

SOUTHWESTERN UNIVERSITY LAW REVIEW



VOLUME 36

2007

NUMBER 2

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OPENING REMARKS: REFLECTING ON THE EXTRAORDINARY HISTORY OF THE CENTRAL DISTRICT[†]

Alicemarie Stotler*

Good morning to all of you. I want to thank Southwestern Law School, the Southwestern University Law Review, Dean Bryant Garth, Professor Jonathan Miller, Debra Leathers, the Director of Development, and the many sponsors who have made this symposium possible, including the Ninth Judicial Circuit Historical Society, the Huntington-USC Institute of California and the West, and the Federal Bar Association, among others.

This event is unique, as I do not believe that any other district in America has received such a fantastic celebration for its 40th anniversary. Today, our district is not only the largest in America but it is also among the most diverse, because we have citizens from every continent and practically every nation in the world. Our district covers some 40,000 square miles and includes seven counties; we have our suburban neighborhoods, urban industrial areas, and of course, the growing counties of San Bernardino and Riverside, both of which are two of the fastest-growing counties in America. The district is home to more than fifty percent of California's population of 37 million people, and it is almost five percent of the entire national population. Last year, roughly 12,000 civil and 2,000 criminal cases were filed in our district. Compare that to 1966, when about 77,000 cases throughout the nation were filed, and just last year, over 350,000 cases were filed nationally.

To say that things have changed is an understatement. In many ways,

[†] Unless otherwise noted, these opening remarks have been edited by the Southwestern University Law Review.

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the political, technological, economic, and social landscape of today is almost unrecognizable from that of 1966. Back then, the population of California was 18.5 million people or about half of what it is today. You could still buy a very nice house in Southern California for under \$100,000. "Thunderball," "Doctor Zhivago" and "That Darn Cat," were among the top-grossing movies of the year. "Star Trek" made its television debut, and The Beatles, and yes, the Rolling Stones, Bob Dylan and Nancy Sinatra all had hit records, as did her dad, Frank. Lyndon Baines Johnson was our President. Chief Justice Earl Warren headed the Supreme Court, and as noted in the article that Mr. Bradley Williams is writing,¹ the Vietnam War was raging. Over 400,000 troops were overseas and we had the beginnings of an anti-war movement here at home. 1966 was one year after the Watts Riots rocked Los Angeles, and the same year that saw race riots in Cleveland and San Francisco. It was two years before the assassinations of Martin Luther King and Bobby Kennedy, which shocked and saddened the nation and the world.

In the legal arena, the Supreme Court announced its landmark *Miranda* decision in June of that year, and Congress had only recently enacted the Civil Rights Act of 1964 and the Voting Rights Act of 1965. The latter abolished the literacy tests and discriminatory practices that kept African-Americans from the polls, and the former enacted Title VII, which included broad prohibitions against a wide array of discriminatory practices. Both these pieces of legislation greatly expanded the role of the federal government and the federal courts - areas that traditionally had been reserved to the states. Likewise, the Johnson administration's issuance of Executive Order 11246 in 1965, embracing the notion of affirmative action, brought a new breed of cases into the federal courts. The various social movements that emerged from the 60s and 70s - the civil rights, women's rights, gay rights, immigrants' rights movements, and rights for the disabled - altered the way that we thought about traditional institutions such as our families, our churches, and even our economic systems. So, too, the entry of large numbers of women into the workforce and into jobs that were not traditionally women's work, as well as the vast expansion of federal and state employment law, reshaped the contours of work and brought issues such as sexual harassment and discrimination from the workplace to the courthouse. The environmental movement made us aware of the fragility of our shared environment and prompted legislation such as the Clean Water and Endangered Species Acts. And finally, the computer and the

1. Bradley B. Williams, *When California's Southern District Became Central: A Brief Look at the Historical Context of the Central District in 1966*, 36 SW. U. L. REV. 175 (2007).

technological revolution of the past few decades has forever changed the ways in which we communicate with each other and how we amuse ourselves. It has given rise to an entire generation that cannot imagine life without the cell phone, the laptop, the iPod or the Xbox. Of course, these changes have greatly affected the federal courts and the role that they play in the lives of our citizens.

The sessions presented here today will shed some light on how these changes have played out in our district and will include an in-depth examination of some of the landmark cases that arose right here in the Central District. These cases involved school desegregation, litigation over the Century Freeway that morphed into litigation over affordable housing for all of those who were displaced by the new freeway, precedent-setting intellectual property cases, and cases affecting the civil rights of criminal defendants.

Yes, times have changed, the caseloads have grown, and so has the court. In 1966, our primary residence was 312 North Spring Street which is still the main home today, but we have moved into the Roybal Federal Building, as well as into courthouses in Orange County and Riverside, and if things go well, someday we will build a new courthouse in Downtown Los Angeles. There is much history to that story. Since 1966, we have grown from 10 judges to 28 active judges, with five of those positions currently vacant and waiting to be filled. Over the years, we have had 72 district judges in all. Eight of our judges have been elevated to the Court of Appeals - some of them are with us today - and others have gone to the California Supreme Court. In our chambers, we have gone from the era of typewriting memos to the era of Lexis, Westlaw and the web as more of our activities have been computerized. Starting in January of 2007, all of our criminal filings will be done electronically, and by January of 2008, we expect our civil filings will also be filed electronically.

Yet despite four decades of tremendous societal change, much about the court remains unchanged. The judges still wear black robes and we call our courtrooms to order much as we did forty years ago. Ordinary citizens still weigh the evidence and render verdicts as members of the jury. The Court remains an oasis of decorum and order in a public sphere that has grown increasingly hostile, heated, and decidedly uncivil over the last forty years. Most importantly, our central mission remains the same – to serve the ends of justice. Some traditions are worth preserving – especially the notion that judges are to be impartial and independent of majority will and that all citizens are entitled to a fair and impartial hearing of their cases. So again, I thank Southwestern Law School for providing us with this opportunity to reflect on the history of our district and welcome all of you

this very special symposium.

WHEN CALIFORNIA'S SOUTHERN DISTRICT BECAME CENTRAL: A BRIEF LOOK AT THE HISTORICAL CONTEXT OF THE CENTRAL DISTRICT IN 1966

Bradley B. Williams*

I. INTRODUCTION

"The redistricting of the Federal courts in California is long overdue," U.S. Representative Don Edwards explained to his House colleagues on March 2, 1966. "When California entered the Union in 1850, two Federal districts were established." And he continued, "Today, over 100 years later and 19 million people richer, we still have only 2 [sic] districts. Too long have our people been burdened by the inconvenient location of the Federal courts."¹

Remarkable population growth was not the only change that California was experiencing in 1966 when Congress established two new federal district courts for the state. The reformation of California's federal courts into four districts — Northern, Eastern, Southern, and Central — came during a time of extraordinary change and turmoil in the country, in the state, and in the greater Los Angeles region.² This Article examines the historical context surrounding the reorganization of California's federal courts, focusing on the transformation of the Southern District,

* The author wishes to thank Sandy Henes, his research assistant, for her diligent work. He is also indebted to U.S. District Judge Howard Turrentine, Southern District of California, for sharing his unpublished manuscript "40th Anniversary of the Court."

1. 89 Cong. Rec. 112, 4562 (1966) (quoting William Donlon "Don" Edwards, a Democrat, who served in the House of Representatives from 1963 to 1995, representing the 9th, 10th, and 16th districts in Santa Clara County in Northern California).

2. *See id.* at 4567-70 (describing the redistricting plan, that was eventually implemented, to create two new federal district courts for California).

headquartered in Los Angeles, into the Central District of California.

In 1966, the nation was in the midst of the Cold War with the Soviet Union. The "hot war" in Vietnam was escalating, with nearly 400,000 American troops on the ground and 128,000 tons of bombs dropped on North Vietnam by year's end.³ Opposition to the war was growing too. Anti-war rallies on April 15 attracted 50,000 protestors in San Francisco and 200,000 in New York City.⁴ The Space Race with the Soviets was also in high gear, with the Soviets sending two astronauts at a time aloft in the Voskhod spacecraft and the United States sending pairs up in its Gemini craft. The U.S. Space program had a profound effect on Southern California, since many of the contractors and subcontractors were located in there.⁵

II. THE CIVIL RIGHTS STRUGGLE

In 1966, the greatest challenge facing Los Angeles, as well as California and the nation, was the ongoing struggle for civil rights by African Americans and other minorities. As W.E.B. DuBois had famously articulated in 1903, "the problem of the Twentieth Century [was] the problem of the color-line."⁶ Recent progress had been made, beginning with the Supreme Court's unanimous decision in *Brown v. Board of Education*.⁷ Furthermore, the Civil Rights Act of 1964, prohibiting discrimination in public accommodations and in employment, was another major milestone. Groups like the Southern Christian Leadership Conference, the NAACP, the Congress for Racial Equality, and the Student Non-violent Coordinating Committee continued to press for equality through protest marches, sit-ins, and demonstrations across the country.⁸

On March 9, 1965, nearly 700 protestors, about half of them white, began demonstrations at the U.S. Courthouse and Federal Building on Spring Street in Los Angeles.⁹ The demonstrations were in protest of the

3. ROBERT MANN, A GRAND DELUSION: AMERICA'S DESCENT INTO VIETNAM 513-14 (2001).

4. *Id.* at 536.

5. ANDREW ROLLE, CALIFORNIA: A HISTORY 458-60 (Harlan Davidson, Inc. 4th ed. 1987) (1963).

6. W.E.B. DUBOIS, THE SOULS OF BLACK FOLK XXXI (Bantam Classics ed., 1989) (1903).

7. *Brown v. Bd. of Educ.*, 347 U.S. 483, 494-95 (1954) (presenting the decision penned by Chief Justice Earl Warren, the former three-time governor of California).

8. See TAYLOR BRANCH, PILLAR OF FIRE: AMERICA IN THE KING YEARS 1963-65 (1998) (detailing an account of the civil rights movement at this time).

9. *Federal Building Halted by Civil Rights*, L.A. DAILY J., Mar. 11, 1965, at 1 [hereinafter *Federal Building Halted by Civil Rights*].

treatment of marchers in Selma, Alabama, who had been brutally attacked two days earlier by police armed with billy clubs, bull whips, and tear gas.¹⁰ The Los Angeles protestors picketed the courthouse, blocked building entrances, laid down on the sidewalk, and occupied the office of the U.S. Attorney Manuel Real.¹¹ According to news accounts, Real tried reasoning with the demonstrators occupying his office, but eventually the protestors were forcibly removed. Initially, only a few demonstrators blocking the building's entrances were arrested.¹²

On the third day, however, eight judges of the district court resident in the Spring Street courthouse — Chief Judge William Byrne, Sr., Pierson Hall, Thurmond Clarke, Albert Lee Stephens, Jr., Charles Carr, Jesse Curtis, Avery Crary, and Francis Whelan — sat *en banc* to consider U.S. Attorney Real's request for an injunction against demonstrations on the building grounds. The eight judges signed an order imposing the injunction.¹³

The next day, 6,000 men, women, and children marched peacefully on the courthouse, but remained on the sidewalk and in the street, off federal property. After a week of protests, Real's meetings with civil rights leaders and the intervention of black Assemblyman Mervyn Dymally cooled the situation. Judge Curtis eventually dismissed most of the cases.¹⁴

Racial tensions persisted into 1966 and beyond. Housing segregation was common throughout the nation, and Southern California was no exception.¹⁵ U.S. District Judge David W. Williams, the first African American judge in the Central District, described the subterfuge he was forced to use in order to purchase property in segregated Bel Air, long after racial covenants had been struck down. In a 1998 interview, Williams said,

I dealt with this real estate woman on the telephone . . . I had to put [the money in an escrow account] in cash, because if I tried to buy it on the installment plan they'd have found out who I was. . . I'm told that she got into some trouble with the neighbors or the real estate crowd for selling a lot in Bel Air to a Negro. The first one. There was not another Negro in Bel Air.¹⁶

10. See *id.*; Don Irwin, *King Pleads Case for Right to March*, L.A. TIMES, Mar. 12, 1965, at 2.

11. See *Federal Building Halted by Civil Rights*, *supra* note 9, at 1.

12. See *id.*

13. Arthur Berman, *Rain, Legal Moves Stall L.A. Pickets*, L.A. TIMES, Mar. 12, 1965, at 3. (noting Judge Harry Westover did not sit on the panel due to a prior commitment).

14. See *id.*

15. ETHNIC LOS ANGELES 55-56 (Roger Waldinger & Nehdi Bozorgmehr, eds. 1996).

16. See Audio Tape: Oral History: Honorable David W. Williams, U.S. District Court,

In 1963, the California Legislature had passed the Rumford Fair Housing Act, named for its principal sponsor W. Byron Rumford from Berkeley, one of the first African Americans to serve in the California Assembly.¹⁷ The law prohibited landlords from refusing to rent housing to people because of "race, color, religion, national origin, or ancestry."¹⁸ The following year, the California Association of Realtors and others placed Proposition 14 on the ballot to overturn the act, and the voters passed it by the required two-thirds margin, setting the stage for a prolonged court battle.¹⁹ This "fair housing" issue would continue to be contentious throughout the 1966 gubernatorial campaign.

Some have suggested that black resentment over Proposition 14 was an underlining cause of the riots that erupted in Watts in 1965.²⁰ What started with a routine traffic stop of a black motorist by a white policeman, ended five days later with thirty-four dead (almost all of them black), 1,032 reportedly injured, and nearly 4,000 arrested. The rioters destroyed or damaged more than 600 buildings with an estimated value of over \$40 million.²¹ Los Angeles was not alone in experiencing this kind of violence. Similar riots in black neighborhoods occurred in several major American cities throughout the latter part of the 1960s.²²

III. CHALLENGES TO COURTS AND AUTHORITY

In addition to civil rights protests, the mid-1960s witnessed all kinds of challenges to the status quo and to authority, especially governmental authority. For example, when the Warren Commission issued its report on the assassination of President Kennedy, books like the best-seller *Rush to*

Central District of California, Interview Conducted by Mae Ussery, held by Ninth Judicial Circuit Historical Society (1998) (on file with the Ninth Judicial Circuit Historical Society); *Shelley v. Kraemer*, 334 U.S. 1, 19-21 (1948) (holding that judicial enforcement of restrictive covenants was a violation of equal protection).

17. *State Starts Enforcing New Fair Housing Act*, L.A. TIMES, Sept. 21, 1963, at 8; Jerry Gillam, *Big Bills Still Pending With One Month to Go*, L.A. TIMES, May 27, 1963, at 11.

18. *State Starts Enforcing New Fair Housing Act*, *supra* note 17.

19. See Paul Weeks, *Prop. 14 Foes to Appeal to State Supreme Court*, L.A. TIMES, Nov. 5, 1964, at 22.

20. See GOVERNOR'S COMMISSION ON THE LOS ANGELES RIOTS, VIOLENCE IN THE CITY: AN END OR A BEGINNING? 3-4 (1965) (reporting from the commission appointed by Governor Edmund G. Brown that was chaired by John A. McCone, former Director of the Central Intelligence Agency, and included Warren M. Christopher, of O'Melveny & Myers, Judge Earl S. Broady, and Asa V. Call among others).

21. *Id.* at 23-24.

22. *Id.* at 2.

Judgment, by attorney Mark Lane, challenged the commission's findings.²³ Joseph Ball, a well-known and respected attorney in the Southern District, found himself having to defend the work he did for the commission as its senior counsel. After one public debate with commission critics, Ball said "If we had followed the same distortions as Lane did in his book, I would be ashamed of myself as a lawyer."²⁴

Courts were also subjected to challenges and outright attacks on their authority. In the 1966 California primary campaign, candidates from both parties criticized both state and federal court decisions.²⁵ In a particularly egregious example, Los Angeles Mayor Sam Yorty, challenging Governor Edmund G. "Pat" Brown for the Democratic gubernatorial nomination, accused the state Supreme Court of delaying its decision on the constitutionality of Proposition 14 for political purposes.²⁶ The California Bar responded overwhelmingly against the outspoken mayor's accusation. Attorney Daniel Pruitt, who supported Proposition 14, called the charges "unfair, unjustified and inaccurate."²⁷ Herman Selvin, an attorney who argued against the proposition before the court, declared that as a lawyer, Yorty should be held in contempt of court.²⁸ Lawyers throughout the state stepped forward in support of the state Supreme Court and the independence of the judiciary generally.

Attorney Charles Beardsley led an effort to publish a full page ad in the *Los Angeles Daily Journal*. The ad read in part, "[o]ur courts and judges are being subjected to a studied campaign of irresponsible criticism assaulting their integrity and the integrity of our whole judicial system."²⁹ The ad also proclaimed, "[t]hrough their Board of Governors, 27,000 lawyers in California have spoken out in a message which every thoughtful citizen will support: defend our judges from improper attack, ignore baseless charges against the courts, recognize that public confidence in the orderly processes of justice is indispensable to our society."³⁰ Among the more than 500 lawyers who attached their names to this open letter were such future district court judges as William Gray, Harry Hupp, David Kenyon, and Laughlin Waters. In the end, Brown defeated Yorty in the primary only to be defeated himself in November by political newcomer

23. See Hugh Trevor-Roper, *Introduction*, in MARK LANE, *RUSH TO JUDGMENT* 7-11 (1966).

24. See *Warren Report Critics, Defenders in SD Clash*, L.A. DAILY J., Nov. 23, 1966, at 1.

25. See, e.g., *Bar Rises to Defend State Courts*, L.A. DAILY J., May 6, 1966, at 1.

26. *Id.*

27. *Id.*

28. *Id.*

29. See *A Message to All Citizens of California from the Undersigned California Lawyers*, L.A. DAILY J., May 20, 1966, at 9-10.

30. *Id.* at 10.

Ronald Reagan.

While the bar stepped up to defend the courts, the general public's view of the justice system at this time was decidedly less supportive. A Harris Poll conducted nationwide after the November 1966 election showed that 52% of the public thought the U.S. Supreme Court was doing only a "fair-to-poor job."³¹ In the California election to retain members of the state Supreme Court, the five justices stood unopposed. All retained their seats, but the "no" votes each garnered reached an unprecedented high. Chief Justice Roger Traynor, for example, received more than 760,000 "no" votes and just over a million "yes" votes.³²

Public disapproval of the courts at this time can largely be attributed to a number of controversial decisions. In California, many voters were unhappy that the Traynor-led court had overturned Proposition 14.³³ On the national scene, many people were disturbed by the Warren Court's decisions in controversial cases. For example, many people were upset by *Baker v. Carr*, which recognized the right to challenge the apportionment of state legislatures in federal court.³⁴ Furthermore, *Reynolds v. Sims* and *Wesberry v. Sanders*, establishing the principle of "one man, one vote," upset many.³⁵

Decisions expanding the rights of criminal defendants such *Gideon v. Wainwright* and *Escobedo v. Illinois* were also unpopular.³⁶ In addition, the contentious decision in *Miranda v. Arizona* was handed down on June 13, 1966, detailing the rights of the criminally accused.³⁷

31. See Miles Clark, *Supreme Court Opposition Comes from Oldsters*, L.A. DAILY J., Nov. 16, 1966, at 1.

32. Maurice J. Hindin, *Letter to the Editor, Vote on Judges*, L.A. BAR BULL., Dec. 1966, at 47-48.

33. See *Mulkey v. Reitman*, 413 P.2d 825, 836 (Cal. 1966) (holding by Justice Peek with Justice Taylor concurring that Proposition 14, Article I, section 26 of the California Constitution is unconstitutional); but see *id.* (White, J., dissenting) (arguing that Proposition 14 was voted on by the people and is a valid exercise of state legislative power).

34. *Baker v. Carr*, 369 U.S. 186, 187-88 (1962) (holding that the dismissal of a complaint challenging apportionment of state legislatures was in error).

35. *Reynolds v. Sims*, 377 U.S. 533, 567-70 (1964) (holding that "an individual's right to vote for state legislators is unconstitutionally impaired when its weight is in substantial fashion diluted when compared with votes of citizens living in other parts of the State"); *Wesberry v. Sanders*, 376 U.S. 1, 7-8 (1964) (holding that "one man's vote in a congressional election is to be worth as much as another's").

36. *Gideon v. Wainwright*, 372 U.S. 335, 342-43 (1963) (holding that the Sixth Amendment right to counsel is "necessary to insure fundamental human rights of life and liberty" (quoting *Johnson v. Zerbst*, 304 U.S. 458, 462 (1938))); *Escobedo v. Illinois*, 378 U.S. 438, 491-92 (1964) (holding that "when the process shifts from investigatory to accusatory. . .our adversary system begins to operate . . . [and] the accused must be permitted to consult with his lawyer").

37. *Miranda v. Arizona*, 384 U.S. 436, 471-72 (1966).

These decisions led to an active campaign against the courts. One group even sponsored billboards around the country declaring "Impeach Earl Warren."³⁸ This was an extreme position to be sure, but it is indicative of the antipathy that many felt toward the courts. As Los Angeles County District Attorney Evelle J. Younger observed at the time, "[o]ne may, if he wishes, debate the wisdom or merit of the changes that have taken place in the criminal law, but no one can deny or ignore their significance."³⁹ United States Attorney General Nicholas Katzenbach was much clearer in his assessment of these reforms in criminal procedure. In a letter to the chief judge of the U.S. Court of Appeals for the D.C. Circuit, the attorney general wrote that he believed "judges have left the public behind and, even among the judges, the margins of the consensus have been passed."⁴⁰

Of these controversial decisions, the ones having the broadest, most immediate impact on the largest number of people were those establishing the principle of "one man, one vote."⁴¹ By 1965, most states had reapportioned their legislatures or were in the process of doing so. In California, the legislature dragged its heels.⁴² Los Angeles County with a population of more than 6 million, had the same number of votes in the state Senate as the Alpine-Mono-Inyo district, which was comprised of three counties with a combined population of 14,294.⁴³ After suits were filed in the Southern District and Judge Myron Crocker ordered California to show cause why it should not be reapportioned, the legislature took action in time for the 1966 election.⁴⁴ The effect was a major shift of political power from the rural, less populated north to the more populous, suburban south, a change that would have lasting effects in the state.⁴⁵

Immigration, both legal and illegal, was contributing to the explosive population growth in California. The Immigration Act of 1965 abolished the national origins quota system, and gave priority to relatives of U.S.

38. See Fred W. Grupp, Jr., *The Political Perspectives of Birch Society Members*, in *THE AMERICAN RIGHT WING* 83, 107-11 (Robert A. Schoenberger ed., 1969).

39. Evelle J. Younger, *A Survey of the Changing Criminal Law*, L.A. BAR BULL. 542, 544 (1966).

40. *Katzenbach Says Court Reforms Hinder Justice*, L.A. TIMES, Aug. 5, 1965, at 15 (internal quotations omitted).

41. See Robert J. Donovan, *Reapportionment Stirs Entire U.S.*, L.A. TIMES, Mar. 21, 1965, at A3 ("[On] June 15, 1964, the court ruled that the principle of 'one man, one vote' must apply to each house of every state legislature.").

42. *Id.*; See JAMES J. RAWLS & WALTON BEAN, *CALIFORNIA: AN INTERPRETIVE HISTORY* 402 (New York, 6th ed., 1993) [hereinafter RAWLS & BEAN].

43. RAWLS & BEAN, *supra* note 42.

44. *State Ordered to Act in Assembly Reshuffle*, L.A. TIMES, Jan. 20, 1965, at 110.

45. Donovan, *supra* note 41, at A3.

citizens and people with special work skills and abilities.⁴⁶ This legislation also established a cap of 170,000 immigrants per year, which excluded those with priority status.

Illegal immigration from Mexico was spurred by the end of the Bracero Program in 1964. In effect since 1942, this program brought about 200,000 temporary, mostly farm workers to the United States annually. When it ended, no comparable program was established in its place, though the networks established between U.S. labor contractors and Mexican workers remained. Illegal immigration increased accordingly. In 1966, the Border Patrol apprehended over 6,000 illegal immigrants in its El Centro, California office alone, increasing the caseload of the federal court in San Diego.⁴⁷

IV. KEEPING PACE WITH CHANGE

New federal legislation and Supreme Court decisions had a significant effect on the California districts courts and the local bar. The bench and bar kept pace with these changes by collaborating on educational programs. One of the more successful and popular ones was the "Bridging the Gap" program, designed to help new lawyers transition from law school to law practice and co-sponsored by Los Angeles' legal newspaper, the *Daily Journal*.⁴⁸ Two programs were held in 1966, one in January and another in June, following the bar's admittance of new lawyers. In January, District Judge Francis Whelan, Bankruptcy Referee James Moriarty, and Clerk of Court John Childress spoke to more than 250 attendees about practicing in the federal courts. The advice proffered by all three was practical. Judge Whelan pointed out that a lawyer preparing for a case in federal court should read both the statutory rules of procedure and the local rules, or the results could be fatal to one's case.⁴⁹ Bankruptcy Referee Moriarty noted that the Southern District of California led the nation in bankruptcy filings in 1965, with 2,446 in the Southern Division, 1,806 in the Northern Division, and 20,480 in the Central Division. With so many filings, he

46. Immigration Act of 1965, Pub. L. No. 89-236, §§ 201-03, 79 Stat. 911, 911-12 (1965) (current version at 8 U.S.C. §1151 (2000)).

47. Pia M. Orrenius, *Illegal Immigration and Enforcement Along the U.S.-Mexico Border: An Overview*, Q1 ECON. & FIN. REV. 2, 4 (2001); *Arrests for Smuggling Aliens Rise*, L.A. TIMES, Dec. 15 1966, at B3.

48. Miles Clark, *Bridging the Gap for New Admittees "Better than Ever,"* L.A. DAILY J., June 7, 1966, at 1 [hereinafter Clark, *Bridging the Gap*].

49. Fred McCarthy, *Federal Court Procedure: Practice Explained for New Local Attorneys*, L.A. DAILY J., Jan. 19, 1966, at 1 [hereinafter McCarthy, *Federal Court Procedure*].

observed that while many in the audience might not have planned on representing debtors or bankrupts, it was quite possible that the new lawyers could find themselves representing creditors.⁵⁰ Clerk of Court Childress said that his office was there to help attorneys solve problems. He pointed out, though, that his office had problems too, especially with lawyers whose checks for filing fees were returned for insufficient funds, and he implored the new attorneys to “avoid such embarrassing oversights.”⁵¹

In June, the nineteenth semi-annual program kicked-off with a presentation by attorney Robert Warren, a partner at Gibson, Dunn & Crutcher, who outlined the differences in discovery rules in federal and state courts.⁵² Bankruptcy Referee Russell Seymour showed the film “The Anatomy of a Bankruptcy,” prepared by the Committee on the Continuing Education of the Bar, and Clerk of Court Childress again offered tips for federal filings, this time without the admonition about bad check writing.⁵³ Senior District Judge Harry Westover observed that judges form their impressions of attorneys from their pleadings, so he urged the new lawyers to know the rules of court and know the facts of their cases. And he pointed out that their days of studying the law had only just begun.⁵⁴

The Los Angeles County Bar Association also arranged educational programs for veteran practitioners and judges. One such program, held in June 1966 and arranged by Superior Court Judge A. Andrew Hauk who had recently been nominated to the federal bench, was praised for exploring a controversial yet timely issue: civil disobedience.⁵⁵ The *Los Angeles Daily Journal* praised the bar association for “again taking leadership in a difficult, controversial but essential matter for lawyers,” and coming up with “one of the best balanced programs on civil disobedience that has been arranged in the Southland.”⁵⁶ The panel discussion participants included Rev. Richard Vachon, Loyola Law School Professor of Constitutional Law, Municipal Court Judge Loren Miller, a member of the NAACP national legal committee, Charles O’Brien, chief deputy attorney general for criminal law and enforcement, and John Pratt, vice-president of the

50. James E. Moriarty, *Bankruptcy Problems, Procedures Outlined by Referee Moriarty*, L.A. DAILY J., Jan. 25, 1966, at 1.

51. McCarthy, *Federal Court Procedure*, *supra* note 49.

52. Clark, *Bridging the Gap*, *supra* note 48.

53. *Judges Tell Secrets*, L.A. DAILY J., June 17, 1966, at 1.

54. *See Bridging-Gap Judge Talks Range Widely*, L.A. DAILY J., June 15, 1966, at 1.

55. Miles Clark, *County Bar Association Leaps Into New Controversy With Top Civil Disobedience Expert Panel Scheduled*, L.A. DAILY J., June 28, 1966, at 1.

56. *Id.*

Lawyers Constitutional Defense Council.⁵⁷

Federal judges and lawyer delegates held educational programs at the 1966 annual Ninth Circuit Conference, held at the Newporter Inn in Newport Beach.⁵⁸ Judges and lawyers from the Southern District of California played a conspicuous role in that year's meeting. Judge Peirson Hall chaired the breakfast meeting of the district judges.⁵⁹ Judge James Carter participated on a panel that discussed the creation of a commission on judicial disability.⁶⁰ Attorney George M. Treister delivered a talk with the title "Bankruptcy Jurisdiction: Is It Too Summary?"⁶¹ Lawyer delegate Julian von Kalinowski chaired a panel on "A Lawyer's Look at Judicial Management of Litigation," while attorney Herman Selvin participated in a discussion of the uniform rules of evidence.⁶² Ninth Circuit Judge Walter Pope's talk on the *Escobedo* and *Miranda* decisions drew much interest. "We can live with this decision," he concluded, adding, "[t]he police are well equipped to evade it."⁶³ Although he was in attendance at the conference, it's not clear whether the circuit's Supreme Court justice, William O. Douglas, was in the room when Judge Pope made his remarks.⁶⁴

V. SENATE BILL 1666

The District Court for the Southern District of California went about its business in the winter of 1966 while the 89th Congress debated Senate Bill 1666, the first omnibus judgeship bill in five years.⁶⁵ The bill was initially proposed by the U.S. Judicial Conference in 1965, and similar versions were introduced in both the House and the Senate.⁶⁶ There was little opposition to the bill, but in the House one congressman argued that before approving additional judgeships, Congress should examine the boundaries

57. *Id.*

58. *Ninth Judicial Circuit Judges 1966 Meet Set*, L.A. DAILY J., July 12, 1966, at 1 [hereinafter *Ninth Judicial Circuit Judges*]; *Ninth Judicial Circuit Conference Gets Underway at Newport Beach*, L.A. DAILY J., July 13, 1966, at 1.

59. *Ninth Judicial Circuit Judges*, *supra* note 58.

60. *Id.*

61. *Judges Meet to Study Bankruptcy, Prisons*, L.A. DAILY J., July 14, 1966, at 1.

62. M.R. Jourdan, *Blanket Evidence Rule Hit at Judges' Meet*, L.A. DAILY J., July 18, 1966, at 1.

63. *Escobedo, Miranda Cases Analyzed*, L.A. DAILY J., July 18, 1966, at 1.

64. M.R. Jourdan, *Bail Reform Is Told to Judges at Convention*, L.A. DAILY J., July 15, 1966, at 1.

65. 89 CONG. REC. 112, 4554-55 (1966) [hereinafter 89 CONG. REC.].

66. Act of March 18, 1966, Pub. L. No. 89-372, 1966 U.S.C.C.A.N. (89 Stat. 86) 2041 [hereinafter U.S.C.C.A.N.].

of the circuit courts. The Ninth Circuit's size was, he observed, "ridiculous."⁶⁷ In reply, House Judiciary Committee Chairman Emanuel Celler pointed out that the Judicial Conference was working on the matter of jurisdictional boundaries. "It is a very vexatious problem," Chairman Cellers said, adding "[it] is going to take a considerable length of time."⁶⁸

The congressman wasn't the only one who questioned changes in jurisdictional boundaries. When the creation of new district courts for California was first proposed, the Department of Justice countered that new judicial districts were unnecessary because larger districts were more efficient. "Our experience is that the larger the district, the more effective the opportunity for modern judicial administration which is essential to justice in our times," wrote Deputy Attorney General Ramsey Clark to Chairman Cellers.⁶⁹ Clark went on to point out that the new districts would need new personnel. "The creation of two new districts in California would necessitate the appointment of two new U.S. attorneys, two new U.S. marshals, additional attorney, marshal, and clerical personnel and facilities and result in the transfer or resignation of valued present personnel."⁷⁰ Clark advocated instead that new divisions be created within the existing districts stating, "[w]e see no end that cannot be served by the creation of new divisions of the court where indicated."⁷¹

Despite these objections, the bill passed, and on March 18, 1966, President Lyndon B. Johnson signed it into law.⁷² It provided for forty-five additional judgeships around the country, of which thirty-five were for district judges and ten were for circuit judges.⁷³ In addition, the act doubled the number of California's district courts from two to four, creating a new Eastern District, with court to be held in Fresno, Redding, and Sacramento; a newly constituted Southern District, comprised of San Diego and Imperial Counties and holding court in San Diego; a newly constituted Northern District, with court held at Oakland and San Jose in addition to San Francisco; and a new Central District, holding court in Los Angeles.⁷⁴ The Northern District was allotted two new judgeships, and the Central District was allotted three, bringing its total of authorized judgeships to thirteen.⁷⁵

67. 89 CONG. REC., *supra* note 65, at 4555.

68. *Id.*

69. U.S.C.C.A.N., *supra* note 66, at 2045.

70. *Id.*

71. *Id.* (describing the author's indebtedness to U.S. District Judge Howard Turrentine for bringing this letter to his attention).

72. Act of March 18, 1966, Pub. L. No. 89-371, 80 Stat. 75-78 (1966).

73. *Id.* at 75.

74. *Id.* at 75-76.

75. *Id.* at 77.

When the bill had passed the House, Chief Judge Byrne was quoted as saying “[i]f the bill passes [the Senate] in its present form, it will take care of our immediate needs.” However, he added prophetically, “if Southern California continues to grow as in the past—which is quite likely—we’ll probably be short of judicial help again in three or four years.”⁷⁶

VI. CHANGES IN THE SOUTHERN DISTRICT

The new law was not to take effect until 120 days after its signing, so in the interim, the U.S. District Court for the Southern District of California continued its work. In May, the court adopted revised local rules to take effect June 1, 1966.⁷⁷ The rules, which made substantial changes in content, style, and format, were the result of five months’ work by a committee chaired by Judge Charles Carr. The *Daily Journal* published the new rules in a series of installments, and at a meeting of the L.A. County Bar Association, attorney Jordan Dreifus, chair of the bar association’s committee on federal practice, urged the members to do their “homework” and study the changes, especially the changes in the federal motion rule.⁷⁸

By this time, Chief Judge Byrne had announced that he would take senior status as of June 30, so in mid-June President Johnson announced the nomination of Los Angeles County Superior Court Judge A. Andrew Hauk to fill that seat. Announced at the same time was the nomination of Pasadena attorney and Republican Party activist William P. Gray to fill the seat vacated by Judge Harry Westover, who had taken senior status at the end of December.⁷⁹

On July 1, Judge Thurmond Clarke, who had been on the federal bench eleven years, took over as chief judge from Judge Byrne.⁸⁰ Judge Hauk had received his commission by the end of June, and was already hearing cases in the court. William Gray received his commission on July 2, and on July 19 more than 300 people overflowed Courtroom 8 to see Ninth Circuit Judge Walter Ely administer the oath of office to him. Attorneys Joe Ball and John O’Melveny were among those paying tribute to newly enrobed

76. 45 *New Federal Judgeships OK'd by U.S. House, Adds Local Judges*, L.A. DAILY J., Mar. 4, 1966, at 1.

77. *United States District Court Revises Local Federal Rules*, L.A. DAILY J., May 3, 1966, at 1.

78. *Rule Changes in Federal Courts Study Is Urged*, L.A. DAILY J., June 23, 1966, at 1.

79. Judge Andrew Hauk, *William Gray Nominated as U.S. District Judges*, L.A. DAILY J., June 15, 1966, at 1.

80. *Judge Clarke Takes Over as Chief Judge*, L.A. DAILY J., July 1, 1966, at 1.

Judge Gray.⁸¹ Nine days later, a similar crowd looked on as Supreme Court Justice Tom Clark formally installed Judge Hauk. After the oath was given by Judge Ely, attorney Earl Adams addressed his former partner, followed by remarks from John Sutro, president of the State Bar, Judge Kenneth Chantry, former Chief of the L.A. County Superior Court, and others from "a blue ribbon cross-section of the bench and bar."⁸²

On Monday, September 19, 1966, the redistricting of California's federal courts became effective.⁸³ The newly created Central District was comprised of Chief Judge Clarke, and Judges Pierson Hall, Albert Lee Stephens, Jr., Charles Carr, Jesse Curtis, Avery Crary, Francis Whelan, Irving Hill, Andrew Hauk, William Gray, and Senior Judges William Byrne, Harry Westover, and Leon Yankwich. Leaving the court to form the new Southern District were Judge James Carter, Judge Fred Kunzel, and Senior Judge Jacob Weinberger. Leaving the court to join the new Eastern District was Judge Myron Crocker, who became chief judge of that district.⁸⁴

Apparently, there was little fanfare for the newly formed Central District. Clerk of Court John Childress had forewarned the bar on the previous Friday that all documents had to be in conformance with the regulations provided for the new districts.⁸⁵ The judges had issued orders and a statement of policy that included the following: pending and closed civil cases would be transferred or retained by the appropriate district; criminal cases pending on the effective date of the act establishing the new districts "shall be proceeded with under the indictments as they shall be captioned and pending on said date;" prosecution of crimes committed prior to, but not commenced until after the effective date were to proceed the same as if the act had not been passed and were to be tried in the respective district "as such District existed prior to the effective date" of the act; and all rules, general orders and resolutions of the Northern and Southern Districts were to be continued in each of the four districts until further order of the court in each respective district.⁸⁶ Referees in bankruptcy and U.S. commissioners were to continue in office or be reappointed for the remainder of their terms. Members of the bar in the Southern and Northern

81. *More Than 300 Honor William P. Gray At Enrobement as U.S. District Judge*, L.A. DAILY J., July 20, 1966, at 1.

82. *Judge Hauk is Welcomed by Justice Clarke*, L.A. DAILY J., 29 July 29, 1966, at 1.

83. *Four New U.S. Court Districts, Designations in Effect Today*, L.A. DAILY J., Sept. 19 1966, at 1 [hereinafter *Four New U.S. Court Districts*].

84. *See id.*

85. *Id.*

86. *Id.*

Districts were to be considered members of the bar in any of the four districts after the effective date "if any part of the District in which they are now admitted is included in such District, subject to further orders of said Districts." With these orders and policies in effect, the transition to the newly reformed Central and other districts apparently was smooth and professional.⁸⁷

The newly reformed Southern District, now headquartered in San Diego, felt more cause for celebration. On Friday, September 16, a ceremony was held at the federal courthouse at the corner of Union and F Streets, presided over by Ninth Circuit Judge Walter Ely.⁸⁸ Joining him on the bench were Judges Carter and Kunzel and Senior Judge Jacob Weinberger, who had first been assigned to San Diego in 1949, and Judge Luther W. Youngdahl, from the U.S. District Court for the District of Columbia, who was sitting in San Diego by designation. Judge Carter swore in the new clerk of court, William Luddy, and the new U.S. Marshal, Wayne Burrell Colburn, and other court officials. The morning session was followed by a luncheon hosted by the San Diego County Bar Association. At the luncheon, future Ninth Circuit Judge J. Clifford Wallace read bar association resolutions calling for construction of a new federal courthouse and for the "speedy appointment" of a third federal judge for the district. Bar President Alec L. Cory praised all who had worked for the past thirteen years to create the new district, while Circuit Judge Ely proclaimed that "today is a proud day for the people of San Diego and Imperial Counties."⁸⁹

In the new Central District, the celebrations were confined to the induction ceremonies for the men confirmed to fill the three newly authorized judgeships, which were compensation for the loss of active Judges Carter and Kunzel to the new Southern District and Judge Crocker to the new Eastern District.⁹⁰ The first two nominations to the Central District came quickly. On September 26, President Johnson nominated Orange County Superior Court Judge Warren Ferguson and former U.S. Attorney Manuel Real.⁹¹ The court welcomed Judge Real to its bench on November 17 in Chief Judge Clarke's courtroom where Ninth Circuit Judge Ely administered the oath. Judge Real was enrobed by his brothers John and Emil, and attorney Bruce Hochman, a long-time colleague, gave a

87. *Id.*

88. *San Diego Celebrates Its Own Federal District Court*, SAN DIEGO DAILY TRANSCRIPT, Sept. 16, 1966, at 1.

89. *Id.*

90. *See Four New U.S. Court Districts*, *supra* note 83, at 1.

91. *Manuel Real Is New U.S. Judge, Also Ferguson*, L.A. DAILY J., Sept. 27, 1966, at 1.

special admonition.⁹² Circuit Judge Ely performed the same duties on December 2 for Judge Ferguson in a similar ceremony held in Chief Judge Clarke's courtroom.⁹³ The third newly created judgeship would not be filled until the following year. On November 29, 1967, President Johnson nominated Los Angeles County Superior Court Judge Harry Pregerson to the new seat. He was confirmed by the Senate eight days later. The new Central District was now intact, and would remain this way for but two more years, when Judge Peirson Hall assumed senior status.⁹⁴

VII. CONCLUSION

The reformation of California's district courts occurred against a backdrop of the Cold War, the Civil Rights Movement, an escalating war in Vietnam, general challenges to authority, and public dissatisfaction with the judicial system stimulated by unpopular court opinions. It was a time of turmoil and upheaval in American society.

Two major factors led to the reorganization of California's district courts. First, the state had experienced significant population growth in the years following World War II, and yet only 3 new judgeships had been added since 1954. As cities like Oakland, San Jose, Sacramento, and Fresno grew, so did the need for more centrally located courts. San Diego, destined to become California's second largest city by 1970, could demonstrate an additional need for its own district court because of the caseload generated by its proximity to the Mexican border. Los Angeles would become the nation's second largest city by 1990, and its own population and economic growth argued for increased judgeships. Second, new law, consisting of federal legislation particularly in the area of civil rights, and U.S. Supreme Court decisions, especially those expanding the rights of criminal defendants, was another contributing factor to the need for rearranging California's district courts.

Chief Judge Byrne, Sr., was correct. The addition of three judgeships in 1966 only met immediate needs. As the population and economy of the Greater Los Angeles region grew, and as Congress continued to expand federal jurisdiction, so grew the Central District's caseload and its attendant need for more judges. Three additional judgeships would be added to the

92. Miles Clark, *Real Is Enrobed as Federal Judge By Judge Ely and Clarke in Court*, L.A. DAILY J., Nov. 18, 1966, at 1.

93. Miles Clark, *Judge Warren Ferguson, New Federal Judge, Has Long Bench Experience*, L.A. DAILY J., Nov. 21, 1966, at 1.

94. Judges of the United States Courts, Biographical Directory of Federal Judges: Peirson Mitchell Hall, http://www.fjc.gov/history/home.nsf/judges_frm (last visited June 25, 2007).

district in 1970, one more in 1978, and five more in 1984.

How these judges and their colleagues on the Central District bench faced the changes and conflicts of the forty years since the district's reorganization is the subject of other articles and discussions in this symposium.

AUTHORIZED MANAGERIALISM UNDER THE FEDERAL RULES — AND THE EXTENT OF CONVERGENCE WITH CIVIL-LAW JUDGING

Thomas D. Rowe, Jr.*

I. INTRODUCTION

A quarter century ago, a junior Professor Judith Resnik helped alert us to the development of “managerial judging” and the many issues it posed.¹ Uneasy with trends that others had presented as warranted responses to changing adjudicatory needs,² she described many changes from a relatively passive judicial role in pretrial case development and raised several concerns:

In the rush to conquer the mountain of work, no one—neither judges, court administrators, nor legal commentators—has assessed whether relying on trial judges for informal dispute resolution and for case management, either before or after trial, is good, bad, or neutral. Little empirical evidence supports the claim that judicial management “works” either to settle cases or to provide cheaper, quicker, or fairer dispositions. Proponents of judicial management have also failed to consider the

* Elvin R. Latty Professor of Law, Duke University. B.A. Yale, 1964; M. Phil. Oxford, 1967; J.D. Harvard, 1970. For suggestions on sources, this comparativist—who is far from losing his amateur status—is grateful to Professors Kevin Clermont, Antonio Gidi, Máximo Langer, Per Henrik Lindblom, Richard Marcus, and Michele Taruffo. Thanks also to Professor Judith Resnik for comments on a previous version of this paper. Surviving errors are, of course, mine. References to Federal Rules of Civil Procedure are to the rules as they stand before the restyled rules scheduled to take effect December 1, 2007.

