any other impacts of events in the sixties on the courts?

Taber: Well, we then—late sixties, early seventies—had the announced policy—whose announced policy? I guess it was Sacramento—legislated that the least restrictive alternative was to be applied in criminal punishment. But that was a lot of nonsense. And then "OR" became, although it had been on the books for many years, the hot current number. That's "released on their own recognizance." Why make people post bail to stay out of jail pending the trial? and when I came on the bench, I was completely in accord with that because people are presumed innocent until proved guilty. But it's not that simple. Especially with young people or people new to crime.

As a result, many young people went right on committing crimes and, with the stalling around of their attorneys, preventing it from going to trial, the kid developed a whole string of felonies and people were mad at him and he'd go directly to prison. That's not right. I don't think anybody should go to prison that hadn't had an opportunity to spend some time in the county jail at Santa Rita to see whether he liked it, and for heaven's sakes, it ought to be done early in their career before they have such a rap sheet that nobody wants them and that their spots are in too deeply. So I have a lot of reservations with things we did in the name of goodness and humanity, if we didn't do an awful lot of harm.

What our courts are very good at doing and should be encouraged to do is to find out what happened. Fact finding. And it should be done promptly. I worry about the length of trial, time of trial. When I first came on the bench, a murder trial took a week at the most. Now, our murder with special circumstances, I've taken nine months to do. Three months just to voir dire.

We've gone through the phase of where the lawyers have these, first they were psychologists who were psyching out prospective jurors and now it's some of them are lawyers who've also come with psychology backgrounds and they're doing it, and I think that's hogwash; I don't think the Constitution guarantees anybody the right to a pro jury. It's a cross-section. And so I don't like to see that kind of fiddling. I also think it doesn't mean a thing. Give me a good experienced attorney any day.

And now the new trend is to, of course, try the case before a [mock] jury. A lawyer picks a jury before he ever goes to trial to try out things. So things are getting honed so finely and so many things are done at trial that nowadays the trials take so long, months literally, that would have been tried in three days to five days and I have never, ever heard anyone say, "Ah, but they found more, more accurately have they found the facts, or that greater justice has prevailed." I have never seen anyone even suggest that, and I would not suggest it. But how you turn it back I don't know.

Felitti: What do you think of sentencing guidelines for criminal cases?

Taber: Terrible, terrible. We've gotten so we get so fearful of discretion of the court. That's part of the strength, has been part of the strength of the judiciary. Many times a judge is the only one that stands between an irate, demanding mob and a single, poor, unpopular defendant. And that judge ought to be able to do what's right for that defendant. Now, I think sentencing in municipal court, by the way, is far more significant

than in a superior court, because in muni court you're getting defendants that are either new to crime or are young and you can play much more customized sentencing than you can in superior court on the misdemeanors. You can still do much more than you can on the felonies. I think that's good.

Some people, you don't want to give more lessons in sterile living, unproductive living; you need to get them out working. I think we need almost a militarily-run CCC [Civil Conservation Corps] for many of our sentenced young people. First of all, we've got to try to divert people from the criminal-justice system. We rarely make a good person out of a criminal through what we do within the courts. I swear that the greatest thing the penologists have got going for them is the inertia of old age, which they call rehabilitation. We've got to divert people before they enter the system. Put more resources there.

I'm terribly worried about the quantity of money we're pouring in on the real losers, the "murder with special circumstance"; they have long rap sheets, not all of them, not all of them, but many have; they've learned to resolve all other problems by killing people, or relieve their tensions by killing people for no reason at all. And we pour money in, in their defense and on their appeal because we don't like to accept the fact that some people are bad. Now I understand that child abuse turns otherwise good children into bad children, I understand that, but we're not sophisticated enough to be able to reverse the process, and we need to spend more money at the beginning to protect the children so that doesn't happen. So, again, it's a societal problem, not just a court problem.

Felitti: Do you believe there is such a thing as rehabilitation, from what you've seen in your courtroom?

Taber: Not much. No, and I think it's very difficult for the government to do that. I think it can be done better privately, and I have in mind different grass-roots programs. Delancey Street in San Francisco, when it was founded, I remember when that occurred and I went over to see them. They ran a tight ship, that's the other point.

Society today and science today keep trying to relieve us of individual responsibility. It's terrible. Listen to your radio and see how we do everything possible so we don't have to say, you made a decision which is bad for society or bad for yourself; it's somehow you got pushed into that decision, "The devil made me do it," a sophisticated variation. That's dangerous and it's bad, because in a democracy, the only way it will work is that the vast majority of the people will voluntarily follow the law, and we're discouraging that.

Felitti: What do you think of judicial activism? What I mean by that term is when laws are interpreted in the court to the extent that they even are modified right in the courtroom.

Taber: I'm totally opposed. Now, when Justice Warren was chief justice (as you can see, I don't fear to tread anywhere, but these are my deeply felt beliefs), I had been just on the bench a short time, as I recall, when he was appointed. And I certainly approved of his goals, what he was trying to do, but I was terribly worried; I hadn't been on the bench long but I was there long enough to realize or to worry about what he was doing, because if you can change precedent so easily for the better, you can also change it for the worse. And so I was very opposed to the Rose Bird court, although they did many things that I was glad to see done, but the price we might pay was too great, and we don't know yet what that price will be.

Felitti: As a last topic to finish up here, what have you thought have been the rewards of your career as a judge?

Taber: Oh, just so, so many. I think the foremost one is that I got the opportunity to earn my living in the way I wanted to. I had no idea it was such a pioneer way. I just thought people got to do what they wanted to do, but very few people, men or women, have the foresight or are fortunate enough to have a little message inside that says "This is the way you want to go." I did. I'm grateful for that.

I'm so grateful I was able to accomplish the prerequisites of schooling, so grateful I got to earn my living practicing as I wanted to, and so grateful I've had the opportunity of going on the bench. I think it's creative; I like people; I thought sometimes I could make a difference in people.

I think another reward is that basically you're exposed to real fine people. You see decency and courage sometimes where you least expected to see it in litigants, both criminal and civil. You see a lot of destructive conduct but you can do something about it. You have the advantage of very bright, able people presenting different viewpoints and then picking the one you believe is the most appropriate under the law. So it's creative work in that sense. Seeing the way people solve their problems, particularly in civil law, is, I think, rewarding. I think if you like it, it's a wonderful way to go through life. I like the practice of law.

RECOPILACION DE LEYES DE LOS REYNOS DE LAS INDIAS.

MANDADAS IMPRIMIR , Y PVBLICAR

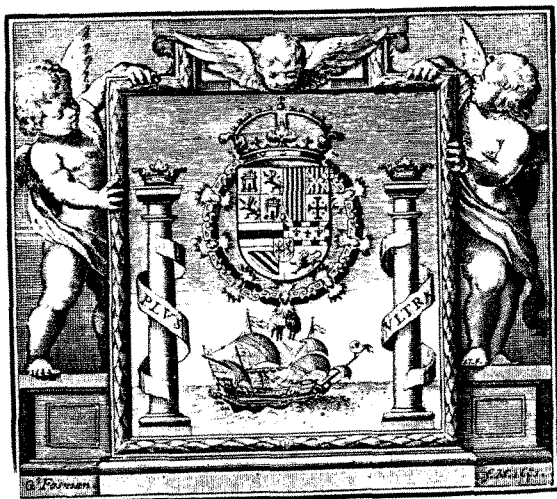
POR LA MAGESTAD CATOLICA DEL REY

DON CARLOS II.

NUESTRO SEÑOR.

VA DIVIDIDA EN QUATRO TOMOS,
con el Indice general, y al principio de cada Tomo el Indice
especial de los titulos, que contiene.

TOMO PRIMERO.



En Madrid: POR IVLIAN DE PAREDES, Año dc 1681.

The *Recopilacion de Indias*, published in 1681, was one of many sources of *derecho indiano*, or Spanish colonial law.

JUDICIAL PUNISHMENT IN COLONIAL NEW MEXICO

CHARLES R. CUTTER

THE centerpiece of the Spanish colonial political structure was a judicial system, rooted in medieval European tradition and modified by New World circumstances, which provided the foundation for the social ordering of the Indies. Here was a government of judges, in which nearly all officials carried some sort of judicial authority. The legitimacy ascribed to the legal system as mediator of social conflict was crucial, and in great measure colonial subjects found identity and defined themselves in juridical terms. Even in the late-colonial period, many held dearly to the notion that "the true job of the king is to do justice in his kingdom."¹ The legal system served as venue for the constant negotiations between the distinctive groups and individuals who made up this hierarchical society.