1. See Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 386-413 (1982).

2. See, e.g., Robert F. Peckham, *The Federal Judge as a Case Manager: The New Role in Guiding a Case from Filing to Disposition*, 69 CAL. L. REV. 770, 770 (1981); William W. Schwarzer, *Managing Civil Litigation: The Trial Judge's Role*, 61 JUDICATURE 400, 401-02 (1978).

systemic effects of the shift in judicial role. Management is a new form of "judicial activism," a behavior that usually attracts substantial criticism. Moreover, judicial management may be teaching judges to value their statistics, such as the number of case dispositions, more than they value the quality of their dispositions. Finally, because managerial judging is less visible and usually unreviewable, it gives trial courts more authority and at the same time provides litigants with fewer procedural safeguards to protect them from abuse of that authority. In short, managerial judging may be redefining *sub silentio* our standards of what constitutes rational, fair, and impartial adjudication.³

Professor Resnik concluded with a call not to risk judicial impartiality in the interest of speedy case disposition:

I want to take away trial judges' roving commission and to bring back the blindfold. I want judges to balance the scales, not abandon them altogether in the press to dispose of cases quickly. No one has convincingly discredited the virtues of disinterest and disengagement, virtues that form the bases of the judiciary's authority. Our society has not yet openly and deliberately decided to discard the traditional adversarial model in favor of some version of the continental or inquisitorial model. Until we do so, federal judges should remain true to their ancestry and emulate the goddess Justitia.⁴

She recognized, though, that developments were likely to entrench judicial managerialism: "Unless the Supreme Court and Congress reject proposed amendments to the Federal Rules, pretrial judicial management will be required in virtually all cases."⁵

The then-pending amendments to the Federal Rules of Civil Procedure did take effect in 1983,⁶ and rounds of amendments since have reinforced federal district judges' managerial authority in several areas of pretrial procedure.⁷ From the relatively informal techniques of pioneers like Judges Peckham⁸ and Schwarzer,⁹ we have moved for better or worse into an era of

3. Resnik, *supra* note 1, at 380 (footnotes omitted).

4. *Id.* at 445 (footnote omitted); see also E. Donald Elliott, *Managerial Judging and the Evolution of Procedure*, 53 U. CHI. L. REV. 306, 308 (1986). Professor Elliott contended:

[W]e should think about civil procedure less from the perspective of powers granted to judges, and more from the perspective of incentives created for lawyers and clients. Our current system of civil litigation creates perverse incentives for lawyers, and then relies on judges to police litigant behavior through techniques like managerial judging. If we are not satisfied with the results, we should redesign the system to provide direct incentives for appropriate behavior.

5. Resnik, *supra* note 1, at 379 (footnote omitted).

6. See 4 CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 1007, at 49-50 (3d ed. 2002).

7. See, e.g., FED. R. CIV. P. 16(b); see also FED. R. CIV. P. 11(c).

8. See Peckham, *supra* note 2, at 770.

authorized managerialism. This Article's purpose is not to evaluate this development; the limited empirical evidence on managerial judging's effectiveness at reducing delay and cost, to which Professor Resnik referred, remains—despite major later efforts—fairly inconclusive.¹⁰ Instead, this Article first briefly discusses the specific ways in which federal judges' managerial powers have been written into the Federal Rules of Civil Procedure. Next, I turn to the question to which Professor Resnik alluded—the degree to which pretrial managerial judging, as we have it in American federal courts, entails movement away from traditional American adversarialism and toward convergence with practices in civil-law systems, which are often referred to as inquisitorial.¹¹ The answer is that there has been some such movement, but less than may have been assumed by some, and with more variation among civil-law systems themselves than is sometimes recognized on this side of the Atlantic.

II. AUTHORIZED PRETRIAL MANAGERIALISM IN THE FEDERAL RULES OF CIVIL PROCEDURE

If one theme can fairly be said to dominate in the rounds of Civil Rule amendments adopted since Professor Resnik's article, that theme is the authorization of both numerous specific measures that district courts can use and the wide discretion they have in pretrial litigation management.¹² A survey of how several key rules have changed over the last quarter century illustrates the extent of the changes, which may come as a surprise to those who have not looked back at where the rules stood around 1980.

9. See Schwarzer, *supra* note 2, at 401-02.

10. See, e.g., JAMES S. KAKALIK ET AL., AN EVALUATION OF JUDICIAL CASE MANAGEMENT UNDER THE CIVIL JUSTICE REFORM ACT 187, 210 (1996) (reporting reduction in time to disposition from imposing an early, firm trial date and other early case-management measures, but increases in attorney work hours); JAMES S. KAKALIK ET AL., AN EVALUATION OF MEDIATION AND EARLY NEUTRAL EVALUATION UNDER THE CIVIL JUSTICE REFORM ACT xxxiv (1996) (summarizing findings including roughly balanced gains and losses in cases disposed of through ADR); JAMES S. KAKALIK ET AL., DISCOVERY MANAGEMENT 67 (1998) (combining discovery and case-management planning with early management reduced disposition time significantly without increasing attorney work hours).

11. See, e.g., Resnik, *supra* note 1, at 445.

12. See discussion *infra* Parts II.A-D (addressing wide discretion granted under Rule 11(c) and pretrial litigation management authorized under Rules 16 and 23(d), and over disclosure and discovery processes).

A. Sanctions Under Rule 11

Until 1983, Rule 11 was a sleepy little eight-sentence rule that rather toothlessly stated that an attorney's signature on a pleading certified "that he has read the pleading; that to the best of his knowledge, information, and belief there is good ground to support it; and that it is not interposed for delay."¹³ Sanctions were limited to striking an offending pleading as "sham and false" and to "appropriate disciplinary action," but only for "a wilful [sic] violation."¹⁴ The original Rule 11 had "not been effective in deterring abuses."¹⁵ The 1983 amendments did not add many words, but importantly imposed an obligation of "reasonable inquiry" while simultaneously sharpening standards as to both factual allegations and legal arguments, as well as discarding willfulness as a prerequisite for sanctions.¹⁶ The amendments authorized, using apparently mandatory "shall" language, the imposition of sanctions either upon a party's motion or on the district court's initiative, with wide judicial discretion over the nature of sanctions, and conferred discretion to award a party's expenses including attorney fees.¹⁷

After the explosion of satellite litigation under the 1983 version of Rule 11, the 1993 amendments changed the rule into its present form.¹⁸ These amendments largely retained the 1983 standards while revising key aspects of the process and sanctions, particularly by introducing the 21-day "safe harbor" for party-initiated sanction motions¹⁹ and limiting sanctions to what suffices for deterrence.²⁰ Sanctions can still be imposed by judicial initiative, after notice and opportunity to show cause why specific conduct did not violate the rule.²¹ Additionally, by changing "shall" to "may," the 1993 amendments explicitly granted federal judges discretion whether to impose sanctions at all as well as in deciding what sanctions to impose.²²

13. FED. R. CIV. P. 11 (1938) (amended 1993).

14. *Id.*

15. FED. R. CIV. P. 11 advisory committee's note (explaining the 1983 amendment).

16. FED. R. CIV. P. 11 (1983) (amended 1993).

17. *Id.*

18. *See* FED. R. CIV. P. 11 advisory committee's note (discussing reasons for the 1993 amendments and how Rule 11 was changed).

19. *See* FED. R. CIV. P. 11(c)(1)(A) (requiring Rule 11 motions to be served but not initially filed with the court and giving the served party twenty-one days to withdraw or correct the challenged filing).

20. *See* FED. R. CIV. P. 11(c)(2) (stating that the sanction imposed for a Rule 11 violation "shall be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated").

21. *See* FED. R. CIV. P. 11(c)(1)(B).

22. *See* FED. R. CIV. P. 11(c).

While Rule 11 is far from the leading authority for judicial case management—in particular, it is not a proactive tool and comes into play only after allegedly offending litigant action—it provides considerable scope for judicial initiative and discretion in addressing and, we can at least hope, deterring misconduct.

B. Pretrial Conferences, Management, and Scheduling Under Rule 16

Federal Rule of Civil Procedure 16 most strongly illustrates the authorization of pretrial managerialism.²³ The change in Rule 16's title, from "Pre-Trial Procedure; Formulating Issues"²⁴ at the original framing to the present "Pretrial Conferences; Scheduling; Management"²⁵ in 1983, reflects how the rulemakers largely took over a rule number to set up a detailed set of pretrial management and scheduling objectives and procedures. From 1938 to 1983, Rule 16 permitted a federal judge to summon attorneys to a pretrial conference and instruct them to consider such matters as simplifying issues, pleading amendments, admissions, limiting the number of expert witnesses, and referring issues to a master.²⁶ The original Rule 16 did allow entry of pretrial orders to control the later course of the action,²⁷ and considerable pretrial-management practice developed under the rule.²⁸

Several of the specific points in the original Rule 16 still appear in today's version, but the 1983 and 1993 amendments significantly lengthened the rule and widened its scope.²⁹ Amendments effective December 1, 2006, part of a package dealing with discovery of electronically stored information, added authority to include in a Rule 16(b) scheduling order provisions for e-discovery and party agreements on asserting claims of privilege or trial-preparation protection after

23. See, e.g., Charles R. Richey, *Rule 16: A Survey and Some Considerations for the Bench and Bar*, 126 F.R.D. 599, 603 (1989) ("I think it can be safely said that the 'passive model' of judging no longer prevails, and that in Rule 16 the drafters endorsed — if not by mandating aggressive judicial involvement, then by at least expressly *permitting* such involvement — the managerial model of judging."); see also FED. R. CIV. P. 16(b) (for cases not exempted by local rule, making pretrial management partly mandatory by requiring entry of scheduling order).

24. FED. R. CIV. P. 16 (1938) (amended 1983).

25. FED. R. CIV. P. 16.

26. See FED. R. CIV. P. 16 (1938) (amended 1983).

27. See *id.*

28. See Richey, *supra* note 23, at 601-02 (surveying pre-1983 practice under Rule 16, including judicial promotion of settlement).

29. See FED. R. CIV. P. 16.

production.³⁰ As *Moore's Federal Practice* now puts it:

Rule 16 is explicitly intended to encourage the active judicial management of the case development process and of trial in most civil actions. Rule 16 calls on judges to fix deadlines for completing the major pretrial tasks and encourages judges to actively participate in designing case-specific plans for positioning litigation as efficiently as possible for disposition by settlement, motion, or trial. Rule 16 authorizes and regulates use of a wide range of case management tools and powers—principally through pretrial conferences. It also authorizes a wide range of sanctions for violations of pretrial orders.³¹

Rule 16, originally a half page and now about three pages long, starts by authorizing pretrial conferences and listing their objectives.³² Its two main subdivisions, (b) and (c), dovetail with the parties' required early Rule 26(f) conference by requiring an early scheduling order with mandatory and discretionary scheduling items.³³ Rule 16(c) provides a sixteen-item, open-ended list of subjects that can be considered and acted upon at any pretrial conference.³⁴ These subjects include, as augmented by the 1993 amendments, issue narrowing, discovery scheduling, summary adjudication, settlement and ADR, severance and trial bifurcation, and trial-time limits.³⁵ The briefer three final subdivisions, (d), (e) and (f), authorize a final pretrial conference; deal with pretrial orders; and authorize sanctions for failure to obey scheduling orders or appear at, be prepared for, or participate in good faith in a scheduling or pretrial conference.³⁶ By any measure, Rule 16 gives judges more managerial arrows than can fit in an ordinary quiver.

C. *Managing Class Actions Under Rule 23*

Authorized managerialism under Rule 23 has a somewhat longer pedigree than under most other rules; Rule 23(d), on orders in the conduct of class actions, goes back to the major 1966 amendments that created the present prerequisites and categories.³⁷ Rule 23(d)'s five-point list begins by

30. See FED. R. CIV. P. 16(b)(5)-(6).

31. 3 JAMES WM. MOORE ET AL., *MOORE'S FEDERAL PRACTICE* 16-1 (3d ed. 2007).

32. See FED. R. CIV. P. 16(a).

33. See FED. R. CIV. P. 16(b)-(c); see also FED. R. CIV. P. 26(f).

34. See FED. R. CIV. P. 16(c).

35. See *id.*; FED. R. CIV. P. 16 advisory committee's note to the 1993 amendment.

36. FED. R. CIV. P. 16(d)-(f).

37. See FED. R. CIV. P. 23(d) advisory committee's note to the 1966 amendment.

conferring broad authority to “make appropriate orders: (1) determining the course of the proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument,” and ends with the catchall “(5) dealing with similar procedural matters.”³⁸ In between are grants of discretionary authority to require notice to class members beyond the notice required for (b)(3) common-question actions under Rule 23(c)(2), to impose conditions on class representatives and intervenors, and to require that pleadings be amended appropriately when an action with class allegations proceeds on a non-class basis.³⁹ Rule 23(d) ends by granting the authority to combine Rule 23(d) orders with orders under Rule 16, which—as we have just seen—has been greatly expanded since Rule 23(d)’s adoption in 1966.⁴⁰

After efforts in the 1990s to amend standards for certifying class actions were abandoned, and interlocutory appeal from class-certification grants and denials authorized,⁴¹ the Advisory Committee turned to amendments governing the appointment of class counsel, settlement, and attorney-fee awards.⁴² These amendments took effect December 1, 2003.⁴³ The new Rule 23(g) counsel-appointment provisions are largely guidelines for judicial selection of class counsel, but they explicitly provide some managerial authority.⁴⁴ For example, under Rule 23(g) a judge can require potential counsel to provide information pertinent to his or her appointment and propose terms for attorney fees,⁴⁵ and can include in the appointment order provisions about awards of attorney fees or nontaxable costs.⁴⁶ The settlement-approval provisions in amended Rule 23(e) primarily provide criteria and require certain procedures, but they also include wide discretion over the manner of giving required notice of a proposed settlement,⁴⁷ confer discretionary authority to require a second opt-out for a (b)(3) class action settlement,⁴⁸ and require court approval to withdraw an objection to a proposed settlement.⁴⁹ New Rule 23(h)’s fee-award provisions largely

38. FED. R. CIV. P. 23(d).

39. See FED. R. CIV. P. 23(b)(3), (c)(2), (d).

40. FED. R. CIV. P. 23(d); see FED. R. CIV. P. 16.

41. See FED. R. CIV. P. 23(f) and advisory committee’s note to the 1998 amendment.

42. FED. R. CIV. P. 23(e), (g), (h).

43. FED. R. CIV. P. 23(e), (g), (h).

44. See FED. R. CIV. P. 23(g).

45. FED. R. CIV. P. 23(g)(1)(C)(iii).

46. See FED. R. CIV. P. 23(g)(2)(C).

47. See FED. R. CIV. P. 23(e)(1)(B).

48. See FED. R. CIV. P. 23(e)(3).

49. See FED. R. CIV. P. 23(e)(4)(B). The withdrawal-approval requirement responds at least in part to the problem of “bad objectors,” which occurs when an objector gums up the settlement

establish procedural steps, but they also grant discretion over whether to hold a hearing⁵⁰ or to refer some fee-award issues to a master or magistrate judge.⁵¹

D. Managing Disclosure and Discovery Under Rules 26-37 and 45

Initial discussion of trial courts' extensive authorized managerial powers in connection with disclosure and discovery seems best approached globally rather than rule by rule, both because of the 1970 partial rule rearrangement and also because of parallel provisions in some aspects of different rules. Two requirements involving judicial control that were in the original rules, leave of court to take a deposition⁵² and a motion and good-cause showing for production and inspection or entry onto premises under Rule 34,⁵³ have been eliminated. Currently, a motion and a showing of good cause are required only for physical and mental examinations under Rule 35(a).⁵⁴ The abandoned prior-approval requirements for individual discovery requests, which would no doubt be an impossible burden today, have been replaced with extensive power to plan and manage the disclosure-discovery process as a whole, as well as rule on particular issues.

An interesting pattern in discovery management's history is that trial judges' powers in some respects seemed to reach a nadir in 1970, with a backlash starting in 1980 and continuing through several rounds of amendments. The prior-approval requirements for depositions and Rule 34

process in hopes of being paid to go away. As the Advisory Committee delicately put it, some objections "may augment the opportunity for obstruction or delay." FED. R. CIV. P. 23(e)(4)(B) advisory committee's note to the 2003 amendment.

50. See FED. R. CIV. P. 23(h)(3).

51. See FED. R. CIV. P. 23(h)(4). The rule may contain an unfortunate inconsistency with Rule 54(d)(2)(D), to which it refers. Rule 23(h)(4) says that the court "may refer issues *related to the amount of the award* to a special master or a magistrate judge as provided in Rule 54(d)(2)(D)." FED. R. CIV. P. 23(h)(4) (emphasis added). Rule 54(d)(2)(D) does limit references to *masters* to "issues relating to the value of services," but also authorizes referring a motion "for attorneys' fees to a *magistrate judge* under Rule 72(b) as if it were a dispositive matter"--without the limitation to value issues. FED. R. CIV. P. 54(d)(2)(D) (emphasis added). In short, Rule 23(h)(4) seems to imply that fee-award referrals to magistrate judges can be about how much, and only that; Rule 54(d)(2)(D) allows magistrate judges to decide whether to award fees, as well as how much. See FED. R. CIV. P. 23(h)(4), 54(d)(2)(D). Rule 72(b) requires *de novo* district court judge review of challenged magistrate-judge recommendations on dispositive matters, but the apparent inconsistency about scope of referral remains. See FED. R. CIV. P. 72(b).

52. See FED. R. CIV. P. 26(a) (1938) (amended 1946).

53. See FED. R. CIV. P. 34 (1938) (amended 1970).

54. See FED. R. CIV. P. 35(a).

requests were gone by 1970;⁵⁵ and the 1970 amendments both expressly made frequency of use of discovery methods unlimited unless otherwise ordered⁵⁶ and allowed discovery in any sequence without regard to other discovery taking place.⁵⁷ One move toward greater judicial control was to broaden protective-order authority from depositions to discovery generally.⁵⁸ But the overall working of discovery—at least as the rules read from 1970 to 1980—involved heavy emphasis on party initiative, with judicial involvement coming almost exclusively upon party motion.

The great difference with the extensive and proactive management authority of today is more understandable in light of what the Advisory Committee said about discovery problems in 1970, based upon a field survey of federal pretrial discovery directed by Professor Maurice Rosenberg of Columbia Law School.⁵⁹ In terms that sound breathtakingly quaint today, the Committee reported:

No widespread or profound failings are disclosed in the scope or availability of discovery. The costs of discovery do not appear to be oppressive, as a general matter, either in relation to ability to pay or to the stakes of the litigation. Discovery frequently provides evidence that would not otherwise be available to the parties and thereby makes for a fairer trial or settlement.⁶⁰

55. See FED. R. CIV. P. 26(a) advisory committee's note to the 1946 amendment; FED. R. CIV. P. 34 advisory committee's note to the 1970 amendment.

56. See FED. R. CIV. P. 26(a) (1970) (amended 1983) ("Unless the court orders otherwise under subdivision (c) of this rule [on protective orders], the frequency of use of [the discovery] methods is not limited.").

57. See FED. R. CIV. P. 26(d):

Unless the court upon motion, for the convenience of parties and witnesses and in the interests of justice, orders otherwise, methods of discovery may be used in any sequence and the fact that a party is conducting discovery, whether by deposition or otherwise, does not operate to delay any other party's discovery.

This language was adopted in 1970 and still appears in Rule 26(d), but now comes after a sentence banning discovery efforts in many cases until after the parties' Rule 26(f) planning conference, which must precede the Rule 16(b) scheduling conference. See FED. R. CIV. P. 26(f), 16(b). The net effect of these provisions is that discovery will often start some weeks after initial pleadings, at the earliest, and will occur in a sequence at least somewhat regulated by the scheduling order.

58. Compare FED. R. CIV. P. 30(b) (1938) (amended 1970) (protective orders in connection with depositions) with FED. R. CIV. P. 26(c) (protective orders generally).

59. COLUMBIA PROJECT FOR EFFECTIVE JUSTICE, FIELD SURVEY OF FEDERAL PRETRIAL DISCOVERY: REPORT TO THE ADVISORY COMMITTEE ON RULES OF CIVIL PROCEDURE (1965). See FED. R. CIV. P. 26 advisory committee's Explanatory Statement Concerning 1970 Reorganization of Discovery Rules (referring to Columbia Survey as basis for statements in quotation that follows in text of article).

60. FED. R. CIV. P. 26 advisory committee's Explanatory Statement Concerning 1970 Reorganization of Discovery Rules.

Contrast the Committee's view just ten years later, when it proposed a new Rule 26(f) authorizing the court to summon the parties for a discovery conference: "There has been widespread criticism of abuse of discovery."⁶¹ Still, as originally adopted the discovery-conference authority had to be invoked by party motion.⁶²

Discovery-rule amendments have been so frequent since 1980 that proceeding through their history would be pointlessly tedious. Instead, given the basic background of where we started from in 1970, it should suffice to summarize principal managerial powers over disclosure and discovery as they stand in the Rules today:

- Since 1983, Rule 16(b) has required a scheduling order that sets the time to complete discovery;⁶³ it also confers authority to modify disclosure times and the amount of discovery to be permitted.⁶⁴ Since 2006, it includes provisions concerning discovery of electronically stored information and party agreements on post-production assertion of privilege or trial-preparation claims.⁶⁵
- Since 1993, Rule 16(c)(6) has allowed judges to consider at pretrial conferences "the control and scheduling of discovery, including orders affecting disclosures and discovery pursuant to Rule 26 and Rules 29 through 37."⁶⁶
- Rule 26(b)(1), as amended in 2000, grants authority to decide on party motion whether good cause exists to allow "subject-matter" discovery beyond the general party-initiated discovery of matters "relevant to the claim or defense of any party."⁶⁷
- Rule 26(b)(2), as amended in 1983, 1993, and 2000, authorizes judges on party motion or their own initiative to change rule limits on the number of depositions and interrogatories; to limit the number of admission requests;

61. FED. R. CIV. P. 26(f) advisory committee's note to the 1980 amendment.

62. See FED. R. CIV. P. 26(f) (1980) (amended 1993).

63. See FED. R. CIV. P. 16(b)(3).

64. See FED. R. CIV. P. 16(b)(4).

65. See FED. R. CIV. P. 16(b)(5)-(6); *supra* text accompanying note 30.

66. FED. R. CIV. P. 16(c)(6).

67. FED. R. CIV. P. 26(b)(1).

and to limit discovery on such grounds as cumulativeness, bypassed opportunity to get information sought, and cost and burden in relation to stakes.⁶⁸

- Rules 26(b)(2)(B) and 45(d)(1)(D), added in 2006, provide a process for dealing with contested assertions that electronically-stored information is in a source identified as “not reasonably accessible because of undue burden or cost,” including ordering discovery on a showing of good cause and specifying conditions for the discovery, which may include cost-sharing or cost-shifting.⁶⁹
- Rules 26(b)(5)(B) and 45(d)(2)(B), added in 2006, provide for dealing with claims of privilege or of protection as trial-preparation material as to information, electronically stored or otherwise, produced in discovery.⁷⁰
- Rule 26(c), as broadened in 1970 and further amended in 1993, authorizes protective orders on party motion.⁷¹
- Rule 26(d), as added in 1970 and amended in 1993 and 2000, authorizes judges to control the sequence of discovery on party motion.⁷²
- Rule 26(f), as amended in 2000, accommodates the Eastern District of Virginia’s “rocket docket”⁷³ by authorizing local rules requiring that the parties’ Rule 26(f) conference and

68. See FED. R. CIV. P. 26(b)(2). The 2006 amendment adding the “two-tier” provision of Rule 26(b)(2)(B) on dealing with claims that electronically stored information is in identified sources that are not reasonably accessible split the content of former Rule 26(b)(2) between Rule 26(b)(2)(A) and -(C), with no change in the existing text.

69. See FED. R. CIV. P. 26(b)(2)(B) and advisory committee note to the 2006 amendment; FED. R. CIV. P. 45(d)(1)(D).

70. See FED. R. CIV. P. 26(b)(5)(B), 45(d)(2)(B). Federal courts exercised this power even before the 2006 amendments. See, e.g., 6 MOORE’S FEDERAL PRACTICE, *supra* note 31, § 26.47[5], at 26-156 to -161 (discussing various approaches to managing unintended disclosures of privileged material).

71. See FED. R. CIV. P. 26(c).

72. See FED. R. CIV. P. 26(d).

73. See *United States v. Ferguson*, 432 F. Supp. 2d 559, 569 n.10 (E.D. Va. 2006) (“The Eastern District of Virginia has been referred to as the ‘Rocket Docket’ since Judge Walter E. Hoffman, in 1954, pursued a 12-year regimen[] of putting in long hours, cutting the traditional 2-hour lunch, and holding court on Saturdays and holidays.”).

report occur before the time limit mandated in the rule itself.⁷⁴

- Rule 26(g), added in 1983 and amended in 1993, authorizes sanctions for Rule 11-type violations in connection with disclosures and discovery requests, responses, and objections, *without* Rule 11's safe-harbor and deterrence-limit provisions.⁷⁵
- Rule 30(d)(3)-(4), as effective (without subparagraphs) in 1938 and amended in 1970, 1993, and 2000, authorizes sanctions for misconduct in depositions and allows the court on motion to terminate or limit depositions.⁷⁶
- Rule 37, as effective in 1938 and substantively amended in 1970, 1980, 1993, and 2000, grants authority to rule on discovery disputes and impose a broad range of sanctions in connection with discovery disputes and misconduct,⁷⁷ and to bar use of information by a party who failed to disclose it as required,⁷⁸ subject to a limit added in 2006 mostly forbidding sanctions "under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system."⁷⁹
- Finally, Rule 45(c), as amended in 1991 and 2006, authorizes judges to protect persons subject to discovery and trial subpoenas.⁸⁰

Discovery must be a fearsome Gulliver to require all those strings, and others I may have overlooked, to tie him down.

74. See FED. R. CIV. P. 26(f).

75. See FED. R. CIV. P. 26(g); FED. R. CIV. P. 11(c)(1)(A) (21-day safe harbor), 11(c)(2) (deterrence limit on sanctions).

76. See FED. R. CIV. P. 30(d)(3)-(4).

77. See FED. R. CIV. P. 37.

78. See FED. R. CIV. P. 37(c)(1).

79. FED. R. CIV. P. 37(f).

80. See FED. R. CIV. P. 45(c).

III. ARE WE GETTING CIVIL-IZED?

It is easy to find statements to the effect that the advance of pretrial managerialism moves American and civil-law systems closer together.⁸¹ Sometimes the assertion seems to be stronger—that our increasing managerialism makes American judges function more in the way that supposedly “inquisitorial” civil-law judges do. Alfred Cortese and Kathleen Blaner, for example, argue that “there has been a convergence of the systems over time For example, some aspects of the American system, such as the increasingly managerial role played by the judge, mimic the inquisitorial style”⁸² Professor Linda Mullenix says that “particularly in the realm of complex litigation, the American managerial judge has undertaken roles that are indeed converging with the civil law inquisitorial judge.”⁸³ And Professor Richard Nagareda sees managerialism working in tandem with a more inquisitorial role in protecting absent class members:

Under the traditional [adversarial] view, courts are to be passive; parties are to be active. In class actions today, these postures are often reversed, with conscientious courts having to assume a more active, inquisitorial, and managerial posture in an attempt to safeguard the passive class members whose rights the class judgment stands to govern.⁸⁴

When focusing on American and civil-law systems’ similarities and remaining differences, it is important to have in mind the basic features of the polar “adversarial” and “inquisitorial” models—although, of course, no adjudicatory system employs either in a totally pure form. The adversarial model associated with common-law systems presumes a passive judge acting in an umpire’s role with a heavy emphasis on party (i.e., lawyer)

81. See, e.g., John H. Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823, 859 (1985) (“What makes the *Manual [for Complex Litigation]* look ‘proto-Germanic’ in the eyes of the comparative lawyer is the informal feel of ‘the conference method;’ and the active judicial role in defining issues, promoting settlement, and fixing the sequence for fact-gathering.”) (footnotes omitted).

82. Alfred W. Cortese Jr. & Kathleen L. Blaner, *Civil Justice Reform in America: A Question of Parity with Our International Rivals*, 13 U. PA. J. INT’L BUS. L. 1, 20 (1992). The authors add that “some aspects of the German system, such as counsel’s written and oral arguments, are clearly adversarial,” which appropriately reflects that systems are not purely adversarial or inquisitorial but rather blends that place them at various intermediate points along a spectrum. *Id.*

83. Linda S. Mullenix, *Lessons from Abroad: Complexity and Convergence*, 46 VILL. L. REV. 1, 13 (2001) (footnote omitted). Professor Mullenix notes that a key difference still remains, yet she minimizes it somewhat: “Although our judges still are not fact-finders, it is difficult not to take note of the increasing managerial involvement of judges in the resolution of complex cases, often verging on functions such as fact-finding.” *Id.* at 14.

84. Richard A. Nagareda, *Administering Adequacy in Class Representation*, 82 TEX. L. REV. 287, 374 (2003).

initiative and control over a wide range of matters.⁸⁵ In theory, as Professor J.A. Jolowicz put it, “in the adversary process . . . the best judge [was] the judge who, like a jury, knows nothing of the case he is to try until the trial itself begins,”⁸⁶ although judicial involvement in American pretrial discovery has long since made that principle inoperable here.⁸⁷ Given the degree of party control, the job of judge or jury as trier of fact is not to ascertain, and especially not to ferret out, the truth, but instead to resolve the parties’ dispute based on the facts they present.⁸⁸ At best we may hope that adversary presentation and cross-examination bring out something approximating the truth.⁸⁹

If common-law systems have long worked in ways putting them at some distance from the purest adversarial model, it is also likely that civil-law courts never worked in anything close to a diametrically opposite inquisitorial model. After all, a civil-law judge has no civil dispute to work with until a party initiates a case against one or more opponents;⁹⁰ and each party usually employs its own lawyer who does his or her adversarial best, to the extent possible within the system’s limits, to advance the client’s cause. Perhaps two features for our purposes best define the civil-law model, to which the label “inquisitorial” is often attached: first, considerable judicial initiative and control in shaping the course of the proceedings generally;⁹¹ and second, judicial primacy in fact-gathering.⁹²

85. See, e.g., Neil Andrews, *The Adversarial Principle: Fairness and Efficiency: Reflections on the Recommendations of the Woolf Report*, in REFORM OF CIVIL PROCEDURE: ESSAYS ON “ACCESS TO JUSTICE” 169, 171 (A.A.S. Zuckerman & Ross Cranston eds., 1995) (“Under an adversarial principle, it is the parties who dictate at all stages the form, content and pace of proceedings.”). Andrews proceeds to list twelve matters controlled by the party/lawyer in England, including pretrial decisions on adding parties, selecting material facts, pretrial progress, whether to seek interim or summary relief, and settlement. See *id.*

86. J.A. Jolowicz, *Adversarial and Inquisitorial Models of Civil Procedure*, 52 INT’L & COMP. L.Q. 281, 286 (2003). Jolowicz adds that in English practice this idea “has been finally killed off.” *Id.*

87. See Stephen N. Subrin, *Discovery in Global Perspective: Are We Nuts?*, 52 DEPAUL L. REV. 299, 301 (2002) (listing effects of changes in federal discovery rules).

88. The United States’ retention of the civil jury, never a feature in civil-law systems and largely abandoned in other common-law systems, means that—at least for cases to be tried before juries—dependence on party presentation has to remain predominant. See Jolowicz, *supra* note 86, at 282 (judicial interference with party presentation of facts would “deprive the jury of its sovereignty over the facts”).

89. See *id.* at 283-84 (calling it “a major defect of the adversary system that the judge has no duty to try to ascertain the truth,” and noting skeptically Wigmore’s claim “that cross-examination is ‘beyond any doubt the greatest legal engine ever invented for the discovery of truth.’”) (footnote omitted).

90. See *id.* at 281.

91. See *supra* note 81.

92. See Langbein, *supra* note 81, at 825 (“Having now made the great leap from adversary

This second feature alone seems to warrant using the term “inquisitorial,” and the limited appropriateness of the label may account for some imprecision in discussions of whether increasing pretrial managerialism in America is making our system more “inquisitorial” in nature.

To the extent that civil-law systems give judges the leading role in deciding which facts need to be ascertained and bringing them out (thus seeking directly to determine the truth, in contrast to the pure adversarial model), the United States for the most part seems not to have moved in the civil-law direction.⁹³ Neither, as we shall see, do at least some civil-law systems operate in much that way. Yet to the extent that civil-law judges take initiative to shape the course of proceedings—as some do considerably and others less so—American pretrial managerialism does take us in their direction. Professor Máximo Langer emphasizes an important distinction: “[U]nlike the court of the inquisitorial system that actively investigates the truth, the managerial court is active to make sure that the parties do not delay proceedings.”⁹⁴ And Professor Rolf Stürner concisely summarizes the similarities and distinctions between managerialism and inquisitorial judging:

Nearly worldwide, civil procedure relies on party activity, but allows for additional court activity. The coordination of party activity requires case management by the court. This case management, which is not an inquisitorial fact finding but invites the parties to coordinate their activities, is mandatory in many continental codes of civil procedure and

control to judicial control of fact-gathering, we would need to take one further step to achieve real convergence with the German tradition: from judicial control to judicial conduct of the fact-gathering process.”)

93. Interestingly, in 1990s civil-justice reforms, England moved not only toward greatly increased managerialism, but also toward more judicial involvement in fact development. As Cambridge Professor J.A. Jolowicz explains, the new English procedural rules

provide for a substantial increase in the judge’s powers of control of the case at the expense of those of the parties. . . . The judge also has the power to control evidence, which he may do by giving directions on the issues on which he requires evidence, on the nature of the evidence that he requires to determine those issues and on the way in which the evidence is to be placed before the court.

Jolowicz, *supra* note 86, at 287 (footnote omitted).

94. Máximo Langer, *The Rise of Managerial Judging in International Criminal Law*, 53 AM. J. COMP. L. 835, 836 (2005). Professor Langer adds:

If the adversarial system conceives the relationship between the main procedural actors as a dispute between two parties before a passive umpire, while the inquisitorial system presumes an official investigation that impartial officials conduct to find the truth, the managerial judging system conceives procedure as a device that the court uses with (even involuntary) collaboration and coordination from the parties to process cases as swiftly as possible.

Id. at 878. The investigative mode, when opposing parties are also involved, can of course also use managerial techniques in an effort to expedite case processing.

now in the reformed English procedure, too.⁹⁵

Such managerial judging will inevitably give the American trial judge considerable knowledge about the case before trial, just as civil-law judges often learn much about their cases in fairly early stages. Still, a key difference remains in that much—perhaps most—American managerialism deals with discovery; civil-law systems (and, for that matter, other common-law nations) employ much less extensive party-initiated discovery than we do.⁹⁶ Thus civil-law judges' control must be over other aspects of pretrial procedure—particularly scheduling, issue definition and narrowing, settlement promotion, and (where civil-law judges do engage in it) “inquisitorial” fact development.⁹⁷

IV. SOME PARTICULARS

A. *Party Control in Civil-Law Systems*

One should not understate the degree of control that adversarial parties retain in civil-law systems, even given a baseline in many countries of greater judicial control than in traditional American pretrial practice during the pre-managerial era. The German judge, for example,

does not have an inquisitorial responsibility to determine the truth, and need not try to save the parties from the consequences of deficient litigation. The parties control the issues presented for decision and select the evidence to be considered. The judge's role is enhanced compared to that of an American judge, however. The complaint “is first directed to the Court, and secondly to the opposing party,” and the judge has “responsibility to undertake a certain amount of positive activity during the proceedings in the interest of insuring a fair and just outcome.”⁹⁸

95. Rolf Stürmer, *Some European Remarks on a New Joint Project of the American Law Institute and UNIDROIT*, 34 INT'L LAW. 1071, 1082 (2000) (footnote omitted).

96. See, e.g., KUO-CHANG HUANG, *INTRODUCING DISCOVERY INTO CIVIL LAW* xxvi (2003) (“In the continental system, no such [discovery] rights are recognized. The civil judges exclusively enjoy investigative power.”); Subrin, *supra* note 87 (discussing discovery similarities and differences in American, other common-law, and civil-law systems).

97. See Subrin, *supra* note 87, at 301-02.

98. Richard L. Marcus, *Putting American Procedural Exceptionalism into a Globalized Context*, 53 AM. J. COMP. L. 709, 723 (2005) (quoting PETER L. MURRAY & ROLF STÜRMER, *GERMAN CIVIL JUSTICE* 194, 155 (2004)) (citations omitted).

And in France party statements of the claim, defense, and desired remedy define the litigation and are explicitly protected in the civil procedure code:

French law recognises a basic concept of the *objet du litige*, which . . . includes but does not consist exclusively of the remedy sought by the claimant. The phrase is used to refer to . . . the substance of the dispute of which the judge is seised by the parties. The "*objet du litige*," says the code, "is determined by the respective pretensions of the parties," and these are the claim, which sets the proceedings in motion, and the defence. The *objet du litige* can be modified by the parties through their incidental claims or defences, but is binding on and unalterable by the judge, who must decide on everything that is claimed and only on what is claimed.⁹⁹

Yet when it comes to the evidence the court receives, "[i]t is clear for France, however, that it is not exclusively for the parties to control the 'evidence' that comes before the court for its decision."¹⁰⁰

Similarly, Spain's 2000 Law of Civil Procedure

maintains the principles of party disposition . . . as overriding principles of Spanish civil justice. Under these principles, parties determine the subject matter and scope of the issues of the proceeding, if and when it is initiated, and if it is to be voluntarily terminated. Within the proceedings themselves, the parties, not the court, usually decide the source of factual proof for the contentions at issue. . . . A system of civil procedure is designed to protect the rights of individuals involved in legal disputes that, as a general rule, are controlled by the parties to the dispute.¹⁰¹

Whatever the degree of their control and even initiative, then, at least in some systems civil-law judges do not take on the character of what American commentators sometimes call "roving commissioners."¹⁰²

99. Jolowicz, *supra* note 86, at 291 (footnotes omitted). If the statement of remedy sought limits what relief can be granted, French courts have less flexibility than their American counterparts. See FED. R. CIV. P. 54(c) ("Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in the party's pleadings.").

100. Jolowicz, *supra* note 86, at 293; see also *infra* text accompanying notes 106-07.

101. Ignacio Díez-Picazo Giménez, *The Principal Innovations of Spain's Recent Civil Procedure Reform*, in THE REFORMS OF CIVIL PROCEDURE IN COMPARATIVE PERSPECTIVE 33, 40 (Nicolò Trocker & Vincenzo Varano eds. 2005) [hereinafter "REFORMS"].

102. See Jack Bass, *The Fifth Circuit in Southern History*, 19 GA. L. REV. 473, 480 n.32 (1984) (quoting unpublished speech dealing with the accusation that federal judges "have appointed themselves roving commissioners to do good"); see also HUANG, *supra* note 96, at 25 (despite his own assertion about civil judges' investigative power, see *supra* note 96, stating that under civil law's "principle of party presentation" "the court cannot conduct an ex officio investigation, and is allowed to investigate only the evidence designated by either party.") (footnote omitted).

B. Directions of Movement in Civil-Law Countries

Discussion of pretrial-management changes so far in this Article, and to a considerable extent in the American literature on convergence, has been of American developments and the extent to which those changes are moving the United States toward civil-law patterns.¹⁰³ Civil-law systems, of course, are not standing still either; interestingly, in responding to modern civil-litigation problems, they are sometimes moving not toward our system but in parallel with (or ahead of) us. A French judge's role was defined in quite passive terms from the Napoleonic era until 1965, with the judge initially to do "no more than to decide between the rival contentions of the parties."¹⁰⁴ A 1935 reform authorized the judge to "summon the parties and their lawyers to appear before him, but he could not make binding orders and he could do nothing that might prejudice a question of substance."¹⁰⁵ Only in 1965 did the French judge get

real power. He can make orders binding on the parties and impose sanctions. He can lay down time limits and he can make orders relating to the *instruction* [fact-finding procedures authorized by the judge]; when it comes to the hearing of witnesses, even if ordered on the application of a party, the judge decides what are the relevant facts to be proved, and it is he who examines the witnesses.¹⁰⁶

Further, the French civil code provides, "Everyone is bound to co-operate with the administration of justice with a view to revelation of the truth.' In addition the parties are explicitly required . . . to cooperate in the conduct of fact finding measures ordered by the judge."¹⁰⁷

By contrast, the former Berlusconi government proposed changes in Italian civil procedure that went precisely the other way. The model was presented as "privatizing" civil justice, with the preparatory stage "taken away from the hands of the judge and entrusted exclusively to those of the parties' lawyers. No more 'managerial judges', therefore, but only 'managerial lawyers'"¹⁰⁸ The preparatory phase

will consist only *and exclusively* of the exchange of a number of written pleadings and briefs between the parties' lawyers, without having any contact with the judge. . . . All this may be put to an end only when a

103. See *supra* Parts II-III.

104. Jolowicz, *supra* note 86, at 290.

105. *Id.*

106. *Id.* at 290-91.

107. *Id.* at 291.

108. Michele Taruffo, *Recent and Current Reforms of Civil Procedure in Italy*, in REFORMS, *supra* note 101, at 217, 225-26.

party will feel satisfied and will ask the judge to fix the hearing for the presentation of evidence.¹⁰⁹

The present Prodi government is not continuing this movement, which goes against the current flowing in most other systems, but neither has it brought forth any plans to increase the judicial role.¹¹⁰ An additional practical factor may limit pretrial managerialism by Italian judges—sheer underinvestment in judicial resources, leaving judges so swamped that they cannot take managerial initiatives.¹¹¹ In Italian litigation, judges may not get involved until at least one party rattles the judicial cage.

C. *Promotion of Settlement and Alternative Dispute Resolution*

One phenomenon—not entirely an uncontroversial one—that has accompanied American managerial judging is judicial promotion of settlement and alternative dispute resolution (ADR) approaches, such as early neutral evaluation, court-annexed mediation or arbitration, or other devices. Sometimes judges just informally suggest a particular form of ADR for a case, but Federal Rule 16(c) provides that they may have the parties consider at pretrial conferences, and “may take appropriate action, with respect to . . . (9) settlement and the use of special procedures to assist in resolving the dispute when authorized by statute or local rule.”¹¹² In addition, since 1998 federal law has required that each district court “authorize, by local rule . . . the use of alternative dispute resolution processes in all civil actions [and] . . . devise and implement its own alternative dispute resolution program, by local rule . . . to encourage and promote the use of alternative dispute resolution.”¹¹³ Promoting settlement and ADR is thus not just a significant feature in American federal pretrial practice; it is institutionalized.

ADR and settlement promotion have also long been (but with recently increased emphasis) institutionalized tradition in France.¹¹⁴ The French

109. *Id.* at 226.

110. E-mail from Michele Taruffo, Professor, University of Pavia, to Thomas D. Rowe, Jr., Professor of Law, Duke University (Dec. 11, 2006, 01:37:00 PST) (on file with author).

111. Conversation with Ugo Mattei, Professor, University of California Hastings College of the Law, in Los Angeles, California (Sept. 7, 2006). *See also* Langbein, *supra* note 81, at 824 n.3 (referring to “the systems of Southern Europe, where judicial domination of fact-gathering is less prominent and where less adequate resources have been devoted to developing and motivating the bench.”).

112. FED. R. CIV. P. 16(c)(9).

113. 28 U.S.C. § 651(b) (2006).

114. *See* Jolowicz, *supra* note 86, at 294.

code of civil procedure has assigned judges the responsibility to attempt conciliation for most of the past two centuries.¹¹⁵ Moreover, since 1996, French judges may appoint a mediator with party consent; and, since 1998, legal aid has been available to try to help parties reach settlements.¹¹⁶ With regard to Germany, Professor Resnik refers to “the vigorous efforts of German judges to convince parties to settle.”¹¹⁷ Similarly, to give just a few other examples, recent reforms in Norway require mediation, and Finland has just adopted a new mediation law; Swedish and English procedural codes and practices entail settlement promotion.¹¹⁸ It seems unnecessary to delve deeply into practice in other civil-law nations to conclude that some basic similarities are present.

D. Inquisitorial Fact-Finding in America

If it is generally accurate to say that American managerialism does not converge with the inquisitorial aspect of civil-law judging (to the extent that civil-law systems actually have it), such fact-finding is not invariably absent from our managerial judging—although the occasions for it may be quite limited. First, judges may choose to make more use of court-designated experts: “Th[e] transformative potential of *Daubert*, coupled with the modern willingness to accept the role of the managerial judge, may encourage a greater degree of inquisitorial thinking, opening the door to institutions like court-appointed experts and scientific tribunals.”¹¹⁹

115. *See id.*

116. *See id.*

117. Resnik, *supra* note 1, at 386 (footnote omitted). *See also* Marcus, *supra* note 98, at 731 (“German judges . . . have long been under a statutory obligation to facilitate settlement [and] . . . place a premium on settlement”). Interestingly, though, and “remarkably from the American perspective, the German judicial role is so active as to have supplanted any out-of-court ADR practice; unlike the U.S., there is no market for private ADR services in Germany.” *Id.* (citation omitted).

118. *See* Per Henrik Lindblom, *ADR—The Opiate of the Legal System?* 17 n.51, 18 (2006) (manuscript on file with author). In England, though, judicial settlement promotion seems to take a back seat to cost and attorney-fee concerns. “In England, it seems, there is limited judicial promotion of settlement. . . . [T]he great importance of cost-shifting in England makes it a tool to encourage settlement even in the absence of [formal settlement] offers” Marcus, *supra* note 98, at 730.

119. Edward K. Cheng, *Same Old, Same Old: Scientific Evidence Past and Present*, 104 MICH. L. REV. 1387, 1401-02 (2006) (reviewing TAL GOLAN, *LAWS OF MEN AND LAWS OF NATURE: THE HISTORY OF SCIENTIFIC EXPERT TESTIMONY IN ENGLAND AND AMERICA* (2004)); *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 592-93 (1993):

Faced with a proffer of expert scientific testimony . . . the trial judge must determine at the outset . . . whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue. This entails a preliminary

Second, the role of trial judges in deciding whether to approve proposed class settlements, especially when no objectors appear to present challenges, is likely to involve some degree of judicially initiated inquiry.¹²⁰ Third, the master's role in complex litigation, particularly of the public-law variety, may take on inquisitorial aspects:

[W]hile the pre- and post-trial stages of complex litigation are clearly new developments, the inquisitorial judicial role for which they call—and which masters are being asked to serve—is not. Judicial involvement in managing the litigation (particularly discovery) and in undertaking significant responsibility for fact-finding (including *ex parte* investigations) is a well-established, longstanding feature of Anglo-American legal culture—a feature of equity's forgotten, quasi-inquisitorial tradition, in which masters played a critical part.¹²¹

Still, it seems likely that American staffing traditions, including the lack of a civil-servant judiciary trained in fact-gathering, and American norms will sharply limit just how far American judges are likely to go in inquisitorial directions:

Suffice it to say that American judges, trained in and accustomed to an adversary structure, are “ill-equipped for effective inquisitorial judging.” Not only is an investigatory or managerial judicial role incompatible with the highly entrenched adversarial norms and customs in the U.S. legal system, but American judges lack the investigatory resources available to judges in an inquisitorial system. The federal judiciary operates on a limited budget and with restricted factfinding powers, limiting its capabilities outside the context of an adversarial dispute. Moreover, even if inquisitorial judging techniques were technically compatible with current legal structures . . . they are not desirable given the democratic premises on which the nation's adversary system is based.¹²²

assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue.

(footnotes omitted). See also Langbein, *supra* note 81, at 835-41 (describing use of court-appointed experts in Germany).

120. See *supra* text accompanying note 84.

121. Amalia D. Kessler, *Our Inquisitorial Tradition: Equity Procedure, Due Process, and the Search for an Alternative to the Adversarial*, 90 CORNELL L. REV. 1181, 1197-98 (2005) (footnote omitted).

122. Martin H. Redish & Andrianna D. Kastanek, *Settlement Class Actions, the Case-or-Controversy Requirement, and the Nature of the Adjudicatory Process*, 73 U. CHI. L. REV. 545, 575-76 (2006) (footnotes omitted).

V. CONCLUSION

Some of the gaps between American and civil-law systems have been narrowed by the development and institutionalization of pretrial managerial judging in the United States federal courts, and by European reforms. In particular, managerialism definitely moves away from the classic adversarial model featuring a passive judge, and can shift a significant amount of control over the pretrial process from the parties to the court. That general change brings the United States somewhat closer to the degree of judicial control often seen in many civil-law systems, although the level of party control in those systems should not be underestimated. Yet two significant differences remain, both related to fact-gathering approaches: First, to the extent that civil-law judges have the main initiative-taking role in the fact-gathering process, American managerial judges largely have not moved in that direction, nor do they seem likely to do so. Thus, we have moved significantly toward an "inquisitorial" system only as that label refers to civil-law systems as a whole, and not to their inquisitorial aspect. Second, as long as American pretrial proceedings involve much more of the kind of discovery that we have now than do other systems, the focus of American pretrial management will be much more on discovery than elsewhere.

Professors Nicolò Trocker and Vincenzo Varano provide a nuanced view on degrees of convergence and lack thereof in a concluding essay to a volume on recent procedural reforms in several nations:

[T]he reform movement has brought about an attenuation of the differences, according to which we were used to classify procedural models. If the common law procedural systems were usually defined as adversarial, based as they were on the predominance of the parties, they are presently placing more and more emphasis on the role and powers of the judge especially as far as the management of procedure is concerned. . . . Civil law procedural systems, in turn, which used to be labeled as inquisitorial in an even more arbitrary and simplistic way, not only have made clear their adherence to the principles of parties' initiative, and adversary procedure, but they have also reshaped their character, sometimes adopting institutions typical of the common law such as the cross-examination, other times opening the door to such ideas as that embodied in the mechanisms of discovery or moving towards a bifurcation of the proceeding clearly based on the pretrial/trial separation experience.¹²³

123. Nicolò Trocker & Vincenzo Varano, *Concluding Remarks*, in REFORMS, *supra* note 101, at 243, 244-45 (footnotes omitted).

For the parties and their lawyers, finally, pretrial managerial judging means not only a reduction in the control that they (or their predecessors) were used to exercising in more fully adversarial modes of proceedings. It also requires that the adversarial scorpions in their litigation bottle seek ways to cooperate, at least as to pretrial procedural management, with each other and the judge. Such cooperation may be uncomfortable, although it is likely to be in litigants' enlightened self-interest. And the reduction of party control may be unwelcome, although I have heard litigators at conferences confess that they sometimes need "adult supervision." Still, as federal judge Robert Parker explained:

Although . . . additional institutionalization of managerial judging measures would move our system closer to an inquisitorial system of civil dispute resolution, these measures would not turn our essentially adversarial system into an essentially inquisitorial one. Litigants will not lose control over those aspects of their cases that are essential to an adversarial system of justice.¹²⁴

124. Robert M. Parker & Leslie J. Hagin, "ADR" Techniques in the Reformation Model of Civil Dispute Resolution, 46 SMU L. REV. 1905, 1913 (1993) (footnote omitted).

COMMENTS ON FORTY YEARS OF DEMOGRAPHIC CHANGES IN THE CENTRAL DISTRICT OF CALIFORNIA, AND THE IMPACT OF TECHNOLOGY ON THE VANISHING TRIAL

Myrna Raeder*

These comments touch on the three presentations in the panel discussing the overview of changes in the U.S. District Court for the Central District of California.

I. DEMOGRAPHIC CHANGES IN THE CENTRAL DISTRICT

First, I will briefly expand upon Dr. Williams' and Chief Judge Stotler's depictions of the forty year old, now "not quite" middle-aged Central District by focusing on the seventy-two judges who have called the District home. Although the District was formed in 1966, its judges have been nominated by every president since Franklin Delano Roosevelt, since the first few were reassigned from the existing Southern District.¹ Slightly more than one-third (twenty-six judges) were born in the greater Los Angeles area,² but the majority came from elsewhere, including five who

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1. An Act to Provide for the Appointment of Additional Circuit and District Judges, and for Other Purposes, Pub. L. No. 89-372, 80 Stat. 75 (1966) (describing how California was reorganized from two districts (Northern and Southern) into four (Northern, Eastern, Central, and Southern). The Eastern District authorized three judgeships: two judges transferred from the Northern District and one from the Southern District. The Central District authorized thirteen judgeships: ten judges transferred from the Southern District and three filled new positions. The Northern District retained seven judgeships and authorized two new judgeships to replace judges transferred to the Eastern District; and the Southern District retained two judgeships.).

2. Judges of the United States Courts, Central District of California, <http://www.fjc.gov/servlet/tGetCourt?cid=40&order=a> (last visited Feb. 27, 2007) (click on the hyperlinks for the following judges' biographies for information about their birthplaces in the Los

were born as far away as Australia, Ecuador, and China.³ These backgrounds reflect the mobility that is so signature to the United States and emphasize Los Angeles' multicultural nature.

Sixteen judges, or twenty-two percent, have belonged to a race or ethnicity other than White, including seven Hispanics,⁴ four Asian Americans,⁵ and five African Americans.⁶ Minority representation in the Central District began almost immediately with Judge Real's appointment in 1967.⁷ Diversity among the Central District judges continued throughout each succeeding presidency, with Carter (3) and Clinton (4) appointing the most minority judges.⁸ Many of the judges' stories epitomize the American Dream. For example, Judge Takasugi was interned with his family during WWII⁹ and became the first Japanese American to ever be appointed to the federal bench in 1976; he was also the first Central District judge to hire a female clerk.¹⁰

The Central District bench was all male until 1978, when President Carter appointed Judge Pfaelzer.¹¹ Now, fifteen judges, or twenty percent of

Angeles area: Anderson, Percy; Byrne, William Matthew Jr.; Fernandez, Ferdinand Francis; Gray, William Percival; Guilford, Andrew J.; Hall, Cynthia Holcomb; Hupp, Harry Lindley; Keller, William Duffy; Kenyon, David Vreeland; Klausner, Robert G.; Larson, Stephen G.; Lew, Ronald S. W.; Manella, Nora Margaret; McLaughlin, Linda Hodge; Moreno, Carlos R.; Otero, S. James; Pfaelzer, Mariana R.; Phillips, Virginia A.; Pregerson, Dean D.; Rea, William J.; Snyder, Christina A.; Stephens, Albert Lee Jr.; Stotler, Alicemarie Huber; Taylor, Gary L.; Tevrizian, Dickran M. Jr.; and Waters, Laughlin Edward Sr.).

3. *Id.* (click on the hyperlinks for the following judges' biographies for information about their birthplaces outside the United States: Baird, Lourdes Gillespie; Cooper, Florence-Marie; Davies, John G.; King, George H.; and Yankwich, Leon Rene).

4. *Id.* (click on the hyperlinks for the following judges' biographies listing race or ethnicity as Hispanic: Fernandez, Ferdinand Francis; Baird, Lourdes Gillespie; Moreno, Carlos R.; Otero, James S.; Paez, Richard A.; Real, Manuel Lawrence; and Wardlaw, Kim McLane).

5. *Id.* (click on the hyperlinks for the following judges' biographies listing race or ethnicity as Asian American: King, George H.; Lew, Ronald S.W.; Takasugi, Robert Mitsuhiro; and Tashima, Atsushi Wallace).

6. *Id.* (click on the hyperlinks for the following judges' biographies listing race or ethnicity as African American: Anderson, Percy; Collins, Audrey B.; Hatter, Jr., Terry J.; Marshall, Consuelo Bland; and Williams, David Welford).

7. Judges of the United States Courts, Manuel Laurence Real, <http://www.fjc.gov/servlet/tGetInfo?jid=1973> (last visited Feb. 16, 2007).

8. Judges of the United States Courts, Central District of California, <http://www.fjc.gov/servlet/tGetCourt?cid=40&order=a> (last visited Feb. 27, 2007) (listing biographical information for all Central District judges and which President appointed each judge).

9. Takasugi Fellowship, About the Honorable Robert M. Takasugi, <http://takasugifellowship.com/judge.html> (last visited Feb. 20, 2007).

10. Los Angeles Judge and Bar Association to Receive State Bar's Diversity Awards, News Release (Oct. 6, 2004), http://calbar.ca.gov/state/calbar/calbar_generic.jsp?cid=10144&n=58989.

11. Judges of the United States Courts, Mariana Pfaelzer,

the total number of judges who have served on this court, have been female,¹² including two of the District's nine chief judges.¹³ Three have been minorities.¹⁴ Of the chief judges, two were United States Attorneys,¹⁵ and seven served on the California Superior Court.¹⁶

Not only has the California State court system produced many federal judges, but several have also gone the other way — back to the state appellate courts. Additionally, eight have left for the Ninth Circuit.¹⁷ While I did not tally the number who came from large law firms, it is undoubtedly more than coincidental that I overlapped with four future Central District judges in the late 1970s when I was an associate at O'Melveny & Myers.

II. TECHNOLOGICAL CHANGES THAT IMPACT THE VANISHING TRIAL

One might wonder where all this demographic information originated; not surprisingly the answer is that it emanates from the technological revolution that coincides with the lifetime of the Central District. The Federal Judicial Center's website contains biographies of all federal judges.¹⁸ The obvious starting place to talk about the internet is the Central

<http://www.fjc.gov/servlet/tGetInfo?jid=1876> (last visited Feb. 16, 2007).

12. Judges of the United States Courts, Central District of California, <http://www.fjc.gov/servlet/tGetCourt?cid=40&order=a> (last visited Feb. 27, 2007) (click on the hyperlinks for each judge's biographies for information that fifteen are female).

13. *Id.* (click on the hyperlinks for the following judges' biographies for information that they were female chief judges: Marshall, Consuelo Bland and Stotler, Alicemarie Huber).

14. *Id.* (click on the hyperlinks for the following judges' biographies listing race or ethnicity: Hatter, Jr., Terry J. (African American); Marshall, Consuelo Bland (African American); and Real, Manuel Lawrence (Hispanic)).

15. *Id.* (click on the hyperlinks for the following judges' biographies for information that they had been U.S. Attorneys before serving on the Central District: Byrne Jr., William Matthew and Real, Manuel Lawrence).

16. *Id.* (click on the hyperlinks for the following judges' biographies for information that they were Superior Court judges before serving on the Central District: Clarke, Thurmond; Hall, Irving; Hatter Jr., Terry J.; Hauk, Andrew A.; Marshall, Consuelo Bland; Stephens Jr., Albert Lee; and Stotler, Alicemarie Huber).

17. Judges of the United States Courts, U.S. Court of Appeals for the Ninth Circuit, <http://www.fjc.gov/servlet/tGetCourt?cid=21&order=a>. (last visited March 20, 2007) (click on the hyperlinks for the following judges' biographies for information that they served on the Central District before serving on the Ninth Circuit: Ferguson, Warren John; Hall, Cynthia Holcomb; Paez, Richard A.; Pregerson, Rymer, Pamela Ann; Harry; Tashima, Atsushi Wallace; and Wardlaw, Kim McLane).

18. Judges of the United States Courts, http://www.fjc.gov/history/home.nsf/autoiframe?openform&top=/history/home.nsf/page/judgessitecontent&nav=/history/home.nsf/page/judges_nav&page=/history/home.nsf/page/searchcriteria (last visited March 20, 2007) (judges' biographies can be searched by name, court, or any of a number of criteria).

District website, which has been accessed more than three million times since October 1997.¹⁹ The Clerk's message welcomes the public to the Electronic Case Filing (ECF) system and describes the e-filing requirements that apply in criminal and some civil cases.²⁰ It discusses the optical scanning program and PACER, the Federal Judiciary's system for Public Access to Court Electronic Records.²¹

The website also explains how twelve judges participate in the ADR attorney settlement officer panel²² and how the litigants in every civil case must participate in one of the settlement procedures at least forty-five days before the local Rule 16 conference.²³ The website describes the pilot prisoner mediation panel for prisoner civil rights,²⁴ and *Bivens* cases.²⁵ It includes the recently adopted Attorney Civility and Professionalism Guidelines, which state unequivocally: "[w]e will advise our clients regarding availability of mediation, arbitration, and other alternative methods of resolving and settling disputes."²⁶ In addition, the Guidelines provide: "in every case, we will consider whether the client's interest could be adequately served and the controversy more expeditiously and economically disposed of by arbitration, mediation, or other forms of alternative dispute resolution."²⁷

Statistical reports on the internet can be obtained from a number of federal websites. The Central District judicial caseload profiles for the years 1992-2006 showed a decrease in completed trials per judgeship from 25 to

19. CACD Home Page, <http://www.cacd.uscourts.gov/> (last visited Feb. 26, 2007) (the counter at the bottom of the page shows how many visitors have been to the website).

20. Letter from Sherri R. Carter, District Court Executive and Clerk of Court, to Counsel (September 8, 2006), available at [http://www.cacd.uscourts.gov/Cacd/Notices.nsf/5a76d63503298120882567cf0058efb4/2db0d18dd700881b882571e600534dcb/\\$FILE/CR%20Letter.pdf](http://www.cacd.uscourts.gov/Cacd/Notices.nsf/5a76d63503298120882567cf0058efb4/2db0d18dd700881b882571e600534dcb/$FILE/CR%20Letter.pdf).

21. *Id.*; see <http://pacer.uscourts.gov/pacerdesc.html> (last visited Feb. 26, 2007).

22. Attorney Settlement Officer Panel, <http://www.cacd.uscourts.gov/cacd/AttySetPan.nsf/Attorney%20Settlement%20Officer%20Panel?OpenView&Start=1&Count=500&Expand=6#6> (last visited Feb. 20, 2007).

23. Procedures for Implementing Settlement Options (last updated Feb. 20, 2007), available at <http://www.cacd.uscourts.gov/cacd/AttySetPan.nsf/1de24f921db4d0e4882567c500772c1e/9cee8cd17d736fe08825680b0074e76b?OpenDocument>.

24. Pilot Prisoner Mediation Program (July 10, 2001), <http://www.cacd.uscourts.gov/CACD/GenOrders.nsf/9c2cc844e5f9ad22882567d30077b467/251e0da34447c8dc88256ac60059efa1?OpenDocument>

25. *Id.*; *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971).

26. *Attorney Admissions: Civility and Professionalism Guidelines*, <http://www.cacd.uscourts.gov/cacd/AttyAdm.nsf/366772ea8f17d2cc8825716500670366/f8fb3292453bd42d882567c80058c22a?OpenDocument> (last visited Feb. 17, 2007).

27. *Id.*

12,²⁸ and an increase in median time from filing to civil trial from 13 to 21.3 months.²⁹ This differs significantly from the median time from filing to disposition of civil cases, which in 2006 was 7.2 months.³⁰ Additionally, the timing of civil case terminations was nearly evenly split into categories of cases requiring no court action and those terminated before the pretrial conference. Moreover, less than 3% came during pretrial, after pretrial, or at trial, which reinforces the conclusion that those cases that settled did so quickly.³¹

Statistics on the total number of trials were also available, showing 368 trials were terminated in the Central District during the twelve month period ending Sept 30, 2005; 176 were civil (84 nonjury and 92 jury) and 182 were criminal (72 nonjury and 110 jury).³² From 1968 to 2005, a total of 4,645 cases were transferred out of the District to the Multidistrict Litigation Panel; only 911 came into the district.³³

The Administrative Office's website reveals even more about federal trends, as does Marc Galanter's pioneering work on the Vanishing Trial Project.³⁴ Generally, technology has accelerated the bureaucratization of the judiciary, yet it receives too little attention as a link between the managerial judging phenomenon that Professor Resnik so perceptively identified over twenty years ago,³⁵ and the vanishing trial. All data confirmed that filings

28. *Federal Court Management Statistics*, available at <http://www.uscourts.gov/fcmstat/index.html> (follow "District Courts" hyperlink under 1997, 2003, and 2006, select "CALIFORNIA CENTRAL" from the pull-down menu, then click the "Generate" button to view the statistics).

29. *Id.*

30. *Id.*

31. See Administrative Office of the U.S. Courts, Federal Judicial Caseload Statistics Table C-5 56 (2005), available at <http://www.uscourts.gov/caseload2005/tables/C05mar05.pdf> (showing the Median Time Intervals From Filing to Disposition of Civil Cases Terminated, by District and Method of Disposition, during the 12-Month Period Ending of September 30, 2005 in the Central District).

32. See Administrative Office of the U.S. Courts, Federal Judicial Caseload Statistics Table C-7 196 (2005), available at <http://www.uscourts.gov/judbus2005/appendices/c7.pdf> (showing the Civil and Criminal Trials completed in the Central District during the 12-Month Period Ending of September 30, 2005).

33. See Administrative Office of the U.S. Courts, Federal Judicial Caseload Statistics Table S-19 69 (2005), available at <http://www.uscourts.gov/judbus2005/tables/s19.pdf> (Table S-19. Cases Transferred by Order of the Judicial Panel on Multidistrict Litigation, Cumulative From September 1968 through September 30, 2005).

34. See generally Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459 (2004); also available on the American Bar Association Section of Litigation website, at <http://www.abanet.org/litigation/vanishingtrial/>.

35. See Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 376-77 (1982) (noting that, traditionally, judges were disinterested from the controversies they adjudicated, but that the

are up and trials are down and that federal courts actually tried fewer cases in 2002 than they did in 1962, despite five times more civil filings and more than double the criminal filings.³⁶ In other words, civil trials plunged from 11.5% to 1.8% of civil dispositions, and the absolute number of trials decreased by 20%.³⁷

Likewise, the absolute number of criminal trials decreased 30%, and criminal trials decreased from 15% of criminal dispositions to fewer than 5%.³⁸ This trend is even more dramatic when 2002 is compared to 1985, the year that trials peaked.³⁹ To be fair, put in context, federal trials have been decreasing since at least before WWII, though with less acceleration than in the recent past.

Generally, the quantity of readily available statistics concerning the federal courts was overwhelming, and finally, the light bulb went on. Many of the available statistics were not simply being prepared to make better policy decisions, but instead to compare individual judges. How does this relate to vanishing trials? Most blame the sentencing guidelines and mandatory minimums as the major culprits in reducing criminal trials, because trials remained relatively constant at 13 to 15% from 1962 to 1991 and then fell to fewer than 5% by 2002.⁴⁰ Less agreement exists as to the demise of civil trials. Factors range from skyrocketing costs, litigation shifts to ADR and agencies, and changes in the legal rules and judicial interpretations favoring summary judgment.⁴¹

Yet, technology receives too little credit for its role as the *deus ex machina* hovering in the background, the puppet master pulling the strings that move us towards fewer trials. Without technology, there would not be e-discovery, which can be so expensive that counsel settle when they realize the cost of litigation may be more than the value of the case.⁴² Without computers, lawyers would be unable to produce the costly and lengthy sets of interrogatories or the complex summary judgment motions accompanied

recent trend is for judges to be more active and managerial, such as meeting with parties to encourage settlement and supervise case management).

36. See *id.* (referencing Table C-4 of the annual reports of the Administrative Office of the United States Courts).

37. *Id.* at 459, 461.

38. *Id.* at 493.

39. *Id.* at 461 (referencing Table C-4 of the annual reports of the Administrative Office of the United States Courts).

40. See Galanter, *supra* note 34, at 495.

41. Patricia Lee Refo, *Opening Statement: The Vanishing Trial*, 2004 A.B.A. SEC. J. OF LITIG. 30, 2-4, available at http://www.abanet.org/litigation/journal/opening_statements/04winter_openingstatement.pdf.

42. *Id.* at 3.

by the voluminous exhibits that technology makes possible. As one Central District judge mentioned at the symposium, she spends so much time keeping up with paperwork that she barely has time for trials, which she manages with the aid of a chess clock.⁴³ Similarly, class action notification would be virtually impossible without technology. From a managerial perspective, judges would be unable to compare their terminations, caseloads, and disposal rates without the aid of compiled statistics.⁴⁴

Ultimately, technology encourages all but the most complex civil cases to lose their individual characteristics and be regarded as abstract statistics. This fuels the managerial trend that eschews lengthy trials, which generate appeals instead of closed cases, and favors early settlements. Similarly, the impact of technology extends to criminal cases, where, in addition to the previously mentioned statistical information, judges also receive an enormous amount of data from the United States Sentencing Commission.⁴⁵ Many Assistant United States Attorneys (AUSAs) peruse such information to ensure that judges do not deviate from the median or mean. Even post *Booker*,⁴⁶ a number of circuits consider advisory guidelines as presumptively reasonable, an issue currently before the United States Supreme Court.⁴⁷

The bottom line is that it is hard to be a maverick in a statistically driven world. Judges have become bureaucratized in a maze of judicial committees and conferences, and the statistics focus on batting averages in the guise of terminated cases, rather than on impartial umpiring. In some ways, it is a wonder that any trials occur here at all, given the District's multicultural environment (the Central District website lists 185 interpreters

43. Judge Florence-Marie Cooper, Central District of California, commenting during the Round-Table discussion between six federal judges about how cultural, social, political and economic changes in California have affected the way they approach their work at the Southwestern University Law Review Symposium: The U.S. District Court for the Central District of California, 1966-2006: Text and Context (Oct. 27, 2006). Judge Florence-Marie Cooper's remarks can also be found in *Analyzing the Judicial Perspective: How Cultural, Social, Political and Economic Shifts Have Changed the Federal Judiciary in California*, 36 SW. U. L. REV. 225, 232 (2007).

44. See Statistics Division of the Administrative Office of the U.S. Courts, *Federal Judicial Caseload: Recent Trends* 7, 9, 17 (2005), available at www.uscourts.gov/recenttrends2001/20015yr.pdf.

45. See United States Sentencing Commission, *Federal Sentencing Statistics by State, District, and Court* (2006), available at <http://www.ussc.gov/linktojp.htm>.

46. *United States v. Booker*, 543 U.S. 220 (2005) (holding that the mandatory nature of the Federal Sentencing Guidelines violates the Sixth Amendment; approving use of Guidelines as advisory).

47. *Rita v. United States*, 177 F. App'x. 357 (4th Cir. 2006), cert. granted, 127 S. Ct. 551 (2006). The Supreme Court affirmed the lower court's consideration of advisory guidelines as presumptively reasonable in June 2007. *Rita v. United States*, 127 S. Ct. 2456 (2007).

speaking at least fifty languages).⁴⁸

III. MANAGERIAL JUDGING IN AN ADVERSARIAL SYSTEM

Finally, I would like to briefly address the fascinating question raised by Professor Rowe, about whether managerial judging is creating a hybrid system that merges aspects of the adversarial and civil law traditions.⁴⁹ As Dean Garth suggested in his comments during the symposium, globalization is a potent force requiring the different justice systems to interact.

The American Law Institute in conjunction with UNIDROIT adopted Principles of Transnational Civil Procedure in 2005.⁵⁰ This joint effort recognizes the reality that disputes are increasingly multinational. For example, the Court of Justice of the European Community (EC) has existed since 1974 and Article 177 of the EC Treaty concerning preliminary ruling procedures has been used repeatedly by the United Kingdom, even though the treaty is grounded in the civil tradition.⁵¹ In the criminal realm, Judge Patricia Wald has written about her disquieting experiences as a judge at the International Criminal Tribunal for the former Yugoslavia, which is more oriented towards civil than common law.⁵² Similarly, the European Court of Human Rights has jurisdiction over matters that involve forty-six countries including the United Kingdom.⁵³ The United States has yet to join the International Court of Justice, but it cannot isolate itself forever.

Yet, in my view, trends favoring global perspectives and managerial judges are unlikely to prompt federal judges to adopt inquisitorial practices.

48. Local Roster of Interpreters, <http://www.cacd.uscourts.gov/Cacd/IntRoster.nsf/29dd6cbe6c9b013988256fe9007b65d7?OpenView&Start=1&Count=500&ExpandView> (last visited March 19, 2007) (showing all of the interpreters and which languages they speak).

49. Thomas D. Rowe, Jr., *Authorized Managerialism Under the Federal Rules — and the Extent of Convergence with Civil-Law Judging*, 36 SW. U. L. REV. 191 (2007).

50. See *Transnational Civil Procedure Principles Receive Final Approval; Final Action Deferred on International Jurisdiction and Judgments*, THE A.L.I. REPORTER (2004), available at <http://www.ali.org/ali/R2604-02-Final.htm>.

51. See Thomas E. Wright, *European and International Law: Myths & Reality*, 54 R.I. B. J. Nov.-Dec. 2005, at 19.

52. See generally Patricia M. Wald, *The International Criminal Tribunal in the Former Yugoslavia Comes of Age: Some Observations on Day-To-Day Dilemmas of an International Court*, 5 WASH. U. J.L. & POL'Y 87 (2001).

53. See European Court of Human Rights - Basic Texts, <http://www.echr.coe.int/ECHR/EN/Header/Basic+Texts/Basic+Texts/Dates+of+ratification+of+the+European+Convention+on+Human+Rights+and+Additional+Protocols/> (last visited March 19, 2007).

First, in criminal cases, *Crawford v. Washington*'s⁵⁴ prohibition of testimonial statements at trial when the declarant does not testify and has not been subjected to prior cross-examination is clearly inconsistent with an approach that relies extensively on the dossier and hearsay. Similarly, in civil cases, given the extreme difference in discovery between the United States and other nations, it seems unlikely that the managerial trend will transform federal judges into professionally trained judicial functionaries whose primary role is to develop the facts. To the extent that federal judges become active in promoting settlement, they may resemble civil law judges. However, even with dwindling numbers of civil jury trials, the United States' adversarial party-driven litigation system will not easily adopt civil law traditions because of the ethical obligations lawyers have to their clients.

Admittedly, court-appointed experts⁵⁵ sound inquisitorial in nature, but judges use them to determine the admissibility of evidence, which is an issue for the court, rather than the sufficiency of evidence, which is the jury question. Moreover, at trial, the parties retain the right to call their own experts.⁵⁶

In summary, the fear that the bureaucratization of judges might detract from their role as impartial umpires is legitimate, and raises the question of whether we can incorporate elements of civil law judging that would promote fairness and efficiency without sacrificing common law values.

54. *Crawford v. Washington*, 541 U.S. 36, 68-69 (2004).

55. *See* FED. R. EVID. 706.

56. *Id.* at 706(d).

TRANSCRIPT OF PROCEEDINGS[†]

ANALYZING THE JUDICIAL PERSPECTIVE: HOW CULTURAL, SOCIAL, POLITICAL AND ECONOMIC SHIFTS HAVE CHANGED THE FEDERAL JUDICIARY IN CALIFORNIA

KITTY FELDE*: Good morning. We would like to start by introducing our discussion panel. Our panelists from the Ninth Circuit Court of Appeals are Judge Arthur Alarcón, Judge Richard Paez, Judge A. Wallace Tashima and Judge Stephen Reinhardt. Our panelists from the Central District of California are Judge Florence-Marie Cooper and Chief Judge Alicemarie Stotler.

We have a wealth of judicial wisdom with us today as we turn back the clock to look at how much the courts have changed. The Central District was created in 1966.¹ At that time, California was growing like cornstalk, I guess you could say, and the make up of the judiciary was different then. Who wants to start us off by taking us back through history?

JUDGE ARTHUR ALARCÓN**: Forty years ago the Central District was

† Unless otherwise noted, this Transcript has been edited for publication by the Southwestern University Law Review.

* Kitty Felde is a respected journalist with many years experience reporting on a variety of topics for National Public Radio, Monitor Radio, the Associated Press, KLON, and KCRW. Her print articles have appeared in Buzz magazine, The Christian Science Monitor, The Los Angeles Times, and The Chicago Tribune. Kitty Felde covered the Rodney King beating, the Reginald Denny beating and the O.J. Simpson murder trial. She also has worked as a courthouse commentator for CNN, CBS and CNBC, and as legal affairs correspondent for KCRW's "Which Way, L.A." She also covered the International Criminal Tribunals for the Former Yugoslavia and Rwanda, logging more time in the courtroom than any other American reporter.

1. Circuit and District Judges—Increase in Number, Pub. L. No. 89-372, § 84, 80 Stat. 75 (1966).

** Judge Alarcón was nominated to the Ninth Circuit Court of Appeals by Jimmy Carter on August 28, 1979 and received his commission on November 2, 1979. He assumed senior status on November 21, 1992. Judge Alarcón was a U.S. Army Staff Sergeant from 1943–1946. From 1952–1961, he served as a Deputy District Attorney in Los Angeles County. Thereafter, Judge

composed of all white males. That didn't change until November of 1966 when Judge Real received his appointment to the Central District and became the first Hispanic judge to be on that court.

So, going back 40 years, you had a bench that was all white and all male. It's interesting what has happened since then, and let me throw out some figures to illustrate my point. Since that time, fifteen women have been appointed — forty years ago, there were none; four Asian judges have been appointed to the Central District, including Judge Tashima; five African American judges, two of whom later served as Chief Judges; and there have been seven Hispanic judges on the Central District. So, things have changed tremendously in terms of the composition of the Central District in the past forty years.

KITTY FELDE: Well, the follow up to that would be, of course, what difference does it make? What real difference does it make if there are more females and more people of color sitting on the bench, making decisions? Judge Cooper?

JUDGE FLORENCE-MARIE COOPER***: I think we judges would all like to say the composition of the bench does not make a difference because we are all interpreting the law and following the law. We're all — we hope — fair, objective, good judges; but in my heart, I think it does make a difference. I think that there are issues that women understand that men do not; I think women have empathy with some issues just based on their personal experience. I think the more diverse the bench is certainly increases the odds that a litigant will appear before someone who might have some personal experience that will help them to understand that litigant's individual position. If every time a litigant walks into a

Alarcón was a legal advisor and clemency and extradition secretary to the Governor of California. In 1962, he was the Executive Assistant to the Governor of California. He was the Chairman of the California parole board in 1964 and in the same year became a Judge on the Superior Court of California for the County of Los Angeles. From 1978-1979 Judge Alarcón was an Associate Justice for the California Court of Appeal, Second Appellate District. Judge Alarcón has been an adjunct professor at Southwestern Law School since 1985. He was also an adjunct professor at Loyola Marymount School of Law in 1993 and 1994.

*** Judge Cooper was nominated by William J. Clinton on July 14, 1999, to a seat vacated by Linda H. McLaughlin, and received her commission on November 15, 1999. Judge Cooper was a law clerk to the Hon. Arthur Alarcón in the Los Angeles Superior Court, appellate department from 1975-1977. In 1977, she served as a Deputy City Attorney. Thereafter, she was a senior research attorney for the Hon. Arthur Alarcón in the California Court of Appeal, Second Appellate District from 1978-1980. From 1980-1983, Judge Cooper was a senior research attorney for Judge Woods in the California Court of Appeal, Second Appellate District. Judge Cooper was an adjunct professor at San Fernando Valley College School of Law from 1980-1985. From 1983-1990, she was a Court Commissioner for the Los Angeles Superior Court. She served as a Judge for the Los Angeles Municipal Court from 1990-1991 and from 1991-1999, she served as a Judge for the Los Angeles Superior Court.

courtroom, he or she sees a middle-aged white male sitting on the bench, the chances are pretty slim that the litigant is going to be able to convince the judge as to why, for example as a Hispanic female with little education, who has always been under the thumb of her husband, she did not leave an abusive relationship, why she didn't walk away, why she didn't seek some kind of help, or why she wasn't more aggressive in resisting what her husband was doing. And so, I think the chance that a litigant can walk into a courtroom and see a female or a person of color really makes the system appear more fair; and I think, in fact, it does make the system more fair.

KITTY FELDE: Well, Judge Reinhardt, since in the interest of diversity, we have invited you, as a white male, to join us today, I wonder if you would concur?

JUDGE STEPHEN REINHARDT****: Yes, I concur that the court appears to be more fair when judges reflect a wide diversity of backgrounds. Do you get better justice from female justices or black justices? Is it better to have Clarence Thomas than William Brennan? We do have a fair number of females on our court; if I were looking for justice, would I rather be before a female judge than a male judge? I don't believe that's what counts. Actually, I think our female judges have divided about the same way the male judges have divided, as far as their sympathies and concerns for the individual are concerned.

I do think diversity is important, but I really don't think it matters that much whether you get a minority judge or a majority judge. It matters far more who has appointed that judge. It matters far more what that judge's philosophy is. It is certainly good that we no longer have a uniform white male bench. I think it has been a tremendous improvement to society to see that everyone can do those jobs, that anyone can be a judge; but as far as the results in the decisions, far more has to do with the background of the person, and why that person got appointed than with that person's race or gender.

KITTY FELDE: Well, of course, the make up of the court isn't the only thing that has changed in the Central District since the mid-1960's. Judge Paez, why don't you paint us a picture of some of the other differences that we can see?

**** Judge Reinhardt was nominated by Jimmy Carter on November 30, 1979, and received his commission on September 11, 1980. Judge Reinhardt served in the U.S. Air Force from 1954-1956. He served as a law clerk for the Hon. Luther W. Youngdahl in the U.S. District Court for the District of Columbia from 1956-1957. Thereafter, he practiced at O'Melveny & Myers from 1958-1959 and Fogel, Julber, Reinhardt, Rothschild & Feldman until 1980.

JUDGE RICHARD PAEZ****: Well, the way I look at it, the District Court today is a little bit different from when I was there. I've had the advantage of serving on the state court, then moving to the District Court, and now I am serving at the circuit court level. In that transition, what amazed me in moving from the state court to the federal system, was that the District Court was much different. In the state court we saw one trial after another, after another, after another. You would conduct a jury trial, send the jury out to deliberate and then you would get another trial immediately following. That is just not the case in the District Court. At least, it wasn't over ten years ago when I joined the District Court. Trials didn't happen that frequently, either civil or criminal.

The work was different too; in the District Court there was a lot more management of the cases and a greater involvement on my part with the lawyers and with the litigants at a much earlier step in the process. I have a much greater appreciation for the work of the District Court judge; that is, on the circuit level, you can tell when the District Court judges have attempted to manage the case and have tried to shape the issues and have allowed the parties to really develop the record. I see it when I review a record from the District Court; you can tell how much attention the District Court judge has given the case and how much effort the District Court judge has expended to allow the parties to develop the record.

What I'm getting at is that, at the circuit level, we see many appeals that deal with summary judgment rulings. And you get the sense from reviewing a record: that the District Court judge, in a close case, is more likely to grant summary judgment than to say: "There may be a weak case here, but we should nonetheless let the case go forward." That was a different experience than state court because, in state court, if you had any doubt about the propriety of granting summary judgment, you always erred on the side of denying summary judgment, and letting the case go forward. I see the same thing happening in the district court.

So, as I look back at the District Court, while there was a lot of work, the court rules have changed, and the duties of the District Court judge have

**** Judge Paez was nominated to the U.S. District Court for the Central District of California by William J. Clinton on March 9, 1994, and received his commission on June 16, 1994. Judge Paez was nominated to the Ninth Circuit Court of Appeals by William J. Clinton on January 26, 1999, to a seat vacated by Cecil F. Poole. He was confirmed by the Senate on March 9, 2000, and received his commission on March 14, 2000. Judge Paez began his legal career working as a staff attorney for the California Rural Legal Assistance. From 1974–1976 he was a staff attorney for the Western Center on Law and Poverty. Thereafter, he worked for the Legal Aid Foundation of Los Angeles from 1976–1981. From 1981–1994, Judge Paez served as a Judge for the Los Angeles Municipal Court.

changed. In some respects, I have a great deal of sympathy for the amount of work that the judges must do; but nonetheless, the work seems to have just changed and there's a greater emphasis on the management side and on disposing of cases. The District Court judges are called upon to make difficult legal rulings, using their own best judgment and understanding of the law, and hopefully using case law from the Ninth Circuit and the Supreme Court; but it's a difficult task for the District Court judge, and I think I've come to understand that much better because of the perspective that I've gained both from having served on the District Court and having now spent a considerable amount of time on the Ninth Circuit.

KITTY FELDE: Judge Stotler, would you also compare and contrast these differences for us?

CHIEF JUDGE ALICEMARIE STOTLER*****: Thank you, Judge Paez; and furthermore, we're over-worked and under-paid.

JUDGE PAEZ: I agree. So are we.

CHIEF JUDGE STOTLER: Actually, I also came over from state court and my experience was different from Judge Paez's because in the mid-1980s, I literally was trying criminal cases back to back. At one point, we had three cases going because they were short, they were sweet, and we could do it that way. As was pointed out earlier, our cases now are longer, they are more complex, the stakes are higher, that's true for civil and criminal, and the District judge feels the pinch of all of those cases on the docket; all of those cases need to be adjudicated. I do think in an ideal world, we would like to try every case; I think that's what we used to do in the so-called "old days." We would just put the case to trial, there wasn't much discovery and the thing got resolved more quickly. I don't know if that was a better quality of justice, but that's how we did things a long time ago.

I think now we spend more time looking at the case upfront. We do the screening and the evaluation. Speaking of civil cases, we screen to see if

***** Chief Judge Stotler was nominated by Ronald Reagan on April 4, 1984, to a seat vacated by Robert J. Kelleher, and received her commission on May 3, 1984. She has served as Chief Judge since 2005. Chief Judge Stotler began her legal career working as a Deputy District Attorney in Orange County. She worked as Deputy District Attorney until 1973; thereafter, she went into private practice in Tustin, California. From 1976-1978, Judge Stotler served as a Municipal Court Judge in the Harbor Judicial District. In 1977, she served as a Justice pro tempore for the Fourth District Court of Appeal, Division Two. Thereafter, she served as a Judge in the Orange County Superior Court from 1978-1983. From 1983-1984 Judge Stotler returned to private practice until her confirmation to the U.S. District Court for the Central District of California.

there is something that we can do to move it along: maybe through partial or summary adjudication. At least one judge in my court used to, within 120 days of the complaint being filed, invite a motion for summary judgment from one side or the other because that case wasn't going to last very long on the docket. The prior panel pointed out some of the aggressive steps that we have started to take, and I think it has gone forward in that mode and probably is not going to be changed.

KITTY FELDE: Judge Tashima, what changes have you observed on the Ninth Circuit? Are they separate from changes we've seen over the years outside the courthouse?

JUDGE A. WALLACE TASHIMA *****: I don't think the changes on the Circuit Court differ, at least in substance, from the changes that have taken place in the District Court in this sense. After all, most of our caseload comes from the District Courts, although we, of course, get a number of direct administrative appeals from various agencies. So, in essence, in all of our criminal cases and most of our civil cases, we look at the same cases that the District Court looks at; and in that regard, I want to point to one development that has not been discussed so far in terms of the change that has taken place in the last forty years, and that is that there has been a tremendous change in the substance of law in terms of the statutory law as Congress has enacted it. In other words, the District Court is a creature of Congress, the jurisdiction of the District Court is set by Congress, and Congress passes the statutes that enact the rights that the courts have to enforce.

If you look back forty years, for instance, to the time when we, the old-timers like Judge Alarcón, myself and Judge Reinhardt, went to law school, there was no such thing as environmental law. It wasn't taught in law school. That's because of course, NEPA, the National Environmental Policy Act, wasn't passed until 1969.² There was no such thing as an environmental law, but today that constitutes a good chunk of our laws, and environmental law cases constitute a good chunk of the work of the District

***** Judge Tashima was nominated to the U.S. District Court for the Central District of California by Jimmy Carter on May 9, 1980, to a seat vacated by Warren J. Ferguson, and received his commission on June 30, 1980. Judge Tashima was nominated to the Ninth Circuit Court of Appeals by William J. Clinton on April 6, 1995. His nomination was confirmed by the Senate on January 2, 1996, and he received his commission on January 4, 1996. Judge Tashima assumed senior status on June 30, 2004. Judge Tashima served as a U.S. Marine Corps Sergeant from 1953–1956. From 1961–1967, he served as Deputy State Attorney General. Thereafter, he worked for the Amstar Corporation from 1968–1977. From 1977–1980, he was in private practice.

2. See 42 U.S.C. § 4321 *et seq.* (2006).

Court. The same is true of Title VII. Title VII is part of the Civil Rights Act of 1964.³ I would venture to guess that in 1966, when this district was first created, there was probably not a single Title VII case pending in the District Court. But again, today it makes up a great portion of the District Court's work. So, in area of law after area of law, in the civil law as well as in the criminal law, you can see there are a lot of areas of the law in the courts today that simply did not exist forty years ago.

KITTY FELDE: Has anyone else seen other major changes? Yes, Judge Cooper?

JUDGE COOPER: I think a lot of what we're talking about has to do with the caseload and I think it's very important to understand that forty years ago — I was not on court of course being far too young — but I read that the thirteen judges who were appointed to the newly created Central District in 1966, each had 175 cases. As was mentioned earlier, I have 340 civil cases and about a 100 to 150 criminal cases that require case management. That requires me to be on top of those cases all the time, trying to give each case the attention it deserves; and yet, divide my time among all those cases somehow. And one of the things that I was very aware of coming from state court to federal court is that it really is a full-time job for me to sit in chambers and read the papers that accompany each case. And that's with two wonderful law clerks helping me; there is so much paper. Stacks and stacks and volumes and volumes and in order to read it, to process motions to dismiss, and motions for summary judgment, and all the other things that come through, I'm at the courthouse at 7:00 in the morning. If I'm there everyday, from 7:00 a.m. to 4:00 p.m., and work one of the weekend days, I can keep up with the paperwork. But then if you want a trial, oh come on — I'm sorry, I really don't have time. Trials do so invade my space, I hold trials from 8:00 a.m. to 1:30 p.m., we don't take a lunch break, we jam in five hours of trial, so I can then go into chambers and read some more. Last month, I bought a chess clock, and I told the lawyers you have "X" number of hours and when they stand up, I punch the clock. I said, "You're on your feet, the clock is running." But I do let them know when they're running out of time. I think that's all I can do.