While the uniformity and longevity of the judicial superstructure might suggest rigidity and absolutism in statecraft, a closer scrutiny of the daily workings of the colonial legal system reveals a surprising degree of flexibility and local authority. Both the crown and the subject population served as guardians of public order and had a hand in resolving social conflict. This article focuses on one phase of judicial procedure that was perhaps most conducive to local modification, the

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¹Lorenzo Guardiola y Sáez, *El corregidor perfecto* (Madrid, 1785), 35. This notion is found throughout the period of the *antiguo régimen*. See, for example, *Las siete partidas del sabio Rey don Alonso el Nono* (Salamanca, 1555; facsimile edition, Madrid, 1974), 2.1.1. Also, Colin M. MacLachlan, *Spain's Empire in the New World: The Role of Ideas in Institutional and Social Change* (Berkeley, 1988), 8-13; Benjamín González Alonso, *El corregidor castellano (1348-1808)* (Madrid, 1970), 18.

sentencia, and seeks to demonstrate that in meting out punishment, the magistracy in colonial New Mexico kept in mind not only the desires of the crown but also the expectations of local society.

The composition of the magistracy of New Mexico underscores the point of shared responsibility in judicial administration. Every provincial magistrate carried the king's *vara de justicia*, but the two tiers of the judiciary had distinct outlooks. At the pinnacle of the provincial judiciary, the governors of New Mexico were *peninsulares*, the sole exception being Juan Bautista de Anza (1777-1787), who was born in Sonora. These were salaried officials, chosen mainly for their military skills, with few local ties. A governorship represented an important step in their careers, and, understandably, these officials were always attuned to royal instructions and expectations. To a large degree, the Bourbon-era governors of New Mexico embodied the will of the crown. Nevertheless, none had any formal legal training and their task as chief magistrate lay primarily in maintaining social order. Rather than acting imperiously, the governors usually endeavored to balance the needs and desires of the various constituents of frontier society—settlers, military personnel, clergy, Christian Indians, and others.

At an inferior level, the *alcaldes mayores* and their lieutenants tended to be native-born *hijos del país*, who came from prominent local families and who generally commanded the respect of provincial society. With some exceptions, this local arm of the king's judiciary acted responsibly and did not abuse their office for personal gain. While they, too, lacked formal juridical instruction, the local *alcaldes* understood well the social dynamics of their province. Clearly, they conceived of and administered colonial law from a provincial perspective.²

The individual involvement of ordinary frontier subjects—as plaintiffs, witnesses, and judicial aides—further augmented the local dimension of judicial administration in New Mexico (and throughout the Hispanic world). In demanding what they believed to be appropriate punishments for various offenses, they articulated their expectations of the system. As we shall see, the punishments imposed by judicial authorities conformed as much to the expectations of the participants as they satisfied the political will of the state.

The colonial judiciary sought justice in the convergence of

²A more detailed discussion of the local magistracy is found in Charles R. Cutter, *The Legal Culture of Northern New Spain, 1700-1810* (Albuquerque, forthcoming), ch. 4.

written law, legal doctrine, custom, and equity.³ Exercising his judicial discretion (*arbitrio judicial*)—"the power . . . to choose between two or more alternatives, when each of the alternatives is lawful"—the magistrate chose from among these basic elements of *derecho indiano* and sought solutions that squared both with legal and cultural norms (summed up in the juridical dictum *dar a cada uno lo suyo*).⁴ Because trial by jury was not a feature of the Hispanic legal system, the colonial magistrate protagonized the entire judicial process, especially the *sentencia*. Of course, the learned judge who sat on the *audiencia* possessed a much richer repertoire—textually and intellectually—than a local-level *alcalde*, but all of them recurred to the appropriate sources of contemporary law (i.e., *derecho*, in its fullest sense).⁵ Less adept at legal subtleties, the magistrates

³On the construction of *derecho indiano*, see Charles R. Cutter, "Community and the Law in Northern New Spain," *The Americas* 50 (April 1994), 467-80; Víctor Tau Anzoátegui, "La noción de ley en América Hispana durante los siglos XVI a XVIII," *Anuario de filosofía jurídica y social* 6 (1986), 193-232; and Abelardo Levaggi, "El concepto del Derecho según los fiscales de la Segunda Audiencia de Buenos Aires (1784-1810)," *Actas del VIII congreso del Instituto Internacional de Historia del Derecho Indiano* (Santiago, 1987), 245-59 [hereafter cited as Levaggi, "El concepto del Derecho según los fiscales"].

⁴Quoted in Aharon Barak, *Judicial Discretion* (New Haven and London, 1989), 7. Levaggi, "El concepto del Derecho según los fiscales," supra note 3 at 245-59. The idea that the principal aim of justice was "to give to each his own" (*dar a cada uno lo suyo*) appears repeatedly in the Hispanic world of the *antiguo régimen*, including the northern frontier of New Spain. For example, Spanish Archives of New Mexico, Santa Fe, New Mexico (SANM), II:316, Martín Hurtado v. Jacinto Sánchez, April 23-26, 1722. *Siete partidas* 3.1.3, "E los mandamientos de la iusticia, e del derecho son tres. El primero, que ome biua honestamente, quanto en si. El segundo, que non faga mal, nin daño a otro. El tercero, que de su derecho a cada vno." José Juan y Colón, *Instrucción jurídica de escribanos, abogados, y jueces ordinarios de juzgados inferiores* (Madrid: Imprenta de la Viuda e Hijo de Marín, 1795), 1, "La justicia es una constante y perpetua voluntad de dar a cada uno lo que es suyo." José María Álvarez, *Instituciones de Derecho Real de Castilla y de Indias*, 21, "La justicia, tomada en general, podemos decir que es: la observancia de todas las leyes que previenen no dañar a otro, dar a cada uno lo que es suyo y vivir honestamente."

⁵To understand the legal reasoning of the higher magistracy of the *antiguo régimen*, see Abelardo Levaggi, *El virreinato rioplatense en las vistas fiscales de José Márquez de la Plata*, 3 vols. (Buenos Aires, 1988). Other sources include the Colección Mata Linares at the Real Academia de Historia, Madrid, and the work of an eighteenth-century Mexican jurist, Juan de Torquemada, housed at the Biblioteca Nacional, Madrid, ms. 20311, "Varias Alegaciones Jurídicas que el Lic.do D. Juan Antonio de Torquemada, Abogado de la R.l Audiencia de esta Nueva España, Dixo En sus Reales Estrados, en los de su Real Sala de el Crimen, y en los de el Juscado, y Audiencia Ecclesiastica," 1724-1725. See also Víctor Tau Anzoátegui, "La costumbre como fuente del Derecho Indiano en los siglos XVI y XVII: Estudio a través de los cabildos del Río de la Plata, Cuyo y Tucumán," *III congreso del Instituto Internacional de Historia del Derecho*

INSTRUCCION JURIDICA DE ESCRIBANOS, ABOGADOS

Y JUECES ORDINARIOS DE JUZGADOS
inferiores:

DIVIDIDA EN TRES LIBROS,
CUYAS ESPECIES EXPLICA LA TABLA Ó INDICE DE ELLA:
FUNDADA EN LOS DERECHOS CANÓNICO
y Real, para descargo de ambos Fueros.

E S C R I T A

*Por Don Joseph Juan y Colom, Bachillér en Sagrados Cánones,
y Escribano de los Reynos de S. M. natural
de Valencia y su Ciudad de S. Felipe.*

UNDECIMA IMPRESION.
TOMO SEGUNDO.



CON PRIVILEGIO.

En Madrid: En la Imprenta de la Viuda è Hijo de Marin.
Año de 1795.

A costa de la Real Compañía de Impresores y Libreros del Reyno.

ED

Formularies such as *Instrucción Jurídica de Escribanos, Abogados, y Jueces Ordinarios*, by José Juan y Colón, apparently circulated in New Spain's far northern frontier and helped guide magistrates in matters of criminal procedure. Still, the punishments for assorted criminal activities were usually left to the discretion of the judge.

of colonial New Mexico tended to rely more on custom and equity than their counterparts in the urban centers of empire.⁶ In doing so, the provincial judiciary may well have paid more attention to the expectations of local society.