KITTY FELDE: That's very informative. Judge Reinhardt?

JUDGE REINHARDT: I feel the same in the sense that we used to publish many more decisions. I think about fifteen percent of our dispositions are now published. We used to hear oral arguments in all cases. I don't know what the percentage is now, but it's fairly small. When

3. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (1964) (codified as amended at 42 U.S.C. § 1971 *et seq.* (2006)).

you had an appeal forty or fifty years ago, you had an appeal, and you got to argue the case, and you got a decision that told you what happened. Now, you're in a very small minority if that happens. It's all a function of the number of cases we now have. It's not that we work less — we work more — but there just is not enough time to give cases the treatment that I think they deserve. Now, there is a possible answer to this problem. I don't know how many federal judges believe that it would work, but there are ten times as many state court judges in California as there are federal judges in the country, or something like that. It sounds like a good thing to add more federal judges.

JUDGE COOPER: That sounds like a great idea.

JUDGE REINHARDT: We could double the number of federal judges without much difficulty. We certainly wouldn't dilute the quality of the court by doing that. Although that was one of the arguments against it, when we had this debate maybe ten or fifteen years ago; and federal judges were just horrified at that the idea that we would double our numbers. If we did, in my opinion, we could do a far better job of giving people the kinds of hearings and decisions that they're entitled to, but that's not going to happen. So, the changes here are for the worse, and we just are no longer able to do what we used to, when we really heard all the cases and decided them with the attention that we should.

KITTY FELDE: I understand that capital cases are taking up an increasing amount of judges' time?

JUDGE REINHARDT: No doubt about that. Capital cases take a lot of time, but we've been hearing about the onslaught of capital cases we're going to be faced with ever since I can remember. There are approximately 650 people on death row in California awaiting the final disposition of those cases and we'll all be long dead before we make any progress in getting through the final disposition of those cases. So, if the cases moved the way our wonderful legislators think they should, we would not only be doing nothing but hearing capital cases, but we'd also be twenty years behind in those cases and in all our other work.

KITTY FELDE: We've talked about the relationship between what legislative bodies do and what ends up on your plate. There's another politicization that's affecting the courts. How many open seats are there right now on the Central District Court?

JUDGE COOPER: Five. We have five openings right this minute.

KITTY FELDE: And the reason for that?

JUDGE COOPER: There have been nominations and they have been before the Senate Judiciary Committee or perhaps that's where they are right now. I think two are actually awaiting more investigation; and so, it's

a matter of getting the Senate back in session and taking care of business at the committee level and then at the full Senate level, and hopefully we'll have our people very soon.

KITTY FELDE: Now, have those openings on the Central District existed during both the Clinton and Bush administrations?

JUDGE COOPER: I believe that's correct, but I'm concerned right now that we have twenty-eight authorized positions; that these vacancies have been there and we've had people in the pipeline, but they just aren't getting through; it's just not happening for us.

KITTY FELDE: Is that the only place you feel that politics outside the courtroom has an effect on what you do? I mean, that's the most obvious place if there are missing judges; if your caseload increases and you can tie that back to a bottleneck in the Senate Judiciary Committee, that's a connection, but what else is out there that's affecting your work?

JUDGE COOPER: Well, the obvious reference has already been made to what Congress decides to perceive as an illness that needs a fix; and therefore, they are going to put it into the District Court. So, that's a matter of politics and we could have an entire discussion about whether one branch of government has advocated and the others have been required to fill it in, but that's probably not where we want to go. We see it in the nomination process; now California, I think, is rightly proud of the fact that we have a so-called bi-partisan commission that puts together the nominees. As I understand it, at the committee level the candidates are reviewed pretty heavily and by the time the candidate is marched to the Hill, they've been kind of approved all around, or at least that's my hope, and I think that's very good. It makes for peace in the politics of it and makes for some good friendships on our bench as well.

KITTY FELDE: Judge Cooper, is there anything else you see at the district level?

JUDGE COOPER: Well, we hear an awful lot about activist judges. I think an activist judge is someone who rules in a way that you don't approve of. There is certainly pressure from Congress; I mean Congress talks about setting up some ombudsman to watch over what we do and decide whether our decisions are correct or not. After the change in the sentencing guidelines, there was noise in Congress that they were going to be collecting all of our decisions and checking to see if we seem to be imposing sentences that are appropriate as they see it. And one hopes that one doesn't ever seriously consider such a thing. Judge Otto Kaus was a Justice on the California Court of Appeal for many years, a wonderful man, and he talked about the alligator in the bathtub, that when you go in the morning to brush your teeth, you try not to think about the alligator in the

bathtub, but it's difficult because you know it's there. And so, I think for us, there is some subtle, and I hope ineffective, pressure that people are watching what we do and that they are going to be unhappy with the way we do our job if it's not according to their own rules.

JUDGE TASHIMA: I'd like to add a comment about politics affecting the work of the District Court: it happens in this sense, too, that every once in a while the other branch of the government comes up with programs, like for instance, for several years we had a war on drugs. And what did this program do? It spurred the government to hire more drug enforcement agents. They also beefed up the U.S. Attorney's office to get a hundred more assistant U.S. attorneys in the Central District, but of course, there are no new judges to handle all these new cases. So, each judge has to deal with the cases of twenty prosecutors instead of ten. Same thing with, well, we have to do a better job of closing the borders. So, it makes me think, we will hire 5,000 more border patrolmen, we will prosecute everybody who walks across the Rio Grande, giving us more criminal cases, but we won't hire new judges to take these cases. And then, of course, all of these things have a ripple effect because, let's say in a place like the Southern District of California, with all of the border cases they hardly will be able try any civil cases at all; all they're doing are these border cases. So, it affects, I think, everybody in the system.

KITTY FELDE: Well, let's move on to the Ninth Circuit, which some people refer to as the "Sister or Brother of Satan." What I mean is, if you want to talk about politics and the courts, generally the Ninth Circuit comes up in conversation. Judge Alarcón, I would love to hear the other side of the bench, I mean from where you sit, how is this heard, how does it affect what you do; what are your thoughts?

JUDGE ALARCÓN: Well, what's going on in the Senate Judiciary Committee is having a very serious impact on the selection of appellate judges, and I would predict for you that since we're going to have an election in a few days, and then another election two years from now, that there may be very, very few judges appointed, particularly to the appellate court, because the party that does not have the presidency will hope that it will have the presidency, and they might not want this President to appoint any more appellate judges. Another problem that is interfering with the proper selection of judges is the fact that social issues, such as choice, are tying up Senate Judiciary Committee hearings and the selection of those people. While most Presidents have indicated that they don't have a litmus test, it's pretty clear that some of the Senators have a litmus test as to the people that they would either support or filibuster. So, there are serious problems. We, at the Ninth Circuit, are short two judges at the moment.

And I don't know when those two spots are going to be filled, and because we're two years away from a Presidential election, they may not be filled for more than two years.

KITTY FELDE: Judge Paez, your thoughts on the matter?

JUDGE PAEZ: I don't know that the perception about the Ninth Circuit is justified in any way, but what troubles me is that there's been a fairly serious effort recently in the House Judiciary Committee to split the Ninth Circuit. I'm optimistic that will not happen between now and the end of this Congress, but the attempt to split the Circuit I think disrupts the operations of the court and how judges think about what they're doing at the court. I would like to put the whole issue aside so we can move on and address the truly important things, like the work we do. The Ninth Circuit is administered very efficiently despite what Judge Reinhardt said here about the lack of time to handle our cases. At least from what I can tell, and I don't have the history that Judge Alarcón and Judge Reinhardt have with the court, but the court does run, I think, very efficiently. Cases are handled in an expeditious manner, and I do think that steps have been taken to make sure that despite the heavy caseload that we have, the delay from the time of filing a Notice of Appeal from the District Court to the time of disposition is not unnecessarily delayed.

I think the real question for me though, when you talk about the Ninth Circuit, is how the District Courts perceive the work of the Ninth Circuit and how they interpret our decisions.

KITTY FELDE: All right. I want to come back to both of those issues, the split and also the perception of the District Courts. Judge Reinhardt, would you care to comment on these important issues?

JUDGE REINHARDT: Well, to comment on what Judge Paez said last, yes, we do the job as best we possibly can with the number of judges that we have, considering the caseload. Times have certainly changed from the time when a judge could spend many, many hours on a case and pick up his pen, write a decision and take all the time he wants. We'd all like to have more time, but yes, given the circumstances, we do operate efficiently.

Let me say a few words about the split next. The split will likely either occur in the "Lame Duck" session or more probably it won't occur at all. At least it won't if the Democrats capture either of the houses. And I think there's a fair chance they'll capture the House. If that occurs, then I think the split is probably dead for practical purposes because the split has become a purely partisan issue. It started out as an issue in the northwest, by those interests in the northwest that didn't like the environmental decisions of what they considered to be "California judges," although they really weren't anything of the sort; they were northwestern judges. The

split debate has been with us for twenty years or so and it became part of the whole myth of the Ninth Circuit, the liberal circuit, and the thought is that we really ought to have a conservative circuit. So, in order to have a conservative circuit, they wanted to cut out a circuit in the northwest that they thought would be friendlier to the lumber interest, the oil interest, and various interests up in the northwest. They thought there were too many liberals on the Ninth Circuit.

The appearance that there are a lot of liberals may just be because liberals were more effective. But anybody who can count can now tell you that the Ninth Circuit is not a liberal circuit. There are more, far more conservatives on the Ninth Circuit than there are liberals. So, the people who really wanted to make sure we didn't have a liberal circuit have forgotten what this was all about and don't realize that they've accomplished their objective. There is no longer a need to split the circuit. Every circuit in this country is a conservative circuit, just as the Supreme Court is a conservative court. There really isn't any question about that, but the people who started this split battle have forgotten what it was all about; and they got so caught up in the battle that they're still continuing it. But, it will die undoubtedly if, as I say, the Democrats win the House in the next election.

Now, what happens in a "Lame Duck" session? Nobody can tell these days. All the old rules about committees and using orderly procedures have long gone by the board since the days of Newt Gingrich. And the odds are that, as, I believe, Judge Paez said, it will not happen in the "Lame Duck" session but there's certainly no guarantee. Once we get this split debate behind us, I think the atmosphere will be far better.

I'd also like to mention the relations on the Ninth Circuit are excellent. I mean the court is a collegial court. People get on well, liberals and conservatives. So, it's a very orderly, well-functioning institution and I think we're fortunate to have it.

KITTY FELDE: Judge Tashima?

JUDGE TASHIMA: I agree with Judge Reinhardt about the motivation for a Ninth Circuit split. It is political because the fact is, if you look at all the proposals that have come up as to how the circuit could be split, it really does nothing to take care of where all the cases come from, and that's California. In other words, what the split would do would be to make a nice small - small in terms of caseloads - circuit in the northwest. However, in California, we would still be left with approximately 70 percent of the cases and 50 percent of the judges; so our workload would actually increase and things would get worse. In my view, there really is no way to have a rational circuit split that would relieve problems; and there are some

problems with a large circuit, unless there is some way to take care of the "California problem."

When I say there are problems with large circuits, I mean things like, for instance, in spite of the fact that we only publish fifteen percent of our opinions, we have so many published opinions coming out everyday that I don't think there is a single Ninth Circuit judge that will tell you that he or she reads all of the published opinions as they come out. So, we really don't know the law of our own circuit. Now, whereas, in some of the smaller circuits for instance, they actually do things like circulating three-judge panel opinions to all the judges in the court before they're actually filed. So, a judge can comment about it, such as "I think this case is wrong," before the case is published. Now, we can't do that simply because we're too large and we don't have the time. So, there are problems like that; probably ones that a smaller circuit wouldn't face, but overall I agree that: one, given the size of the Ninth Circuit, I think we're doing an incredibly good job; and two, I agree that the split proposals really do nothing to alleviate what I would consider to be the real problem.

KITTY FELDE: The fact that there isn't that much communication among the Ninth Circuit judges, are there more requests for *en banc* hearings than in other circuits? And for clarification, is it *en banc* when you ask for the full panel to look at a particular case?

JUDGE TASHIMA: I think in the Ninth Circuit, there are more requests for hearings *en banc* by several orders of magnitude. Some circuits I think, like the Second Circuit, had two *en banc* cases last year. And we have about four to six every quarter. So, it's different by an order of magnitude. But as I say, part of the difference is because the judges in our circuit, they don't get to see a case until it is published and it rolls up in their faces in the newspaper.

JUDGE ALARCÓN: I wanted to make a comment about what the Congress is doing to us, particularly in not filling vacancies. We can justify about ten more judges, but politically nobody's really pushing that because the Congress probably wouldn't do it. I say this because, according to some Congressmen, we want ten more liberals on the court. Some of the things that have happened in light of the increasing caseloads and the vacancies we have are very troubling to me even though I agree with Judge Paez that, administratively, we have worked out some very efficient ways of dealing with our caseload. I had a small part in bringing about one administrative change to deal with the caseload to the Ninth Circuit, which we call our screening program.

In the screening program, we have the staff look at the cases and recommend to us which ones should not be argued. So, the way the

screening program works is that a law clerk from San Francisco will sit with three judges and talk about the case and hand us a proposed opinion. We look at the briefs, and then we decide that case without any lawyer participation because we have concluded it doesn't need to be argued. Unfortunately, and I think Judge Reinhardt and I are in agreement on this, at least in this one area, the screening cases usually involve people who are disabled, people who are immigrants, as well as criminal cases. There are almost no diversity cases in the screening program. Those usually go to argument.

Last month, I sat on a screening panel with three judges for three days and we handled 500 cases. Now, this sent cheers in from the administrative staff, but I would find that very troubling if I were looking at this from the academic side or from the legal profession side. Yeah, that's efficient but should we be doing that?

KITTY FELDE: Well, let me ask the devil's advocate question. In light of that, wouldn't it make sense to make some sort of split? Let's set aside the ideological differences or the politicization that started the conversation. Given the growth in California and given the growth in the number of cases, wouldn't it be more efficient to have a second Ninth Circuit? I mean, you could even, for politicization purposes, put San Francisco in the northern part and keep L.A. down with the rest of it. Would that solve the problem?

JUDGE ALARCÓN: I'm not persuaded that the size of the court is going to make a difference. I think we could function if we had ten more judges. And I think we would not have to rely on things like the screening process to give us the time to do our jobs properly. So, I don't think that size is a justification for a split.

JUDGE PAEZ: I'll just comment on this screening process of the Ninth Circuit. To some extent, it is troubling, but what Judge Alarcón did not mention was that any judge who sits on a panel of three, if he or she is troubled by the case or the outcome of the case or doesn't feel like he or she has had enough time to assess the case, the judge can, what we call, kick it to a merits panel. Then, the case gets full treatment. So, there are checks in the system. The screening process has its problems, but it reminds me of my own experience as a Municipal Court judge handling a misdemeanor arraignment calendar or a misdemeanor sentencing calendar, which went just as fast with very little time for the judge that was involved; the cases just flew through the system. I was always troubled by the speed with which we disposed of cases in the Municipal Court but we managed to treat the cases fairly. Even when I did some work for the Superior Court, the cases proceeded through the system awfully fast. And I'm not sure that we

would be able to devote more time to cases if the Circuit were split. As Judge Tashima said, seventy percent of all of our cases come from California. You're still going to have the same numbers, the same demands on our time. We'll still need more judges.

KITTY FELDE: Are most of your cases those coming from Southern California?

JUDGE PAEZ: Probably most of them come from Southern California.

JUDGE ALARCÓN: Over fifty percent come from the Central District.

JUDGE TASHIMA: I'd like to comment briefly, just very briefly, on why most people think it's not feasible to split California and put California into two different circuits. The reason is of course, that it would cause one part of California to be governed by the circuit law of the "Twelfth Circuit" while the other part of California would be governed by the circuit law of the Ninth Circuit. And over time, different circuits develop different laws. So, the State of California would be governed by a two separate sets of laws. First of all, it means for a civil practitioner, it would be a malpractice if you didn't decide which circuit you should bring your case in, to your advantage and of course, for the other side, not to move or change a venue. But more importantly, we have our only execution chamber in San Quentin, which is in the Northern District, and which is presumably in one circuit. However, almost all of the death penalty cases arise from Southern California. What does that mean?

Now, in California there's an unwritten convention among the District Courts that a death penalty case always goes back to the county of origin, including habeas cases, to be decided by that District Court. I don't think that convention could be enforced if the two districts were in different circuits. So that, I think it would be possible even if you were convicted in Southern California, to sue the warden in San Quentin, you see, on your habeas case, and your alternative would be to bring the suit in a district in which you are convicted. That means, you see, if you get different laws governing California on the death penalty, which could potentially happen, then different people would be facing different consequences on the death penalty depending on what part of the state they were from. And I think that would be intolerable.

JUDGE COOPER: Kitty mentioned earlier the perception of the Ninth Circuit from the standpoint of a District Court judge and I just thought I'd comment on that briefly. I've been on the federal bench now for seven years. Before that, I was on the state court about fifteen years. And I do have a very different sense of who's watching what I do. When I was on the state court, I used to teach judges quite a bit about how to try death penalty cases and criminal cases. And I used to tell the judges: "The buck

stops with you. You have to consider yourself the final arbiter because chances are overwhelmingly good, that if this defendant is convicted, that conviction will be upheld. Your errors will be called harmless.” And so, that’s a lot of responsibility for a trial judge to know that essentially, they’re going to say, “Oh, that’s okay,” about the errors you make. When I came to the federal bench, I think I’d been here about two years and I realized that my perception is that my work is much more carefully scrutinized by the circuit judges than it was by the California Court of Appeals and California Supreme Court. Whether that’s true or not I can’t really say, because we’re just talking about perception. But it seems to me that a great deal of attention is paid to the work we do at the District Court level. And I know you folks are over-worked, but nonetheless, you give me the impression that you spend a lot of time making sure I behave myself.

KITTY FELDE: Judge Stotler, would you agree that you have that third eye working?

JUDGE STOTLER: I’ve never doubted the good faith of the judges on the Ninth Circuit and the work that they do. One of the questions asked to us, or maybe we kicked it around before, was whether or not we felt that activist judges voted their conscience. I have disagreed with many decisions from the Ninth Circuit, but I have never seen a decision from the Ninth Circuit where there was not legal precedent to support it. There may be disagreements with the precedent and there may be disagreements with interpretation, but I have yet to meet a federal judge who said, “I will decide the case the way I feel like deciding it.” And that’s true for the District Court. It’s also true for the Circuit.

Let me just comment on Judge Cooper’s remarks. I know that the review of our cases is very thorough. I actually have mixed feelings about the “non-pub rule.” I think, sometimes, there are cases that, and without meaning to degrade any case, are the equivalent of federal small claims. There is nothing new in that case and it doesn’t need to be published. I, for one, appreciate the conservation of our time. Last but not least, I’m hoping there is not a split of the circuit. I don’t want to have to read yet another circuit ruling about how to interpret common issues about the coastline law that’s going to be along all of the western coast of America. I also don’t want to have to worry about the Indian Gaming Regulatory Act.⁴ We have so many Native American cases within the Ninth Circuit. They shouldn’t be different here than in some place up north.

JUDGE COOPER: Well, let me interrupt though. There are other Indian law cases in other districts around the country that you have to be aware of.

4. See 25 U.S.C. § 2701 *et seq.* (2006).

JUDGE STOTLER: Oh, absolutely true. I mean, it is a national law, and we have to look at the interpretations, but we don't need the "Twelfth Circuit" gloss on top of everything that we have, or at least that's my perception. Judge Cooper explained the stack of cases that we have to read and go through as it is. And so, my point is, to keep the District Court decision process efficient, we probably don't need to clutter it up with yet another circuit, which, as Judge Tashima points out, is bound to happen when you've got that additional circuit court.

KITTY FELDE: The Ninth Circuit is always in the media spotlight when we talk about politicization. But what about the Central District? I'm curious whether you are tainted by the California brush among your national colleagues? When I first started reporting, you couldn't sell a story to National Public Radio from California unless there was a major earthquake and people had died or it was a "crazy California" story because that's the opinion people outside of Southern and Northern California have of us here; and I'm wondering if it's the same for the Central District Court?

JUDGE STOTLER: I'd like to use that as a segue into our efforts to become more media friendly, if I may. We've had "Media Day" a couple of times in the last few years, and we have a Ninth Circuit committee which understands that the public learns about the courts in what they read or what they see. We want it to be accurate and we know the media has to have it timely. For example, you've got a big decision, like *Napster*, coming down.⁵ There are arrangements to let the press know to be at the courthouse so that we can have the decision read. In the District Court, we're trying to do some things like that so that for decisions that are big and important, we're going to let the media folks know to be there and be ready. I've been taught by someone who's in this room, but I won't name who, that "In the first paragraph of your order, explain what you're doing," even if it's extremely complex — Judge Alarcón, you do get credit for that — it's your duty as a judicial officer to explain what this case is about. It may be terribly complicated, but if you tell that media person along with all the rest of the public that this is the outcome and what the decision is based on, at least they get the story out there. We hope it's as accurate as it can be, and that we've done our part. Now, the next question is going to be, "Do we play it to the media?" Of course, we don't.

KITTY FELDE: Well, play to the media, let me just back up, play to the media is what everyone keeps bringing up. When you talk about the federal courts, for my side of the business, which is broadcast, both television and

5. *A&M Records v. Napster, Inc.*, 284 F.3d 1091 (2002).

radio, the federal courts are so hard to cover because it is a rare exception that either a recording or pictures can be taken from those courts; which is one of the reasons folks in my business very rarely cover the courts on the federal side.

JUDGE ALARCÓN: What you say is not true with the Ninth Circuit, however. We are part of an experiment to permit the camera in the courtroom and I have been on several cases where the camera has been there. The concern that we have, however, is how much of that 40-minute argument is going to end up on the six o'clock news.

KITTY FELDE: Well, even at NPR, I'll tell you the truth, if a clip is longer than twenty seconds, it's just not going to work. It's a very rare occasion, and I mean, even in public broadcasting, our window is shrinking.

JUDGE PAEZ: C-Span often will broadcast our oral arguments. When we did the *Napster* case,⁶ we allowed it to be streamed online.

KITTY FELDE: Well, Judge Stotler, you were talking about trying to reach out to the media; and actually, Judge Reinhardt, you had some interesting observations about the changes in the media that, even if the doors were wide open, even if judges were available to have conversations with reporters, God forbid, who would show up?

JUDGE REINHARDT: Yes. Oh, I think what I said to you was that the media does a lousy job, particularly in Los Angeles, because there's just no coverage of the courts. The *Los Angeles Times*, which in my opinion is steadily diminishing in quality, has only one reporter to cover the federal court and when he's on vacation, which he is from time to time, and he also covers legal affairs in the rest of the country, so, if he's not in town, it doesn't matter what kind of decision is issued, it won't be in the *Los Angeles Times*. And, if it's not in the *Los Angeles Times*, it doesn't exist because the electronic media read the *Times* and then they give you a digest on television that night. So, if it's not in the *Times*, they don't know about it. So, there's almost no coverage of the courts and to say that it's because the courts are not media-friendly, it wouldn't matter if we catered to them everyday.

JUDGE COOPER: I think that's true. I mean, what sells papers? Much of what we do does not sell papers. I have a case involving the murder of Notorious B.I.G. and every time that's on my calendar, there's hardly room for spectators because the media is there en masse. I never see these people for months and months when I have "regular" cases, but the press is going to show up if they think we're going to do something that would be really

6. *Id.*

interesting to the public; otherwise, they won't be there. I mean, I'm a fan of cameras in the courtroom and I'm a supporter and I wish we had them. Television cameras in the courtroom give people who can't otherwise get into court an opportunity to see what we do. But, I don't think the absence of cameras is really keeping people away.

KITTY FELDE: Reporters have gotten, I'll use the word "lazy," but by that I mean over-worked in the same way that you are being asked to do more with less time. Finding out information about the courts, if you're not a regular court-watcher is really hard. If reporters want to cover City Hall for example, they look on city news and there is what's called "the budget," which is a list of where the Mayor is going to go each day, but it's also got all the other information. Would it be possible to tap into that if there were cases that you, as judges, feel are important? I would think it would be nice if you could have a press person who could supply tidbits, because then, you really would have people following cases that were of interest other than just the celebrity factor.

JUDGE COOPER: I know the Superior Court has a media person. Do we have anyone?

JUDGE STOTLER: We actually have the Ninth Circuit Public Information Officer. Beyond that, and this is a recent development, we have MEDDS. If anybody is interested in any case in the Central District, they can access the Media Electronic Data Delivery System, and anybody can ask to be on the email and, boom, they've got their case. So, we've become, I think, a lot more efficient in that sense.

KITTY FELDE: Well, let's look into the future. We only have a couple of minutes left, so let's see if forty years from now we're having the same conversation about how things will have changed in the next forty years. Does anybody have any thoughts? Certainly if you look back forty years, electronics and computers weren't making your job easier or harder depending on how you look at the paperwork stack. Any thoughts about how things might change in the next four decades? Judge Paez?

JUDGE PAEZ: Well, I would just venture one thought, that if arbitration agreements and other forms of dispute resolution continue at the same pace that they have in the last ten or fifteen years, the number of civil cases that get filed in the District Court will probably decrease significantly.

KITTY FELDE: Alright. Any other thoughts? Judge Tashima?

JUDGE TASHIMA: One of the things I'm quite sure will happen in the next forty years, although I don't know when, is that I think at some point the Ninth Circuit is going to have to be split. The reason I say that is because the Ninth Circuit is supposed to be, the appellate court is supposed to be, a collegial court. That is, the judges are supposed to sit together and

decide cases together. Somebody, either Judge Reinhardt or Judge Alarcón, said, "Well, we need ten more judges and we can still operate with ten more judges." I think that's true, but the question is, can you still operate as a collegial court if you had one hundred judges? What kind of *en banc* court would you have? If you only had half the court, you'd have fifty judges sitting in a room. I don't think that would work. So, I think at some point over the next forty years, the Ninth Circuit is going to have to be split and people will then have to face the questions that everybody's been trying to avoid for the last twenty years.

JUDGE REINHARDT: Well, that's going to be a minor problem. Double the population of this country by then.

KITTY FELDE: Yes. And half of that population increase will be in California.

JUDGE REINHARDT: Everything is going to be different. The system won't be the same, it will bear no more resemblance to this system than we now do to what the courts were in the days when you had a Justice who rode the Circuit and that was your circuit court. I don't know what it's going to be like in the future but I would say it will be substantially different than it is today. And not for the better.

KITTY FELDE: Well, let's have a grand round of applause for our distinguished panel of judges, Judge Alarcón, Judge Cooper, Judge Paez, Judge Reinhardt, Chief Judge Stotler and Judge Tashima. Thank you very much.

LOOKING BACKWARD: THE CENTRAL DISTRICT OF CALIFORNIA

Lawrence M. Friedman*

On September 18, 1966, the Central District of California came into existence.¹ The growing population of California, and the growing workload of the federal courts, made it advisable to create a new federal district centered on the city of Los Angeles. It is unlikely that the average person in southern California paid much attention. There were other things to think about, aside from people's personal affairs: weather and air conditions, for example. That week in 1966, the *Los Angeles Times* reported "moderate to heavy smog," which was troublesome, though it was nothing unusual for Los Angeles.² The stock market continued to rise, as it had been doing for some time; the Dow Jones average had passed 800.³ The safe return of the astronauts of Gemini II was among the events that made headlines that week.⁴ More ominously, the newspapers carried the sad news that the death toll of American soldiers fighting in Vietnam had passed 5,000.⁵ In Los Angeles, on September 16, bells had rung out as the city observed Mexican Independence Day.⁶

The "news" each day is, by definition, new. Yet in a way, everything new builds on something old, on older situations and patterns. Each bit of news just mentioned was unique to September 1966; yet each also fit into a bigger existing category. The United States was rich, and getting richer and the rising stock market was evidence of this fact. Nevertheless, the growing

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1. Circuit and District Judges—Increase in Number, Pub. L. No. 89-372, § 84, 80 Stat. 75 (1966).

2. *The Weather*, L.A. TIMES, Sept. 23, 1966, at A1.

3. Robert Sullivan, *Market Posts Best Weekly Rally in Nearly Three Years*, L.A. TIMES, Sept. 18, 1966, at H1.

4. Marvin Miles, *Next Stop Earth: Gemini Splashdown Set Today*, L.A. TIMES, Sept. 15, 1966, Part 1, p. 1.

5. *American Death Toll in Vietnam War Passes 5,000*, L.A. TIMES, Sept. 16, 1966, Part 1, p.2.

6. *Bells Ring as L.A. Observes Mexican Independence Day*, L.A. TIMES, Sept. 16, 1966, Part 1, p.3.

economy produced, as always, side effects. These side effects were often far from benign. Underdeveloped countries, and poor rural areas in developed countries, did not usually suffer from “moderate to heavy smog.” Smog was a product of big cities, of automobiles, of an industrial society. It was, in a way, a sign of success. It was also a sign of a technological revolution.

Among the most glamorous aspects of this revolution, though certainly not the most important, was space travel. The Vietnam War was an aspect of America’s involvement in the world, which at that time was a bipolar world, the world of the cold war. America was involved with the world in many other ways as well. It exercised a dramatic pull on immigration. America had long been a magnet for immigrants, and the days were over when immigrants meant Protestants from northern Europe. First came waves of immigrants from southern and eastern Europe; and then, by the 1960’s, immigrants from Asia and, especially, Latin America. A celebration of Mexican Independence in Los Angeles was nothing surprising any longer; it reflected the importance of the Mexican population, the flow of Mexicans across the border, and their growing significance in the economy and polity of southern California.

Forty years is a long time in a lifetime, but a short time in the history of a country, and an even shorter time in the history of the human race. Nevertheless, in one sense, forty years is a lot longer than it used to be. In the 20th century, society was changing, the world was changing, and technology was changing. Moreover, all of these things were changing at an accelerating pace. In 1966, nobody had heard about the internet, Google, cell phones, or Al Qaeda. There were no statutes against stalking. People were not yet talking about identity theft. It was only in the early 1980s that people became aware of a dreaded new disease, which eventually got the acronym AIDS. Nobody was yet worrying about the Ebola virus, or about global warming. In addition, in 1966, our students did not sit in classrooms with wireless connections, typing their notes on laptops. When students wanted to read a case, they went to the library. Today, the silence in the library stacks is deafening; instead, students are hunched over their computer screens. The techniques of legal research, the habits of law students, and lawyers, are miles from what they were in 1966.

Rapid social change always means rapid legal change. In 1966, the country was in the midst of the civil rights revolution. The great Civil Rights Act was a two-year old baby;⁷ the Voting Rights Act was one year

7. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (1964) (codified as amended at 42 U.S.C. § 1971 *et seq.* (2006)).

old.⁸ The Civil Rights Act covered sex discrimination; but it would take the Supreme Court five more years to make the momentous and miraculous discovery that a ban on sex discrimination had been there, all along, hiding in the text of the 14th amendment.⁹ The end of mandatory retirement was still in the future, along with passage of the Americans with Disabilities Act.¹⁰ Yet to come were quarrels over copyright of computer software—we were not yet concerned with how long Mickey Mouse could be locked out of the public domain, No Child Left Behind was not yet law; and, of course, there was no 9/11, no “war on terror,” no dispute over Guantanamo Bay or the U.S.A. Patriot Act.

There are many people who have lived through the 40 years of work of the Central District and who know, from the inside, what it has done and what its work is all about. Here I want to put the work of the District into one specific context. I want to talk about the role of the federal courts generally and their place within the national judicial system, and that means discussing the shifting relationship between Washington, D.C. and the fifty separate states. The district courts are the basic trial courts of the federal system, the strong and solid foundation of that system. The federal courts handle only a small part of the load of litigation in this country. The state courts are still the workhorses of the American legal system. If you want a divorce, if your fender was dented in a parking lot, if you want the school board to change its curriculum, if you want a zoning variance, if you feel that your landlord ought to fix your leaking roof, if you have to probate your mother-in-law’s will, or if you want a marriage license, or a dog license, or a license to practice optometry, your business is with state and local courts and agencies, and always has been.¹¹ Nevertheless, in the course of the 20th century, the workload and the importance of the federal government and the federal courts have increased in an impressive way. The states are still vital and important; but the federal government has become a colossus. Moreover, the federal courts are part of this colossus, one of the vertebrae in the spine of *Tyrannosaurus Rex*.

In the early 19th century, the situation was entirely different. The federal government, by almost any measure, did not amount to much. Washington, D.C. was essentially a tiny, muddy village, virtually

8. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 445 (1965) (codified as amended at 42 U.S.C. §§ 1971–1973(bb) (2006)).

9. *Reed v. Reed*, 404 U.S. 71, 75-76 (1971).

10. Americans with Disabilities Act of 1990, Pub. L. No. 101-336, § 933, 104 Stat. 327 (1990) (codified generally at 42 U.S.C. 12101 *et seq.* (2006)).

11. See generally LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* (Touchstone 3d. ed. 2005).

uninhabitable in summer. Very few people lived there on a year-round basis. The federal bureaucracy was minuscule. Even the Supreme Court came for brief periods; the justices stayed in boarding houses, and went home at the earliest opportunity.

One of the first signs of the future federal Leviathan was the passage of the Interstate Commerce Commission Act of 1887. It was a response to a strong demand for action to control the railroads. The early railroads had been distinctly local; they were short lines that went from here to there. A name like "Atchison, Topeka, and Santa Fe," preserves a memory of this period. In time, more and more of these lines were glued together into big, national nets; the big fish swallowed the little fish. At that point, no single state could exercise real control over the railroads. They had gone national. Farmers and small merchants felt that they were at the mercy of the robber barons, who cheated them with exorbitant freight rates; some sort of federal regulation seemed like the only way out.

Whether the ICC solved the problem is another question. A few years later, in 1890, Congress passed another major regulatory law, the Sherman Anti-Trust law.¹² This, too, was a response to a demand for national action—it arose out of the hysteria over the power and antics of the "trusts." These giant combines, like Rockefeller's Standard Oil, had frightened the public out of its wits.

In 1906, Congress passed yet another major federal bill to regulate business: the Food and Drug Act.¹³ This was a direct consequence of scandalous revelations, very notably, Upton Sinclair's description of the meat packing industry in his novel, *The Jungle*.¹⁴ Tales of rotten meat and disgusting sanitary conditions revolted the public. Sinclair was a Socialist; his real aim was to direct attention to the desperate plight of the workers.¹⁵ He wanted radical social reform, but never got it. The only message that got through was a message about the rotten food supply. "I aimed at the heart," he said, "and I hit them in the stomach."¹⁶

A basic paradox underlies the federal system. The states are sovereign, up to a point, but they may not interfere with interstate commerce: the flow of goods and people across state lines. The Constitution turns the country

12. An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies, ch. 647, 26 Stat. 209 (1890) (codified as amended at Monopolies and Combinations in Restraint of Trade, 15 U.S.C. §§ 1-7 (2000)).

13. Pure Food Act, ch. 3915, 34 Stat. 768 (1906).

14. See generally UPTON SINCLAIR, *THE JUNGLE* (Barnes & Noble, Inc. 1995).

15. See Upton Sinclair, in 24 *ENCYCLOPEDIA AMERICANA* 837 (1996).

16. JOHN BARTLETT, *FAMILIAR QUOTATIONS: A COLLECTION OF PASSAGES, PHRASES, AND PROVERBS TRACED TO THEIR SOURCES IN ANCIENT AND MODERN LITERATURE* 634 (Justin Kaplan ed., 16th ed. 1992) (1882).

into a giant free-trade area. This has all sorts of consequences. Take the movement, in the late 19th and early 20th centuries, to get rid of child labor. The northern industrial states passed laws forbidding children from working in factories, mines, and other businesses. They were supposed to go to school instead. Then these states began to lose their factories, which relocated themselves in the southern states, where child labor and compulsory education laws either did not exist or were not really enforced. The other states then demanded national labor legislation. Congress obliged; but the Supreme Court put its foot down: child labor laws were unconstitutional.¹⁷ Ultimately, during the New Deal, the industrial states got their way; and the Supreme Court no longer was able to stand in the way.¹⁸

Nevada, California's neighbor to the East, is an outstanding example of the power of state sovereignty. Nevada became a state in 1864. From the very start, it faced a serious problem: there was no particular reason for anybody to live there. One author even called Nevada the "great rotten borough."¹⁹ The census of 1900 showed a total state population of 40,000, rattling around in the limitless desert.²⁰ However, Nevada had one gigantic asset: it was a sovereign state in a federal union. It began to cobble together a thriving economy, based almost entirely on this one intangible asset. The brilliant plan was to legalize all sorts of things that were illegal in California. First came easy marriage and easy divorce; and then, most famously, gambling.²¹ Nevada is also the only state in the union where prostitution is legal, though oddly enough, not in the county which contains Las Vegas. Is Las Vegas afraid that sex is a distraction from gambling?²² The Nevada formula proved to be a winner. Nevada is today perhaps the fastest growing state in the union.

No doubt other states resented Nevada; it was not clear for example, whether other states had to recognize a quick Nevada divorce or not. Nevada divorce was never as controversial as gay marriage in Massachusetts is today; but the general problem was and is the same. Further, the solution to the problem, if you consider it a problem, has to be a federal solution. This is not always successful, to be sure. The solution to

17. See *Hammer v. Dagenhart*, 247 U.S. 251 (1918).

18. See Fair Labor Standards Act of 1938, 29 U.S.C. § 201 *et seq.* (2006).

19. GILMAN M. OSTRANDER, *NEVADA: THE GREAT ROTTEN BOROUGH, 1859-1964* (1966).

20. U.S. CENSUS BUREAU, *TWELFTH CENSUS OF THE UNITED STATES-1900, STATISTICS OF POPULATION* xxi, available at <http://www2.census.gov/prod2/decennial/documents/33405927v1ch01.pdf> (last visited Mar. 3, 2007).

21. See NEV. REV. STAT. § 122.002 *et seq.* (2006); see *id.* § 125.101 *et seq.* (2006); see *id.* § 463.0129 (2006).

22. See NEV. REV. STAT. § 244.345 (2006).

casino gambling in Nevada, of course, was not prohibition, but imitation. Most states now have state-run lotteries, and lots of states have casinos. Nowadays, everybody seems to want to copy the success of Las Vegas. In a sense, too, Nevada was itself a copycat. Little Delaware and its cheap, easy corporation laws had already shown the power of sovereignty within a federal system.

World affairs have also affected the balance between the states and the federal government. The United States today is a super-power, an economic and a military giant. Its role in world affairs is important and even decisive almost everywhere. Presidents Jefferson and Lincoln had to worry about relations with England and France, and a little bit about Latin America; but what happened in Korea, India or southern Africa never cost them any sleep. This is no longer the case. We live in a risky and interdependent world. The United States is a major player, and "the United States" obviously means the federal government. Washington, D.C. controls foreign affairs and national defense. Wyoming, fortunately, has no hydrogen bombs or ballistic missiles; Michigan does not patrol Lake Michigan with aircraft carriers. The President of the United States has access to a red telephone and a finger on a fateful button; California's governor, Arnold Schwarzenegger, for all his muscles, has no such authority and power. This may well be quite a good thing.

By 1966, then, the role of the federal government and the federal courts had swelled to a size the 19th century would have thought quite inconceivable. The daily "news" reflects this fact. The *Los Angeles Times*, after all, is a local newspaper. Nevertheless, the issues in 1966 that appeared in the *Los Angeles Times* were really, in many ways, federal issues, though sometimes in tandem with the states. States and state courts had little or nothing to say about the war in Vietnam; or about space travel. The states did want military bases and fat defense contracts, but these were parceled out by the national government. Smog and clean air were once local matters, but when people saw pollution as a serious problem, it became a national issue as well. On October 29, 1948, the so-called "Donora death fog" produced what was almost literally darkness at noon in Donora, Pennsylvania.²³ People gasped for breath; twenty died, and thousands were hospitalized.²⁴ This was a kind of national wake-up call. The Los Angeles smog was also notorious.²⁵ All this eventually led to powerful federal programs.²⁶

23. LAWRENCE FRIEDMAN, *AMERICAN LAW IN THE 20TH CENTURY* 196 (2002).

24. *Id.*

25. *Id.*

26. *Id.*

The wave of immigrants and workers flowing across the border from Mexico into the United States was also a national concern, beyond the control or influence of any one state; and it continues to be such a concern to this day. People all over the country follow the stock market; and its rise and fall has an impact everywhere. Regulating the stock market has been, since the 1930's, a national affair, mostly under the control of the SEC.²⁷ The growth of federally regulated issues goes on and on.

Further, the shift to national programs was no accident. When transportation and communication became national, a union of states became, more and more, a single country and a single economy, bound together by the new technology. Messages could travel across the whole country in seconds by telephone or telegraph. The railroad shortened distances in a way that had been unimaginable just a few years before. A small grammatical point is worth mentioning: the Constitution, and early usage, favored a plural verb with the United States: as the United States "are." Since 1900, the idiom has shifted decisively to the singular: the United States "is." United States is singular; it is now one country, rather than a union of separate states, much more than it had been in the past.

Economy and technology are powerful influences on culture, on the way we live and the way we think. The influence extends to every aspect of our lives, sometimes in ways that are far from obvious. For example, it is likely that antibiotics, invented in the 1930's, helped along a revolution in expectations that reverberated in our tort system and led to what I have called a demand for total justice.²⁸ People who get sick nowadays expect to be cured; they are shocked if a disease is called incurable. The automobile, to take another example, increased geographic mobility and loosened family ties. Changes in family structure, in turn, were a factor in a rising rate of divorce. Affluence, and the invention of the stall shower, helped along the so-called sexual revolution.²⁹ This example may seem far-fetched, but at one time nudity was rare and unusual; millions of ordinary people did not wash or undress very often.³⁰ Cheap and efficient washer-dryers, and of course the contraceptive pill, were also factors in these cultural shifts. Social causation is a complex chain, made up of many links. In modern times, technology has forged many of these links. Thus, any major change in society typically means a major change in law, legal doctrines, and legal arrangements.

The transformation of culture affected the balance between states and

27. *Id.* at 164-65.

28. *Id.* at 274.

29. FRIEDMAN, *supra* note 23, at 8.

30. *Id.*

the federal government, and here, too, technology has played an important, maybe even a decisive role. Take, for example, the modern Presidency. Former Speaker of the House, Thomas P. "Tip" O'Neill once said that all politics is local.³¹ He had a point; the case could also be made that all politics is national. How many people could name their representatives in the state capital? Or on the city council? But everyone knows who is President. The President is a major celebrity. He is on TV almost daily. We can hear his voice; observe how he walks, how he dresses; we know his wife, his children, and his dogs. The process began with radio, perhaps with Franklin Delano Roosevelt and his "fireside chats." The radio enabled the President to speak directly to the people. Before radio, this was just not possible. How many people ever saw the face or heard the voice of Thomas Jefferson? Or Abraham Lincoln? Or even Theodore Roosevelt?

One of the most salient aspects of 20th century legal growth was the rise of what I have called "plural equality."³² Basically, this refers to the end of a period in American history in which one race, one gender, one religion, one ethnicity dominated the country. This structure of dominance was gradually, and somewhat painfully, dismantled in the late 20th century. In many ways, the job is far from done; but there has been enormous progress during the lifetime of the judges of the Central District of California. Back in 1966, the women's movement and the civil rights movement were struggling to change the law and customs of the country. The new Civil Rights Law and the new Voting Rights Act were new weapons in this struggle.³³ These statutes would create whole fields of law that, essentially, never existed before, and would lead to new kinds of litigation for the federal courts.

Today, it seems to me, looking back, that the women's movement and the civil rights movements, though of extraordinary importance in their own right, were in a way only the tip of the iceberg. Movement after movement borrowed concepts and goals from these two: the prisoners' rights movement, where the federal courts played an indispensable role; the American Indian movement; the struggle against age discrimination and mandatory retirement; and the movement that brought about passage of the Americans with Disabilities Act. All of these movements represented, in general, the striving for a level playing field in the interests of groups that

31. See Thomas P. "Tip" O'Neill Quotes, available at <http://chatna.com/author/oneillthom.asp.htm> (last viewed Mar. 3, 2007).

32. FRIEDMAN, *supra* note 23, at 10.

33. See Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (1964) (codified as amended at 42 U.S.C. § 1971 *et seq.* (2006)); see Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 445 (1965) (codified as amended at 42 U.S.C. §§ 1971-1973(bb) (2006)).

had been disadvantaged before. All of these have been important national issues, with national—federal—solutions; and all of them have presented the federal courts with thorny issues, and rich opportunities for innovation. Further, these movements were all, in turn, part of a more general striving for self-realization, an outburst of a new and heightened form of individualism, which is part of the social landscape in our days.