A judge had several options at the time of pronouncing sentence. He might absolve the defendant, impose punishment, or strike something of a compromise between parties. An example of judicial absolution occurred in a case of criminal assault perpetrated by a young Spaniard, Francisco Padilla, against Juan Antonio, a Suma Indian who seems to have been quite acculturated. In mid-June 1737, the two had got into an argument over the Spaniard's stray livestock and, as tempers flared, Juan Antonio called Padilla a "snot-nosed dog" (*perro mocoso*). Padilla's response was physical—he attacked his adversary with a stick, delivering several blows to the head and allegedly breaking Juan Antonio's arm in the process. Juan Antonio brought a formal complaint (*querrela*) before Alcalde Mayor Juan González Bas, who began the preliminary proceedings (*sumaria*), imprisoned Padilla, and remitted both the paperwork and prisoner to the governor in Santa Fe. One month later, Juan Antonio had recovered from the attack, as verified by the *alcalde* mayor, and dropped his complaint against Padilla. At this point, Governor Enrique de Olavide y Michelena rendered his decision. He freed from prison and absolved Francisco Padilla because the suit had been dropped and because the victim ran "no risk to his life or to his health" and had recuperated sufficiently to pursue his livelihood. Yet the governor assigned to Padilla not only the cost for the cure of all injuries, but also the "damages that, by reason of being impaired, Juan Antonio has incurred," including his daily maintenance while unable to work. With the help of his father, the young man satisfied the debt—two pesos for the *curandero*, forty-five pesos to Juan Antonio, and seven pesos five reales for judicial costs—to secure his release. Finally, Governor Olavide y Michelena warned Francisco Padilla "to restrain himself in wanting to punish the

Indiano (Madrid, 1970), 115-92; Tau Anzoátegui, "La doctrina de los autores como fuente del Derecho Castellano-Indiano," *Revista de Historia del Derecho* 17 (1989), 351-408; Abelardo Levaggi, "El Derecho Romano en la formación de los abogados argentinos del ochocientos," *Derecho* 40 (1986), 17-33.

⁶A similar situation is found in Río de la Plata in the period just preceding independence. See Ricardo Zorraquín Becú, *La organización judicial argentina en el período hispánico*, 2d ed. (Buenos Aires, 1981), 26, who asserts that "el derecho . . . quedaba subordinado naturalmente a los principios de equidad que no buscan tanto el rigorismo legal cuanto derivan de un ideal de justicia fundado en las normas morales y religiosas. En otras palabras, la misión de los jueces no era ajustarse a la ley sino procurar el bien público, el bien común, supremo objetivo de la acción estadual."

Indians, not meddle with them, nor look for disputes with anyone, under pain of being punished severely and with all the rigor of the law" should another complaint be brought against him.⁷ Judicial absolution, then, was seldom total. In some way, the wrongdoer expiated his guilt.

THE WIDER IMPLICATIONS OF JUDICIAL PUNISHMENT

Far more frequently than absolving the defendant, magistrates imposed punishments of varying degrees. With rare exception, fundamental juridical texts of the *antiguo régimen* are silent on how each type of crime should be punished, nor did Hispanic jurists dwell on the subject. Yet most contemporaries agreed on the purpose of judicial punishment. Its prime function was to repair the damage done to society and, according to some eighteenth-century thinkers, to correct the defect of the guilty party.⁸ But another aim, perhaps more important, also existed—punishment was to serve as a deterrent to others.⁹ A seventeenth-century jurist employed a naturalistic metaphor to demonstrate this duality of purpose. "It has the effect of lightning," wrote Jerónimo Cevallos, "which, striking to punish one, frightens many; and so with one blow, it serves as example and punishment."¹⁰ Magistrates in the far reaches of New Spain shared this understanding of these essential qualities of punishment.¹¹

To serve both ends of punishment the public as well as the culprit thus had to be made aware of the sentence. One effective method was public proclamation of the magistrate's sentence. In 1745, Alcalde Salvador Martínez warned Manuel Baca "one, two, and three times" to obey a local ordinance regarding the cutting of firewood in the thickly wooded *bosque* along the banks of the Rio Grande near Pajarito, just south of Albuquerque.

⁷SANM II:418, "Autos criminales fechos contra Fran.co Padilla por Querella de Juan Antonio sobre Vnas heridas y otros daños," June 12-July 12, 1737. Although an Indian, Juan Antonio referred to himself as a "vecino" of San Clemente, thus revealing something of the social fluidity in colonial New Mexico.

⁸Francisco Tomás y Valiente, *El Derecho Penal de la monarquía absoluta (siglos XVI-XVII-XVIII)* (Madrid, 1969), 353-54.

⁹Joaquín Escriche, *Diccionario razonado de legislación y jurisprudencia* (Paris, 1869), 1400; *Siete partidas* 7.31.

¹⁰Jerónimo Cevallos, *Arte real para el buen gobierno de los reyes y principes y sus vasallos* (Toledo, 1623), 60.

¹¹For example, SANM II:13, "Autos criminales contra Ju.o caititi yndio," June 22, 1682. For an example from Texas, see Bexar Archives (BA), r. 14 fr. 921, Proceedings against Juan José Vergara, February 4-June 30, 1782.

por el dho. p. en sentencia, en la persona y consue, y
 entendido de su efecto = Dho. lo que queda por cian
 da p. en sentencia y vedicio, y por nunciada en los dho.
 autos: lo que dio por su respuesta del dho. fe, y no p
 mo por el dho. no saues, y lo hicie ya actuando como
 Nuevo dho.

Henrique de Arana
 Y Michimaz

Pedro de Arana
 Pedro Joseph de Arana

En los autos, y Causa Criminal, que de Quetzalla dada por
 Sentencia Juan Ant^o Indio de Nacion Suma, contra Fran^{co} Padilla Ni
 zino dela Nra de Albuquerque, preso en el cuerpo de Guardia de
 de N. e Recidos, sobre aver dado unas bridas...
 a dho Juan Antonio de animo del Pueblo
 de S. Agustin dela Pila, apudados por el M.
 maior de dho Nra Cap^{ta} Juan Gonzales Barz,
 hechas las Diligencias en Dio neasual con los
 testigos y confesion examinados en la Sumaria:
 Nra la Confesion del Nro y testigos y tiene
 dados: Nra animo el testimonio dado por
 dho M.^o dela Nra de Quetzalla de dho
 Juan Ant^o y las demas diligencias y confesion
 del proceso, con todo lo qd ver conviene.

Lo que atento a sus meritos a y me Rnito, quedo absolver y absolver de
 la inllancia a dho Fran^{co} Padilla, por confesar, como contra de dho

A portion of the *sentencia* in the criminal proceedings of Juan Antonio, a Suma Indian, versus his Hispanic neighbor, Francisco Padilla (Spanish Archives of New Mexico)

que. Baca refused to comply and was brought to justice. Viewing Baca's defiance as a challenge to royal authority, Governor Joaquín Codallos y Rabal himself issued the final sentence.

And so that it might serve as a lesson to the defendant and as an example to others, I order that this decree be made known on a feast day, after the celebration of the Sacrament of the Holy Mass, in the most public place of said villa; and that it be kept, fulfilled, and executed inviolably, allowing neither pleas nor petitions regarding its content.¹²

Not only was the sentence made public, but it was done in a way that would attract as much attention as possible in the community. As the preceding case demonstrates, public pronouncement as well as public humiliation might also play a role in shaping the *sentencia*. Manuel Baca, and those who knew him, would always remember the day that his punishment was pronounced in the "most public place of said villa."

As deterrents, public humiliation and shame no doubt work best in close-knit communities where peer opinion carries considerable weight. In many respects, colonial New Mexico was a pre-modern environment where nearly "every individual had some sort of social and familial relationship with everyone else" and where local magistrates were "loath to pass a severe sentence upon a defendant who was known in the community and probably on familiar terms with members of the judicial staff itself."¹³ In these simpler social settings, public shame often proved to be an appropriate form of punishment.

Inextricably linked to humiliation and shame are the ideas of honor and respect— notions held in the highest esteem, even on the frontier.¹⁴ The judicial system reflected these values. Con-

¹²SANM II:467, "Causa criminal de officio de la R.l Justicia contra Manuel Baca Vecino del Puesto de Paxarito Jurisdicción de la Villa de S.n Phelipe de Alburquerque, sobre inobediencia a lo mandado por este superior Gobierno, y lo demás que consta en dha causa," October 5-18, 1745.

¹³Michael Weisser, *Crime and Punishment in Early Modern Europe* (Atlantic Highlands, N.J., 1979), 67, 66.

¹⁴On ridicule as a form of punishment in pre-modern Europe, see *ibid.* at 64-65. The concept of honor in colonial New Mexico is a dominant theme in Ramón A. Gutiérrez, *When Jesus Came the Corn Mothers Went Away: Marriage, Sexuality, and Power in New Mexico, 1500-1846* (Stanford, 1991) [hereafter cited as Gutiérrez, *When Jesus Came*]. See also *idem*, "Honor Ideology, Marriage Negotiations, and Class-Gender Domination in New Mexico, 1690-1846," *Latin American Perspectives* 12 (Winter 1985), 81-104. For a discussion of the notions of honor in colonial Mexico City, see Patricia Seed, *To Love, Honor, and Obey in Colonial Mexico: Conflicts Over Marriage Choice, 1574-1821* (Stanford, 1988), 61-74, 136-57.

sider the case of María de los Dolores Gallego and Andrés Martín against Eusebio Chaves. In a heated quarrel over land and water use, Chaves had assaulted his father-in-law, Martín, causing serious physical injury. After a well-conducted *sumaria* by Teniente de Alcalde Mayor Baltasar Griego, Governor Tomás Vélez Cachupín sentenced Chaves to pay court costs of fifteen pesos six reales as well as medical expenses incurred in the course of Martín's recuperation. Moreover, the governor required Eusebio Chaves to kneel and beg forgiveness of his father-in-law in full view of the entire community. In this way the crown reminded society of the proper respect that is due a son to his father, thereby reenforcing patriarchal notions of community and, by extension, social and political hierarchy.¹⁵

Concern for community harmony can be found in yet another aspect of the sentencing process. Those who upset the social equilibrium and transcended accepted norms of morality faced exclusion. Crimes such as adultery or fornication often resulted in banishment. In 1744 Juana Martín brought a complaint against her husband, José de Armijo and his alleged mistress, Gertrudis de Segura, with whom he had been carrying on for some fifteen years. In her complaint (*querella*), Juana Martín asked that Gertrudis de Segura be banished; as for her husband, Juana suggested that the judge "impose upon him severe punishment, so that—because of this complaint or in revenge—he might not mistreat me in deed or in word." In the end, the married couple were reconciled, and Segura, a "mulata soltera," was exiled to El Paso, "or some other distant place," a sentence later commuted to banishment at Santa Cruz de la Cañada (some twenty-five miles from the capital) for a period of four years.¹⁶

Judicial authorities construed incarceration as yet another form of punishment. Idealized as a method to assure the presence of a defendant, it was considered not punitive but, rather,

¹⁵SANM II:590, "Año de 1765. Autos seguidos contra evseblio chaves," June 3-July 2, 1765. The case is also described in Gutiérrez, *When Jesus Came*, supra note 14 at 205-6.

¹⁶SANM II:458a, "Causa Criminal Por Querella de Juana Marttin Contra Joseph de Armijo, en razon de el amanseuam.to Con Gertrudis de Segura, mulatta Soltera," July 20, 1744. Juana later dropped her *querella*, saying that she had been agitated [fue violentada] "del selo de muguer, no advirttiendo, por entonses con alguna, en los graues daños que de ella se podian seguir . . . y auiendo considerado que soy chrisptiana, y que el dho mi esposo, no me ha faltado ni me faltta en todo aquello, que le es de obligasion en la manutension y bistuario, y todo quanto alcanza con su trauajo, todo lo gasto. Yo en casa." This and other incidents of women's involvement with the legal system in New Mexico are also cited in Rosalind Z. Rock, "'Pido y Suplico': Women and the Law in Spanish New Mexico, 1697-1763," *New Mexico Historical Review* 65 (April 1990), 145-59.

a neutral step in the judicial process.¹⁷ A complex penitentiary system—typical of today—was not only costly but superfluous, because the objective of jailing was not punitive. Nevertheless, by the eighteenth century, incarceration—or the express threat thereof—had found its way into the Hispanic judicial system of which New Mexico was a part. In 1753, for example, Governor Tomás Vélez Cachupín threatened a fifty-peso fine and three months in jail for breaking a local ordinance. An earlier *bando* of a similar nature, which prohibited pasturing animals at the ciénega de Santa Fé, called for a one-month stint in jail.¹⁸ And in 1808, the *vecinos* of Santa Fe certified that Governor Joaquín del Real Alencaster had overseen prudently the administration of justice, “punishing certain vices . . . with days or months of prison.”¹⁹

Although not usual, punishment by incarceration was applied for minor offenses. More commonly, magistrates commuted some other punishment if the convict had suffered incarceration during the judicial process. From the local level to the audiencia, this practice held sway throughout New Spain. Thus, magistrates evidently viewed incarceration as a punishment and not simply as a neutral phase in the judicial process.²⁰

While judges sometimes used the threat of prison, they preferred other methods for deterring undesirable behavior. A

¹⁷*Siete partidas* 7.29. Pedro Carrillo y Sánchez, *Prontuario alfabético de legislación y práctica* (Madrid, 1840), 211, “Las cárceles sólo están destinadas para la custodia y no para tormento de los reos.” María Paz Alonso Romero, *El proceso penal en Castilla (siglos XIII-XVIII)* (Salamanca, 1982), 196-97. José Luis de las Heras Santos, *La justicia penal de los Austrias en la corona de Castilla* (Salamanca, 1991), 268 [hereafter cited as de las Heras Santos, *Justicia penal de los Austrias*]. Nevertheless, in the early seventeenth century, Alonso de Villadiego de Vasconiana y Montoya, *Instrucción política y práctica judicial* (Madrid, 1766), 201, revealed that “la Cárcel no se inventó para pena de los delitos, sino para guarda de presos, mas con todo en algunos se puede, y debe dar por pena al delincente . . . y aun ya oy es tanto la Cárcel para pena, como para guarda de los presos.”

¹⁸SANM I:1248, Order of Governor Tomás Vélez Cachupín. Santa Fe, March 29, 1753; SANM I:1251, Bando of Francisco Cuervo y Valdés, Santa Fe, April 25, 1705.

¹⁹Archivo de la Real Audiencia de Guadalajara, Guadalajara, Jalisco, Mexico, sin catalogar, Civil 1809-1819. Certificación of the *vecinos* of Santa Fe, June 25, 1808.

²⁰For example, SANM II:515, “Criminales contra Alejandro Mora vecino de Bernalillo sobre resistencia a la Justicia; maltrato de su mujer y de una yndia su sirviente,” September 23, 1751–November 6, 1752. For a similar approach in Texas, BA “Declaración tomada a D. José Antonio Sausedo sobre azotes que dio a un sirviente suio,” July 8–October 3, 1809. The case is cited in Odie B. Faulk, *The Last Years of Spanish Texas* (The Hague, 1964), 95.

common form of punishment was to impose fines, most of which went to cover court costs (*costas procesales*). Less frequently, a magistrate sentenced a criminal to pay for certain damages that had resulted from his criminal activity, most commonly in cases of assault. Typical is the case of José Manuel Trujillo against Antonio and Juan Domingo Valverde, both from the jurisdiction of Santa Cruz de la Cañada. During a fight over the alleged deflowering of Trujillo's daughter, the Valverdes had beaten Trujillo over the head with a stick and a hoe, instruments handily available to farmers. After the *sumaria*, Governor Joaquín Codallos y Rabal punished the Valverdes by imposing a fine of twenty pesos to cover the costs of curing Trujillo's wounds.²¹

Forced labor was another customary punishment. Given the relative lack of specie in New Mexico, the practice of work punishments, rather than judicial fines, prevailed. In cases of lesser severity, criminals were often assigned to some form of public works project, as in the case of Tomás Méndez. For his criminal assault of Cristóbal Maese, Méndez was condemned to pay the cost of Maese's cure, and to "make five hundred adobes to repair this villa of Santa Fe."²²

Crimes of greater magnitude brought more punishment than making adobes. A frequent sentence for those convicted of particularly heinous crimes, or for habitual offenders, was that of being sent to an *obraje*, especially the mining works in various parts of Nueva Vizcaya. No *obrajes* existed in New Mexico during the colonial period, though in the 1780s officials proposed such a plan.²³ While magistrates in other parts of New Spain, and in Spain itself, often sent convicts to the dreaded presidio-prison at San Juan de Ulúa, this does not seem to have been the case for sentences pronounced in New Mexico.²⁴ To be sentenced to an *obraje* in New Spain's far north was apparently a severe measure, and only brutal crimes received such a punishment.

²¹SANM II:498, "Causa criminal de querrela de Joseph Man.l truxillo Contra Antonio Balverde, y los hijos suios," September 10-30, 1748.

²²SANM II:105, Tomás Méndez v. Cristóbal Maese, December 28, 1704-January 15, 1705.