In the 1970's, the federal courts were confronted with no less than 75 appellate cases dealing with the vital issue of whether the public schools could make rules about the way high school students wore their hair.³⁴ These were cases brought on behalf of boys who wanted to grow moustaches or beards or just plain long, flowing hair.³⁵ They ended up on the dockets of the federal courts. Some of the judges, and no doubt many ordinary people, wondered why an issue so trivial should elbow its way into the courts.³⁶ But the issue was not trivial to the plaintiffs (or, perhaps, to the defendants). Further, behind these cases were two questions, which were not trivial in the least: first, what are the limits of individual choice, not just in hairstyle, but in ways of life; and second, what are the limits of authority, in schools, businesses, and other private and public institutions?

These are not just federal issues, but the federal courts are the most significant battleground for these issues. Those who opposed civil rights laws always spoke about states' rights. This argument, once enormously powerful, came to have a rather hollow ring in an age of television. Talk about states' rights seemed almost beside the point, in an era when dogs and hoses were let loose on civil rights workers and little African-American children, and these images were beamed into every home in the country. When television became national, many regional problems became national as well; and this meant a demand for national solutions. As everybody knows, the Supreme Court in the second *Brown v. Board of Education* case dumped school desegregation into the laps of the federal district courts.³⁷ These judges had to translate the fine words of the high court into working reality.

To be sure, state courts also played a role in the civil rights movement. There were and are civil rights laws in many of the states. Further, there were local parallels to most of the federal statutes and there was, and continues to be, state litigation on these statutes. However, only the federal

34. Laurence M. Friedman, *Limited Monarchy: The Rise and Fall of Student Rights*, in *SCHOOL DAYS, RULE DAYS: THE LEGISLATION AND REGULATION OF EDUCATION* 238 (Kirp & Jensen, eds., 1986).

35. *Id.*

36. *Id.*

37. *Brown v. Board of Educ. of Topeka*, 349 U.S. 294, 299 (1954).

courts can apply a single national standard. This is, in fact, a crucial aspect of the work of the federal courts, including the Supreme Court. They have the job of creating national standards. Since the *Erie Railroad v. Tompkins* case in the 1930's, the federal courts can no longer craft a federal common law.³⁸ They are bound by state law in diversity cases.³⁹ But in other areas, involving federal statutes or constitutional doctrine, the federal courts have the power to smooth out the kinks in the system. Take the great Supreme Court case of *Gideon v. Wainwright*, decided in the 1960's.⁴⁰ A law student who was asked what this case held would likely answer, "*Gideon* means that a poor person, charged with a felony, is entitled to a state-paid lawyer."⁴¹ This answer would not be wrong; but it is somewhat misleading. The right to a state-paid lawyer already existed in most states.⁴² It had existed in California for about 90 years.⁴³ Florida, where the *Gideon* case arose, was, along with a few other states, an exception in denying such a right.⁴⁴ What *Gideon* really did, then, was establish a national standard and bring certain laggards in line. Many of the important federal decisions have this quality. After all, only a minority of the states had segregated schools in 1954. This leveling-out is one of the most important jobs of the federal courts.

The United States is an exceedingly diverse country. On the streets of Los Angeles, you see people whose roots are in countries on every continent. People today talk a lot about their "roots," and the deep meaning of those roots. Assimilation is a dirty word. It is associated with bad policies toward the native tribes and the rejection of our rich rainbow of diversity. But there is a paradox here. Despite differences of race, religion, language, and background, the citizens of the United States are in fact becoming more and more alike. The country is, in truth, more and more a single culture area. People across this country watch the same movies and television programs, follow the same sports events, and listen to the same music. They shop at malls, from Anchorage, Alaska to Palm Beach, Florida, that sell the same products, from the same chain stores. Our country celebrates diversity, but a diversity that exists within an overall framework of great similarity and homogeneity; or, one may say, huge differences within a giant tent of sameness.

38. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 79 (1937).

39. *Id.*

40. *Gideon v. Wainwright*, 372 U.S. 335 (1963).

41. *Id.*

42. FRIEDMAN, *supra* note 23, at 298.

43. *Id.*

44. *Gideon*, 372 U.S. at 335; See FRIEDMAN, *supra* note 23, at 208.

Both the unity and the diversity feed the importance of the federal court system. It is the federal court system that has to cope with both of these social facts. It has to adjust the gears and levers of an incredibly complicated machine. It has to cement national unity, while allowing enough slack and leeway to accommodate diversity, and a chorus of different voices. Only the national courts can do this. There may be approval or disapproval of the tilt toward the center, some may think it is flawed, some might imagine there is a need for readjustment; but in essence, the trend is irreversible, for all the reasons I have discussed.

And the district courts are the workhorses of the federal system, the keystone of the great judicial arch. They are, moreover, heirs to a great and proud tradition. The United States, in general, has not been free from scandal, graft or corruption; not in Washington, D.C. and not in the states. History is replete with episodes that cannot help but embarrass, disgust or enrage honorable people. There have been judicial scandals, too, particularly in the 19th century, in state and municipal courts. Yet, the record of the federal judiciary has been quite remarkable. In the more than 200 years since independence, the federal judiciary has enjoyed an almost spotless reputation. The exceptions are amazingly few. These federal judges and their colleagues have every reason to be proud of that tradition, and the role they play in keeping it alive.

BROWN'S LEGACY IN THE WEST: PASADENA UNIFIED SCHOOL DISTRICT'S FEDERALLY MANDATED DESEGREGATION

Rosina A. Lozano*

I. INTRODUCTION

A white man uses a large American flag to spear a black man in a business suit.¹ The black man's face registers shock and pain; the white man's face displays anger and hatred.² Stanley Forman's famous photograph was awarded the Pulitzer Prize in 1977.³ It remains one of the most searing images of the desegregation campaigns of the 1970s.

The photo not only visually depicts racial hatred, it also dramatically demonstrates the violence that occurred in desegregation campaigns of South Boston—the legacy of non-southern busing that is taught in schools.⁴ Throughout the nation in the 1970s, images of black students and white students holding hands, fighting alongside and against one another, and riding buses flooded the news.⁵ These images contrast greatly with those from Pasadena, California, where the first day of integrated schooling in

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1. THE SOILING OF OLD GLORY (Photograph by Stanley J. Foreman 1976), *available at* <http://www.pbba.net/events/dec03/forman1.jpg> (last visited Mar. 18, 2007).

2. *See id.*

3. *See* The Pulitzer Prizes, <http://www.pulitzer.org/cgi-bin/query.cgi?E=1&X=0&searchtype=1&Q=Forman&FormsCheckbox1=1&words=0&case=1&FormsButton2=Search> (last visited Feb. 16, 2007).

4. THE SOILING OF OLD GLORY, *supra* note 1.

5. *See Opening Day Two Weeks Away, School Integration Plan: Questions and Answers*, PASADENA STAR-NEWS, Aug. 30, 1970, at A1 [hereinafter *Opening Day Two Weeks Away*].

1970 ended with no violent incidents, and staged busing featured not only the faces of black and white students, but students of no less than four different racial backgrounds: black, white, Latino, and Asian.⁶

II. BACKGROUND

A. *Pre-Brown v. Board: Early Efforts to Desegregate California Schools*

Pasadena attracted significant national attention as the first western city ordered by federal courts in the post-*Brown* era to desegregate its schools.⁷ The 1954 judicial decision reached in *Brown v. Board of Education* mandated desegregation in all schools, not just those in the South.⁸ Unfortunately, the Supreme Court's infamous phrasing of "all deliberate speed" thwarted school desegregation efforts throughout the nation.⁹

Effects of the *Brown* ruling were virtually nonexistent in California prior to 1970.¹⁰ In January, a strong ruling by Judge Manuel Real of the United States District Court for the Central District of California demanded compliance from Pasadena's school board.¹¹

Educational equality was hardly a new issue in 1970s California. A century earlier, after a black parent in San Francisco sued for her child to be allowed into the public schools, *Ward v. Flood* established that black children could not be excluded from the public schools if there were no separate schools established for them.¹² Other contemporary efforts to integrate the schools occurred throughout the state. In *Wysinger v. Crookshank*, Arthur Wysinger of Visalia sued for admittance into the all-white high school.¹³ The Supreme Court of California granted him entrance

6. See *id.*, at A1.

7. See *id.*; Lee Austin, *Recall Election Viewed as Crucial to Pasadena School Integration*, L.A. TIMES, Oct. 11, 1970, § L, at C1.

8. *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954).

9. *Brown v. Bd. of Educ.*, 349 U.S. 294, 301 (1955).

10. MICHAEL E. JAMES, *THE CONSPIRACY OF THE GOOD: CIVIL RIGHTS AND THE STRUGGLE FOR COMMUNITY IN TWO AMERICAN CITIES 1875-2000* 278-79 (2005).

11. *Spangler v. Pasadena City Bd. of Educ. (Spangler I)*, 311 F. Supp. 501, 505 (C.D. Cal. 1970) (ordering the Board to adopt a specific plan outlining procedures to solve problems at all grade levels).

12. 48 Cal. 36, 41-42, 57 (Cal. 1874) (black parent sued for child's admittance into white public school); see CHARLES WOLLENBERG, *ALL DELIBERATE SPEED: SEGREGATION AND EXCLUSION IN CALIFORNIA SCHOOLS 1855-1975* 8-11 (1976); RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY* 77 (1975).

13. *Wysinger v. Crookshank*, 82 Cal. 588, 594-95 (Cal. 1890).

because there were no black high schools in the region.¹⁴ Despite integration efforts such as these, state courts still recognized the constitutionality of separate but equal schools.¹⁵

Attempts to desegregate California schools were not solely biracial confrontations between blacks and whites. Parents of varied backgrounds took the initiative to improve their children's experiences in the public schools.¹⁶ History reveals a glaring and poignant irony in this regard: at precisely the same time that legal and actual exclusion of racial minorities was rising, various minority communities of California were fighting to desegregate schools.¹⁷ Japanese segregation in San Francisco schools served as catalyst for the Gentlemen's Agreement of 1907, as Japan was insulted by the discriminatory policy of the school district.¹⁸ This agreement necessitated the involvement of President Theodore Roosevelt in order to maintain healthy diplomatic relations between the United States and Japan.¹⁹

A watershed moment occurred in 1931, when ethnic Mexicans of Lemon Grove, California filed a writ of mandate in the Superior Court of California in San Diego against the school board's recently established segregated school system.²⁰ Judge Claude Chambers ruled that the separation of students had no legal basis, thus ensuring the ethnic Mexican children admission into public schools with non-Hispanic, white students.²¹ This decision—although never appealed and not precedent-setting—holds the distinction of being proclaimed the first successful desegregation court case in the nation.²² It was followed by the renowned *Westminster v. Mendez* case, which featured a similar decision from the Ninth Circuit Court of Appeals.²³ These cases are examples of school desegregation

14. *Id.*

15. *Price v. Civil Service Comm'n.*, 26 Cal. 3d 257, 286 (Cal. 1980) (discussing courts' recognition of "separate but equal" doctrine).

16. *See, e.g., Westminster Sch. Dist. of Orange County v. Mendez*, 161 F.2d 774, 776 (9th Cir. 1947) (parents of Mexican student seeking desegregation of public school).

17. *See id.*

18. *See WOLLENBERG, supra* note 12, at 66-67.

19. *Id.* at 67.

20. *Alvarez v. Owen*, No. 66625 (Cal. Super. Ct. San Diego County Apr. 16, 1931), reprinted in Kristi L. Bowman, Note, *The New Face of Desegregation*, 50 DUKE L.J. 1751, app. at 1807-08 (2001); *see* Robert Alvarez, Jr., *The Lemon Grove Incident: The Nation's First Successful Desegregation Court Case*, 32 J. OF SAN DIEGO HISTORY, 116, 129-131 (Spring 1986), available at <http://sandiegohistory.org/journal/86spring/lemongrove.htm> (last visited Feb. 16, 2007).

21. *See Alvarez, supra* note 20.

22. *Id.*

23. *Westminster*, 161 F.2d at 780 (restraining discriminatory practices against ethnic

efforts in the state of California predating the national focus on school desegregation that began in the wake of the Supreme Court's famed *Brown* decision.²⁴

B. Progressive Education: Pasadena Unified School District's Previous Media Exposure

Not all communities boasted success stories in desegregation. Pasadena had a history of thwarting attempts to integrate its schools.²⁵ Just prior to the *Brown* decision, the city received national attention as a result of journalist David Hulburd's book chronicling the recent administration of school superintendent Willard Goslin.²⁶ Goslin had assumed the top position of Pasadena Unified School District ("PUSD") and immediately began to refocus on a more progressive educational system.²⁷ His new curriculum included "abandonment of letter grades, elimination of competition, rejection of traditional subject matter, and, most important, usurping parental authority"—or so one would believe from the press and propaganda surrounding the call for his removal.²⁸ Actually, as Michael E. James argues, Goslin was simply attempting to create an educational environment in which students of different races could be treated more fairly.²⁹

Goslin tried to hold white students in neighborhood schools with large minority populations near the Arroyo Seco (a shallow canyon and tributary watershed of the Los Angeles River running north-south near the city's western edge).³⁰ His policies ultimately landed him in the center of a vicious national campaign in which he was vilified for what his opponents termed his support of "REDucation."³¹ Civil rights advocate and attorney Carey McWilliams and other Goslin supporters made sure that the media covered the racism exhibited in Pasadena.³² Despite these efforts, Goslin

Mexicans by public schools).

24. See generally WOLLENBERG, *supra* note 12 (Wollenberg details the racist, discriminatory, and eugenic beliefs that imposed *de jure* segregation throughout the state of California.).

25. JAMES, *supra* note 10, at xii.

26. DAVID HULBURD, THIS HAPPENED IN PASADENA (The Macmillan Company 1951).

27. JAMES, *supra* note 10, at 229.

28. *Id.*

29. *Id.*

30. *Id.* at 229-30.

31. *Id.* at 229.

32. *Id.* at 253.

soon found himself without a job; but his departure hardly tempered local debates and disagreements over racial integration of schools.³³

The neighboring communities of Temple City and La Cañada provided an example of this controversy. The all-white communities of Temple City and La Cañada opted to withdraw from the PUSD.³⁴ Temple City left with Goslin's dismissal and La Cañada departed a few years later, when the California Department of Education requested that districts be unified so that a K-12 system could be established.³⁵ La Cañada operated its elementary schools, but used Pasadena schools for junior high and high school.³⁶ The rising debate over unification centered around a small La Cañada district with fewer courses versus a larger district with more courses, resources, and students of color.³⁷ To be sure, some La Cañada parents appreciated the diversity of the schools in Pasadena. As one mother described the benefits for the children:

They have come to appreciate the fact that people are pretty much alike, despite the color of their skin and the shape of their eyes, even as they have been made aware that people from different social, economic and racial backgrounds reflect a great deal that is in such backgrounds in their approach to life and to the world in which they live. For the leaders of tomorrow's world there is no greater lesson to be learned.³⁸

Although she addressed a forum that drew 1,500 community members, this parent's views were not widely adopted by La Cañada.³⁹ For the most part, race was not mentioned in this or other discussions; dialogue focused instead on the fact that schools should be locally run and controlled.⁴⁰ La Cañada felt it would have little control in PUSD where their voting power represented only ten percent of the electorate.⁴¹

Ultimately, La Cañada created its own schools and withdrew from the PUSD. La Cañada residents left behind an increasingly mixed-race public

33. See Spangler I, 311 F. Supp. 501, 507 (C.D. Cal. 1970) (discussing the consistently high degree of racial separation within the District); Conflict in Education: The Pasadena Case, March 1951, Bulletin No. 210 (on file at The Huntington Library, San Marino: Marie Koenig Papers, Pasadena Council for Educational Research Education, Box #2, Folder #2).

34. *Spangler I*, 311 F. Supp. at 508; JAMES, *supra* note 11, at 272.

35. JAMES, *supra* note 10, at 272, 274.

36. *Id.* at 274.

37. Elmer Wells, *Hearing on School Plans Draws 1,500 in La Cañada: 3 Separate Steps Get Consideration Controversy Centers Around Annexation or Unification*, PASADENA STAR-NEWS, Apr. 5, 1960, at 24.

38. *Id.*

39. *Id.* at 17, 24.

40. *Id.* at 24.

41. *Id.*

school population in Pasadena—particularly at Muir High School.⁴² Their departure posed a new problem for Pasadena schools, eventually leading to the filing of numerous court cases against the school district due to the board's redistricting solutions.⁴³ The loss of students resulted in the cessation of reverse busing of white students from the multiracial Arroyo Seco neighborhood to La Cañada schools.⁴⁴

Since La Cañada Middle School was no longer a part of the district, Arroyo Seco parents suggested that their children be sent to McKinley Junior High School, rather than the increasingly black Washington Junior High School.⁴⁵ Walter Shatford, a Board of Education member with children at Washington, advocated for "putting the white in Washington."⁴⁶ At the time, he was supported in his views by only one other member (Dr. Robert Freeman) and opposed by the majority of the board (LuVerne LaMotte, James N. Stivers, and Steve Salisian).⁴⁷ The white students were bused to McKinley on a 3-2 board vote.⁴⁸ The money and support from the East Arroyo community was too great an influence.⁴⁹ Despite some efforts to increase integration by busing black students, this was an explicit case of the district busing white students away from schools with large black populations, resulting in greater racial inequities.⁵⁰

The Board's decision was not upheld without a protest from the black community. In the summer of 1961, Jay Jackson, Sr. filed for his child's intra-district transfer to Eliot Junior High School.⁵¹ Jackson argued that his son was receiving an inferior education at Washington due to its increasingly mono-racial demography.⁵² Sam Sheats, a lawyer and prominent member of the National Association for the Advancement of Colored People ("NAACP"), took Jackson's suit to court.⁵³ *Jackson v. Pasadena City School District* was the first application of *Brown* in

42. JAMES, *supra* note 10, at 274, 276.

43. See Spangler I, 311 F. Supp. 501 (C.D. Cal. 1970); *Jackson v. Pasadena City Sch. Dist.* (*Jackson I*), 26 Cal. Rptr. 661 (Ct. App. 1962).

44. JAMES, *supra* note 10, at 256-57.

45. *Spangler I*, 311 F. Supp. at 508.

46. Lucie Lowery, *Race Bias Claimed in Pupil Grouping*, PASADENA STAR-NEWS, Jan. 8, 1970, at 3.

47. *Id.*

48. See *Spangler I*, 311 F. Supp. at 508.

49. JAMES, *supra* note 10, at 275.

50. See *Spangler I*, 311 F. Supp. at 512.

51. *Jackson I*, 26 Cal. Rptr. at 662.

52. *Id.*

53. JAMES, *supra* note 10, at 278.

California.⁵⁴ The California Supreme Court ruled that the Pasadena Board of Education was intensifying racial segregation through its zoning decisions.⁵⁵

Presumably due to the pressure of the NAACP and the court ruling, the board moved forward in favor of integration. In the minutes from a March meeting in 1962, the board adopted a policy stating "[t]he Board of Education shall do nothing which promotes racial or other types of segregation"⁵⁶ Yet despite the ruling and public proclamation, the board did little to change its policies—a recalcitrance that would eventually result in stern judicial reprimands.⁵⁷ The board's lip service, as opposed to action, left the black community little choice but to continue its long crusade against the inequities of the school system.⁵⁸

C. *Black Community Activism*

The black community of Pasadena pursued equality in schooling with a vigorous determination to end the wrongs it saw daily in the school board's actions. In 1953, the NAACP fought to obtain a cease and desist order against placing additional portable classrooms at Arroyo Seco Elementary School.⁵⁹ The organization viewed the board's commitment to neighborhood schools as a method of promoting overcrowding and inferior conditions for black students.⁶⁰ One researcher summarized the prevailing policy of the board as "construct rather than integrate."⁶¹ Community recognition of the discrepancies between the schools precipitated the formation in 1957 of PACE—the Pasadena Action Committee for Excellence in Education—that hoped to remedy the severe segregation prevalent in Pasadena schools.⁶² This black activism occurred prior to what many whites deemed as the beginning of acute segregation of the schools—

54. *Id.* at 278-279.

55. *Id.* at 279; *Jackson v. Pasadena City Sch. Dist. (Jackson II)*, 59 P.2d 878, 880 (Cal. 1963).

56. Ernest M. Posey, *Segregation in the Pasadena Schools: A Community Effort* 45 (Mar. 30, 1972) (Unpublished B.A. With Honors Thesis, Harvard University) (on file with Pasadena Central Public Library).

57. *See generally* Spangler I, 311 F. Supp. 501 (C.D. Cal. 1970); *see also* Posey, *supra* note 56, at 27.

58. *Id.* at 46.

59. *Id.* at 27.

60. *Id.*

61. *Id.* at 27-28. (explaining that the Pasadena Board was building to accommodate the large numbers of white students in white schools in lieu of transferring these students to nearby minority schools).

62. Posey, *supra* note 56, at 34-35.

namely the loss of La Cañada's white students.⁶³

The NAACP recognized the increasing trend toward segregation and warned that there might be no recourse to end these policies without court involvement.⁶⁴ In 1964, the NAACP continued its struggle towards school integration by threatening boycotts of the seven Pasadena elementary schools it believed to be especially segregated.⁶⁵ These schools "served" eighty-nine percent of the black elementary school population.⁶⁶ The NAACP released a statement decrying the harm to children attending segregated schools, "... Negro parents are becoming painfully aware of the injury their children are suffering because of de facto segregation—injury from which they are convinced their children will never completely recover."⁶⁷

Numerous organizations in the black community recognized the daily reality of inferior conditions and increasingly called them to the attention of the school board. In 1964, the Congress of Racial Equality ("CORE") attempted to halt the use of a church basement for elementary school classes in the northwest district by releasing, in essence, a call to arms, declaring:

In the name of decency, we urge you to get these kids out of the basement for reasons of their physical and mental well-being. Let the overflow from Lincoln school be taken by the underflow at Linda Vista and other "white" schools.⁶⁸

A parent complained about the disparity of these same basement classes by asking, "[i]sn't every child in Pasadena entitled to the best we can provide?"⁶⁹ The black community was cognizant of the very different

63. *Id.* at 41-43 (explaining that in response to the growing black population in Pasadena, especially at Muir High School, La Cañada opted to withdraw from the district and as a result, 800 white students left Muir High School).

64. Letter from Lorenzo H. Traylor, President, Pasadena Branch, NAACP, to LaVerne (sic) LaMotte, Pasadena City Bd. of Educ. (Mar. 30, 1963) (on file with the Pasadena Museum of History, Research Library and Archives: LuVerne LaMotte Papers, Box 2, Fol. 1).

65. *School Boycott Looms: NAACP Asks Desegregation*, PASADENA STAR-NEWS, Mar. 12 1964 (on file with the Pasadena Museum of History: Pasadena Schools - Race Problems, 1953-1967 Fol.).

66. *Id.*

67. *Id.*; see also Lee Austin, *Principal's Firm Hand Averts Race Violence: Parents, Students at Muir High School Join in Dampening Explosive Situation*, L.A. TIMES, Jun. 8, 1966, at G8 (another example of protests aimed at the Pasadena school district occurred at Muir High School where the principal was credited with keeping race violence down by encouraging open communication among the students).

68. PASADENA CONG. OF RACIAL EQUALITY (CORE), . . . SHAME ON YOU (undated) (on file with the Pasadena Museum of History, Black History Collection: Samuel Sheats Papers, Fol. 22).

69. Letter from Dorothy A. Donaldson, Parent, to LaVerne (sic) LaMotte, Pasadena City Bd. of Educ. (Sept. 24, 1964) (on file with the Pasadena Museum of History: LaMotte Collection, Box 2, Fol. 1).

appearances of the schools. As Sandra Knox remembered:

It just made [no] sense to keep calling them neighborhood schools and having one school that didn't have any kids and other schools that were so crowded, schools that were not well kept, schools that had landscaping, others that didn't, schools that had books and some that didn't.⁷⁰

Future superintendent Ramon Cortines remembered the conditions of schools prior to the court action and saw the differences as mainly based on geographic location:

I thought things were very unequal in Pasadena. I mean, on the west side there was a stench in the elementary school restroom, there were no libraries, buildings were not maintained. You had the first-year teachers who were non-certified. Most teachers were certified then.⁷¹

The vast majority of black students—and other minority students—lived on the west side, particularly in the northwest, and attended these inferior schools.⁷²

The board's response to the complaints and findings about the schools was always a reassertion of its support for neighborhood schools—a strategy it would perpetuate throughout the legal trials.⁷³ In 1966, a report issued by CORE attacked the neighborhood school concept stating, "[t]he myth of the 'neighborhood school' and its educational necessity will need to be exploded for what it is: people interested in preserving a racially homogenous school and community complex become more concerned with the myth in direct proportion to proximity of encroaching minority neighbors."⁷⁴ The report detailed the detrimental effects of segregated schools and chastised the school board's April 1964 rejection of redistricting plans that would have improved integration.⁷⁵

70. Interview by Shannon Orr with Sandra Knox in Pasadena, Cal. (Nov. 13, 2002), in *A SERIES OF ORAL HISTORY INTERVIEWS FOCUSING ON: THE DESEGREGATION OF THE PASADENA UNIFIED SCHOOL DISTRICT 163* (Pasadena Oral History Project 2006) [hereinafter *A SERIES OF ORAL HISTORY INTERVIEWS*].

71. Interview by Julie Davis with Ramon Cortines in Pasadena, Cal. (Nov. 30, 2002), in *A SERIES OF ORAL HISTORY INTERVIEWS*, *supra* note 70, at 119.

72. *Id.* ("The squeaky wheel got the oil, and that's where middle-class people went to school. And it was not on the west side, especially the northwest." From this it can be inferred that a majority of the black students lived on the west side and the northwest where schools were maintained in an inferior condition.).

73. See Posey, *supra* note 56, at 40 ("The Board's successful avoidance of any meaningful desegregation show the community's rejection of integration, making desegregation from within impossible.").

74. RALPH SCHLOMING, *ROAD BLOCKS TO EFFECTIVE INTEGRATED SCHOOLS IN PASADENA: A REPORT TO PASADENA CORE 11* (Pasadena CORE Chapter 1966) (on file with the Pasadena Central Public Library).

75. *Id.* at 9-10.

In April of 1968, "the NAACP case," *Williams v. Pasadena Board of Education*, was filed first in Pasadena and later in the Los Angeles County Superior Court.⁷⁶ It charged the school district with creating intentionally-segregated schools and fostering an environment of unequal opportunity in education.⁷⁷ Rather than simply wait for a court response, black parents and other supporters united to create the group Pasadena Demands Quality Education (PDQ-E) and encouraged outside organizations like the Department of Health, Education, and Welfare (HEW) to examine the Pasadena schools.⁷⁸ The vibrant black community in Pasadena relentlessly pursued its objectives through multiple strategies, and made its demands clearly known to the board by actively pursuing the cause of equality in education.⁷⁹

Although students, parents, and strong organizations like the NAACP were all actively involved in the campaign towards more integrated schooling, the conservative majority on the board held its ground. Integration plans were proposed all throughout the 1960s, but were not viable in the face of a voting community that opposed them.⁸⁰ The best the board could do was create an "open district" which allowed students to voluntarily integrate.⁸¹ This plan was not successful, and board members complained that black parents did not really support integration because they did not voluntarily choose to attend the schools in the spaces provided.⁸² It was later ruled that an unfair burden had been placed upon blacks students to do all the busing for integration.⁸³

By 1969, Pasadena school demographics had seen little movement towards integration.⁸⁴ Despite much talk about white flight after court-ordered desegregation efforts began in 1970, in reality there was already a

76. LEAGUE OF WOMEN VOTERS IN PASADENA, INTEGRATION: LAWS, GUIDELINES, AND PLANS: ETHNIC DISTRIBUTION IN PASADENA SCHOOLS: COMPARATIVE DATA ON QUALITY EDUCATION AT HIGH SCHOOLS IN PASADENA 2 (1968) (on file with the Pasadena Central Public Library).

77. *Id.* at 2.

78. Lee Austin, *U.S. Probes Pasadena's Schools on Civil Rights: Earlier Inquiry Brings Seven Investigators to Check for Possible Racial Discrimination*, L.A. TIMES, Jun. 6, 1968, at SG1.

79. *Id.*; see also Posey, *supra* note 56, at 48-51.

80. See Posey, *supra* note 56, at 49-50.

81. *Id.* at 49.

82. *Id.* at 55.

83. LYNNE VERNON, A REVIEW OF PASADENA UNIFIED SCHOOL DISTRICT'S PASADENA PLAN FOR DESEGREGATING PASADENA SCHOOLS 12-13 (1993) (on file with the Pasadena Central Public Library).

84. See *infra* app. A.

rapid demographic change in Pasadena Schools from 1957 to 1969.⁸⁵ This significant shift resulted in escalating the fears of many in the white community that their district would soon be all black.⁸⁶ During this period, the black student population increased by more than 3500 students (189.8%).⁸⁷ A similar drop in Anglo students and an increase of over 800 Latino students accompanied this huge shift in student demographics.⁸⁸ The fears brought about by these changes helped to ensure that integration did not occur voluntarily. It would take national attention, a new board, and judicial enforcement to integrate schools in Pasadena.

III. *SPANGLER V. PASADENA CITY*: U.S. DISTRICT JUDGE REAL ORDERS DESEGREGATION

History and local precedence dictated that the white members of the Pasadena community could successfully appeal to the board and remain in schools they deemed appropriate for their children. They did so again with a show of force—by packing a Pasadena/Muir High School redistricting meeting in April 1963.⁸⁹ The proposed plan would have ensured a student body no more than thirty percent black and overall enrollment at each school at least forty percent white.⁹⁰ *The Los Angeles Times* reported that “a controversial plan . . . was condemned . . . as a costly experiment which would work a hardship on children and parents.”⁹¹ It is unclear what that hardship would have been, since the redistricting would have been more geographically sound and required less busing. Although one member of the community, Lester Lee, was quoted as saying, “[w]e talk about segregation in Alabama and Mississippi, but we’re faced with the problem of segregation right here now,”⁹² obviously the majority of the community was against all plans of desegregation through redistricting. As a compromise, the school board president proposed the building of a third high school to avoid the “controversial redistricting recommendation.”⁹³ The status quo was again upheld.

In July 1967, three high school students—Nancy Spangler and Judy

85. See VERNON, *supra* note 83, at 50.

86. See discussion *infra* Part III.

87. See VERNON, *supra* note 83, at 50.

88. *Id.*

89. *Pasadena School Plan Draws Attacks, Praise*, L.A. TIMES, Apr. 17, 1963, at 22.

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

Clarke of Muir High School and Vivion Rostker of Pasadena High School—aided and persuaded by their parents, filed a lawsuit against the PUSD in Los Angeles Superior Court.⁹⁴ These white and black students and parents opposed the open district plan which theoretically facilitated integration, but in reality systematically allowed white students to transfer out of schools where there was a black student majority.⁹⁵ The suit was filed immediately after the school board rescinded Plan A in favor of an open district.⁹⁶

A well-supported recommendation by the Citizen Task Force and the superintendent, Plan A would have readjusted high school district lines, allowing for a more equitable distribution of students both geographically and by race.⁹⁷ School board candidates Brad Houser and John Welsh both lived in a white neighborhood that, according to Plan A, would be moved to Muir High School.⁹⁸ Both men ran successful campaigns in clear opposition to Plan A and their election reversed the board majority, overturning the 4-1 vote from just two months prior (May 1967).⁹⁹ The previous board had proclaimed their strong support of integration at that time: "It would appear that any relatively high Negro enrollment within any high school would present a critical situation for the entire community. Therefore, the Board of Education both 'legally and practically' must look toward some degree of ethnically balancing the three high schools."¹⁰⁰ The rescission of Plan A demonstrated that once again, Pasadena voters had come out in force against integration attempts by the school board.

The Superior Court refused the first case submittal by Spangler et al., in an attempt to allow a new board to settle the issue.¹⁰¹ Judge Ralph Nutter, however, made it clear that he did not condone the previous actions of the board, stating, "I would say that the Pasadena School Board, and the Los Angeles School Board, for that matter, will act at its peril if it fails to take action in this regard."¹⁰² Despite Jim Spangler's warning that the suit would be refiled if no action was taken, the new board failed to make

94. See Telephone interview by Sean Langevin with Jim and Bobbie Spangler in Santa Rosa, Cal. (Dec. 2, 2002), in A SERIES OF ORAL HISTORY INTERVIEWS, *supra* note 70, at 7; Robert J. Allan, *Lawsuit Filed Over School Ethnic Plan*, L.A. TIMES, Jul. 19, 1967, at G7.

95. Posey, *supra* note 56, at 75.

96. See Allan, *supra* note 94, at G7; see also VERNON, *supra* note 84, at 6.

97. Posey, *supra* note 56, at 75.

98. *Id.* at 76.

99. *Id.* at 79; VERNON, *supra* note 83, at 5.

100. VERNON, *supra* note 83, at 4.

101. See Jim Spangler, *Jim Spangler's Statement to Pasadena Board of Education in 1967 (Press Release)*, in A SERIES OF ORAL HISTORY INTERVIEWS, *supra* note 70, at app. B at 3-5.

102. *Id.* at 5 (quoting Judge Ralph Nutter).

sufficient changes, which resulted in the resubmission of the case in August 1968.¹⁰³ Although a new board was again elected, the federal government stepped in when HEW examined the schools for discriminatory practices by the school board.¹⁰⁴

The penalty for maintaining intentionally segregated schools—a loss of federal funding—was no great deterrent until the passage of the 1965 Elementary and Secondary Education Act, which greatly increased the amount of federal funding to public schools.¹⁰⁵ In 1968, HEW began its review of northern and western communities for compliance with desegregation efforts.¹⁰⁶ HEW found great disparities between the facilities at the different high schools in Pasadena. Muir High School's science equipment was forty years old, compared to the newer equipment at Pasadena High School.¹⁰⁷ Additionally, Muir lacked many of the facilities that Pasadena High possessed, and was using twenty-two "substandard transportables."¹⁰⁸ HEW concluded that, "based on all the available information . . . the dominant motive of the school board during this period was the desire not to rezone Caucasian students into Muir because it had an increasing Negro and other minority enrollment."¹⁰⁹ In other words, the school board's actions were motivated "primarily [by] racially discriminatory reasons."¹¹⁰ HEW's findings generated enough evidence to justify filing a petition for the federal government to become a plaintiff in the *Spangler* suit.¹¹¹ The trial to decide the future of PUSD was about to begin.

The fate of PUSD would be decided in the federal court building in Los Angeles with District Judge Manuel Real presiding.¹¹² All of the board's and the school district's former segregationist policies and positions were about to be aired in public. The trial did more than consider the distribution of students in the school district, it also examined the everyday treatment

103. See VERNON, *supra* note 83, at 9.

104. See *id.*

105. SCHOOL DESEGREGATION: PAST, PRESENT, AND FUTURE 18 (Walter G. Stephan & Joe R. Feagin eds., Plenum Press 1980).

106. *Id.* at 19.

107. VERNON, *supra* note 83, at 11.

108. *Id.*

109. *Id.* at 10.

110. *Id.*

111. See JAMES, *supra* note 10, at 284-87; Lee Austin, *Attorneys Will Resume Fight over Integration*, L.A. TIMES, May 10, 1970, §SG, at C1.

112. See Lucey Lowery, *Pasadena School Board Policy Hit By Ex-Head: Salmon Charges Laxity*, PASADENA STAR-NEWS, Jan. 7, 1970, at 1.

towards students and teachers of color.¹¹³ During the trial, the local press provided ongoing documentation of the emerging evidence which exposed an entrenched system of segregation.¹¹⁴

Black teachers took the stand to discuss the discriminatory treatment they had experienced during their hiring and placement.¹¹⁵ A colleague told Jeanne Williams that black teachers should be serving their own by teaching in predominantly black schools.¹¹⁶ When Doris Foster applied for a job at the school district, she was told, "they're taking maids' applications downstairs."¹¹⁷ Teachers also testified that they believed African American students were placed in levels inferior to their ability.¹¹⁸ Parent and future board member Maj. Elbie Hickambottom testified that his son had an IQ of 165 and had been in a gifted program in elementary school but was placed in average courses upon arrival at Washington Junior High School.¹¹⁹ Although his son was reassigned once the error was brought to a counselor's attention, Maj. Hickambottom removed his son from public school.¹²⁰

The testimony continued beyond teachers and parents to include former board members and superintendents. Former board members testified that the majority of its members had perpetually voted to keep the school district segregated.¹²¹ Former superintendent, Paul Salmon, complained that, in an effort to quell approval of the integration Plan A, a board member had threatened him into remaining silent and withholding his opinions.¹²² One former board member, Robert Freeman, reportedly testified that he "objected to transfers of whites from schools where there was a high Negro percentage, which . . . was allowed."¹²³ Apparently, although the majority of board voters had perpetuated segregation, others in the community had disagreed with the policies and were willing to testify about the inconsistencies in the treatment of students in PUSD.

The evidence presented against the school board was overwhelming.

113. *See id.*

114. *Id.* at 3.

115. *Id.*

116. *Id.*

117. *Id.*

118. Lucie Lowery, *Race Bias Claimed In Pupil Groupings: Teachers Outline Objections*, PASADENA STAR-NEWS, Jan. 8, 1970, at 1.

119. *Id.* at 1, 3.

120. *Id.* at 3.

121. Gene Blake, *Ex-Chief Of Pasadena Schools Takes Stand: Testifies Efforts to Integrate System Regressed After Board Election in 1967*, L.A. TIMES, Jan. 8, 1970, at 26.

122. *Id.*

123. Lowery, *supra* note 118, at 3.

Despite attempts to counter the claims against it by arguing for neighborhood schools and explaining its policy against forced cross-town busing, the school board lost the case.¹²⁴ Judge Real found that racial imbalance existed at all levels of the school district due to deliberate board policies.¹²⁵ He also ruled that there was discrimination in placement and hiring of teachers and administrators, and voiced concern about the interclass grouping policies and procedures.¹²⁶

In his January 22nd ruling, Judge Real ordered the school district to submit a desegregation plan by February 16th, giving the school district less than a month to formulate strategies to undo years of institutionalized segregation at PUSD.¹²⁷ The plan needed to be applied across the school district (K-12), with no school having a majority of any minority students.¹²⁸ Judge Real specified that the "plan must involve teacher assignments, hiring and promotional practices and school construction projects, as well as student assignments."¹²⁹ The decision, while not new in light of earlier court cases, did indeed send a warning to other districts in California which may have deemed themselves "safe" from desegregation.¹³⁰

As Judge Real explained in regards to the *Brown* ruling: "The Court made no distinction as to Northern or Southern segregation. The Supreme Court held, simply, that segregated education is inherently unequal."¹³¹ The local media closely monitored the decision in the *Spangler* case and the reaction of the Pasadena school board and community, as this case preceded the Los Angeles Unified School District ruling.¹³²

124. *Spangler I*, 311 F. Supp. 501, 505 (C.D. Cal. 1970); Lucie Lowery, *Racial Bias Denied By Board Members: Defense in School Suit Opens*, PASADENA STAR-NEWS, Jan. 15, 1970.

125. *Spangler I*, 311 F. Supp. at 504, 505-506.

126. *Id.* at 504.

127. *Id.* at 505.

128. *Id.*

129. Gene Blake, *Pasadena Schools Told to Integrate*, L.A. TIMES, Jan. 21, 1970, at A1.

130. Jack McCurdy, *Court Ordered Integration: Pasadena Schools Working on Large-Scale Bussing Plan*, L.A. TIMES, Jan. 25, 1970, at A1 ("Although the first of its kind in the West, the decision is similar to other lower and appeals court findings in favor of integration and does not establish precedent . . . However, it may serve as a warning to other school districts in California and the West that the courts are ready to rule swiftly against segregation regardless of cause.").

131. *Spangler I*, 311 F. Supp. at 504.

132. *Crawford v. Los Angeles*, 551 P.2d 28 (Cal. 1976).

A. *Pro-Active Reaction*

The school board quickly voted 3-2 that it would not appeal Judge Real's ruling.¹³³ The board members realized that if their lawyers had been unable to refute any of the 54 findings of fact brought against them in court, there was little they could do to change those results through appeal.¹³⁴ They believed their money, time, and energy would be better spent working towards a program of integration for the next school year.¹³⁵ Once forced into integration, the board embraced the decision and the Pasadena Plan moved towards integration of *all* of its schools at all grade levels.

The biggest challenge was finding a way to integrate without resorting to the highly unpopular busing.¹³⁶ The board pleaded with President Richard Nixon, Governor Ronald Reagan, and the California Superintendent of Public Instruction in an attempt to find an alternative to busing.¹³⁷ The board recognized that the decision to bus and not to appeal would adversely affect the standing of board members in the community and stated, "[w]e have risked our political futures, our reputations, and our professions in our decision not to appeal the mandate given to our school system, but rather willingly meet the requirements by law, so that our children will truly have an excellent education as well as be integrated."¹³⁸ Judge Real did not mention busing in his ruling,¹³⁹ but the school board concluded that there was no other recourse.¹⁴⁰ As Pasadena was not a

133. Lucie Lowery, *School Board Rejects Appeal; Welsh Resigns: Court Integration Orders Supported*, PASADENA STAR-NEWS, Jan. 28, 1970, at H1. School board member Welsh chose to resign with the decision not to appeal. His powerful resignation included the following statement to the board: "By not appealing . . . [w]e are in effect saying, 'You are right judge. For the past eight years our efforts have been a sham, our policies tokenism, our long-range plan has been a stall, our master plan is only for effect. . . our superintendents have been insincere.' This is an indictment and it is not true." Despite his dramatic reading, the school board remained firm on its decision. *Id.*

134. VERNON, *supra* note 83, at 15.

135. *Id.*

136. Letter from LuVerne LaMotte, President, Bd. of Educ., and Ralph W. Hornbeck, Superintendent of Sch. and Sec'y of Bd. of Educ., to Max Rafferty, Sacramento (Feb. 16, 1970) (on file with Pasadena Museum of History: LaMotte Collection, Box 3, Fol. 1).

137. Letter from LuVerne LaMotte, President, Bd. of Educ., and Ralph W. Hornbeck, Superintendent of Sch. and Sec'y of Bd. of Educ., to Richard M. Nixon, Washington D.C. (Feb. 18, 1970) (on file with Pasadena Museum of History: LaMotte Collection, Box 3, Fol. 1); Letter from LuVerne LaMotte, President, Bd. of Educ., and Ralph W. Hornbeck, Superintendent of Sch. and Sec'y of Bd. of Educ., to Ronald Reagan (Mar. 9, 1970) (on file with Pasadena Museum of History: LaMotte Collection, Box 3, Fol. 1); Letter from LaMotte and Hornbeck, *supra* note 136.

138. Letter from LuVerne LaMotte and Ralph W. Hornbeck to Richard M. Nixon, *supra* note 137.

139. See Blake, *supra* note 129, at A1.

140. See Letter from LuVerne LaMotte and Ralph W. Hornbeck to Richard M. Nixon, *supra*

geographically sprawling city, the average bus commute for a child would be three and one-half miles, which is approximately a twenty-minute ride.¹⁴¹ Despite the relatively short bus trips, the Pasadena Plan would require substantial busing and create a significant financial burden originally estimated at \$1 million a year.¹⁴²

The public face of the PUSD was the school board, but the day-to-day workings of the school district were implemented by school administrators, teachers, and employees on each school campus. How would the school district prepare for such a drastic shift in school attendance and assignment policy? Would it approach the new school year with the same outlook as the board? The Pasadena Educational Association (PEA), the teachers' union, supported the Pasadena Plan for integration by a vote of more than two to one.¹⁴³ Employees from the school district, as well as parents and community members, worked to create programs in preparation for the changes.¹⁴⁴ Early concerns for teachers included the challenge of teaching in a more multicultural and heterogeneous classroom setting.¹⁴⁵ A former board member remembered that one teacher had decorated her classroom with pictures of monkeys in an attempt to make the students feel welcome in class; she was quickly re-educated.¹⁴⁶

Recognizing that pedagogical techniques required for teaching in a diverse setting must be taught, the PUSD set aside \$80,000 for the funding of summer workshops towards staff development.¹⁴⁷ The workshops would provide teachers with the techniques to thrive in a new work environment and to ensure good teacher-student relations.¹⁴⁸ Workshop speakers included Judge Real, who gave a history of integration supported by the ideal of equal opportunity.¹⁴⁹ He asked, "[h]ow can whites or blacks . . . expect to understand their respective ideas, aspirations, and dreams unless

note 137.

141. See *Opening Day Two Weeks Away*, *supra* note 5, at A1.

142. Lowery, *School Board Rejects Appeal*, *supra* note 133, at 1.

143. Memorandum from Jeanne Christiansen, PEA President, to All Certificated Personnel (Feb. 26, 1970) (on file with the Pasadena Museum of History: LaMotte Collection, Box 3, Fol. 3b).