²³Archivo General de Indias (AGI), Guadalajara 354, Conde de Revillagigedo to Antonio Valdés, México, March 27, 1790.

²⁴Ibid. Ruth Pike, "Penal Servitude in the Spanish Empire: Presidio Labor in the Eighteenth Century," *Hispanic American Historical Review* 58 (February 1978), 21-40.

CAPITAL PUNISHMENT IS DECREED ONLY RARELY

Perhaps somewhat surprisingly, given the authoritarian nature of the Spanish state, there exist only a few cases of capital punishment in New Mexico during the colonial period. Common to all is the particularly brutal, cruel, or treacherous means by which the crimes were committed.²⁵ To execute a death sentence, a provincial magistrate first had to send the criminal proceedings to some superior authority. And from at least 1765, any judicially imposed corporal punishment also required the approval of the corresponding *audiencia*—in the case of New Mexico, the *Audiencia* of Guadalajara.²⁶ Documentary evidence indicates that even before this date provincial governors in New Mexico routinely sent cases of a grave nature to some sort of legal adviser for an opinion.²⁷

The reluctance to impose capital punishment was not unique to the far north of New Spain. Throughout Spanish America, as well as on the peninsula, the death sentence was rare.²⁸ A report on the affairs of the *Audiencia* of Guadalajara for 1798 shows that of the 265 persons tried in criminal cases during the year, the tribunal did not issue a single death sentence, although seven were so condemned in absentia. To the contrary, over half (142, or 53.6 percent) received no judicial punishment at all. If one includes those who eluded authorities, an even greater number escaped castigation.²⁹ This lenitive

²⁵For example, SANM II:673, "Causa Criminal contra las reas M.a Fran.ca y M.a su madre sentenciadas a muerte con parecer de asesor," April 22, 1773; SANM II:690, Mendinueta to Bucareli, Santa Fe, October 14, 1775.

²⁶AGI Guadalajara 334, Parecer de Fiscal, Madrid, April 8, 1767. A precedent existed under the *Reglamento* of 1729 (n. 40, 100), which applied to military jurisdiction and required that criminal cases that merited capital punishment be forwarded for review to the viceroy (as capitán general).

²⁷For example, SANM II:187, Criminal proceedings against Miguel Luján, April 20, 1713-October 22, 1714.

²⁸William B. Taylor, *Drinking, Homicide, and Rebellion in Colonial Mexican Villages* (Stanford, 1979), 98, notes this phenomenon in central and southern New Spain. Michael R. Weissner, *The Peasants of the Montes: The Roots of Rural Rebellion in Spain* (Chicago and London, 1976), 78, states that "of more than fourteen hundred sentences pronounced [from 1600 to 1690] in the courtroom of Toledo covering every conceivable social crime, no Montes peasant was ever condemned to the galleys or subjected to any other form of corporal punishment, even in cases of murder and rape."

²⁹AGI Guadalajara 365, "Lista de negocios despachados, 1798," Guadalajara, December 31, 1798. The breakdown of the *audiencia*'s sentencing is as follows: "46 sent to [work] prison; 29 condemned in absentia to the same destination; 19 to public works in this city [Guadalajara]; 7 to the gallows in absentia; 3 to [the Hospital of] Belén because of illness; 3 dead; 114 set free; 8 women sentenced to house of correction of this city; 5 women to the same destination

quality of the sentences is, to many, one of the more surprising features of the Spanish colonial judicial process. Yet, considering the nature of many colonial communities, with their close social and familial relationships, it is understandable.

One of the characteristics of the *antiguo régimen* was the notion of inequality—or perhaps, as Abelardo Levaggi has suggested, “relative equality”—under the law.³⁰ Indeed, the legal system bolstered the ideal of social hierarchy, granting privileges, exemptions, and special treatment according to one’s corporate identity (clergy, military, guilds, universities, Indian communities, and so forth). On the peninsula, lineage, corporate membership, and profession served as indicators of social standing and legal status. These were important in the Indies, too, but racial identity was perhaps a greater determinant of place in society because it affected so greatly one’s possibilities for corporate association. Not surprisingly, the judiciary in Spanish America considered race when determining appropriate punishment.

Such racial distinctions also were made in the far north, but their actual implementation is somewhat ambiguous. In 1768, for example, the governor of New Mexico, Pedro Fermín de Mendinueta, declared that for robbery, “if the person is of *color quebrado* [a half-breed] they will receive twenty-five lashes at the pillory; if white they will be tied to the pillory and shamed publicly with the item they stole hanging from their neck.”³¹ To be sure, those who did suffer the lash were of lower castes. Convicted in 1742 of apostasy and flight, kidnapping, and breaking jail, the *genízaro* Luis Quintana paid for his errors with two hundred lashes in public and four years of labor at the mining works of San Felipe el Real de Chihuahua.³² On the other hand, Cayetano Pasote, a mixed-blooded *lobo*, had a better fate. Pasote was convicted of having assaulted the gover-

in absentia; 1 who hanged himself; 2 insane, one to Belén in this city, the other to the one in Mexico City; 28 who were not put in prison because it was deemed not appropriate to the merits of their cases; total 265.”

³⁰Abelardo Levaggi, *Manual de Historia del Derecho Argentino (Castellano-Indiano/Nacional)* (Buenos Aires, 1991), tomo 2, 7 [hereafter cited as Levaggi, *Manual de Historia del Derecho Argentino*]. For a discussion of the idea of legal inequality in Spain, see de las Heras Santos, *Justicia penal de los Austrias*, supra note 17 at 19-27.

³¹Cited in Gutiérrez, *When Jesus Came*, supra note 14 at 191; also in Adrian Bustamante, “‘The Matter Was Never Resolved’: The *Casta* System in Colonial New Mexico, 1693-1823,” *New Mexico Historical Review* 66 (April 1991), 159.

³²SANM II:441, Proceedings v. Antonio Jiménez, Felipe Trujillo, and Luis Quintana, July 8, 1741-July 31, 1742. The *genízaros* of New Mexico were Hispanicized Indians, usually of Plains Indian background, who lived among hispanic *vecinos* and in their own communities, such as Tomé and Abiquiú.

nor's cashier—wounding him seriously with a knife thrust to the face—and, on another occasion, of having broken into the house of the daughter of a prominent citizen, Felipe Tafoya, with intent to kill the latter. Cayetano Pasote managed to avoid the two hundred lashes of his original sentence because he had spent one and a half years in confinement, a circumstance that Governor Tomás Vélez Cachupín felt was a suitable substitute. (Additionally, the convict was banished downriver to Tomé, just south of Albuquerque, for ten years.)³³ Yet the paucity of instances of corporal punishment—as opposed to the overwhelming evidence of other, non-corporal forms—suggests that magistrates in New Mexico and other areas of the far north sought to avoid such dramatic, violent, and perhaps socially disruptive displays of discipline.

Indians also had special status under colonial law, but unlike that of persons of mixed blood, theirs was judicially favorable. Despite their very real social and economic subordination, indigenous persons were legal minors and were in theory to be treated with mildness for correction of their faults. Juan de Solórzano Pereira, for example, believed that “their punishments must be tempered.” And a late-eighteenth-century jurist, Juan Gregorio de Zamudio, noted that “all the authors . . . recommend that judges be temperate in cases [involving Indians], that they lessen their punishments, that they behave with the love of true fathers and not with the severity of rigorous judges.”³⁴ In New Mexico, as one governor pointed out, magistrates were to act according to “royal orders that say that crimes committed against Indians must be punished with greater rigor than those committed against Spaniards.”³⁵ Little evidence supports the view that Indians were given lighter sentences, but neither were they punished with greater severity, and occasionally their supposed ignorance played to their advantage. This is perhaps because, especially in New Mexico, Indians constituted a vital and stable element of the colony. And, as members of the larger community, their persistent and daily contact with Hispanic neighbors helped to ensure more even-handed treatment by the judiciary.

In the event of conviction, one might always hope for an *indulto*, or a pardon from the crown. Usually these applied

³³SANM II:517, “Criminales contra Cayetano Pasote, calidad lobo, sobre unas heridas y lo demas que dentro se expresa,” January 12, 1751–November 23, 1752.

³⁴Both quotes in Levaggi, *Manual de Historia del Derecho Argentino*, supra note 30 at t. 2, 105, 279.

³⁵SANM II:447, Proceedings against Juan Miguel Alvarez del Castillo, Baltasar Baca, and Gregorio de Benavides, September 11–24, 1743.

generally throughout the empire, and milestones in the personal lives of the royal family—marriages, births, accessions to the throne, and so forth—often found expression in an empire-wide *indulto*. A convict languishing in the presidio at San Juan de Ulúa or making adobes in the hot desert sun surely derived special satisfaction from hearing of some such joyous event. Typical of the general pardons were those that took place in 1781 on the occasion of the “felicitous delivery of the Princess of Austria, Our Lady.” The commandant general proclaimed the good news throughout his jurisdiction, and authorities in New Mexico publicized the corresponding *indulto*.³⁶ More important for the convicts in the far north, like others in New Spain, the authorities apparently secured their releases.³⁷

Judicial punishment of crime in northern New Spain reveals one facet of the colonial political apparatus, a system in which crown and subject both shared responsibility. In New Mexico, the most common punitive measures that magistrates adopted were forced labor, fines, and banishment. Capital punishment was rare. These punishments—imposed by both peninsular and native-born officials—corresponded in part to the political and administrative exigencies of the crown, for they maintained social order while they alleviated the drain on the imperial treasury. The punishments also satisfied the needs and desires of the local inhabitants, who expected and got from the legal system a venue for mediating conflict. The composition of the provincial magistracy, the construction of *derecho indiano*, and the cultural consensus on the nature and aim of punishment were important factors that account for a flexible judicial apparatus that responded to local circumstances.

³⁶AGI Guadalajara 277, Caballero de Croix to José de Gálvez, Arizpe, October 23, 1781.

³⁷For an example from Texas, BA, r. 38 fr. 303, Proceedings against Martín de Jesús, June 23-October 24, 1808. For other parts of New Spain, see AGI Guadalajara 318, “Lista de la qual se manifiesta el estado de los negocios civiles pendientes, y conclusos en esta Aud.a Pub.a. Año de 1813.” Of the ninety-three cases listed under the heading “Causas Conclusas,” twenty-four received *indultos*. Some of these had been convicted for serious crimes such as murder.

BOOK REVIEWS

Playing the Cards That Are Dealt: Mead Dixon, the Law, and Casino Gaming, by R.T. King. Reno: University of Nevada Oral History Program, 1992; 262 pp., illustrations, index; \$19.95, cloth.

This unusual autobiography is a form of oral-history testimonial that deserves at least brief consideration in the context of juristic history and the gray area of casino gambling. It invites perusal by students of history and the law.

Mead Dixon was a Nevada lawyer who rose to prominence as legal adviser to William F. Harrah, one of the nation's leading entrepreneurs in legalized gambling. Eventually, after Harrah's death, Dixon became president of Harrah's gambling empire in Nevada and Atlantic City and guided the merger of Harrah's into the corporate structure of the Holiday Inn. He died shortly after having completed the interviews in this volume.

The interviews were conducted by Ken Adams, a consultant to the Oral History Division of the University of Nevada in Reno, and rendered in narrative form by R.T. King, director of that program. King rearranged the raw material into a coherent pattern; thus, from the historian's point of view, this is primary historical material that has been processed and refined.

Those who seek information on the history of the bench will find little here of interest, but those who reflect on the bar will identify Dixon as a latter-day Horatio Alger who rose in the profession by a combination of luck, hard work, and obvious skill in the practice of law. After an impoverished youth in Illinois and a stint in the military during World War II, he rushed through law school at the University of San Francisco and passed the Nevada bar examination before he had finished his law degree. For several years he survived in Reno on the cast-offs from other lawyers in the town's provincial but exotic legalistic climate.

Neither Dixon nor King tells us much about the evolution of law or important litigation in the gambling business, although Dixon was intimately involved in the expansion of the Harrah network. He spent much of his career constructing deals for this and other casino enterprises, including some of the major gambling and hotel resorts on the Las Vegas Strip—work that, by his own account, he found fulfilling and rewarding.

It is evident that Dixon was an honest and industrious attorney who took a direct, active interest in the well-being of his clients. He was widely respected in the profession, and speaks candidly of judges and lawyers whom he admired or disliked. Much of his conversation here is casual and colloquial, belying the careful approach to the legal challenges that he undertook.

One surprising aspect of this book is Dixon's unfavorable attitude toward the efforts of the Nevada Tax Commission and the Gaming Control Board to regulate gambling. He considers that the Nevada agencies had excessive power in the 1950s, when they were trying to purge the casino business of organized crime, whereas most scholars who have written on the subject assume that the agencies were too weak to do their job effectively.

Playing the Cards That Are Dealt is handsomely produced. Its production was made possible with financial assistance from the Harrah's organization.

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The People v. Clarence Darrow: The Bribery Trial of America's Greatest Lawyer, by Geoffrey Cowan. New York: Times Books, 1993; 546 pp., notes, selected bibliography, index; \$27.50, cloth.

Most criminal-defense lawyers have represented clients who, midway through trial, decide they are dissatisfied with their defense counsel and demand to take over their own defense. Judge and counsel try to convince the defendant that anyone who represents him or her self has "a fool for a client." That old adage does not apply, however, when the defendant is Clarence Darrow, the country's most famous and eloquent lawyer, who, as a criminal defendant, took over from his attorney, brilliantly cross-examined opposing witnesses, gave a closing argument that moved the judge, jury, and courtroom spectators to tears, and, in the face of strong prosecution evidence, was acquitted after jury deliberations lasting less than forty minutes.

In *The People v. Clarence Darrow*, Geoffrey Cowan focuses on two cases from Darrow's career: the 1911 murder case arising from the bombing of the *Los Angeles Times* building, and the resulting trial against Darrow for attempting to bribe one of the jurors in the case.

The *Times* bombing was part of a nationwide campaign of violence by organized labor. Unlike bombings in other parts of

the country that had destroyed only property, however, twenty men were killed in the *Times* explosion and resulting fire. Two labor activists, the McNamara brothers of Indianapolis, were arrested and brought to Los Angeles to stand trial for murder. At the request of labor leaders who included Samuel Gompers, Darrow left his comfortable—predominantly corporate—law practice in Chicago to defend the McNamaras in what at the time was the trial of the century.

The evidence against the brothers was overwhelming. Despite his own belief in the defendants' guilt and the hopelessness of the case, Darrow continued to tout their innocence to the press, to the public, and to the labor unions financing the defense. Finally, after months of fruitless investigation, defense preparation, and jury selection, Darrow suddenly pleaded both brothers guilty. The move shocked union members who had been contributing their dimes and quarters to the defense of two "innocent" men, whose only crime—according to Darrow—had been their union activities. It also alienated Darrow from labor leaders, and was said to have set back the organized-labor movement in Los Angeles by twenty years.

Cowan explores thoroughly the events leading to the guilty pleas and the reasons for the pleas. The inescapable conclusion is that, with the case ending in guilty pleas, in large part Darrow hoped to avoid being prosecuted for having bribed one juror and attempting to bribe another. He was prosecuted nevertheless, and was acquitted by his own eloquence and reputation, rather than by any reasonable doubt that he had actually bribed the jurors.

Cowan uses two lesser-known cases of Darrow's career not only for their own fascinating history, but also to illustrate Darrow's complex and less-than-sterling character. After reading Cowan's book, we know Darrow not only as the legendary "Attorney for the Damned," but also as the philandering husband, the lawyer who convinced (and paid) witnesses to change their stories or to leave the jurisdiction before trial, who (through intermediaries) bribed jurors, and whose closest friend acknowledged that Darrow would "use bribery where safe, perjury where safe. He will manipulate and marshal labor all over the United States at psychological moments to appear in masses and utter threats, arousing a bitterness, a recklessness meant to intimidate a jury."

Cowan meticulously recreates the events of both cases and the mood of contemporary Los Angeles in the war between organized labor and "the forces of capital." The cast of characters is a marvelous reflection of the period. The owner of the *Los Angeles Times* was Harrison Gray Otis, a "general" in the war against labor. William J. Burns, the "most famous detective

in America," investigated the McNamara case, in which Eugene Debs and Samuel Gompers were also active. Lincoln Stefens testified compellingly for the defense in Darrow's trial. Darrow's former law partner, Edgar Lee Masters, gathered dozens of depositions from lawyers, judges, and community leaders in Chicago as to Darrow's reputation for good character.

After the McNamara case, Darrow publicly vowed never to practice law again. Following his own acquittal, of course, he went on to represent scores of clients, including John Scopes and Leopold and Loeb. One cannot but wonder if he continued to use the tactics he employed in the *Times* case.