144. *Id.*

145. Interview by Catherine Bilanchone with Ann Hight (Dec. 2, 2002) in A SERIES OF ORAL HISTORY INTERVIEWS, *supra* note 70, at 243.

146. *Id.*

147. *Pasadena to Begin Preparations for School Changes*, L.A. TIMES, Jul. 5, 1970, § SG, at B1.

148. *Id.*

149. Charles Reilly, *Judge Tells Teachers: 'Reasonableness' Asked In Segregation Cases*, PASADENA STAR-NEWS, Jul. 11, 1970, at 1.

we provide the means of communication?"¹⁵⁰ Judge Real encouraged the teachers to support students in these new educational settings and "to correct segregation."¹⁵¹

The PUSD's staff was dedicated to the tenets of multiculturalism, judging by the proactive reaction to the ruling and the new teaching strategies implemented to foster interaction between students of all backgrounds.¹⁵² The demographics of Pasadena demanded this type of teaching/learning style to ensure that all students were included. By 1970, Pasadena's diverse population reflected "79.8 per cent Caucasian, 16.1 per cent Negro, 3.1 per cent Oriental and 1 per cent other."¹⁵³ In the 1970 census, the Latino population was included in the white statistics; two years later, the PUSD Latino population alone comprised about eleven percent.¹⁵⁴

Embracing the diversity of the student body and using multiculturalism as an asset of the school system served as a means to promote integration.¹⁵⁵ Audubon Elementary School hosted a day of mother-daughter sewing for all of the elementary schools.¹⁵⁶ The participants learned about African costuming, "but the primary emphasis was on cultural exchange."¹⁵⁷ In another effort to embrace multiculturalism, the PUSD made plans to observe half-days on both Black-American Day and Cinco de Mayo.¹⁵⁸ On the two half-days, schools would host "special ceremonies" to teach students about black and Latino cultures and famous individuals.¹⁵⁹

The schools consistently endeavored to embrace their multicultural environment.¹⁶⁰ They tried to use integration as teachable moments to increase understanding of difference.¹⁶¹ Unfortunately, in focusing primarily on multicultural aspects of the school, the staff missed the

150. *Id.*

151. *Id.*

152. See, e.g., Lee Austin, *Dispute Arises Over Courses on Minorities: Study of Their Roles in US Past Should Be Expanded, Two Pasadena Trustees Say*, L.A. TIMES, Apr. 14, 1968, § SG, at B1 (explaining that courses were created to "encourage and enable students of different social, racial and ethnic backgrounds to live and work together").

153. Wanda Tucker, *City Manager's Report on Agenda: Pasadena Cites Progress in Minority Hiring*, PASADENA STAR-NEWS, Aug. 1, 1971, at 1.

154. See Jack Cook, *Pasadena 'Anglo' Pupils Diminish*, PASADENA STAR-NEWS, Nov. 2, 1972, at 4.

155. See Lee Austin, *Pasadenans Pave Way for Integration Quietly: Parents and Teachers Sponsoring Biracial Programs in Anticipation of Fall Bussing*, L.A. TIMES, Jun. 14, 1970, at G6.

156. *Id.* at L1.

157. *Id.*

158. Jack Cook, *2 School Holidays Due in '73*, PASADENA STAR-NEWS, May 4, 1972, at 16.

159. *Id.*

160. See, e.g., Austin, *Pasadenans Pave Way for Integration Quietly*, *supra* note 155, at G1.

161. *Id.*

opportunity to address interpersonal misconceptions between students going to school with individuals of another race or ethnicity. Cultural awareness, while interesting, did not equal the understanding of individuals, which comes from day to day interactions.

The school board and district quickly found support for school integration from local community members and parents.¹⁶² Ultimately, the students were the ones to feel the effects of integration and busing, and the community wanted to be sure that students were prepared for the changes.¹⁶³ The following activities sponsored by non-school officials gives a sense of the community's support for ensuring integration was a successful and smooth transition:

The multifront activities are taking place in homes, schools, libraries and at public gatherings. They include exchange visits by black and white children who will be classmates next fall, coffee klatches for mothers of different ethnic backgrounds, PTA-sponsored get-acquainted sessions for parents, discussion meetings with speakers on integration, film showings and distribution of literature.¹⁶⁴

Besides individual efforts, numerous community organizations also worked to support the school board.¹⁶⁵ Paving the way to integration began within six months of the judicial ruling¹⁶⁶ and are listed here in their entirety to demonstrate the impressive breadth of the community's involvement.¹⁶⁷ The groups ranged from liberal organizations to church groups.¹⁶⁸ All had different ways of showing their support for the school board:

Activities include: distribution of car bumper stickers, "Support Pasadena School Board," by the Pasadena Human Relations Committee; recruiting help by the Volunteer Bureau, providing speakers by the Reiss-Davis Child Guidance Center, training teams to lead discussion groups by the Women's International League for Peace and Freedom, and placing materials on school integration in libraries by the school district's Inter-Group Relations Bureau.

The Ecumenical Council of Pasadena area churches has prepared 50-page education kits of integration material, the American Friends Service Committee has compiled and distributed resource materials, the Community Planning Council is providing resource people for meetings

162. *Id.*

163. *See id.*

164. *Id.*

165. *Id.* at G6.

166. *See, e.g.,* Austin, *Pasadenans Pave Way for Integration Quietly*, *supra* note 155, at G1.

167. *See id.* at G6.

168. *See id.*

and contacting its member agencies to support integration, and the Altadena Neighbors funded the in-service training program for Edison and Eliot schools staff.¹⁶⁹

These organizations did not all have radical leanings, nor were they catering solely to the black community.¹⁷⁰ White Pasadena residents rallied behind the school board to encourage the changes.¹⁷¹

Like Boston where “[m]any schools in fact desegregated peacefully, yet few of these white supporters find their way into books[,]”¹⁷² Pasadena’s community, both white and black did attempt to make desegregation less painful and more productive for the students in the schools.¹⁷³ Members of the white community had been involved in the desegregation campaigns from the outset, as two of the three parents involved in the lawsuit against the PUSD were white.¹⁷⁴ Other lawsuits filed by the NAACP against the district included white parents among the plaintiffs.¹⁷⁵ While white flight—the decline in white student population due to an exodus to private schools—was locally believed to have increased with the integration order, not all white community members were opposed to integration, nor did all choose to remove their students from public schools.¹⁷⁶ Later articles placed too much emphasis on those who chose to leave, rather than looking at the positive contributions and reactions from those who remained.

More controversy soon emerged due to the increasing minority population.¹⁷⁷ The demographics of the district altered rapidly from 1968 to 1972, when the high school population shifted from 20.1% black, 5.9% Latino, and 4% Asian to 38.3% black, 11% Latino, and 2.8% Asian.¹⁷⁸ The schools addressed their increasingly multicultural student body early, evidenced in 1968 with the creation of “The Spanish-Speaking People in

169. *Id.* at G6.

170. *See id.* at G1 (demonstrating that the broad spectrum of organizations included the Pasadena Recreation Department, Students in Support of Integration, League of Women Voters, American Friends Service Committee, Pasadena Human Relations Committee, Volunteer Bureau, Ecumenical Counsel of Pasadena Area Churches, Campfire Girls, and others).

171. *See id.*

172. Jeanne F. Theoharis, “*We Saved the City*”: Black Struggles for Educational Equality in Boston, 1960-1976, 81 RADICAL HIST. REV. 61, 64 (2001).

173. *See JAMES, supra* note 10, at 284.

174. *Id.*

175. *Id.* at 285.

176. *Cf. Spangler v. Pasadena City Bd. of Educ. (Spangler II)*, 375 F. Supp. 1304 (C.D. Cal. 1974).

177. *See Austin, Dispute Arises Over Courses on Minorities, supra* note 152 at B1.

178. *Compare id.*, at B5, with Jack Cook, ‘Anglo’ Student Enrollment Sags, PASADENA STAR-NEWS, Nov. 2, 1972 at H4.

America” and “The Negro in the Making of America” history courses meant to highlight the roles of these two ethnic groups in the formation of the United States.¹⁷⁹ A board member raised complaints that by including only these two groups, the schools were leaving out other ethnic groups’ contributions, such as Asians.¹⁸⁰ Still, the mainstream media remained devoted to a black/white paradigm that discussed the bi-racial nature of integration and the school district.

On the other hand, the black community newspaper, the *Pasadena Eagle*, recognized there was much to be gained by catering to Latinos.¹⁸¹ The newspaper included articles authored by Latino community members and pointed out the coalitions and alliances between blacks and Latinos.¹⁸² There was extensive coverage of the “boycott” at Pasadena High School in March of 1969 where minority students drew attention to their desires for a more equitable school culture.¹⁸³ In demanding equal education, they sought the right to: 1) be involved in all extracurricular activities, 2) choose their own courses that would help them attain their educational goals, 3) have teachers and counselors of color to aid them in their schooling, and 4) gain more access to administrators to have their voices heard.¹⁸⁴ Although coinciding with the beginning of the court trial, the student uprising was a separate incident, which demonstrated recognition of the issues, and proposal of solutions.¹⁸⁵ The minority parents soon followed their children’s example by creating a brown-black coalition to advocate for many of their demands.¹⁸⁶ These parents became crucial supporters of integration, and, not satisfied with only this effort, continued to advocate for equal representation in all activities and courses to the school administration and staff.¹⁸⁷

Overall, the PUSD worked diligently to ensure that it would have the support of teachers, administrators, and community members on September 14, 1970, the first day of integration.¹⁸⁸ The school district made clear in a

179. See Austin, *Dispute Arises Over Courses on Minorities*, *supra* note 152 at B1.

180. *Id.*

181. See, e.g., David Robinson, *Pasadena Walkout ‘Successful’: Boycott Noted as Non-Violent*, PASADENA EAGLE, Apr. 10, 1969, at 1 (local newspaper covering multiple ethnicities).

182. See *id.*

183. See *id.*

184. *Id.*

185. *Id.*

186. David Robinson, *Black-Brown Coalition Established*, PASADENA EAGLE, May 17, 1969, at 1.

187. See Robinson, *supra* note 181, at 1.

188. See *Opening Day Two Weeks Away*, *supra* note 5, at A1.

Pasadena Star-News article what the parents should expect.¹⁸⁹ It discussed after-school programs, emphasized the school district's free and supervised transportation, and created cartoon characters as a way of labeling buses for primary students.¹⁹⁰ The tone of the article was informational, but it also kept a positive spin that avoided all reference to race.¹⁹¹ Instead, the PUSD shared its commitment to working with students of "varying socioeconomic backgrounds and abilities."¹⁹² It described the integration efforts as creating a more "ethnically balanced" student body.¹⁹³ There was no mention of the earlier biracial efforts to mingle black and white students; more focus was placed on multiculturalism and the positive response of the school district to encourage integration.¹⁹⁴

B. Negative Backlash

The school board received a great deal of support from parents, teachers, and community organizations after the trial.¹⁹⁵ By ducking racial issues in its press releases, the district may have been attempting to avoid alienating those parents who did not wish their children to attend schools outside of their neighborhoods or with black children. However, given the historical preference for segregation and a voting majority that did not embrace integration,¹⁹⁶ a negative reaction to the board's position towards integration was swift and inevitable.

Many community members did not believe that the integration suit was just.¹⁹⁷ For example, during the trial, Frank Cowhurst, the Don Benito School PTA President, vocalized his opposition to the busing of black students to his school.¹⁹⁸ Since the new federally financed housing development, the Pepper Tree, would have overcrowded the predominantly black schools, the Superintendent suggested busing the children to the Don Benito School, which was predominantly white. The Don Benito School

189. *Id.*

190. *See id.*

191. *See id.*

192. *See id.*

193. *See id.*

194. *See Opening Day Two Weeks Away*, *supra* note 5, at A1..

195. *See Austin, Pasadenans Pave Way for Integration Quietly*, *supra* note 166, at B1, B6.

196. *See JAMES*, *supra* note 10, at 273 (stating that the majority of the white community disfavored desegregation).

197. *See id.*

198. Lee Austin, *Segregation a Problem Even Before Pepper Project Opens*, L.A. Times, Jan. 16, 1970, at SG1.

area was viewed as an electorally-important community that could help pass school bonds.¹⁹⁹ Board member John Welsh said, “[w]e don’t pass bonds when we upset people with this kind of thing We are going to do ourselves a lot of damage.”²⁰⁰ There was a belief that this busing contradicted the neighborhood school concept and would be very unpopular throughout the district. While these arguments were not new, they were somewhat surprising in light of the fact that the school board was in the middle of a lawsuit about the segregation policies of its schools.²⁰¹

The negative reaction by many parents to the school board’s decision not to appeal the federal court’s ruling was predictable, given past opposition to integration.²⁰² When Welsh chose to resign from the school board the day it rejected the proposal to appeal the federal court’s ruling, he voiced the opinion of many by dramatically proclaiming that the federal court decision meant the “end of local control” of schools.²⁰³ One parent, Robert Clearwater, voiced his complaints at the same January 28th meeting by saying that his child was not going to be bused “no matter what the ethnic balance.”²⁰⁴ He went on to state that “he did not believe in ‘destroying a child psychologically’ for a ‘socialist’ belief, and he said ‘I do not believe that the Supreme Court is the law of the land; it is the interpreter’.”²⁰⁵ He further said that “he would lie down in front of the bus if necessary, and they could bus the child ‘only over my dead body.’”²⁰⁶ Another parent, Tom Still, expressed his regret to lose Welsh, since Welsh’s views better represented the parents’ wishes.²⁰⁷ He believed that “the next step will be ‘inter-district busing because Pasadena has more than its share of minority students.’”²⁰⁸ In reaction to a board of education that they felt no longer supported them, some parents decided to fight the federal ruling on their own.²⁰⁹

Board members LuVerne LaMotte and Houser agreed with the parents that the Supreme Court should be the one to decide cases dealing with

199. See *id.* at SG8.

200. *Id.*

201. See Lowery, *School Board Rejects Appeal*, *supra* note 133, at H3.

202. See *id.*

203. *Id.*

204. *Id.*

205. *Id.*

206. *Id.*

207. Lowery, *School Board Rejects Appeal*, *supra* note 133, at H3.

208. *Id.*

209. Lucie Lowery, *Pasadena Now: The Nation's Watching*, PASADENA NOW, Mar. 1970, at 11.

segregation due to housing patterns.²¹⁰ Contradictory rulings in other federal courts throughout the country fueled this response.²¹¹ San Diego's school district had been vindicated in a court ruling just a week after the PUSD had been reprimanded.²¹² Hoping for the Supreme Court to intervene, Pasadena parents worked to create their own appeals committee.²¹³ They organized to raise support and legal funds to fight Judge Real's ruling at the same time that the school district was discussing plans to implement integration.²¹⁴

Parents believed that the federal government supported their views on forced school integration.²¹⁵ President Richard Nixon's comments in opposition to busing were used in the brief filed by the parents' lawyers.²¹⁶ The Republican Club favored the appeal, stating the club is "firmly committed to the principle that children of all races are entitled to equal educational opportunities," but rejects "as unlawful and unconstitutional any plan which would involve the compulsory transportation of students out of their normal attendance areas in order to create an artificial racial balance in the Pasadena schools."²¹⁷ The Ninth Circuit held that the parents had no right to intervene and appeal Judge Real's ruling.²¹⁸ Opponents of integration did not stop there, however, because the counterattack against federal efforts to integrate local schools continued.²¹⁹

Henry Marcheschi, the board member most opposed to forced integration, devised a strategy that he believed would allow for a continuance of the neighborhood school, while still accommodating minority student choice.²²⁰ He called his idea the "New Pasadena Plan" and suggested that white students stay in their own schools while minority students were granted the opportunity or privilege to attend the schools of their choice.²²¹ Marcheschi also supported a separate Latino and black

210. *Id.*

211. *Id.*

212. *Id.*

213. *Id.*

214. *Id.*

215. Lucie Lowery, *Schools Decision Appealed: President Cited By Pasadenans*, PASADENA STAR-NEWS, Mar. 31, 1970, at H3.

216. *Id.*

217. Lucie Lowery, *Integration Edict Extension Granted: Two Days Allowed By Judge, South Officials Join in Case*, PASADENA STAR-NEWS, Feb. 13, 1970, at 3.

218. *Spangler v. Pasadena City Bd. of Educ. (Spangler III)*, 427 F.2d 1352, 1352 (9th Cir. 1970).

219. See Tom Livingston, *Sheats Attacks New Plan*, PASADENA STAR-NEWS, Nov. 17, 1971, at H1.

220. *Id.*

221. See *id.*

school district where members of these racial and ethnic groups were free to make their own decisions about student education.²²² This would escape what Marcheschi called “forced equality.”²²³ This plan was intended to promote local control of schools and the opportunity to attend neighborhood schools, rather than attack race.²²⁴ As historian Becky Nicolaides has suggested in her study of the blue-collar Southern California suburb of South Gate, by arguing for community control and complaining that community segregation was not their fault, opponents of integration believed they were able to prove that they were not racist.²²⁵

Pasadena residents mimicked this strategy and took it even further.²²⁶ Unlike South Gate residents, Pasadena residents expressed a willingness for minority students who wished to attend their schools to be allowed to do so, therefore demonstrating that they were not against equality.²²⁷ In making this argument, they did not realize that they were condemning schools whose student body was predominantly minority.²²⁸ This stance implied that black students would benefit from or prefer to go to schools in white neighborhoods or schools with predominantly white students.²²⁹ This reinforced the idea behind Judge Real’s ruling that the schools in Pasadena were not equal and would leave some black students questioning their worth.²³⁰

In reality, integration itself did leave some black students feeling they were unworthy of the resources brought to the schools.²³¹ One former black student explained the mixed messages to the children:

[W]hen white children were bused to Grover Cleveland Elementary School from San Rafael and Linda Vista particularly, it was then that Cleveland had most of its asphalt playground torn up and sod . . . was put in. It wasn’t until those children, who happened to be predominantly but not exclusively Anglo or Caucasian, came into the school district as it relates to Cleveland specifically that pergolas came, a jungle gym, a

222. *Id.* at H4.

223. Lee Austin, *Cussed, Discussed Board President: Marcheschi Tempers Pragmatism With His Ideals*, L.A. TIMES, Feb. 23, 1975, at SG1.

224. See Livingston, *supra* note 219, at H1.

225. BECKY NICOLAIDES, *MY BLUE HEAVEN: LIFE AND POLITICS IN THE WORKING-CLASS SUBURBS OF LOS ANGELES, 1920-1965*, at 296-98 (University of Chicago Press 2002).

226. See Lucie Lowery, *School’s Decision Appealed: President Cited by Pasadenans*, PASADENA STAR-NEWS, Mar. 31, 1970, at 1.

227. Livingston, *supra* note 219, at H1.

228. See *id.*

229. See *id.*

230. See Interview by Justin Addison with John J. Kennedy in Pasadena, Cal. (Dec. 3, 2002), in A SERIES OF ORAL HISTORY INTERVIEWS, *supra* note 70.

231. *Id.*

library . . . Cleveland had no true mentally gifted minor program until these children came. It didn't have a resource room until these children came. So the message that was being sent was one that by virtue of white children coming to your school, all these good things are going to happen. So the message could be that there was something wrong with you, because prior to the white children coming, all these good things did not occur.²³²

The New Pasadena Plan would have exacerbated these feelings by placing the burden of integration on black students who would have entered white neighborhood schools knowing that they did not belong and feeling that they did not deserve the extra resources available at those schools.²³³

This New Pasadena Plan was not endorsed by the board and was never implemented.²³⁴ Marcheschi's strategy however was adopted and expanded by other parents in an attempt to avoid integrating their schools.²³⁵ In the summer of 1972, after two years of integration in the schools, parents from a community near Temple City—a small community southeast of Pasadena—petitioned to secede from the PUSD and join the Temple City School District.²³⁶ Parents from a square mile of Pasadena county territory felt that their students would benefit from neighborhood schools.²³⁷ The territory's spokesman, Ronald Capron, a parent of private school children, argued that their reasons for leaving the PUSD had nothing to do with race: "It is definitely not racial We have blacks, Mexican-Americans and Orientals in our area."²³⁸ Adamant about supporting the neighborhood schools concept and refusing to view their actions as racist, this community of 194 students—179 white—lobbied for their right to join the Temple City School District.²³⁹ Contrary to Capron's statement that the territory had black students,²⁴⁰ none of the students were black.²⁴¹ With a predominantly white, non-Hispanic population, it seems hard to view this position as about anything but race.

The PUSD voted down the Temple City transfer by a vote of four to

232. *Id.*

233. See Livingston, *supra* note 219, at H1.

234. See *id.*; see also Spangler II, 375 F. Supp. 1304 (C.D. Cal. 1974).

235. *Pasadena School District Faces Secession Move*, L.A. TIMES, Jun. 15, 1972, at SG1.

236. *Id.*

237. *Id.* at SG1, SG7.

238. *Id.*

239. Jack Cook, *School Transfer Bid Voted Down by Board: Freedom of Choice Involved*, PASADENA STAR-NEWS, Jun. 21, 1972, at C1.

240. *Pasadena School District Faces Secession Move*, *supra* note 235, at SG7.

241. James Quinn, *Pasadena Trustees Reject Secession, 4-1: 'White Flight' Cited as Reason Children Near Temple City Can't Join That District*, L.A. TIMES, Jun. 21, 1972, at SG6.

one.²⁴² Facing what the Pasadena board members viewed as increasing white flight from the school district, they could not afford to lose any more students.²⁴³ Fewer students attending Pasadena's public schools resulted in reduced state funding.²⁴⁴ In a situation where funding was falling but expenditures were increasing, the PUSD needed to do something to stop the outflow of students or consolidate and close some schools.²⁴⁵ The school district's enrollment had been dropping precipitously since 1966.²⁴⁶ The 1971-1972 school year showed a 1,576 student decrease.²⁴⁷ For the 1972-1973 school year, an additional 1,200 students were expected to leave the district.²⁴⁸ These were substantial drops in enrollment as there were 27,547 students in the district in the 1971-72 school year, but only 26,347 students in the district for the 1972-73 school year.²⁴⁹ Although not sufficient proof for the Central District Court, this pattern of losing white students supported the school board's view that parents were choosing to remove their students from the Pasadena public schools rather than sending them to the integrated schools.²⁵⁰

According to local sources, the majority of the city of Pasadena backed Marcheschi's efforts to get rid of busing and impose a voluntary integration plan.²⁵¹ This view was solidified with the local vote towards Proposition 21, the antibusing initiative that was supported by two-thirds of the community, including a major part of the black community.²⁵² These results spurred Marcheschi and his supporters to increase their attack against those favoring integration. The New Pasadena Plan could no longer be an option if black parents preferred their students to attend neighborhood schools. Instead, Marcheschi backed a slate of three board candidates hoping to gain a board majority, so they could end forced busing in Pasadena and implement a more favorable voluntary integration plan.²⁵³

242. *Id.*

243. *Id.*

244. Lee Austin, *Retrenchments Urged for Pasadena Schools*, L.A. TIMES, Feb. 17, 1972, at SG1.

245. *Id.*

246. *Id.*

247. *Id.*

248. *Id.*

249. Jack Cook, *Pasadena School Rolls Dip*, PASADENA STAR-NEWS, Oct. 11, 1972, at 1.

250. See Austin, *Retrenchments Urged for Pasadena Schools*, *supra* note 244, at SG1.

251. See Lowery, *Pasadena Now: The Nation's Watching*, *supra* note 209, at 10-11; see also, Austin, *Cussed, Discussed Board President*, *supra* note 223, at SG1.

252. Campaign Mailer, Vetterli Myers Newton: Very Much Needed for the Pasadena School Board! (1973) (on file with the Huntington Library: Marie Koenig Papers, Educ. Box #2, Pasadena Educ. Fol.).

253. See Austin, *Cussed, Discussed Board President*, *supra* note 223, at SG1.

Since this anti-busing cadre believed that the current board was not representing their needs, they chose to run as a slate in hopes of removing members of the board who were complying with the federal ruling.²⁵⁴

C. *Anti-busing Majority*

In Spring of 1973, the new anti-busing slate of Richard Vetterli, Henry Myers, and Lyman Newton swept the board election.²⁵⁵ They did so with the support of non-parent voters.²⁵⁶ Sixty percent of the voters in Pasadena did not have school age children and were susceptible to the anti-busing campaigns that were based on "fear and intimidation."²⁵⁷ These three new board members assumed office with a mandate of a vote margin ranging from 56.5% to 58.6%.²⁵⁸ It was clear that Pasadena was looking to a school board that would support Marcheschi in his efforts to end forced busing.²⁵⁹ Vetterli, Myers, and Newton expressed that their mission on the board was to "reverse the current flight of those families with school-age children to other areas. . . . The social and economic impact on the Pasadena Area is being felt by businessmen, homeowners, and taxpayers alike."²⁶⁰ The "lone dissenter" left on the board was Sam Sheats, the only black trustee on the school board.²⁶¹

In December of 1973, the board filed a motion for relief from the previous desegregation order.²⁶² The 4-1 decision was a direct reflection of the prior year election.²⁶³ The school board's hope was to relieve itself from the burden of the integration plan that required the school district to spend money on busing in a community that opposed forced integration.²⁶⁴ After four years of board support for integration, this new board would fight the decision.²⁶⁵ However, the board did not alter the Pasadena Plan in effect, because it felt that the continued disruption would be detrimental to

254. *Id.*

255. *See* VERNON, *supra* note 83, at 18-19.

256. *Id.* at 18.

257. *Id.*

258. *See* Austin, *Cussed, Discussed Board President*, *supra* note 223, at SG1.

259. *See id.*

260. Campaign Mailer, *supra* note 252.

261. *See* Austin, *Cussed, Discussed Board President*, *supra* note 223, at G1.

262. *See* VERNON, *supra* note 83, at 19; *see also* Spangler II, 375 F. Supp. 1304 (C.D. Cal. 1974).

263. *See* VERNON, *supra* note 83, at 18-19.

264. *Id.*

265. *Spangler II*, 375 F. Supp. at 1305.

the children.²⁶⁶ That may have been part of the reason for not altering the Pasadena Plan; the other may have been due to potential contempt citations brought against the school board members for ignoring the federal ruling.²⁶⁷ However, as scholar Michael James described in detail, the new board did begin to control other aspects of school culture to rid the school of what it believed to be “un-American,” such as “radical” teachers and forced busing.²⁶⁸

In 1975, an unsuccessful recall campaign effort was attempted against Vetterli, Myers, and Newton.²⁶⁹ Moderate and liberal groups, the black community, and two teacher unions supported the recall.²⁷⁰ The election coincided with the retirement of Henry Marcheschi, who was replaced by Jerome Meier, an opponent of busing.²⁷¹ The hope from the integrationists was to be able to get out the vote and regain control of the board.²⁷² Part of the integrationists’ reasoning included an opposition to the move towards fundamentalist instruction, as well as the antics of the board “to reconstruct their America.”²⁷³ Four of the five board members were later held in contempt of court for failing to comply with Judge Real’s integration order.²⁷⁴ The four board members of the anti-busing slate were cited for not following the order to adequately search for applicants for school administrators among minorities.²⁷⁵ District Judge Real included in his new ruling a detailed plan as to how the school district should recruit and hire more minorities.²⁷⁶ A school board meeting had also been closed when individuals opposing the board’s views had attempted to protest in large numbers.²⁷⁷ Henry Marcheschi, the board President, said closing the meeting was something that needed to be done a long time before, and he would do it again to restore order in the board meetings.²⁷⁸ The community was visibly divided over the new fundamentalist direction of the board.²⁷⁹

266. See *Judge Cites Four on Coast School Board*, N.Y. TIMES, Aug. 18, 1974, at L23.

267. See *Spangler v. Pasadena City Bd. of Educ. (Spangler IV)*, 384 F. Supp. 846 (C.D. Cal. 1974).

268. See JAMES, *supra* note 10, at 292.

269. *Pasadena Voters Back Busing Foes Recall of Three Rejected – 4th Elected to Board*, N.Y. TIMES, Mar. 7, 1975, at L58.

270. *Id.*

271. *Id.*

272. *Id.*

273. JAMES, *supra* note 10, at 292.

274. See *Judge Cites Four on Coast School Board*, *supra* note 266, at L23.

275. *Id.*

276. *Spangler IV*, 384 F. Supp. 846, 851-52 (C.D. Cal. 1974).

277. See Austin, *Cussed, Discussed Board President*, *supra* note 223, at G1.

278. *Id.*

279. See JAMES, *supra* note 10, at 295.

The election held promise for the recall advocates as they received more than the required number of signatures to gain a recall.²⁸⁰ The board members responded to this result by appealing to conservatives and encouraging them to vote.²⁸¹ They blamed the current recall on outside agitators, stating, "[y]es, outsiders are trying to take over and destroy the Pasadena School System in the name of 'civil rights.' But their interest is not in racial harmony or a better public school system in Pasadena. Their interest is to dominate and totally control our schools."²⁸² They claimed that the main issue at hand was busing, despite what the campaign literature said.²⁸³ They believed that because the newly elected board was working towards ending busing, outsiders were quickly joining the recall movement before the stop to busing could be accomplished.²⁸⁴ This would go against local wishes. The board blamed the coalition of radical outsiders like the "Attica Brothers" and "Soledad Brothers" who paid for protesters to picket their schools alongside parents who originally filed the court case against the PUSD.²⁸⁵ Their strategy worked. On election day, the status quo was upheld, as all three anti-busing board members retained their places and were joined by a fourth anti-busing colleague, Jerome Meier.²⁸⁶

Representing the interests of the majority of the Pasadena population, the new anti-busing board members continued to support a Supreme Court hearing to end busing.²⁸⁷ Board President Marcheschi, who was among the supporters, noted that "[he] would find it difficult to believe the Supreme Court is going to deny black parents the right to have their children attend their neighborhood schools in the spirit of denying the rights of black parents."²⁸⁸ After Proposition 21, the anti-busing proponents increasingly boasted numbers of blacks voting against it, in order to support their cause.²⁸⁹ Discussion of separate districts of blacks and Latinos ceased, and talks focused on allowing black parents to have a choice of where their

280. Craig Turner, *3 on Pasadena School Board Face Recall Vote*, L.A. TIMES, Dec. 3, 1974, at A3.

281. Mailer, *Propaganda for Richard Vetterli, Henry Myers, and Lyman Newton Recall Campaign 1* (on file with the Huntington Library: Marie Koenig Papers, Educ. Box #2, Pasadena Educ. Fol.).

282. *Id.*

283. *Id.*

284. *Id.*

285. *Id.* at 6.

286. Lee Austin, *Pasadena School Election Polarizes Busing Issue*, L.A. TIMES, Mar. 6, 1975, at A3.

287. See Austin, *Cussed, Discussed Board President*, *supra* note 223, at SG1.

288. *Id.*

289. Nowhere in the literature did it talk about the voter apathy of the black districts, nor the protests and campaigns to remove them from office by a large segment of the black population.

students would attend school, even if that led to all-black or all-white schools.²⁹⁰ In this way, attention was deflected from the white families and supporters.²⁹¹ By supporting the "black cause," they were demonstrating to the press that they were not racist.²⁹²

IV. CONCLUSION

The Pasadena schools managed to find themselves in the middle of a national debate to desegregate schools throughout the country during the 1970s. As James K. Fitzpatrick observed:

This miserable business of "busing," with all its implications and consequences, may yet tear this country apart more savagely than the issue of Viet Nam. From California to Michigan to Pennsylvania to Florida, wherever a wandering newsman goes the bitter question constantly comes up: What about busing?²⁹³

In Southern California, the fight to end forced busing was particularly strong in Los Angeles and Orange County where opposition tactics similar to Pasadena's were employed.²⁹⁴ National organizations, such as the Michigan based Citizens Opposed to Forced Busing of School Children, were created in the 1970s to oppose busing.²⁹⁵ It was quick to point out that 20% of its members were black and that it also had support from "Chinese, Polish, Italian, and other ethnic groups."²⁹⁶ Pasadenans found support in these organizations and through resolutions, such as the one sent by The California Federation of Republican Women, imploring the President that he end what it saw as "the Yoke of Forced Busing."²⁹⁷

Shortly after the recall election of 1975, the Supreme Court reviewed the school board's case.²⁹⁸ The Court decided that the school district would not need to readjust its schools each year to reflect the no majority of any

290. See Austin, *Cussed, Discussed Board President*, *supra* note 223, at SG1.

291. *Id.*

292. *Id.*

293. James J. Fitzpatrick, *School Busing Could Well Be No. 1 Issue*, HUMAN EVENTS, Mar. 4, 1972, (on file with the Huntington Library: Marie Koenig Papers, Educ. Box #2, Race in Educ. Fol.).

294. LISA MCGIRR, *SUBURBAN WARRIORS: THE ORIGINS OF THE NEW AMERICAN RIGHT* 239-40 (Princeton University Press 2001).

295. Membership Drive Mailing, Citizens Opposed to Forced Busing of School Children (on file with the Huntington Library: Marie Koenig Papers, Race/Crime Box, Forced Busing Fol.).

296. *Id.*

297. Resolution from the California Federation of Republican Women (April-May 1976) (on file with the Huntington Library: Marie Koenig Papers, Educ. Box #2, Race in Educ. Fol.).

298. See *Pasadena City Bd. of Educ. v. Spangler*, 427 U.S. 424 (1976).

minority rule.²⁹⁹ The Court ruled that the District Court could not require compliance each year after a “racially neutral attendance pattern” was created in the first year.³⁰⁰ While a victory for the school board, the Supreme Court did not rule wholly against the integration plan.³⁰¹ Judge Real continued to hold jurisdiction over Pasadena schools until June of 1979, when the 9th Circuit Court of Appeals ruled that court supervision was no longer defensible.³⁰² After more than six years of court cases and hundreds of thousands of dollars of school district funds spent in litigation, the *Spangler* case was over. Ironically, busing in Pasadena continued into the 1980s, even as other counties, such as Los Angeles, eliminated forced busing in their school districts.³⁰³

Today, the PUSD is an overwhelmingly minority school district.³⁰⁴ In fact, in 1995, integration attempts were discussed to integrate the school district once again.³⁰⁵ However, this time the focus was to even out the numbers of black and Latino students in the schools.³⁰⁶ Today the demographics of PUSD do not reflect those of the city. With an enrollment of 21,321 students in the 2005-2006 school year, the ethnic breakdown is as follows: 54.1% Hispanic, 26% black, 15.7% white, 2.5% Asian, 1.5% Filipino, 0.2% American Indian, 0.2% Pacific Islander, and 0.3% were multiple ethnicities or gave no response.³⁰⁷ According to the 2000 Census, Pasadena’s four largest ethnic groups were: 53.4% white, 33.4% Latino, 14.4% black, and 10% Asian.³⁰⁸ The increasingly diverse city remains largely segregated in the schools with a large number of its white school age children attending private schools.³⁰⁹

Today the most segregated schools in the nation are in the West and the North, not the South.³¹⁰ As the Harvard-sponsored Civil Rights Project has

299. *Id.* at 435.

300. *Id.* at 436-37.

301. *Id.* at 440-41.

302. *Spangler v. Pasadena City Bd. of Educ.*, 611 F.2d 1239, 1241 (9th Cir. 1979).

303. Jiles Fitzgerald, *Pasadena Schools to Continue Busing*, PASADENA STAR-NEWS, Mar. 18, 1981, at A1.

304. See Pasadena Unified School District Profile, <http://www.pusd.us/index.php?topic=Job> (last visited Mar. 6, 2007).

305. Richard Lee Colvin, *Integration Plan Aims to Mix Blacks and Latinos*, L.A. TIMES, Mar. 13, 1995, at B1.

306. *Id.*

307. See Pasadena Unified School District Profile, *supra* note 304.

308. City of Pasadena – Pasadena Demographics, <http://www.ci.pasadena.ca.us/statistics.asp> (last visited Mar. 6, 2007).

309. *Id.*

310. See, e.g., Goodwin Liu, *The Parted Paths of School Desegregation and School Finance Litigation*, 24 LAW & INEQ. 81, 95 (2006).

shown: “[a]lthough minorities now represent around 40 percent of school enrollments nationwide, white students, increasingly isolated in middle- and upper-class suburban schools, attend schools that are 80 percent white.”³¹¹ The efforts to create an integrated and equal public school system in the United States and Pasadena now faces new challenges. It seems entirely likely that the U.S. District Court will be involved in future rulings that will provide answers to these new, and yet familiar, questions facing our schools.

311. Garrett M. Graff, *Pushing Civil Rights*, 106 HARV. MAG. 82, 83 (2003).

Appendix A:

Racial and Ethnic Elementary Enrollment (As of October 1969)

	Spanish Surname	Anglo Cauca- sian	Negro	Oriental	Ameri- can Indian	Other non- White	Total
Allendale	63	354	2	15	0	3	437
Altadena	50	521	239	25	0	6	841
Audubon	30	169	386	22	0	1	608
Burbank	24	504	11	4	0	0	543
Cleveland	6	7	528	1	0	0	542
Don Benito	11	494	21	4	0	1	531
Edison	41	185	374	20	4	6	630
Field	55	462	7	12	0	0	536
Franklin	31	53	493	16	2	0	596
Garfield	128	162	56	5	2	1	354
Hale	28	428	51	14	1	11	533
Hamilton	128	424	3	16	0	27	598
Jackson	26	29	534	55	0	4	648
Jefferson	200	543	46	25	4	26	844
Lincoln	79	40	672	8	2	0	801
Linda Vista	6	163	1	6	0	0	176
Loma Alta	22	324	195	11	1	4	557
Longfellow	167	769	129	36	2	0	1103
Madison	141	148	546	11	2	8	856
McKinley	41	128	23	5	0	6	203
Noyes	3	307	2	5	0	2	319
San Rafael	9	384	2	9	0	0	404
Sierra Madre	31	508	0	13	0	0	552
Sierra Mesa	20	408	0	5	2	1	436
Washington	43	28	1060	16	0	11	1158
Webster	30	610	10	6	2	2	660
Willard	84	715	2	11	0	16	828
Total	1497	8867	5393	376	25	136	16,294

Source: Pasadena Public Library News Clippings,
Pasadena Schools. Integration/Busing, 1960-1969 Folder.

THE FREEWAY WITH A HEART: MY LIFE AS A CONSENT DECREE JUDGE IN THE CENTURY FREEWAY CASE

Harry Pregerson*

The United States District Court for the Central District of California has been around almost as long as I've been a judge. In 1965, at the height of the Watts Riots, Governor Pat Brown appointed me to the Los Angeles Municipal Court. In 1966, he appointed me to the California Superior Court.¹ And in 1967, President Johnson nominated me for a seat on the Central District of California, where I served for over a dozen years until President Carter elevated me to the Ninth Circuit. My years on the Central District were wonderful. It's much better to be a trial judge than an appellate judge. This is the truth: when you're a district judge, you can see the results of your work. You see the people before you. You see how your work affects them. Anytime I think about the work I've done as a judge, my thoughts first turn to the cases I handled as a trial judge on the Central District of California.

I have fond memories of Chief Judge Alfred P. Murrah, for whom the Murrah Federal Building in Oklahoma City was named. He was a U.S. district judge for the District of Oklahoma from 1937 to 1940. He then served thirty years as a U.S. circuit judge for the Tenth Circuit Court of Appeals. President Franklin Roosevelt appointed him to both positions.

* The Honorable Judge Harry Pregerson: United States Circuit Judge, United States Court of Appeals for the Ninth Circuit, 1979-present; United States District Judge, Central District of California, 1967-1979. B.A., University of California, Los Angeles, 1947; L.L.B. University of California, Berkeley (Boalt Hall), 1950; LL.D (Honorary), Southwestern University School of Law, 2003. Terry Carter of Century Housing was essential in helping me prepare my remarks for the symposium, and my former law clerk Christopher David Ruiz Cameron helped tremendously in editing them for publication. Los Angeles Assistant City Attorney Christopher Westhoff, J.D., Southwestern Law School, 1974 cheerfully provided key facts regarding the Hyperion project, ensuring that I described accurately the project in which he has played an instrumental role in his position as Public Works General Counsel. Finally, I thank my law clerk Jessica Owley Lippmann for her invaluable assistance throughout this project.

1. The United States District Court for the Central District of California was also established in 1966.

While I was a district judge, Al Murrah was director of the Federal Judicial Center in Washington. Al and I once talked about the difference between the work of a district judge and a circuit judge. He said,

Here's the way it works, Harry. When you're a circuit judge, you hear cases one full week out of every month. Your mind is like a bathtub. You fill it up with information for the week of hearings. When you get through, you just pull the plug and everything drains out. You can't even remember what you've been through unless you look at your notes.

But that's not the way it works on the district court. There, as a judge you live the cases, particularly those that you tried and those you resolved through the mechanism of the consent decree. I presided over a number of cases that were resolved by consent decree. One was *Keith v. Volpe*,² the Century Freeway case, which I discuss below. Another was the Hyperion Wastewater Treatment Plant case.³ I was on that case from 1977 until 1999. We rebuilt Hyperion, at a cost of approximately \$1.6 billion, into one of the finest wastewater treatment facilities in the country. Today, all of the wastewater treated at Hyperion receives full secondary treatment before it is returned to the ocean. On an ordinary day, the plant treats approximately 350 million gallons of wastewater. In addition, each day approximately thirty million gallons of secondary effluent is pumped from Hyperion to the water treatment facilities at West Basin Municipal Water District. There it receives advanced treatment (tertiary filtration and then reverse osmosis). The resulting pure water is either sold to industrial customers for their use or injected into the ground to provide a barrier to salt water intrusion into the fresh water aquifer under the south bay. A project to expand the amount of secondary effluent pumped from Hyperion to West Basin is currently in the design phase. That project will raise the pumping capacity to well over 100 million gallons per day.

Hyperion is currently rated to take 450 million gallons per day and has space to build an additional set of modules, which would increase plant capacity to 550 million gallons per day of full secondary treatment. During a severe storm a few years ago, the plant actually processed close to one billion gallons in one day. As you can see, Hyperion's capacity coupled with increased water conservation should serve the needs of our growing population for decades to come.

Hyperion lies just to the south of LAX near the ocean, between Playa del Rey and El Segundo. The people who work at Hyperion have honored me with the sobriquet "The Sludge Judge." At the ceremony celebrating

2. *Keith v. Volpe*, 352 F. Supp. 1324 (C.D. Cal. 1972), *aff'd*, 506 F.2d 696 (9th Cir. 1974), *cert. denied*, 420 U.S. 908 (1975).

3. *Pac. Legal Found. v. Quarles*, 440 F. Supp. 316 (C.D. Cal. 1977).

the completion of the Hyperion Plant, Mayor Richard Riordan and the City Council kindly named the technical assistance building after me. It's a nice building that faces the ocean. At the ceremony, I inquired of the mayor: "Dick, I've always wanted to live by the ocean, but I've never been able to afford it. Do you think you could let me have about 800 square feet on the top floor facing the ocean?" Well, he said he couldn't do it. So you see, life is a series of compromises. I settled for visitation rights at the Plant and a reserved parking place.

One last thought about Hyperion: the American Public Works Association selected the "Hyperion Treatment Plant: From 'Sludge-Out' to Full Secondary Treatment" as one of the top ten public works projects of the Twentieth Century.⁴

The point I want to make is this: when you're a judge overseeing the terms of a consent decree, you're cast in a somewhat different role. Your main job is to keep the people involved who are charged with carrying out the terms of the consent decree focused on their common goals. It's not an easy job when you are dealing with former adversaries.

The Century Freeway case gave rise to a lot of tension. There were clashing personalities, among both the parties and their lawyers. One time I consulted a friend of mine who was a management expert.

"What am I going to do?" I asked. "I've got these people who don't get along with each other. They can drive you crazy, and they're hurting the project."

"Easy," he said. "Just call them into your office and tell them, 'You work this out amongst yourselves. If you don't get it straightened out in two hours, you're all fired.'"

I replied: "Well, I can't do that. I can't fire anybody."

And he said: "Well, I don't know how the hell you can get anything done if you can't fire anybody!"

So if you're working on consent decree litigation, being the judge means getting people to work together to achieve common goals. You're not a judge in the usual sense. In most disputes, each side makes an argument, you make a ruling, and you say goodbye. You leave, and you're probably never going to see them again. But in consent decree litigation, these people are going to be with you for the next five, ten, or fifteen years, maybe more. So in addition to being a judge, you have to be a psychologist, a diplomat, and, at times, a babysitter.

4. The other nine projects are: the Bay Area Rapid Transit District (BART), the Grand Coulee Dam and Columbia Basin Project, the Tennessee Valley Project, the Panama Canal, the Interstate Highway System, the Reversal of the Chicago River, the Hoover Dam-Boulder Canyon, the St. Lawrence Seaway/Power Project, and the Golden Gate Bridge.