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Justice for the Times: A Centennial History of the Idaho State Courts, edited by Carl F. Bianchi. Boise: Idaho Law Foundation, 1990; 332 pp., illustrations, appendices, glossary, index; \$23.95, cloth; \$17.95, paper.

According to conventional wisdom, death and taxes are the only constants in life. A third never-ending feature of living, change, is the well-chosen theme for the centennial history of the Idaho state courts. Carl F. Bianchi has performed an uncommon feat in editing a collection of essays by various writers, all focused on a central thesis, with a short title that accurately describes the parts and the whole of the work. These storytellers explain how the officers of the Idaho courts have established a record of adapting to new circumstances over a period of 127 years. The product is a professional monograph in language understandable to laymen, with only minor defects worth mentioning.

The first two chapters of the book cover the territorial and early statehood eras to 1900. Merlin Young relates the creation of the Idaho Territory, the dire need for justice in the mining camps, and the frustration of the citizenry with political appointees, who sometimes showed up in the region within a year of appointment or, after arriving, often abandoned bench and bar at the earliest opportunity for better patronage, prestige, or income. Byron Johnson makes excellent use of the *Proceedings and Debates of the Constitutional Convention of Idaho* as a bridge from Young's chapter to the functioning of the new state court system. He also gives a good accounting of the participation of women in the state's legal arena from 1895 to 1920. Both writers use case law and anecdotal material to propel their narratives.

Scott Reed continues the tract in "Turn of the Century Courts," including "the most dramatic legal event" in Idaho's legal history (p. 76), the Haywood-Pettibone trial. He lays out the critical foundation that supports the remainder of the book. Joseph McFadden takes up the reins from 1920 to 1950. His chapter continues Reed's vigorous lead, closing with a general discussion of conditions prevailing during World War II—declining bar admissions, a reduction in the number of practicing attorneys and suit filings, and stagnation in judicial pay and benefits.

Gerald Schroder's essay on the 1950s represents a significant shift from the first four chapters. Schroder is adept at using session laws, oral histories, newspaper accounts, bar proceedings, and the *Report of the Co-ordinator of the Courts* to change emphasis. He discusses bureaucratic impediments to justice and the mechanics of legal administration, with little mention of courtroom antics. Thomas Miller, in "The 1960's," reinforces this transition by interpreting legislative measures enacted during that incendiary decade. These two chapters profoundly illustrate how greatly administration of the courts differed from Young's territorial depiction.

Bianchi himself teams up with Alfred Hagan on the 1970s, and then independently deals with the 1980s. The computerization of Idaho's state courts and standardization of court procedures are the underlying themes of these closing chapters. Bianchi demonstrates a mastery of administrative detail by turning an ordinarily uninteresting topic into a readable synthesis with a positive ending. A prognostication on "Idaho Courts in the Second Century," by Chief Justice Robert E. Bakes, and four appendices—on legal research, the Idaho College of Law, Idaho's courthouse architecture, and important events in the state's judicial history (a time line)—supplement the text. These morsels of information, and an abundant supply of appropriate photographs, constitute a fine finish to a solid historical work.

The index is one of two weaknesses in *Justice for the Times*. The other flaw is associated with professionals writing about their craft. They are reluctant to talk about bad apples. There is no indication of any malfeasance, scandalous conduct, or disbarment, and only a brief discussion of unethical practices. Such omissions, if indeed there are any, compound the fault with the index. Victims Frank Stunnenberg, Newton Wilson, and Bert McCurry are absent in the ending lists. The prosecutors, defenders, judges, and some of the accused are there, though. These two literary slips give an impression of callousness, a conclusion that would be contrary to the overall message of *Justice for the Times*. The book is a service to the peo-

ple of Idaho, a handy reference for the legal-history researcher, and an interesting diversion for history buffs of every stripe.

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Justice Lies in the District: The U.S. District Court, Southern District of Texas, 1902-1960, by Charles L. Zeldon. College Station, Texas: Texas A & M University Press, 1993; 314 pp., illustrations, notes, bibliography, index; \$49.50, cloth.

Charles L. Zeldon's new book, *Justice Lies in the District*, analyzes the history of the United States District Court, Southern District of Texas, from its establishment in 1902 until the court noticeably changes its priorities from a private to a public agenda in 1960. According to Zeldon, "From its inception through the 1950s, the court's judges consistently applied a private agenda in setting their priorities and in making their judicial decisions. Their goal was the promotion of Southeast Texas' economic, social, and political development through private means. To achieve this goal, the judges chose to support, stabilize, and regulate local and national businesses and markets. These regional development imperatives were in conflict with a public agenda stressing the enforcement of federal social and economic regulations" (p. 11). In short, the court saw its primary purpose as promoting economic progress, even if it meant supporting elite established business interests against less favored competitors and outside concerns. It would appear that there was one standard for the rich and another for the poor.

The long and narrow Southern District stretched along the Gulf Coast for six hundred miles. Although at first glance it resembled a super gerrymander, its boundaries had firm foundations in geography and economics. The act of 1902 that divided Texas into four judicial districts designated four meeting places for the Southern District: Brownsville, Laredo, Galveston, and Houston. Until 1938 the court had only one judge to travel the district and to deal with an ever-increasing volume of business. By necessity, the judges had to exercise considerable care in setting civil dockets. In criminal proceedings, the court tended to act quickly and to come down on the side of leniency for minor violations. Small-time smugglers, illegal aliens who had no intention of taking up permanent residence, Mexican draft evaders with little stake in World War I, and casual Volstead Act offenders experienced a sort of rough-and-ready brand of

Texas justice that reflected local realities more than the lofty aims of Washington lawmakers.

The judges, increased in number to three by the 1950s, were primarily homogeneous upper-class Democratic corporation lawyers from Houston. Only one of seven appointees was a Republican. All were Anglo-Saxon males. One was the mayor of Houston. They well realized that they operated in an environment of boom-and-bust, with the general thrust a tremendous growth in the petroleum industry. Through the impact of the discovery of oil, the Great Depression, and two world wars, the court doggedly followed a probusiness agenda, whether protecting key railroad lines in receiverships or handling the legal impact of the Texas City disaster of 1946. Civil-rights issues seemed an imposition, and during the Eisenhower years the court only reluctantly altered its agenda to deal with the consequences of the civil-rights revolution.

Zeldon's work breaks new ground, being one of the first scholarly studies of a federal district court. In particular, the author had to develop his own thesis, which he supports by a blending of traditional legal and historical primary and secondary sources. Of special note is the use of district court records at the National Archives-Southern Plains Region. Zeldon had the cooperation of the present judges of the Southern District, who deserve praise for giving him a free hand and affording him complete academic freedom, even though they might have preferred different conclusions.

Justice Lies in the District is an admirable and provocative contribution to the history of a long-ignored aspect of the federal judiciary and to American legal studies in general.

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Bright Radical Star: Black Freedom and White Supremacy on the Hawkeye Frontier, by Robert R. Dykstra. Cambridge: Harvard University Press, 1993; 348 pp., illustrations, notes, index; \$47.50, cloth.

In *Bright Radical Star*, which details the evolution of frontier Iowa from being arguably the most racist "free" state in the Union to one of its most avowedly egalitarian, Robert R. Dykstra seeks to link the extraordinary transition in the state's collective behavior with the psychology and sociology of race relations.

A wide-ranging assortment of personalities from a plethora of political cultures—immigrant Irish, Germans and Scandina-

vians, migrants from New England and New York, advocates of slavery and abolitionists—illuminates this saga. The story begins in 1833, with Iowa officially opened to settlement, and continues through 1880, the end of the pioneer era. For various reasons, it appears that the number of non-black Iowans acknowledging the justice of civil equality increased sharply from a few obscure and idiosyncratic villagers to a demonstrated majority of the Hawkeye State's electorate.

Employing multiple ecological regression and other quantitative techniques, the author analyzes three equal-rights referenda in the state—one held before the Civil War, one shortly thereafter, and the other at the close of Reconstruction. These quantitative techniques are quite useful; however, more qualitative analysis—particularly of the state's African-American population—would have been helpful.

The importance of this work rests, in part, on a simple fact: while political historians have analyzed the nature of anti-slavery and "free soil" politics, the emergence of the Republican party as a partial result, the coming of the Civil War and the court of racial dispensation during Reconstruction, it is unusual for them to combine all these elements in an exhaustive examination of attitudes toward race, the political environment, the development of political parties, and the struggles over the political rights of African Americans in the nineteenth century.

To be sure, Iowa's evolution was not entirely *sui generis*. Citizens in New York soundly rejected black suffrage in an 1846 referendum, and did so again in 1800 and 1869, before acquiring a reputation of racial liberalism that has persisted (perhaps undeservedly) well into the twentieth century. Moreover, the political scene in Iowa—as elsewhere—was complicated by the persistence of other divisive issues. The rise of the Know Nothing movement, which was fueled by increased immigration (particularly of Roman Catholics), and the nagging irritation of the temperance question roiled the electorate.

Despite these commonalities, it does seem that Iowa's political culture had some unique aspects. Iowa was the only "free" state whose United States senators had both voted for the notorious Fugitive Slave Act of 1850. Inevitably the state was influenced profoundly by its southern neighbor, Missouri, a border state that was at once a hotbed of slavery and seething racial animosities, as evidenced by the *Dred Scott* case, which ultimately divided the United States Supreme Court and the nation.

Anti-abolitionist Iowans could point to legal precedents to justify their beliefs. As Dykstra puts it, "Did not the Constitution, southerners asked, specifically mandate interstate rendi-

tion of escaped chattels? And had not the law of 1793 been sustained as constitutional? The answers were yes, and by the autumn of 1849 southern hotspurs clamored for the translation of these guarantees into a new federal statute tough enough to override all antislavery resistance in the North." These "southern hotspurs" had their counterparts in southern Iowa, particularly (p. 99).

Yet the Civil War intervened, and Iowa stood with the Union. In that crucible of conflict emerged a dramatic transformation of racial views in the state. Unfortunately, in this respect—as in a number of others—the author does not distinguish sharply the experience in Iowa from that of other "free" states. Part of the problem is that, although African Americans are a primary subject of this text, their voices are rarely heard in it.

Nevertheless, it would be churlish to fail to admit that this study remains as a signal accomplishment and a major addition to the literature. By noting that racial attitudes can evolve, the author also demonstrates that the law that both shapes and reflects these attitudes can equally be reformed.

Gerald Horne

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The Centralia Tragedy of 1919: Elmer Smith and the Wobblies, by Tom Copeland. Seattle: University of Washington Press, 1993; 258 pp., illustrations, notes, bibliography, index; \$35.00, cloth; \$17.50, paper.

This book is an exemplary study of an American tragedy: the violent deaths of five persons on November 11, 1919, in the western Washington town of Centralia. Tom Copeland relies on interviews, legal testimony, and a solid grasp of the relevant historiography to recount the events surrounding these deaths. At the center of his narrative is Elmer Smith, a small-town lawyer driven by a passionate faith in justice and a deep sympathy for the defenseless and the wronged. The author's focus on Smith gives the book an immediacy and a sense of drama as compelling as any Hollywood effort to evoke compassion for those on the margins of history.

Elmer Smith was brought up in North Dakota and trained as a lawyer in Minnesota. In the autumn of 1916 he began his career as a lawyer in Centralia, having followed his parents and family west to Washington State. Timber companies dominated the regional economy and exerted a considerable influence on its political life as well. The United States' participa-

tion in the war in 1917 increased their power, for it fostered an atmosphere in which dissent became disloyal and unAmerican. The labor organization founded in 1905, the Industrial Workers of the World, was popular with Washington loggers and miller workers, but its uncompromising radicalism and militancy made it the target of much hostility. Union members—often known as Wobblies—took the growing public antagonism in stride. They continued their fight for better wages and working conditions, engaged in free-speech battles whenever the authorities tried to silence them, and refused to be intimidated despite the considerable forces arraigned against them. They found an ally in Elmer Smith, who undertook legal work on their behalf.

The end of the war only increased social tensions, as veterans returned to find unemployment and sought out any convenient scapegoats. Wobblies in Centralia, as elsewhere, were harassed and assaulted, and were generally on the receiving end of much of the veterans' abuse. Rumors and threats suggested that the town's first Armistice Day parade, on November 11, 1919, would include a raid on the IWW hall and the eviction of the town's Wobblies. In the tense atmosphere, people took to arming themselves. As the parade passed the hall, a mob charged the building. The subsequent shooting left four veterans dead. Later, a mob broke into the jail, filled with Wobblies, to drag out and lynch Wesley Everest.

Thirteen men—twelve Wobblies and Smith—were charged with the murder of one of the veterans, Warren Grimm. One of the men was freed when the charge against him was dropped, and another two were fugitives who were never brought to trial. The other ten stood trial in early 1920. The jury found Smith and another man innocent, but the rest were found guilty of either second- or third-degree murder. Each was to spend more than ten years in jail. As the author makes clear, their trial made a mockery of the judicial process, and within a few years even some of the jurors were prepared to testify on the prisoners' behalf.

Copeland provides telling descriptions of the parade and the subsequent arrests and trial. His account is an even-handed one, in which he carefully notes Smith's errors. But he also explores the consequences of that November day: over half the book examines the years after Smith's acquittal, as he fought to secure the prisoners' release. His efforts were often in vain, for his tireless advocacy made him the target of much animosity. On numerous occasions he was either denied the right to speak in public or jailed for his efforts. The atmosphere during the 1920s was harsh, and after spending five years speaking out on behalf of the imprisoned men, Smith found himself disbarred and unable to practice law.

Although *The Centralia Tragedy of 1919* is a stark reminder of the oppressive intolerance of the war years and the 1920s, it demonstrates that there were always people like Smith who fought for justice, whatever the price. Despite considerable sacrifices—in terms of his health, his profession, his freedom, and his personal life—Smith refused to be silenced and fought on regardless of opposition. When he died from a bleeding ulcer in 1932 at the age of forty-four, he left his family little in the way of money or financial security. But his funeral was the largest ever seen in Centralia. Copeland's book is a moving tribute to one who fought tirelessly against "the world's great anguish and its wrong." Those interested in the history of law and justice along the Pacific Coast will find it a fascinating story.

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BRIEFLY NOTED

The Oxford Dictionary of American Legal Quotations, edited by Fred R. Shapiro. New York: Oxford University Press, 1993; 582 pp., appendix, index by key word, index by author; \$49.95, cloth.

"You can get a happy quotation anywhere if you have the eye," Oliver Wendell Holmes, Jr., is recorded as writing to Harold Laski under the entry "Quotations" in this marvelous compendium (p. 356). Fortunately, the author, an assistant librarian in legal research at Yale Law School, had a wide-ranging eye when compiling the more than thirty-five hundred entries here. The sources extend from the 1620 Mayflower Compact to Justice Clarence Thomas and cover diverse subjects, from abortion (the first entry) to Yale Law School (the last). Particularly useful is the key-word index, which makes it possible to find topics beyond the alphabetically arranged subject headings. This is a valuable addition to any reference shelf.

The Legacy of Oliver Wendell Holmes, Jr., edited by Robert W. Gordon. Stanford: Stanford University Press, 1992; 324 pp.; notes, index; \$42.50, cloth.

In 1985, Stanford University held a conference on Oliver Wendell Holmes, Jr. Five of the essays collected here were originally presented at the conference while the remaining two were contributed later. Morton Horowitz and J.W. Burrow

consider Holmes's place in intellectual history, while Robert Ferguson explores the justice's use of language to create a judicial persona. Mathias Reimann's essay places *The Common Law* in the context of German philosophy; Stephen Diamond's explores Holmes's jurisprudence by reviewing his opinions in tax cases. Peter Gibian demonstrates how the jurist created a public style in reaction to his famous father; David Hollinger examines how the younger Holmes became a hero to other intellectuals like Felix Frankfurter and Harold Laski; and Robert Gordon's introduction lays the framework for the ones that follow, pointing out that they help to clarify both Holmes and his interpreters.

From Profanity Hill: King County Bar Association's Story, by Marc Lampson. Kirkland, Wash.: Documentary Book Publishers, 1993; 128 pp.; notes, appendices, index; \$24.95, cloth.

This slim, well-illustrated volume chronicles 140 years of the bench and bar in Seattle, Washington. The King County Bar Association did not organize until 1886, but the book begins with the 1851 arrival of Dr. David S. Maynard among the twenty-one others of the Denny party. Maynard, a physician, would become Seattle's first justice of the peace and one of its first lawyers. Rather than being an institutional history, the book reviews the lives of prominent lawyers and judges in the context of their times, up to the present, concluding that "nearly every major social event in the city, for better or worse, has included the active involvement of members of the bar."

ARTICLES OF RELATED INTEREST

Below we list articles recently published in journals of history, law, political science, and other fields that we believe may be of interest to readers. Although comprehensive, the list is not definitive, and the editor would appreciate being informed of articles not included here.

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Compiled with the assistance of Helen Petersen.

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