Back to the Century Freeway case. In 1972, four couples, the NAACP, the Sierra Club, the Environmental Defense Fund, and the City of Hawthorne sued federal and state officials over pending construction of the I-105 Freeway, which had been planned since the late 1950s. By random selection, the clerk's office in the Central District assigned the case to me. It came before me on a motion for a preliminary injunction, and I ruled that further work should be enjoined until federal officials complied with the National Environmental Policy Act (NEPA) of 1969 and state officials complied with the California Environmental Quality Act (CEQA) of 1970. As the case progressed, I considered issues relating to the plaintiffs' rights under other state and federal statutes, including federal housing laws.

I spent a lot of time drafting the preliminary injunction order to cover every possible contingency. After I issued the preliminary injunction, it took several years for the governmental entities involved to satisfy the federal and state environmental protection laws, including laws designated to protect homeowners and renters. Seven years later, a comprehensive consent decree was signed by the parties who then were ordered by the court to comply with its terms.

Let me tell you about some of the important provisions of the consent decree. The consent decree required: modification of the original freeway plans to provide for more environmentally responsible transportation options; construction of below-market replacement housing for displaced former residents of the freeway corridor; affirmative action for minorities and women for freeway construction employment; job training for prospective workers; management training for prospective project subcontractors; and child care for area residents.

I. ENVIRONMENTALLY RESPONSIBLE TRANSPORTATION OPTIONS

Originally, the Century Freeway was to be built as a ten-lane superhighway, with no accommodation for the additional air and noise pollution that more automobiles would surely cause. Under the consent decree, Caltrans agreed to help reduce air emissions by making room for a light rail line in the freeway's median and constructing high-occupancy vehicle lanes to encourage van- and car-pooling. The agency also agreed to erect sound barriers or construct the freeway below ground to mitigate noise pollution.

II. REPLACEMENT HOUSING

Our consent decree originally called for 4,200 units of affordable replacement housing. We cut it back to 3,700 because the head of the Federal Highway Administration said the country was in such bad shape they had to save money by cutting back 500 units for poor people. We knew that this vast construction project would displace 25,000 people, so we wanted to build 3,000 single-family replacement homes, plus multi-family units, to provide below-market housing for a total of 30,000 people. But while the Century Freeway was under construction, the state agency created to build replacement housing—the Century Freeway Housing Program—actually built over 4,300 homes, so we surpassed our 3,700 figure.

In August 1995, we formed Century Housing Corporation, a non-profit dedicated to building affordable housing in the Los Angeles area. Century Housing came into being with the blessing of the President of the United States and the Governor of California. All the assets in our housing program, including money and property worth about \$120 million, were transferred to this non-profit.⁵ That was kind of a miracle in itself. I'll tell you how it happened.

I consulted with Professor George Crawford of Stanford and the Jones Day firm. Although Professor Crawford was not called a monitor, I consulted him from time to time. One day, we were riding down Imperial Highway with Allan Kingston, who was the director of the Century Freeway Housing Program. With us were state transportation officials. We were giving the officials a tour of the freeway corridor. I pointed out the window and said, "There's one of our projects."

"No, that's been sold," Allan said.

"What happened to the money?" I wanted to know.

"We had to give part of it back to Federal Highways and the remainder to Caltrans."

I asked, "Why can't we recycle the funds? Why can't we build more units?" No one seemed to know the answer.

So, I turned to Professor Crawford and said, "George, take a hard look at the consent decree. See if there's some way that we can use this money and build more houses because there's a desperate need for housing here." That's all I said to George.

The next thing I knew, George Crawford was in Washington, D.C.

5. Once consent decree goals were substantially achieved, I authorized Century Housing Corporation to build affordable housing units—including the 8,400 additional units built so far—outside the immediate corridor area. See *Keith v. Volpe*, 960 F. Supp. 1448 (C.D. Cal. 1997).

talking to John Sununu, chief of staff to the first President Bush. George and Sununu worked it out. The administration said, "We want more housing too, so just go ahead and recycle." That's the way it happened. It was a miracle. There's no book you can buy to help you figure these things out. You've just got to get good, dedicated people who will help you solve problems.

When we privatized the housing program as a non-profit organization, I selected Allan Kingston as president and chief executive officer.⁶ I also selected the board of directors. Under Allan's leadership, in the last ten years, Century Housing Corporation has developed over 8,400 additional units, bringing a total of 12,700 affordable dwelling units to the Los Angeles area.

III. AFFIRMATIVE ACTION

The Century Freeway had the largest affirmative action program in America. The consent decree required sixty-five percent of construction work to go to minority employees and ten percent to go to women. We achieved the minority hiring goal. We also achieved seven percent on the women's hiring goal, a little short, but still a record for women's employment in a major U.S. construction project.

These goals weren't achieved overnight. People needed to be trained for these jobs, so we built a training center with the help of the International Brotherhood of Carpenters and the leadership of Bill Robertson, the Executive Secretary-Treasurer of AFL-CIO's County Federation of Labor. Our apprenticeship construction program in Lennox graduated more than 6,500 local residents, 4,800 of whom were placed in prevailing-wage construction jobs. We also trained 980 women, 720 of whom were placed in prevailing-wage construction jobs.

IV. JOB TRAINING

These students were taught the skills needed to get a job in the construction industry. I attended the graduation of our first training class. Attending the ceremony was an African-American family whose daughter was graduating. They were as proud of their daughter as I was of mine when she graduated from medical school. I talked to the daughter. She was

6. Allan just completed a third term as chairman of the board of governors of the National Housing Conference—the oldest housing advocacy organization in America.

excited to be able to go out into the world and get a good job—a job that paid the prevailing wage. She no longer needed to work at a minimum-wage job. Her parents were overjoyed. I was honored to be part of the graduation ceremony, and I will never forget it.

You all remember that the Northridge Quake of 1994 caused part of the Santa Monica Freeway to collapse, and you may remember that the repair job was done very quickly. I was not involved in that construction project, but here's something I do know. On the Century Freeway, we had an outreach coordinator for women in construction. We called her "Coke." (Her real name was Suataute Anoa'i.) Coke has since passed away. She was a wonderful and compassionate woman. One day, the prime contractor on the Santa Monica Freeway Project telephoned Coke and asked her to help him find three women graduates of our training program. These women had worked for the contractor as heavy equipment operators on the Century Freeway Project. He wanted them back because they were outstanding workers. Coke made a deal with the contractor. She said, "I'll find those three women and send them over to you on the condition that you take ten more of our women trainees." He did just that and was glad to do it.

Our apprenticeship training program continues to train women and minorities in the construction trades. We trained 880 people for work on the Alameda Corridor project. This project built subterranean transportation lanes from rail and shipping yards in East L.A. to cargo terminals at the Port of Los Angeles. Today, hundreds of our trainees work for LAX, soundproofing homes near the airport.

We also had people ask, "Well, you have these goals and you have this goal of paying prevailing wage. How do you know the goals are carried out?" The answer is an organization called the Century Freeway Affirmative Action Committee (CFAAC). CFAAC monitored compliance and played a large role ensuring that contractors were paying prevailing wages without taking kickbacks from employees. In the end, thirty-eight percent of \$2.2 billion in freeway money went to minority- and women-owned business enterprises. We wanted it to go to them because this freeway didn't go through wealthy neighborhoods. It went through Watts, Willowbrook, Lynwood, Downey, Norwalk, and other small communities. We wanted the people adversely affected by the freeway to reap some of its benefits. That's only fair.

V. MANAGEMENT WORKSHOPS

To help minority- and women-owned businesses succeed, we held seminars on how to bid on Caltrans public works projects. We sponsored management workshops and technical assistance programs. We also helped them get their construction bonds, because if you don't have a construction bond—it takes a lot of money to do that—you're not going to get the job.

VI. CHILD CARE

The children of freeway construction workers and area residents needed to be taken care of as well, so we built child development centers. One of my dreams was to establish a child care center at each of the Century Freeway's five transit stations. This program was not contained in the original consent decree. The idea was that a commuter could drive to the transit station, park her car, park her kid, get on the light rail, and ride to work. We have not yet established child care centers at all the transit stations, but we're working on it. Two more sites should be ready before the end of the year. Meanwhile, Century Housing Corporation has worked to develop nine child development centers throughout the transit corridor. The newest one will be on Imperial Highway, right across the street from Nickerson Gardens. It's going to be a community center, and there will be an after-school tutoring program to help kids with their homework and to teach them how to use computers.

One other matter related to child care. In some of Century's apartment complexes, perspective tenants must agree to help in the education of their children. Kids who do well get scholarships to either Pitzer College or USC.

I've put thirty-five years of my life into the Century Freeway and these related projects. Naturally, I've gotten attached to it all. In 1992, I remember getting depressed during the civil disturbances, when our city seemed to be going up in flames. I was sitting in my chambers, speaking on the telephone to my former courtroom deputy Dick Johnson.⁷ I said, "Look what's happening on television. All our work is going up in flames." But you know what? Only one of our projects suffered any arson. It was Cochran Villas, the project that Johnnie Cochran had sponsored in honor of his parents. Fortunately, the damage was minor. In fact, our biggest

7. Dick is a wonderful man. He's a retired Marine Corps captain, so he outranks me, because I retired as a first lieutenant. For years after I left the district court, I kept the Century Freeway case, and Dick continued to work with me on it, usually pro bono.

project, right at the epicenter of the rioting, was spared. The contractor telephoned and said to the foreman, "I'm coming over." The workers were already there. They had primarily trained through our program. They were people from the neighborhood. The foreman told the contractor, "Don't come down here; it's too dangerous. But we're staying, and don't worry, nothing is going to happen to these projects." And nothing happened. I thank God for that.

I hope now you have a better idea why we call the Century Freeway the freeway with a heart, and why the Century Freeway case and the Hyperion case are considered important parts of the history of the Central District of California.

THE UNINTENDED CONSEQUENCES OF CONSENT DECREES AND THE CASE OF THE CENTURY FREEWAY LITIGATION: *KEITH V. VOLPE*

James A. Kushner*

I. INTRODUCTION

This Article discusses the Century Freeway litigation, the consent decree utilized in resolving the litigation, and their impact on transportation planning in Los Angeles. It is a case of well-meaning, creative, successful judicial management and dispute resolution but with unintended adverse consequences.

II. PROFILE IN COURAGE

Included with the highest moral achievement of our American judiciary are the actions of Judge Harry Pregerson and other jurists who have enforced obligations on governmental institutions by imposing continuing court supervision. The methodology he used in *Keith v. Volpe*,¹ the Century

* Professor of Law, Southwestern Law School. The author was counsel of record while serving as cooperating attorney, N.A.A.C.P. Legal Defense and Educational Fund, in *Citizens Environmental Council v. Brinegar*, No. 73 CV 349 W1 (W.D. Mo. filed June 1973) (South Midtown Freeway, Kansas City, Missouri), see James A. Kushner, *Urban Transportation Planning*, 4 URB. L. & POL'Y 161 (1981), and *Goolsby v. Blumenthal*, 581 F.2d 455 (5th Cir. 1978), *rev'd per curiam en banc*, 590 F.2d 1369 (5th Cir. 1979), *cert. denied*, 444 U.S. 970 (1979) (Dempsey Avenue, Macon, Georgia), see James A. Kushner & Frances E. Werner, *Revenue Sharing and Relocation: The Administrative Dilemma of Ostensibly Conflicting Congressional Directives*, 5 ECOLOGY L.Q. 433 (1976), and advised counsel in numerous highway challenges when serving as Project Attorney at the National Housing and Economic Development Law Project at the University of California at Berkeley. The author greatly appreciates the comments of Austen Parrish on a preliminary draft of this article.

1. 506 F.2d 696 (9th Cir. 1974), *cert. denied*, 420 U.S. 908 (1975), *aff'g sub nom. Keith v. Cal. Highway Comm'n*, 352 F. Supp. 1324 (C.D. Cal. 1972).

Freeway case, is a form of alternative dispute resolution known as the "consent decree." The consent decree "attempts to solve seemingly intractable societal problems through judicial mediation and prescription."² It is a way to integrate citizen participation into executive behavior, allowing the court and the parties to mitigate adverse impacts of illegal official actions.³ To illustrate its wide-spread use, as of 2004, one of every ten school districts and more than 400 correctional institutions operate under a consent decree.⁴ The Century Freeway, however, was the first roadway to be built using the terms of such a consent decree.⁵

During the case proceedings, Judge Pregerson called the Century Freeway the "freeway that has a heart."⁶ He was likely referring to the inclusion of gender and racial affirmative action job opportunities, the Green Line light rail public transport component, and the extraordinary production of affordable replacement housing, the likes of which has never been ordered before or since in highway construction litigation.⁷ Most travelers in Los Angeles who take Interstate 105 to the Los Angeles International Airport (LAX), however, might assume the Judge's comment was a reference to the highway being a more convenient route compared to alternatives, such as the I-405, the I-110 to the I-10, or surface streets, even though the I-105 is becoming increasingly congested.

An overview of the project may help readers understand the settlement. The I-105, a 17.3-mile road, is a freeway that lacks a specific origin and has no specific destination.⁸ It serves little purpose other than to offer a relatively unclogged alternative to other routes and to provide a partially improved route to LAX for those traveling from eastern and southern communities.⁹ As traffic continues to increase, however, even that respite will likely be short-lived. The roadway includes high occupancy vehicle (HOV) lanes with bus and light rail stations at interchanges.¹⁰ The Green

2. Anthony N.R. Zamora, Note, *The Century Freeway Consent Decree*, 62 S. CAL. L. REV. 1805, 1806-07 (1989).

3. See *id.* at 1811.

4. David Zaring, *National Rulemaking Through Trial Courts: The Big Case and Institutional Reform*, 51 UCLA L. REV. 1015, 1020-21 (2004).

5. Lance Wilfred Shoemaker, *The Use of Equitable Tools in Freeway Construction Litigation*, 28 TRANSP. L.J. 15, 37 (2000).

6. *Id.* at 37 (citing Robert Trombley & Robert Herbert, *Road Paved With Good Intentions*, L.A. TIMES, Dec. 27, 1987, at A1).

7. *Id.* at 36-37.

8. *Id.* at 36.

9. See *id.*

10. Roger Nober, Note, *Federal Highways and Environmental Litigation: Toward a Theory of Public Choice and Administrative Reaction*, 27 HARV. J. ON LEGIS. 229, 270 (1990).

Line light rail included in the project runs from the western edge of Redondo Beach, without actually taking riders to the beach, bypasses LAX, and terminates, as does the Century Freeway, at the I-605 in Norwalk.¹¹

The consent decree also provided for 3,700 units of subsidized, below-market, replacement housing for displaced homeowners and renters.¹² Although the overwhelming need was for housing for low-income individuals, the site residents preferred that low-income housing not be built in their backyard (NIMBY).¹³ The result was that 40% of the units were designated for moderate-income residents, 30% for low-income families, 20% for very low-income, and 9% for very, very low-income displacees.¹⁴

The consent decree, rather than assigning housing construction and management to an existing government agency, instead privatized development using a new entity.¹⁵ Although lacking experience at that time, today that entity is the highly regarded Century Housing Fund, an active developer of creative, affordable housing.¹⁶ Century Housing has developed more than 9,500 affordable housing units as of 2003.¹⁷ Through the Fund, the legacy of the Century Freeway litigation and Judge Pregerson's work on the Central District court lives on.

III. STRETCHING THE USUAL BOUNDARIES OF JUDICIAL AUTHORITY

As courageous as the Century Freeway consent decree may have been, its application raises serious concerns. The most critical benefits of a consent decree may result from avoiding the traditional litigation process, focusing judicial authority and resources instead on the remedial obligation, and ensuring that the plaintiffs do not sustain further injuries during relief implementation.¹⁸ When federal courts employ broad injunctive authority in managing reapportionment, school desegregation, prison and institutional reform, or public works projects such as the Century Freeway, it is often because the executive and legislative branch have failed to function

11. Shoemaker, *supra* note 5, at 36.

12. *Id.* at 38.

13. *Id.* at 39.

14. *Id.*

15. *Id.* at 51.

16. *Id.*

17. Ted M. Handel, *The New Markets Tax Credit Program*, 25 L.A. LAW., Jan. 2003, at 13, 14. According to Judge Harry Pregerson, 12,700 units have been built as of 2006. Judge Harry Pregerson, United States Court of Appeals for the Ninth Circuit, Address at the Southwestern Law School Law Review Symposium: The U.S. District Court for the Central District of California, 1966-2006: Text and Context (Oct. 27, 2006).

18. Shoemaker, *supra* note 5, at 87.

properly.¹⁹ Most often it is because Congress has failed to establish mechanisms that ensure compliance with its directives or impose accountability upon the executive branch.²⁰ In other situations, the executive branch or the state has failed to comply with federal or state statutes or constitutional standards in carrying out its authority.²¹ The response by the judicial branch, then, is to impose its own executive authority, often imposing policies that typically reflect legislative decision-making.²² For example, consent decrees often obligate the legislature to expend unappropriated and unauthorized funds to provide a remedy.²³ The challenge in the Century Freeway litigation was extraordinary due to the "multiple parties, . . . multiple claims, and multiple remedies" making the litigation and consent decree implementation polycentric.²⁴

Rather than utilize the typical master or referee to manage implementation, Judge Pregerson employed three experts to perform a variety of tasks, one of which was intended to be dispute resolution.²⁵ However, "because none of the special masters/monitors had any power, they had very little authority over the parties to help resolve serious conflicts" and, therefore, "played a minimal role."²⁶ Looking back on complaints from the parties, perhaps appointing a single master might have allowed the neutral reporting of issues and problems to the judge for resolution.²⁷ Usually, consent decrees save time, expense, and risks by avoiding further litigation and a trial.²⁸ However, the complexity of the Century Freeway consent decree and limited resources available to the court stretched the court and its appointed experts to their limit.²⁹

19. Zamora, *supra* note 2, at 1809, 1811-12.

20. *Id.* at 1821.

21. Shoemaker, *supra* note 5, at 18; Zamora, *supra* note 2, at 1823-24 ("[R]esidents of the freeway corridor overcame a recalcitrant bureaucracy and passive legislature to obtain relief . . ."); Zaring, *supra* note 4, at 1018.

22. Shoemaker, *supra* note 5, at 17 ("[T]he decree created new mitigation programs that neither the Congress nor the executive branch had planned."); see also Robert R. Detlefsen, *Government Consent Decrees and the Paradox of "Consent: A Critical Case Study*, 18 JUST. SYS. J. 13, 25 (1995) (explaining that through the consent decree, judicial and executive officials bypassed the legislature); Zamora, *supra* note 2, at 1818.

23. Zamora, *supra* note 2, at 1813.

24. *Id.* at 1833.

25. Shoemaker, *supra* note 5, at 19, 66. These tasks included "resolv[ing] disputes between the parties," "monitor[ing] the housing program," and "resolv[ing] housing implementation issues in the early 1990s." *Id.*

26. *Id.* at 66.

27. *Id.* at 67-68.

28. *Id.* at 18; see also *id.* at 19-28 (discussing the advantages and disadvantages of special masters in consent decrees); Zamora, *supra* note 2, at 1816.

29. Zamora, *supra* note 2, at 1833.

In the Century Freeway litigation, the parties negotiated and executed the consent decree following a tentative finding that the federal and state transportation agencies had failed to comply with environmental reporting obligations³⁰ and replacement housing planning obligations arising from displacement.³¹ The consent decree was a creative response of the litigants and the supervising federal judge designed to bring the highway project into compliance.³² Compliance included ordering the construction of thousands of affordable housing units and establishing a new housing agency.³³

The consent decree also established a series of affirmative action programs and obligations to employ women and minority construction firms and workers on the project and called for integrating the highway with plans for public transport and transit stations. As desirable as these elements were, they may very well have exceeded the court's authority, either because the applicable federal statutes failed to specifically require the action (for example, constructing affordable housing and including public transport) or because the litigation did not seek relief of public transport concessions³⁴ or affirmative action.³⁵ The consent decree involved a set of litigants that included the environmental plaintiffs' attorneys and an anti-highway state government.³⁶ Both recruited the federal court to rewrite what amounted to legislative standards and to exercise the executive supervision ordinarily assigned to federal and state cooperating agencies.³⁷

On a substantive level, consent decrees present three major problems. First, the parties and the court may ignore unresolved substantive obligations. In this case, the parties defined the lawsuit too narrowly and excluded consideration of a requirement for environmental planning. Second, the settlement may fail to effectively remedy the stipulated violation. Third, the decree may be constructed according to the goals of the parties and fail to meet the needs of stakeholders not invited to participate.

30. *Keith v. Volpe*, 506 F.2d 696 (9th Cir. 1974), *cert. denied*, 420 U.S. 908 (1975), *aff'g sub nom. Keith v. Cal. Highway Comm'n*, 352 F. Supp. 1324 (C.D. Cal. 1972) (affirming injunction pending preparation of a formal environmental impact statement and report). See National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4347 (2000).

31. *Keith*, 352 F. Supp. at 1341-50; see Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 42 U.S.C. §§ 4601-55 (2000).

32. Shoemaker, *supra* note 5, at 47-49.

33. *Id.* at 38, 51.

34. See Zamora, *supra* note 2, at 1821-22.

35. Shoemaker, *supra* note 5, at 39-40; Detlefsen, *supra* note 22, at 23 (arguing the provisions were social policy favored by Governor Brown and plaintiffs' counsel).

36. See Zamora, *supra* note 2, at 1806; Shoemaker, *supra* note 5, at 49.

37. See Zamora, *supra* note 2, at 1826.

The judicial action in this case may have been creative, heroic, and well-intentioned, but it was ultimately poor transportation planning. In another case, it may represent government agencies and parties using the consent decree to evade statutory, regulatory, or constitutional standards such as those protecting the environment. While consent decrees may save litigation time, they may also contribute to higher costs and longer delays. This was the case of the Century Freeway. Instead of the project being completed in 1983 for \$500 million, it was not completed until 1993 at a cost of \$2.2 billion.³⁸ At more than \$100 million per mile, the freeway is the most expensive road in American history.³⁹

IV. THE LIMITS OF JUDICIAL INTERVENTION

Although the federal judicial role in the Century Freeway litigation was courageous, just as it was in the case of school desegregation litigation, courts are no more prepared or properly equipped to make urban planning decisions than they are to effectively craft educational policies. The consent decree implementation process in the Century Freeway case was called the "hot tub approach" by Caltrans' attorneys, meaning that Judge Pregerson wanted the parties themselves to work out their differences and thus, deferred to the parties rather than seeking to understand the antagonism existing between them.⁴⁰ The consent decree established no dispute resolution mechanism other than the parties approaching Judge Pregerson, who then simply directed them to negotiate a resolution.⁴¹

Ideally, the authority and obligation to plan, design, and construct transportation improvements should reside with those democratic institutions that possess the expertise to do so.⁴² Nevertheless, courts may be able to step in where agencies cannot.⁴³ Just as the best judges in the United States supervised desegregation plans that rendered our nation more segregated as whites fled the cities for the suburbs,⁴⁴ the Century Freeway

38. Shoemaker, *supra* note 5, at 19.

39. Virginia Ellis, *Century Freeway: Caltrans' 'Dirty Little Secret,'* L.A. TIMES, Mar. 28, 1999, at A1.

40. Shoemaker, *supra* note 5, at 54.

41. *See id.* at 67.

42. *See Zaring, supra* note 4, at 1027 (preferring undemocratic agencies over undemocratic judges).

43. *Id.* at 1077.

44. *See* JAMES A. KUSHNER, APARTHEID IN AMERICA 65-66 (1980) (originally published as James A. Kushner, *Apartheid in America: An Historical and Legal Analysis of Contemporary Racial Residential Segregation in the United States*, 22 HOW. L. J. 547 (1979)).

litigation is an example where well-meaning actors actually worsened the overall transportation in the region by failing to reflect the realities of highway development and the choices available through comprehensive urban transportation planning.⁴⁵

Curiously, the plaintiffs were able to claim victory in obtaining housing and other concessions, such as hiring women and minority construction companies and workers and including a light rail train, but it was Caltrans who really won the case because the freeway was constructed without any environmental conditions being imposed.⁴⁶ Adverse environmental impact was the original motivation for challenging the highway construction.⁴⁷ Section 134 of the Federal-Aid Highway Act requires that metropolitan highway projects be the product of a comprehensive transportation planning process.⁴⁸ Most states have never implemented Section 134 and have never engaged in comprehensive planning.⁴⁹ First, states grandfathered all proposed highways; later, states failed to seriously consider public transport alternatives.⁵⁰

The Century Freeway was based on highway planning that generated a self-fulfilling prophecy. The planning assumed the development of sprawling residential development to justify a highway; the highway then, in turn, generated demand which then led to the resulting development.⁵¹ Dense, mixed-use developments served by efficient public transport would have reduced traffic congestion, the resulting air pollution, oil dependency, and fuel inflation.⁵² Not only were sprawling developments assumed, but traffic projections were likely enhanced by assuming single-occupancy driving.⁵³ An assumption of car-pools, or even an occasional second passenger in addition to the driver, would eliminate most roadway projects.⁵⁴ More accurate projections of traffic might have eliminated the need for the highway construction and could have demonstrated an

45. See generally James A. Kushner, *Urban Transportation Planning*, 4 URB. L. & POL'Y 161 (1981).

46. See Shoemaker, *supra* note 5, at 56.

47. Keith v. Volpe, 506 F.2d 696 (9th Cir. 1974), *cert. denied*, 420 U.S. 908 (1975), *aff'g sub nom.* Keith v. Cal. Highway Comm'n, 352 F. Supp. 1324 (C.D. Cal. 1972) (affirming injunction pending preparation of a formal environmental impact statement and report); see also Zamora, *supra* note 2, at 1805-06. Interestingly, the highway was built too close to the water table, costing the state \$60 million. Ellis, *supra* note 39, at A1.

48. 23 U.S.C. § 134 (2000).

49. See KUSHNER, *supra* note 44, at 164.

50. *Id.*

51. See *id.* at 165.

52. See *id.* at 164.

53. See *id.* at 167-68.

54. *Id.*

increased demand for public transport.⁵⁵ Today, just as in 1972, it is not possible for the United States nor the City of Los Angeles to build its way out of highway traffic congestion.⁵⁶ What can be done—and should have been done thirty years ago—is to invest in public transport, utilizing exclusive bus lanes and busways, pre-paid fares and fare-free zones to speed boarding and to utilize other technologies to continue Los Angeles' leadership in infrastructure planning and development⁵⁷ toward smarter and more sustainable growth.

The Century Freeway litigation and consent decree presented a win-win result for the court and the parties, but perhaps not for nonparticipating stakeholders and the region. The result is a high-speed light rail that bypasses and fails to fully serve the airport, city, county, or region; serves very few riders; and does not generate the urban revitalization that typically results from transit separated from a freeway.⁵⁸ Ironically, had there not been a consent decree, Adriana Gianturco—who was Governor Jerry Brown's transportation director at the time of the consent decree drafting—might have sought to kill the plans for I-105 since both the Governor and the Mayor of Los Angeles opposed the freeway on environmental grounds, instead favoring much-needed public transport.⁵⁹ This action would have reduced congestion and improved the transportation and environmental quality of Los Angeles. Instead, Ms. Gianturco was obligated to complete the freeway pursuant to the consent decree, and today we live with that result.⁶⁰

Although Judge Pregerson undoubtedly acted with courage and creativity in supervising the Century Freeway litigation resolution, as he did in his remarkable support for homeless veterans as an active participant and leader in establishing the Bell Homeless Shelter, The Westwood Transitional Village and the Salvation Army's Haven Program,⁶¹ there exist inherent problems in the institution of the consent decree, as well as the

55. See KUSHNER, *supra* note 44, at 167.

56. See JAMES A. KUSHNER, THE POST-AUTOMOBILE CITY 7-8 (2004).

57. See WILLIAM FULTON, THE RELUCTANT METROPOLIS: THE POLITICS OF URBAN GROWTH IN LOS ANGELES 137 (1997).

58. See *id.* at 125-26.

59. See Shoemaker, *supra* note 5, at 48; Robert L. Rabin, *Lawyers for Social Change: Perspectives on Public Interest Law*, 28 STAN. L. REV. 207, 255 (1976).

60. See Shoemaker, *supra* note 5, at 56; *but see* Detlefsen, *supra* note 22, at 23 (suggesting that settlement was an initiative of Governor Brown's office and that Caltrans might never have agreed to the consent decree).

61. United States Courts for the Ninth Circuit, *Judge Pregerson Receives Award from Department of Veterans Affairs*, <http://www.ce9.uscourts.gov/Web/OCELibra.nsf/0/cae566dc88009541882569de0064d0fc?OpenDocument> (last visited Jan. 13, 2007).

unintended consequences of active supervision of complex matters of public policy by the judiciary.

HARRY PREGERSON, THE REAL MAYOR OF LOS ANGELES

Christopher David Ruiz Cameron*

Most Angelenos think their mayor is a trim, photogenic man who wears Armani suits to work in his cool City Hall suite downtown. Although there *is* a guy who fits that description, the Real Mayor of Los Angeles is built like a rock—squat and powerful—and goes to work in brown cowboy hats and black leather boots. The Real Mayor keeps his chambers in a nondescript office building near a Woodland Hills shopping mall. But you won't find him there much, because befitting his clothing, he likes to get his hands dirty.

The Real Mayor of Los Angeles is Harry Pregerson. And although his official title is United States Circuit Judge, Harry Pregerson's true calling is to be the behind-the-scenes powerhouse of the nation's biggest city. He cares about L.A. like nobody else. For thirty-five years and counting, whenever the city faces a problem public servants cannot or will not handle, the odds are that Judge Pregerson will be the one doing what any big city mayor might do: working the phones, coming up with solutions, and modestly passing the credit to others.¹

The Real Mayor and the elected mayor of Los Angeles do have some things in common. Both Mayor Antonio Villaraigosa and Judge Pregerson are true Angelenos. Both were born and raised on the eastside of Los Angeles, in the City Terrace section of Boyle Heights, and educated on the westside of the city, at UCLA.² Furthermore, both Mayor Villaraigosa and Judge Pregerson graduated from law school before entering a lifetime of

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1. See, e.g., Bill Boyarsky, *A Cause Liberal L.A. Runs From*, L.A. TIMES, Mar. 2, 2003, at M3 (criticizing city leaders for embracing tree and animal rights, but not homelessness).

2. See Ajay Singh, *The Education of a Mayor*, UCLA MAG. ONLINE (Jan. 1, 2006), available at http://www.magazine.ucla.edu/features/education_of_major (describing the education and career of Antonio Villaraigosa); see Assemb. Con. Res. 142, 2001-02 Leg., Reg. Sess. (Cal. 2002) (describing the education and career of Judge Pregerson).

public service in Los Angeles, and along the way, gained tremendous respect for helping others realize their potential instead of helping themselves to riches.³ Moreover, both Mayor Villaraigosa and Judge Pregerson serve broad constituencies of millions of people in Southern California, although the Real Mayor of Los Angeles has not been elected to public office since he served as UCLA's student body president more than sixty years ago.⁴

Who is this other mayor, the one most Angelenos never heard of? After his wife Bernadine Pregerson, a longtime professor of microbiology at Pierce College,⁵ Harry's first love is the United States Marine Corps. With them he won a Purple Heart during the Battle of Okinawa, one of World War II's bloodiest fights.⁶ He still cuts a cake every year on November 10, the birthday of the Marine Corps. But the military outfit currently capturing most of Judge Pregerson's time and energy is the Salvation Army, which operates shelters and support programs for homeless men, women, and children throughout Los Angeles County.⁷

Although Jewish, Judge Pregerson probably spends more time in churches than synagogues. He lives in the affluent West San Fernando Valley, but his soul lies in working class, Latino East Los Angeles. In fact, until he discovered bolo ties, Judge Pregerson sometimes wore a clip-on under his official robes. It is hard to imagine the other mayor in such a wardrobe.

The Real Mayor of Los Angeles knows that people attracted to his considerable intelligence, charm, and networking skills might also be persuaded to follow his conscience. For this reason, Harry mingles as easily with powerbrokers in Century City as he does with homeless veterans

3. See Singh, *supra* note 2 (describing the education and career of Antonio Villaraigosa); see Assemb. Con. Res. 142, 2001-02 Leg., Reg. Sess. (Cal. 2002) (describing the education and career of Judge Pregerson).

4. Los Angeles Business Journal Staff, *Who's Who: 25 of the Most Influential, High-Profile Judges in L.A.*, L.A. BUS. J., Jan. 31, 2000, at 9.

5. Bernadine Pregerson, Bernadine Pregerson's Microbiology Webpage, <http://www.piercecollege.edu/faculty/pregersb> (last visited Feb. 19, 2007).

6. See Assemb. Con. Res. 142, 2001-02 Leg., Reg. Sess. (Cal. 2002) (describing Judge Pregerson's military career).

7. See, e.g., The Salvation Army Bell Shelter, http://www1.salvationarmy.org/usw/www_usw_social.nsf/vw-sublinks/9DAA7E6B64BD884E88256DB4006EC244?openDocument (last visited Feb. 19, 2007) (describing the emergency shelter services available to homeless people in Los Angeles County); The Salvation Army Westwood Transitional Village, http://www1.salvationarmy.org/usw/www_usw_social.nsf/vw-search/4D54E40A4C879B6288256DB4006EC241?opendocument (last visited Feb. 19, 2007) (describing the housing and support services for homeless families in Los Angeles county).

in the City of Bell. Of course, he is friendly with CEOs, entrepreneurs, and legislators, and their spouses and children too. He is on a first-name basis with not only the Sheriff of Los Angeles County, but also patrol car deputies; he says hello to not only the hotel managers, but also the chamber maids; he jokes with not only big firm law partners, but also their legal secretaries. Harry Pregerson gets to know just about everybody he meets. Because who knows? He might need their help one day to get something he wants. And His Honor wants plenty: better schools for children; equal rights for women and minorities; dignity for veterans and immigrants; respect for gay people; food for the hungry and shelter for the homeless; and clean water, affordable housing, and better transportation for everyone.

What motivates him? Mainly a conscience “forged out of the Ten Commandments, the Bill of Rights, the Boy Scout oath, and the Marine Corps Hymn.”⁸ He is guided by the dictum of one of his judicial heroes, Chief Justice Earl Warren, who asked but one question when it came time to decide a case: “Very simple—‘Is it fair?’ . . . That’s it. Our system has to be grounded in fairness.”⁹

At age eighty-three, Harry Pregerson is the nation’s longest-serving active member of the United States Court of Appeals.¹⁰ Long past the age when most of his contemporaries retired, or took senior status, he is almost as vigorous as the day in 1967 when President Johnson appointed him to the United States District Court for the Central District of California.¹¹ But no other jurist comes close to having accomplished as much important work off the bench as on it.

Off the bench, Judge Pregerson has probably done more to address the problems of homelessness than any single person in the country. Thanks to Judge Pregerson’s work with the Salvation Army, U.S. Vets, the General Services Administration, the Veterans Administration, and dozens of other public and private partners, many homeless people in Los Angeles County can put a hot meal in their stomachs and a roof over their heads each night.¹² Almost from scratch, these groups built the Salvation Army Bell Shelter, converted from an old United States Army Air Base in the City of

8. Patt Morrison, *Attack Will Test How Much We Believe in America*, L.A. TIMES, Sept. 12, 2001, at B3.

9. Jason Hoppin, *Judge Bucks Third-Strike Rules*, THE RECORDER, May 28, 2003, at 1 (quoting Judge Pregerson quoting Chief Justice Warren).

10. Assemb. Con. Res. 142, 2001-02 Leg., Reg. Sess. (Cal. 2002).

11. Henry Weinstein, *Changed Lives Testify to Judge’s Compassion*, L.A. TIMES, Nov. 2, 2001, at B2.

12. See Assemb. Con. Res. 142, 2001-02 Leg., Reg. Sess. (Cal. 2002) (discussing Judge Pregerson’s community involvement).

Bell (350 beds);¹³ the Westside Residence Hall, operated by U.S. Vets in Inglewood (515 beds);¹⁴ and the Westwood Transitional Village, operated by the Salvation Army, which assists whole families (40 units and 151 beds).¹⁵ These facilities offer more than shelter; they provide services that give homeless men and women a chance to get back on their feet, to organize their lives, and to rejoin the community as productive citizens.¹⁶ These services include case management, child care, on-site health care, mental health counseling, job training, substance abuse treatment, and when appropriate, financial assistance.¹⁷

On any given day, you can find Judge Pregerson lending his name to raise awareness of a wide variety of other charitable organizations, including after-school clubs for boys and girls, battered women's shelters, child care centers, scholarship programs for Latino law students, and assistance for veterans, just to name but a few.¹⁸ You might spot him cleaning lab instruments with his wife at Pierce College, or buying textbooks for her pre-nursing students.¹⁹ You might also find Judge Pregerson swearing in another crop of immigrants who have completed the naturalization process and are ready to pursue the American dream as United States citizens.²⁰ Certainly, Harry Pregerson is the only federal judge in the country to lend his name to a freeway interchange (where the Century 105 and Harbor 110 Freeways meet),²¹ a wastewater treatment facility (at the Hyperion Sewage Treatment Plant near Playa del Rey),²² and a day care center (in the Edward R. Roybal Federal Building downtown).²³

13. See The Salvation Army Bell Shelter, *supra* note 7 (fulfilling a key objective of the McKinney-Vento Homeless Assistance Act of 1987, Pub. L. No. 100-77, 101 Stat. 482 (codified at 42 U.S.C. §§ 11301-11489 (2000))).

14. See U.S. Vets, <http://www.usvetsinc.org/locations/location.asp?id=4> (last visited Jan. 29, 2007) (describing the program and services offered).

15. See Los Angeles Homeless Services Authority, Westwood Transitional Village, <http://www.lahsa.org/contracts/transhousing/2005CDBG10.htm> (last visited Jan. 29, 2007).

16. See *supra* notes 13-15 (describing the services offered by each program).

17. See *supra* notes 13-15 (describing specific services offered by each program).

18. Assemb. Con. Res. 142, 2001-02 Leg., Reg. Sess. (Cal. 2002).

19. See *supra* note 5 (showing Bernadine Pergerson's microbiology syllabus).

20. See James Ricci, *For New Citizens, It's Not the Party, It's the Drive That Got Them There*, L.A. TIMES MAG., Oct. 1, 2000, at 9 (describing swearing in ceremony for 900 new Americans—including 398 Mexicans, 5 Romanians, 67 Iranians, 2 Tongans, 79 Salvadorans, 10 Canadians, and many others—held at Montebello Golf Course's Quiet Cannon restaurant).

21. See Assemb. Con. Res. 142, 2001-02 Leg., Reg. Sess. (Cal. 2002) (naming the state highway route 105 and 110 interchange the "Judge Harry Pregerson Interchange").

22. See Environmental Monitoring Division, Labs, <http://lacity.org/SAN/EMD/labs/index.htm> (last visited Jan. 29, 2007) (stating that the Harry Pregerson Technical Support Facility provides 78,000 square feet of laboratory space).

23. See U.S. General Services Administration, Pacific Rim (9) Child Care Centers,

Judge Pregerson's attitude can be infectious. "He inspires people to do good things[]," says one housing advocate.²⁴ He is a tremendous networker, which is an invaluable quality when he requisitions "turkeys, barber chairs, beds, treadmills or huge freezers for food storage," all items that can be found inside the walls built to house the aforementioned projects.²⁵

On the bench, Judge Pregerson is the author of over 1,000 written opinions touching on every important subject in our society: civil rights, commercial law, criminal law, housing, labor and employment, the environment, transportation policy, and many others.²⁶ In some of his most important decisions, Judge Pregerson has held that:

- Aliens whose sexual orientation would subject them to violence in their homelands constitute a "particular social group" having "a well-founded fear of future persecution" entitling them to asylum in this country.²⁷
- Rancho Los Amigos National Rehabilitation Center, which pioneered the use of the halo to support patients with head and neck injuries, should not be closed until accommodations could be made for disabled patients in accordance with the Americans With Disabilities Act.²⁸
- El Segundo-based Unocal Corporation could be sued in federal court under the Alien Tort Claims Act for its role in aiding or abetting the military regime of Myanmar in the forced labor, murder, and rape of villagers during the construction of an overseas oil pipeline.²⁹
- Expert opinion on Battered Women's Syndrome is admissible to overcome a now-reluctant victim's testimony that her injuries were self-inflicted.³⁰
- UCLA's Corrine A. Seeds University Elementary School, in its role as

http://www.gsa.gov/Portal/gsa/ep/contentView.do?P=PLCC&contentID=19635&contentType=GSA_OVERVIEW (last visited Jan. 29, 2007) (listing various child care centers, including the Harry Pregerson Child Care Center).

24. Weinstein, *supra* note 11, at B2 (quoting Century Housing Corp. Development Director Ann Marie Hickambottom).

25. *Id.*

26. See *infra* notes 27-34 (describing Judge Pregerson's various opinions).

27. Karouni v. Gonzales, 399 F.3d 1163, 1172-78 (9th Cir. 2005).

28. Rodde v. Bonta, 357 F.3d 988, 990 (9th Cir. 2004).

29. Doe I v. Unocal Corp., 395 F.3d 932, 953-56 (9th Cir. 2002), *reh'g en banc granted*, 395 F.3d 978 (9th Cir. 2003), *vacated and dismissed*, 403 F.3d 708 (9th Cir. 2005). Although Judge Pregerson's panel opinion was vacated by the Ninth Circuit on rehearing *en banc*, a Los Angeles County Superior Court judge, adopting the spirit of his reasoning, permitted a parallel suit to go forward under California's anti-slavery law. See Leslie Simmons, *Unocal Must Defend Slave Suit Under State Law*, *Court Rules*, L.A. DAILY J., Aug. 1, 2003, at 1.

30. Dillard v. Roe, 244 F.3d 758, 766-67 (9th Cir. 2001).

an educational research laboratory devoted to studying the state's changing demographic makeup, may rely on race and ethnic data to admit a diverse study body.³¹

- A Los Angeles resident who as a young girl survived the Holocaust by being smuggled out of Poland in a coffin, but who continued to suffer serious psychological trauma, is entitled to receive Social Security disability payments even though she is receiving modest reparations from the Federal Republic of Germany.³²
- The National Football League violated federal antitrust laws and should be enjoined from trying to prevent the Oakland Raiders from becoming the Los Angeles Raiders and taking up tenancy in the Los Angeles Coliseum—which they later did (before, of course, later moving back to Oakland).³³
- The City of Los Angeles should be permitted to go forward with ambitious plans to build the world's most advanced sewage disposal system—by subjecting wastewater effluent to secondary treatment and reducing the discharge of sludge into Santa Monica Bay—over objections by a conservative public interest organization that those plans would cost too much.³⁴

Despite Judge Pregerson's voluminous legal decisions, it is his work off the bench, where Judge Pregerson trades in his black robe for his signature cowboy hat and boots, that has transformed him into the Real Mayor of Los Angeles. Unlike elected mayors, His Honor serves without term limits. It was not a job he asked for; instead, the job asked for him.

It really started in 1972, when Judge Pregerson issued an injunction to halt construction of the Century Freeway until state and federal officials complied with the National Environmental Policy Act.³⁵ The lawsuit was brought by the mostly black and poor residents of the south Los Angeles neighborhoods of Watts and Willowbrook.³⁶ When Caltrans tried to seize

31. *Hunter ex rel. Brandt v. Regents of the Univ. of Cal.*, 190 F.3d 1061, 1062-63 (9th Cir. 1999).

32. *Grunfeder v. Heckler*, 748 F.2d 503, 504 (9th Cir. 1984).

33. *L.A. Mem'l Coliseum Comm'n v. NFL*, 484 F. Supp. 1274 (C.D. Cal. 1980) (granting preliminary injunction). Although the order granting a preliminary injunction was reversed, 634 F.2d 1197, 1198 (9th Cir. 1980), Judge Pregerson's entry of judgment on the jury's eventual verdict favoring the Raiders—together with related rulings rejecting both the defendants' "single entity" defense and their motion to transfer venue—was upheld, 726 F.2d 1381, 1384 (9th Cir. 1984).

34. *Pac. Legal Found. v. Quarles*, 440 F. Supp. 316, 319-20 (C.D. Cal. 1977), *aff'd*, 614 F.2d 225, 226 (9th Cir.), *cert. denied*, 449 U.S. 825 (1980).

35. *Keith v. Volpe*, 352 F. Supp. 1324, 1328 (C.D. Cal. 1972), *aff'd*, 506 F.2d 696, 698 (9th Cir. 1974), *cert. denied*, 420 U.S. 908 (1975).

36. *Volpe*, 352 F. Supp. at 1328.

their homes to build what is now the 17.3-mile Century 105 Freeway, they refused to give up their community without a fight.³⁷ These soon-to-be displaced residents wanted affordable replacement housing and relocation assistance.³⁸ For this reason, they sued federal and state officials for not complying with various environmental impact laws.³⁹

Most judges would have avoided the headaches that followed, either by leaving the parties to sort out the environmental issues on their own, or by dismissing the lawsuit altogether. But Judge Pregerson saw and seized the opportunity to address the larger social implications of a massive public works project, one which would eventually cost \$2.2 billion.⁴⁰ Why, he wondered, shouldn't the freeway corridor in traffic-snarled Los Angeles include a rail line for public transportation? Or a carpool lane to reduce smog? And why shouldn't some of the lucrative government contracts and high-paying jobs that it would take to build the project go to the people who actually live there? And for that matter, why shouldn't their children have day care while their parents were at work building the new freeway?

These questions lead to the construction of what he called "the freeway with a heart."⁴¹ Thanks to the influence of Judge Pregerson, California's Department of Transportation (Caltrans) was persuaded to substitute a six- to eight-lane freeway for the traditional 10-lane superhighway that was originally planned.⁴² The project resulted in much more than a freeway, including:

- Replacement of 3,000 demolished single-family residences with more than 4,300 affordable homes.⁴³
- Creation of the non-profit Century Housing Corporation, which in the decade since the freeway opened, has built 8,400 more housing units, for a total of 12,700 homes.⁴⁴

37. *Id.* at 1328-29.

38. *Id.* at 1342.

39. *Id.* at 1328-39.

40. See Eddie North-Hager, *Judge Stayed With 105 Project for the Long Haul*, DAILY BREEZE, Dec. 11, 2005, at A4 (stating that the 17.3 miles of freeway cost \$127.2 million per mile to build).

41. See generally Dean W. Hestermann et al., *Public Works, the Courts, and the Consent Decree: Environmental and Social Effects of the "Freeway With a Heart,"* UNIV. OF CAL. TRANSP. CTR., <http://www.uctc.net/papers/348.pdf> (discussing the transportation planning issues addressed in building the Century Freeway).

42. *Id.*

43. Assemb. Con. Res. 142, 2001-02 Leg., Reg. Sess. (Cal. 2002).

44. *Id.* Once consent decree goals were achieved, Judge Pregerson authorized Century Housing Corp. to build affordable housing units—including the 8,400 additional units built so far—outside the immediate corridor area. See *Keith v. Volpe*, 960 F. Supp. 1448, 1467-69 (C.D. Cal. 1997).

- Addition of the area's first, light-rail public transportation in the freeway median.⁴⁵
- Addition of a high-occupancy vehicle lane for car- and van-pools.
- Establishment of a construction industry apprenticeship program, which has trained and placed more than 4,800 people in construction jobs, including hundreds of women.⁴⁶
- Awarding of substantial portions of construction work to minority (65%) and female employees (7%), for a total of \$836 million in contract work (38% of all contracts awarded).
- Establishment of nine child care centers for commuters, freeway workers, and others.⁴⁷

To be sure, Judge Pregerson did not unilaterally order that these things be done. Instead, he persuaded representatives for corridor residents, Caltrans, and other state and federal highway officials to agree to do them. It took about seven years of managing consent decree negotiations, and another twenty years of construction supervision, to get the job done.

Only a handful of public officials in this town could ever dream of persuading so contentious a group to sign onto such a deal. Mayor Villaraigosa might have pulled it off, but during the 1970s, when the job had to be done, he was still attending UCLA.⁴⁸ In those days, only His Honor Harry Pregerson could do it.

Henry Lozano, longtime aide to the late Congressman Ed Roybal and his successor Xavier Becerra, said it best. He once told me he had tried to persuade Harry to run for mayor—the elected position with an office in City Hall. When I asked why, Lozano said, “Because Harry’s a man of conscience. Because he gets things done. Because he’s a hard man to say no to.”⁴⁹

Not everyone has praised Harry Pregerson for doing what he thought was the right thing, or for being a hard man to say no to. As the views of

45. Interstate 105 California, http://www.interstate-guide.com/i-105_ca.html (last visited Jan. 29, 2007).

46. Weinstein, *supra* note 11, at B2.

47. See U.S. General Services Administration, Pacific Rim (9) Child Care Centers, http://www.gsa.gov/Portal/gsa/ep/contentView.do?P=PLCC&contentID=19635&contentType=GSA_OVERVIEW (last visited Jan. 29, 2007) (listing various child care centers, including the Harry Pregerson Child Care Center).

48. Singh, *supra* note 2, available at http://www.magazine.ucla.edu/features/education_of_major (describing the education and career of Antonio Villaraigosa).

49. See Weinstein, *supra* note 11, at B2 (quoting Salvation Army Bell Shelter Director Robert Freedman as saying, “People find it hard to say no to the judge[.]”).

my colleague Professor Jim Kushner suggest, Judge Pregerson has had his share of critics.⁵⁰ But to his credit, neither did he hide his motives before he acted, nor was he deterred by the criticism that came afterward, either in the freeway case, or in his other work.

In 1979, after twelve years as a federal district judge, Judge Pregerson was nominated by President Carter for a seat on the Ninth Circuit.⁵¹ Like all candidates for the federal appellate bench, he sat before a panel of senators to answer their questions. But in the midst of this typical exchange, something unusual happened. The nominee was asked what he would do if presented with a conflict between the law and his conscience, and he gave an honest answer by stating, "I would follow my conscience."⁵² Shortly thereafter, he was confirmed and took his seat on the United States Court of Appeals for the Ninth Circuit, the nation's largest federal appellate court.

Almost twenty-four years after answering that question, for doing exactly what he had promised, Judge Pregerson was attacked in an op-ed piece published in the *Los Angeles Times*.⁵³ The reason? He refused to join a series of Ninth Circuit opinions denying appeals by three men who were sentenced to spend 25 years to life in prison following third-strike convictions for petty theft and other non-violent offenses.⁵⁴ One of those men, Larry Wallace, faced the possibility of life imprisonment for the third-strike offense of stealing a \$130 television set from a Lake Elsinore Wal-Mart.⁵⁵ As Judge Pregerson explained to one legal newspaper:

I think the Three Strikes law should only be applied to a defendant whose criminal history, including his last offense, demonstrates that he needs to be taken off the streets because he poses a realistic threat to the health and safety of the community. There are cases where a long term in prison is justified and cases where it is not.⁵⁶

50. See James A. Kushner, *The Unintended Consequences of Consent Decrees and the Case of The Century Freeway Litigation: Keith v. Volpe*, 36 SW. U.L. REV. 301 (2007) (describing the problems surrounding Judge Pregerson's decisions in the litigation of The Century Freeway).

51. Assemb. Con. Res. 142, 2001-02 Leg., Reg. Sess. (Cal. 2002).

52. Hugh Hewitt, *The Law's Conscience: How Judge Harry Pregerson of California's 9th Circuit Rules With His Heart Instead of His Head*, WKLY. STANDARD, Sept. 26, 2003 (quoting transcript, including questions by Sen. Alan Simpson, R-Wyo.).

53. Howard J. Bashman, 'Conscience' Is No Cause for Judges to Flout Laws, L.A. TIMES, June 1, 2003, at M5.

54. See *Wallace v. Castro*, No. 00-16993, 2003 U.S. App. LEXIS 9719, at *4 (9th Cir. May 19, 2003) (Pregerson, J., dissenting); *Rico v. Terhune*, No. 01-56692, 2003 U.S. App. LEXIS 9739, at *3 (9th Cir. May 19, 2003) (Pregerson, J., dissenting); *Turner v. Candelaria*, No. 00-15606, 2003 U.S. App. LEXIS 9735, at *3 (9th Cir. May 19, 2003) (Pregerson, J., dissenting).

55. *Wallace*, 2003 U.S. App. LEXIS 9719, at *4 (Pregerson, J., dissenting).

56. Hoppin, *supra* note 9, at 1.

For this statement, Judge Pregerson was practically accused of treason.

A few months later, for authoring a panel opinion holding that the upcoming October 2003 election to recall Governor Gray Davis should be postponed,⁵⁷ at least until state officials could address the potential unfairness posed by the continued use of the type of punch-card voting that had caused so much trouble in Florida during the 2000 presidential election,⁵⁸ he was attacked on national television. On CNN's "Capital Gang," commentator Robert Novak called the decision "terrible" and claimed, inaccurately, that Judge Pregerson "is one of the most reversed appellate judges in America."⁵⁹ The attack was odd because although Judge Pregerson was a member of the three-judge panel, he didn't author the decision; it was a *per curiam*, or unsigned, opinion.⁶⁰ But the panel was indeed reversed a few weeks later following rehearing *en banc* by an eleven member panel of the Ninth Circuit.⁶¹

Paling in comparison to these attacks are Jim Kushner's misgivings about the Century Freeway project. Although the actions taken were "creative, heroic, and well-intentioned," Professor Kushner says Judge Pregerson mistakenly relied on consent decree litigation to carry out those actions.⁶² He writes:

On a substantive level, consent decrees present three major problems. First, the parties and the court may ignore unresolved substantive obligations. In this case, the parties defined the lawsuit too narrowly and excluded consideration of a requirement for environmental planning. Second, the settlement may fail to effectively remedy the stipulated violation. Third, the decree may be constructed according to the goals of the parties and fail to meet the needs of stakeholders not invited to participate.⁶³

These criticisms remind me of the old joke about the two elderly women who visit a Catskill Mountain resort. One of them says: "Boy, the food at this place is really terrible." The other one says: "Yeah, I know. And such small portions!"⁶⁴

57. See *Sw. Voter Educ. Reg. Project v. Shelley*, 344 F.3d 882, 887-88 (9th Cir. 2003) (*per curiam*), *rev'd en banc*, 344 F.3d 914, 916 (9th Cir. 2003).

58. See generally *Bush v. Gore*, 531 U.S. 98 (2000).

59. Rush Transcript of *Capital Gang* (Cable News Network television broadcast Sept. 20, 2003), <http://transcripts.cnn.com/TRANSCRIPTS/0309/20/cg.00.html>.

60. See *Shelley*, 344 F.3d at 888 (*per curiam*), *rev'd en banc*, 344 F.3d 914 (9th Cir. 2003) (stating that the case was only before Judge Pregerson).

61. *Shelley*, 344 F.3d at 914.

62. Kushner, *supra* note 50, at 306.

63. Kushner, *supra* note 50, at 305-06.

64. Woody Allen as Alvy Singer, in *ANNIE HALL* (United Artists Pictures 1977).

Although it is unclear whether Jim Kushner is upset about the freeway being built, or about if its benefits were too few, this much *is* clear: there is not much substance to the argument that “the parties defined the lawsuit too narrowly and excluded consideration of a requirement for environmental planning.”⁶⁵ If anything, the consent decree, as implemented, defined the landscape broadly, and it kept getting bigger. As for environmental planning, if building 4,300 replacement homes, creating a non-profit to build 8,400 more, putting in the area’s first light rail line, adding a carpool lane, setting up affirmative action and training programs for high-wage construction jobs, and establishing child care centers isn’t good environmental planning, I don’t know what is.⁶⁶ Certainly, with the benefit of hindsight, it’s hard to say our community would have been better off without all these things.

On an average day, over 200,000 drivers traverse the Century Freeway without realizing that the “freeway with a heart” is the lasting legacy of the Real Mayor of Los Angeles. But that is okay with Harry Pregerson. He has already put on his cowboy hat and boots, rolled up his sleeves, and prepared to tackle his next project to make our lives better.

65. Kushner, *supra* note 50, at 305.

66. See *supra* notes 43-47 (describing the various benefits of the freeway development).

CRIME, PUNISHMENT AND THE CENTRAL DISTRICT

Karen R. Smith*

I. INTRODUCTION

The first forty years of the Central District coincide with the expansion of constitutional rights during the waning years of the Warren Court and with the retrenchment of those very same rights in the Burger and Rehnquist eras.¹ During that timeframe, the judges of the Central District have contributed to the evolving jurisprudence of constitutional criminal procedure by adjudicating an impressive number of landmark cases. The cavalcade of Central District cases through which the United States Supreme Court produced transforming legal doctrine involves searches and seizures,² the exclusionary rule,³ Federal Sentencing Guidelines departure theories,⁴ the application of the Eighth Amendment to forfeiture cases,⁵ the *mens rea* requirements for federal statutes involving distribution of adult films with underage actors,⁶ and false statements made in violation of

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1. See Stephen F. Smith, *Activism As Restraint: Lessons from Criminal Procedure*, 80 TEX. L. REV. 1057, 1059-60 (2002) (noting that the Warren Court spanned from 1953 when Justice Earl Warren received a recess appointment from President Eisenhower, until 1969; the Burger Court commenced June 1969 and ended September 1986; the Rehnquist Court spanned from 1986 until September 2005, when Chief Justice Rehnquist died in office).

2. *Katz v. United States*, 389 U.S. 347, 353 (1967).

3. *United States v. Leon*, 468 U.S. 897, 900 (1984).

4. *Koon v. United States*, 518 U.S. 81, 85 (1996).

5. *United States v. Bajakajian*, 524 U.S. 321, 324 (1998).

6. *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 65 (1994).

United States Code § 1001.⁷

Why has the Central District played such a prominent role? Is it merely an accident of location and good timing?⁸ Is the geographic area covered by the Central District simply a “hotbed of federal crime?” Perhaps. During the last forty years, Los Angeles has developed into a major urban population center. It has become a well-stocked hunting ground for — in the words of Justice Jackson — the “competitive enterprise of ferreting out crime.”⁹ Location undeniably provided the Central District with the opportunity to host some of the most significant federal criminal trials in the past forty years.¹⁰ More importantly, however, Central District judges often handled these opportunities with a degree of creativity and a stubborn commitment to fairness that deserve to be acknowledged. While Central District judges have been reversed by the Ninth Circuit and the United States Supreme Court, such reversals cannot diminish the importance of the difficult task assigned to the district court jurist. Unlike the somewhat insulated appellate-court judge, the district court judge must seemingly deal with the “ultimate reality show” — jurors, witnesses, experts, federal prosecutors, defense counsel, *pro se* defendants, and of course the ever-present media, in its many forms. Furthermore, the district court judge must deal with the unpredictable human element, while grappling with legal issues of first impression, providing injunctive relief when necessary and safeguarding the trial process by keeping distractions to a minimum within the courtroom.

Given that a district court judge responds to the issues presented by the litigants, one would not expect to uncover “trends” in the court’s decision-

7. *United States v. Yermian*, 468 U.S. 63, 64 (1984).

8. The Central District came into existence in 1966. *Circuit and District Judges – Increase in Number*, Pub. L. No. 89-372, 80 Stat. 75 (1966). Section 3(a) Pub. L. 89-372 decreed that the existing Northern and Southern judicial districts be divided into four judicial districts, thereby creating the Eastern and Central Districts. *Id.* § 3(a), 80 Stat. 75, 87. The Central District contained the counties of Los Angeles, Orange, Riverside, San Bernardino, San Luis Obispo, Santa Barbara and Ventura. *Id.* The legislation also specified that Los Angeles was the only place for conducting court for the Central District. *Id.*

9. *Johnson v. United States*, 333 U.S. 10, 13 (1948).

10. See discussion *infra* Part IV. For example, the “War on Drugs” which was launched during the past forty years created intense focus on international drug smuggling activity and certainly contributed to the development and use of drug courier profiles at international points of entry such as Los Angeles International Airport. See Brian A. Wilson, *The War on Drugs: Evening the Odds Through Use of the Airport Drug Courier Profile*, 6 B.U. PUB. INT. L.J. 203, 203-05 (1996). By the same token, the presence of the Lompoc Correctional Institution within the Central District explains the prosecutions of two famous escapees, Christopher Boyce and Native American Activist Leonard Peltier. See *Boyce v. Ashcroft*, 251 F.3d 911, 913 (10th Cir. 2001) (referring to the escape case in the Central District); *United States v. Peltier*, 693 F.2d 96, 96-97 (9th Cir. 1982).

making over the past forty years. Central District judges often followed the then-controlling law to the letter, only to be reversed by the United States Supreme Court,¹¹ and at other times, they advanced novel legal positions that changed previous precedent.¹² The Supreme Court has often scrutinized the district court judge's exercise of discretion.¹³ As trial attorneys know, it is the trial judge's exercise of judicial discretion that keeps the proverbial trial "playing-field" level or reduces the trial to a legal nightmare. Moreover, for indigent defendants who face the seemingly unlimited resources of the federal government in criminal prosecutions, the district court judge is the "lifeline" to a fair trial; it is the district court judge who is the sole arbiter of whether "sufficient" funds for counsel will be expended, and whether expert witnesses, scientific or psychiatric examinations, and transportation of incarcerated defense witnesses will be authorized.¹⁴

On this celebratory occasion, it is fitting that we explore the major criminal decisions that originated in this district. I will focus on four aspects of the Central District's anthology of groundbreaking Supreme Court cases: (1) famous Fourth Amendment cases;¹⁵ (2) noteworthy substantive criminal law cases;¹⁶ (3) the high profile criminal cases;¹⁷ and finally, (4) the leading Selective Prosecution cases — an apparent specialty of Central District judges and a topic of misguided and disturbing mischief by the Supreme Court.¹⁸

II. FOURTH AMENDMENT CASES: FROM THE WARREN COURT REVOLUTION THROUGH THE REHNQUIST ERA

A routine Central District case was the springboard for the Fourth Amendment expectation of privacy standard.¹⁹ Veteran bookie Charles Katz practiced his trade from phone booths in the 8200 block of Sunset

11. See, e.g., *Katz v. United States*, 389 U.S. 347, 347-49 (1967).

12. See, e.g., *United States v. Bajakajian*, 524 U.S. 321, 324-26 (1998).

13. See, e.g., *Delo v. Stokes*, 495 U.S. 320, 321-22 (1990).

14. See 18 U.S.C.A. § 3006(A) (West 2006); *Ake v. Oklahoma*, 470 U.S. 68, 76-80 (1985). The district court judge also exercises control over funding of investigation and fact development in federal habeas corpus.

15. See discussion *infra* Part II.

16. See discussion *infra* Part III.

17. See discussion *infra* Part IV.

18. See discussion *infra* Part V.

19. *Katz v. United States*, 369 F.2d 130, 130 (1966).

Boulevard.²⁰ Employing the latest 1960's electronic surveillance technique, Federal Bureau of Investigation (FBI) agents taped microphones to the outside of two phone booths.²¹ The wires from the microphones ran to a recorder on top of one of the phone booths.²² But, what was crucial under the controlling Fourth Amendment precedent was that "[t]here was no physical penetration inside of the booths."²³ The contents of the phone booth tapes as well as Katz's conversations heard through the walls of his apartment, constituted the probable cause needed to obtain a search warrant for his apartment.²⁴ The apartment search uncovered wagering paraphernalia.²⁵ The late Central District Judge Jesse Curtis denied Katz's motion to suppress the taped conversations and found Katz guilty after a bench trial.²⁶

This unremarkable case revolutionized the way we view the Fourth Amendment. No longer do we discuss constitutionally protected places.²⁷ Rather, Justice Stewart observed in *Katz* that the Fourth Amendment protects "people, not places,"²⁸ and, thanks to Justice Harlan, law students for over forty years have memorized the "two-prong" Katz reasonable expectation of privacy test.²⁹ It should be noted that Judge Manuel Real was the head of the United States Attorney's Office at the time of *Katz* and attorney Harvey Schneider, one of Katz's counsel, subsequently served as a Magistrate Judge in the Central District.³⁰

The other blockbuster Fourth Amendment case from this district was *United States v. Leon*.³¹ The United States Supreme Court, particularly Justice White, had clearly hinted that some form of "good faith exception" to the exclusionary rule was needed.³² In *Illinois v. Gates*, the Supreme Court flirted with the possibility of using the case as a vehicle for the good faith exception, but ultimately decided to use *Gates* to revise the probable

20. *Id.* at 131-32.

21. *Id.* at 131.

22. *Id.*

23. *Id.*

24. *Katz*, 369 F.2d at 131.

25. *Id.*

26. *Id.*

27. *Katz v. United States*, 389 U.S. 347, 351 (1967).

28. *Id.*

29. *Id.* at 361 (Harlan, J., concurring) (stating that the privacy test consists of two parts - "first that a person has exhibited an actual (subjective) expectation of privacy and second, that the expectation be one that society is prepared to recognize as 'reasonable'").

30. *Id.* at 347.

31. 468 U.S. 897 (1984).

32. *Illinois v. Gates*, 462 U.S. 213, 246 (1983) (White, J., concurring).

cause standard.³³ The honor of bestowing the “good faith exception” upon the world was saved for *United States v. Leon*.³⁴ In *Leon*, the Burbank police department obtained a search warrant for three residences in Burbank and Glendale.³⁵ Leon’s residence on South Sunset Canyon in Burbank was searched and law enforcement officers seized a large quantity of drugs.³⁶ Leon, along with two others, was indicted and drew Judge A. Wallace Tashima for trial.³⁷ The defendants filed motions to suppress the evidence seized during the searches.³⁸ Judge Tashima ruled that the probable cause presented was insufficient to support the issuance of the search warrants.³⁹ But, Judge Tashima specifically found that “there [was] not any question about good faith.”⁴⁰ The officer had gone to the Superior Court judge and gotten a warrant, had consulted with three Deputy District Attorneys before proceeding, and Judge Tashima stated he had no doubt about the truth of the officer’s statement.⁴¹ However, Judge Tashima held firm to his belief that “[o]n the issue of good faith, obviously that [was] not the law of the Circuit, and [he was] not going to apply that law.”⁴² With such a perfect record and findings, the government could not resist requesting that the officer’s good faith be made clear on the record — it was the good faith exception at issue — period.⁴³ On July 5, 1984, the United States Supreme Court in *Leon* modified the Fourth Amendment exclusionary rule as applied to officers acting in reasonable reliance on a search warrant, allowing admission of evidence seized pursuant to the officer’s good faith reliance on the warrant.⁴⁴

It is significant that the Central District Court produced the two “bookends” of the Fourth Amendment — two cases that clearly symbolize the opposing constitutional perspectives of the Warren Court and the

33. *Id.* at 217. The Supreme Court ordered the parties to reargue the good faith exception issue, but did not incorporate this issue into the majority opinion. The Court stated that “[w]e decided today, with apologies to all, that the issue we framed for the parties was not presented to the Illinois courts and, accordingly, do not address it. Rather, we consider the question originally presented in the petition.” *Id.* Justice White, however, disagreed and lobbied to adopt a good faith exception to the exclusionary rule in *Gates*. *Id.* at 246 (White, J., concurring).

34. 468 U.S. at 922.

35. *Id.* at 901-02.

36. *Id.* at 902.

37. *Id.*

38. *Id.* at 903.

39. *Id.*

40. *Leon*, 468 U.S. at 904.

41. *Id.*

42. *Id.* at 904 n.4.

43. *Id.* at 903-04.

44. *Id.* at 897, 922.

Burger Court.⁴⁵ As the *Katz* case demonstrated, the Warren Court was reluctant to compromise an individual's protection against a Fourth Amendment violation.⁴⁶ Indeed, the Warren Court would have considered a "good faith" exception a serious breach of an individual's right to be free from unreasonable searches and seizures; suppression is warranted if no probable cause exists because the issuing magistrate erred.⁴⁷ Nonetheless, the *Leon* Court directly confronted that premise and rejected it, stating that, "we deal here only with the remedy to be applied to a concededly unconstitutional search."⁴⁸ The *Leon* Court, noting that the exclusionary rule is a costly weapon, held that "the marginal or nonexistent benefits produced by suppressing evidence obtained in objectively reasonable reliance on a subsequently invalidated search warrant cannot justify the substantial costs of exclusion."⁴⁹ If an officer has a reasonable good faith belief that a search warrant is valid, then that officer should be able to rely on that warrant and a subsequent search should be upheld.⁵⁰ But, remember that the Central District judges in *Katz* and *Leon* were dutifully following the controlling law, and it was ultimately the Supreme Court that decided to make this radical change in the law.⁵¹

The following Central District Fourth Amendment cases also deserve mention. In *United States v. Montoya de Hernandez*, Ms. Montoya, a female traveler from Bogota, Colombia, arrived at Los Angeles International Airport and aroused the suspicion of the customs agents.⁵² Over a lengthy period of almost sixteen hours, Ms. Montoya was detained in a small room under the watchful eye of customs officers to allow nature to take its course and Ms. Montoya to pass the contents of her bowels.⁵³ At the end of this uncomfortable sixteen hour stand-off, the authorities obtained a court order from a magistrate judge, and transported Ms. Montoya to a hospital where she was examined and ultimately passed

45. See *Katz v. United States*, 389 U.S. 347 (1967); *Leon*, 469 U.S. 897 (1984).

46. In *Katz*, the majority stated "[w]herever a man may be, he is entitled to know that he will remain free from unreasonable searches and seizures." 389 U.S. at 359.

47. *Id.*

48. 468 U.S. at 900, 915 n.13.

49. *Id.* at 907, 922.

50. *Id.* at 921 n.22, 922.

51. The *Leon* court conceded that the lower court had not erred. The Supreme Court simply explained that it "reexamined the purposes of the exclusionary rule and the propriety of its application in cases where officers have relied on a subsequently invalidated search warrant. [Its] conclusion [was] that the rule's purposes [would] only rarely be served by applying it in such circumstances." *Id.* at 904, 926.

52. *United States v. Montoya de Hernandez*, 473 U.S. 531, 533-34 (1985).

53. *Id.* at 535.

eighty-eight balloons containing 528 grams of cocaine.⁵⁴ Defendant Montoya made a motion to suppress the cocaine before the late Judge William Gray, who denied the motion.⁵⁵ The Ninth Circuit reversed Ms. Montoya's conviction based upon her unreasonable seizure in the case.⁵⁶ However, the United States Supreme Court upheld Judge Gray's ruling and held that the "detention of a traveler at the border . . . is justified[,] . . . [if the authorities] reasonably suspect that the traveler is smuggling contraband in her alimentary canal."⁵⁷ The surprising length and manner of the detention did not violate the Constitution.⁵⁸

Another important detention case was *INS v. Delgado*, where garment factory workers and their union filed two actions in federal district court challenging the Immigration and Naturalization Service's "sweeps" for undocumented aliens working in factories.⁵⁹ Central District Judge Laughlin Waters denied the request for injunctive relief, since under the Fourth Amendment none of the workers had in effect been detained at the workplace.⁶⁰ As in *Montoya*, the United States Supreme Court agreed with the district court's position.⁶¹

This last set of Fourth Amendment cases highlights the independent thinking displayed by Central District judges. Although the United States Supreme Court ultimately disagreed with the district court's conclusions regarding jurisdiction over foreign nationals, the issues raised in these cases were challenging.⁶² Defendant Humberto Alvarez-Machain was kidnapped from his medical office in Guadalajara, Mexico, flown to El Paso, Texas, and arrested by Drug Enforcement Agency (DEA) officials who believed Dr. Alvarez-Machain played a role in the torture and death of DEA Agent Enrique Camarena-Salazar.⁶³ Central District judge Edward Rafeedie, who heard the defendant's motion to dismiss the indictment, ruled that the court lacked jurisdiction to try the defendant because DEA agents abducted him in violation of the United States Extradition Treaty with Mexico.⁶⁴ Despite

54. *Id.* at 535-36.

55. *Id.* at 536; *United States v. Montoya de Hernandez*, 731 F.2d 1369, 1369 (9th Cir. 1984).

56. *Montoya de Hernandez*, 731 F.2d at 1373.

57. *Montoya de Hernandez*, 473 U.S. at 541.

58. *Id.* at 543-44.

59. *INS v. Delgado*, 466 U.S. 210, 212-13 (1984).

60. *Id.* at 213-14; *Petition for Writ of Certiorari* at 45a, *Delgado*, 466 U.S. 210 (No. 82-1271).

61. *Delgado*, 466 U.S. at 218.

62. *United States v. Alvarez-Machain*, 504 U.S. 655, 658-59 (1992); *United States v. Verdugo-Urquidez*, 494 U.S. 259, 263, 274-75 (1990).

63. *Alvarez-Machain*, 504 U.S. at 657.

64. *United States v. Caro-Quintero*, 745 F. Supp. 599, 601, 614 (C.D. Cal. 1990); *Alvarez-*

Judge Rafeedie's scholarly analysis of these complicated international legal issues,⁶⁵ the United States Supreme Court held that the arguably illegal search of co-defendant Verdugo-Urquidez's home in Mexico by United States agents did not violate the Fourth Amendment,⁶⁶ and that the forcible illegal abduction of Dr. Alvarez-Machain from Mexico did not prohibit his trial in the United States for violations of federal criminal law.⁶⁷

III. THE CENTRAL DISTRICT CONTRIBUTION TO SUBSTANTIVE FEDERAL LAW

Although the majority of the Central District cases that find their way into casebooks involve criminal procedure issues; nevertheless, one deceptively simple criminal case deserves our attention. Judge Manual Real was asked to give jury instructions regarding the scienter requirement of 18 U.S.C. § 1001 in the routine white collar crime prosecution of engineer Esmail Yermian.⁶⁸ Yermian's counsel requested an instruction not only requiring that the Government prove that the defendant "had actual knowledge that his statements were false at the time [he] made them, but also that he had actual knowledge that those statements were made in a matter within the jurisdiction of a federal agency."⁶⁹ Judge Real rejected the request and "instructed the jury that the Government must prove that respondent 'knew or should have known' that the information was to be submitted to a government agency."⁷⁰ Following Yermian's conviction, the

Machain, 504 U.S. at 658. Judge Rafeedie also considered this issue in a related case involving another foreign national. *United States v. Verdugo-Urquidez*, 939 F.2d 1341, 1343 (9th Cir. 1991).

65. In a footnote to *Verdugo-Urquidez*, a Ninth Circuit opinion, Judge Reinhardt complimented Judge Rafeedie's efforts to master the law in this area. Judge Reinhardt commented, "Judge Rafeedie[] conducted further legal research on his own . . . [and] [a]fter observing that counsel had been of little assistance to him in resolving the difficult issues involving the law of extradition, he proceeded to write an exhaustive and scholarly opinion on the subject." *Verdugo-Urquidez*, 939 F.2d at 1343 n.1. See also *Caro-Quintero*, 745 F. Supp. at 601 n.2.

66. *Verdugo-Urquidez*, 494 U.S. at 263-64, 274-75.

67. *Alvarez-Machain*, 504 U.S. at 669-70. As a final chapter in the Alvarez-Machain saga, in 1992 a district court judge granted a motion for a judgment of acquittal at the close of the government's case against Dr. Alvarez-Machain. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 698 (2004).

68. *United States v. Yermian*, 468 U.S. 63, 66 (1984) (citing *United States v. Yermian*, 708 F.2d 365 (9th Cir. 1983)).

69. *Id.*

70. *Id.* at 66-67.

Ninth Circuit reversed and the Supreme Court granted certiorari.⁷¹ Central District Magistrate Judge Stephen Hillman, then Chief Deputy of the Federal Public Defender's Office,⁷² argued the case before the Supreme Court.⁷³ While the Supreme Court held that actual knowledge of federal agency jurisdiction is not required under § 1001, Stephen Hillman must have argued very persuasively because he garnered four votes from Justices Rehnquist, Brennan, Stevens and O'Connor – not the usual dissenting suspects.⁷⁴

The United States Supreme Court again considered the interpretation of the word “knowingly” in *United States v. X-Citement Video, Inc.*, involving the Protection of Children Against Sexual Exploitation Act of 1977, 18 U.S.C. §§ 2252(a)(1) and (a)(2).⁷⁵ After the defendants were convicted before District Court Judge David Kenyon, the Ninth Circuit ruled that the statute was facially unconstitutional.⁷⁶ Upon review by the Supreme Court, Chief Justice Rehnquist, while admitting that the Ninth Circuit adopted the “most natural grammatical reading” of the use of the word “knowingly” in the statute, nevertheless ruled that the word applied to the phrase “use of a minor;” thereby, interpreting a scienter requirement that avoids the “absurd.”⁷⁷

Another example of the independent thinking of Central District judges is demonstrated in *United States v. Bajakajian*.⁷⁸ Defendant Bajakajian pled guilty to one count of failing to report exported currency and elected a bench trial before Judge John Davies on a separate forfeiture count.⁷⁹ Judge Davies found that the entire \$357,144, which the defendant had hidden from customs, was subject to forfeiture in violation of 31 U.S.C. § 5316.⁸⁰ But, Judge Davies, to the dismay of the government, also ruled that the defendant need only forfeit \$15,000 of the \$357,144 because to forfeit the

71. *Id.* at 67-68.

72. 2005 Judicial Staff Directory, http://www.jsd.cq.com/includes/pdf_samples/jsd1186.pdf (last visited Jan. 13, 2007).

73. *Yermian*, 468 U.S. at 64.

74. *Id.* at 75. The United States Supreme Court did not address the “should have known” issue. *Id.* at 64. The Ninth Circuit, on remand, reinstated the district court judgment. *United States v. Yermian*, 741 F.2d 267, 267 (9th Cir. 1984).

75. *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 65-66, 68 (1994). The statute prohibited the interstate transportation, shipping, or distribution of visual depictions of minors in sexually explicit acts. *Id.* at 67-68. The tapes at issue in *X-Citement Video* depicted an underage Traci Lords in pornographic films. *Id.* at 66.

76. *United States v. X-Citement Video, Inc.*, 982 F.2d 1285, 1285-86 (9th Cir. 1992).

77. *X-Citement Video*, 513 U.S. at 65, 68-69, 77-78.

78. *United States v. Bajakajian*, 524 U.S. 321, 326 (1998).

79. *Id.* at 325 (citing *United States v. Bajakajian*, 84 F.3d 334 (9th Cir. 1996)).

80. *Id.* at 321 (citing *Bajakajian*, 84 F.3d 334).

entire amount as the law directed would be "extraordinarily harsh" and "grossly disproportionate" to the offense.⁸¹ The United States Supreme Court agreed with Judge Davies' findings and Eighth Amendment analysis.⁸² Forfeiture of the entire amount of \$357,000 dollars would have been an excessive fine in violation of the Constitution.⁸³

IV. LESSONS LEARNED IN HIGH PROFILE CASES IN THE CENTRAL DISTRICT

Acknowledging that the Central District courthouse has been the backdrop for an abundance of high profile cases is not an overstatement. Some of these cases have been more memorable than others, not always because of the legal outcomes, but rather because these cases have caused a degree of havoc in the courthouse. The following cases, though, were eye-opening and instructive.

The drug conspiracy prosecution of flamboyant automaker John Z. DeLorean ended in an acquittal,⁸⁴ but it nonetheless ushered the Central District into a new age of media coverage. The court became acquainted with the media's insatiable thirst for anything even remotely related to a celebrity trial.⁸⁵ Cameras have never been allowed in a federal courtroom, but that policy does not mean the media accepts being kept out of the trial process.⁸⁶ Thus, the classic tension between the First Amendment and the Sixth Amendment erupted in the DeLorean case. Judge Robert Takasugi, in an effort to preserve the defendant's right to an impartial jury, attempted to control the release of the parties' pre-trial motions to the media.⁸⁷ The Ninth Circuit ruled on a writ filed by the media that Judge Takasugi could not do so.⁸⁸ Judge Takasugi also had to deal with the much ballyhooed broadcast of the undercover videotape of defendant DeLorean's actions

81. *Id.* (holding that the factual findings made by the district court in conducting an excessiveness inquiry must be accepted unless clearly erroneous; however, the question whether a fine is constitutionally excessive requires *de novo* review)).

82. *Id.* at 337-39 (citing *Bajakajian*, 84 F.3d 334).

83. *Id.* at 337.

84. Robert Lindsey, *DeLorean Jurors Discuss Reasons Behind Verdict*, N.Y. TIMES, Aug. 18, 1984, at 46.

85. See, e.g., *Associated Press v. U.S. Dist. Ct. for the C.D. of Cal.*, 705 F.2d 1143 (C.D. Cal. 1983).

86. *Publicity is the Issue in DeLorean Case*, N.Y. TIMES, May 14, 1984, at B11.

87. *Id.*

88. *Id.*

during the drug investigation.⁸⁹ Although Judge Takasugi could not prevent the television broadcast of this powerful videotape evidence on the eve of trial, he used his discretion to order a continuance of the trial for several months.⁹⁰ The continuance was the only means he had to offset the potential prejudicial impact of the videotape evidence. Judge Takasugi hoped that potential jurors' memories of this media event would fade. But, through the process of these pretrial media skirmishes which the district court repeatedly lost in the Ninth Circuit,⁹¹ we all witnessed how trial courts struggle mightily to preserve defendants' Sixth Amendment right to a jury trial in conjunction with the public's First Amendment right of access to those very same criminal trials.

The Central District judges have been involved in two infamous espionage prosecutions. Christopher Boyce, of "the Falcon and the Snowman" fame, was prosecuted before Judge Kelleher for his conspiracy with Andrew Daulton Lee to sell top secret information to agents of the Soviet Union.⁹² While his trial was relatively uneventful, Boyce's daring escape from the federal correctional institution in Lompoc in 1980 and his life as a bank robbing fugitive on the run drew national attention.⁹³ The other espionage case was that of disgraced FBI agent Richard Miller, who had three jury trials on his espionage, conspiracy and bribery charges.⁹⁴

The federal prosecutions of California Highway Patrol (CHP) officer George Gwaltney and Los Angeles Police Department (LAPD) officers Koon, Powell, Briseno and Wind, of the infamous Rodney King beating case, are both legally and socially significant. The Gwaltney case involved one of the first prosecutions, outside of the South, of a law enforcement officer under the theory of violating a citizen's civil right to not be deprived of "life or liberty without due process."⁹⁵ The brutal sexual assault and

89. *Judge Postpones Delorean's Trial*, N.Y. TIMES, Oct. 25, 1983, at A25.

90. *Id.*

91. *See, e.g., Associated Press*, 705 F.2d 1143. The DeLorean trial is believed to be the dawning of the phenomena of "Defense Counsel courthouse press conferences." DeLorean attorneys Howard Weitzman and Donald Re held a press conference on the federal courthouse steps following each trial session to give their interpretation of their court day for the media. The Assistant U.S. Attorney trying the case never countered this move.

92. U.S. Marshals Information – Historical Perspective, Capture of Christopher Boyce, <http://www.usmarshals.gov/history/boyce/index.html> (last visited Mar. 3, 2007).

93. *Id.*

94. *United States v. Miller*, 874 F.2d 1255, 1255 (9th Cir. 1989). Miller's first trial ended in a hung jury; his second trial before Judge Kenyon resulted in convictions that were overturned on appeal by the Ninth Circuit. *Id.* The district court abused its discretion regarding admission of polygraph evidence, along with other errors regarding prior misconduct evidence and the testimony of a government expert witness. *Id.*

95. *United States v. Gwaltney*, 790 F.2d 1378, 1378 (9th Cir. 1986).

murder of twenty-three year old female motorist Robin Bishop was disturbing, especially when the government charged a CHP officer with those crimes.⁹⁶ Gwaltney's earlier state court criminal trials had ended in hung juries.⁹⁷ The federal prosecution was presided over by then District Court Judge Pamela Rymer.⁹⁸ Judge Rymer is credited with deftly handling the, at the time, cutting edge scientific issues that arose during trial and for her even-handed use of discretion to insure that both the defense and the prosecution had adequate time to prepare and present a very difficult case.⁹⁹

While the federal prosecution of the four LAPD officers who beat Rodney King into submission was a watershed Central District moment, one should pause to consider a much earlier case involving excessive police-force. In 1977, African-American motorist Adolph Lyons filed a civil rights complaint against the city of Los Angeles seeking damages, an injunction and declaratory relief in United States District Court before Judge Robert Takasugi.¹⁰⁰ The lawsuit arose out of the LAPD's use of a "chokehold" on Mr. Lyons while he was stopped for a traffic infraction, a non-functioning taillight.¹⁰¹ Mr. Lyons contended that without provocation, the police applied a stranglehold around his neck until he lost consciousness.¹⁰² When he awakened, he was face down, spitting blood, and had urinated and defecated.¹⁰³ The police issued a citation and released him.¹⁰⁴ Judge Takasugi initially ruled that Lyons lacked standing for injunctive relief, but, following a reversal by the Ninth Circuit,¹⁰⁵ granted an injunction prohibiting the use of chokeholds by the LAPD which was affirmed on appeal.¹⁰⁶ While the United States Supreme Court ultimately held that Lyons did lack standing to secure injunctive relief because he could not show with sufficient certainty a likelihood that he would be a victim of the chokehold in the future,¹⁰⁷ Los Angeles police and civic

96. *Id.*

97. *Id.* at 1381.

98. *Id.* at 1378.

99. *See generally id.* (upholding on appeal Gwaltney's conviction and ninety year sentence).

100. *Lyons v. City of Los Angeles*, 615 F.2d 1243, 1244 (9th Cir. 1980).

101. *Id.*

102. *Id.*

103. *City of Los Angeles v. Lyons*, 461 U.S. 95, 115 (1983).

104. *Id.*

105. *Lyons*, 615 F.2d at 1244.

106. *Lyons v. City of Los Angeles*, 656 F.2d 417, 417 (9th Cir. 1988).

107. *Lyons*, 461 U.S. at 105; *but see cf. id.* at 114-16 (Marshall, J., dissenting) (noting that Lyons was a "Negro Male" and citing to the disproportional number of minority chokehold victims in Los Angeles - "[t]hus in a city where Negro males constitute 9% of the population, they have accounted for 75% of the deaths resulting from the use of chokeholds").

authorities banned the use of chokehold restraints while the case was pending.¹⁰⁸

A decade after the Lyons chokehold litigation, the police defendants in the Rodney King beating case contended that the prohibition on the use of the chokehold removed a useful means of subduing resisting suspects.¹⁰⁹ Therefore, without the option of the effective chokehold restraint, LAPD officers were more likely to inflict the more painful baton blows or taser "jolt" to subdue suspects.¹¹⁰ Thus, ironically, the Lyons case led to the shocking use of force techniques captured on the infamous Rodney King video tape.¹¹¹

The federal prosecution based upon the Rodney King beating followed the state court acquittals of the four LAPD officers.¹¹² The riot-weary city of Los Angeles awaited the federal verdict with considerable trepidation;¹¹³ the outbreak of violence following the officers' state court acquittals had exposed the extent of the city's racial fragility. Lives were lost, businesses were destroyed, and the credibility of the judicial system was seriously questioned.¹¹⁴ A clear indication of the widespread fear that gripped Los Angeles while the federal trial progressed is shown by the way in which the verdict in the federal case was handled; the Los Angeles Police Department went on tactical alert on Friday, April 16, 1993, and the verdict was announced at seven in the morning on Saturday, April 17, 1993.¹¹⁵ All eyes were on the federal courthouse that day as officers Koon and Powell were

108. *Id.* at 100 ("On May 6, 1982, the Chief of Police in Los Angeles prohibited the use of the bar-arm chokehold in any circumstances. A few days later, on May 12, 1982, the Board of Police Commissioners imposed a 6-month moratorium on the use of the carotid-artery chokehold except under circumstances where deadly force is authorized.").

109. STACEY C. KOON & ROBERT DEITZ, *PRESUMED GUILTY: THE TRAGEDY OF THE RODNEY KING AFFAIR* 56 (1992) (criticizing the chokehold decision and stating that "a decade ago the city of Los Angeles overreacted to minority demands on limiting force, and thereby restricted an officer's ability to subdue a suspect. . . . But absent other tools, the limitations made it almost inevitable that the Rodney King affair, or something like it, would occur someday.").

110. *Id.* at 56-57.

111. *Id.* at 60 (stating that "[i]f the chokehold had been approved as a nonlethal use of force—not associated with the death of black suspects, not approved as a cost-effective restraint on police—the Rodney King incident would have never occurred the way it did. All we would have had to do was to swarm him with a chokehold, and the entire episode would have been over in ten or fifteen seconds. Rodney King would have been cuffed and awaiting an ambulance for transport to the hospital.").

112. *United States v. Koon*, 833 F. Supp. 769, 774 (C.D. Cal. 1993).

113. Laurie L. Levenson, *The Future of State and Federal Civil Rights Prosecutions: The Lessons of the Rodney King Trial*, 41 UCLA L. REV. 509, 532 (1994).

114. *Id.* at 527.

115. *Id.* at 532 (citing Jim Newton & Henry Weinstein, *King Case Verdict Expected Today: Police Go on Alert*, L.A. TIMES, Apr. 17, 1993, at A1).

convicted of various federal charges.¹¹⁶

There were also unanticipated non-violent consequences of the federal *Koon* case. District Court Judge John Davies sentenced Sgt. Stacey Koon to only a thirty month sentence, using novel departure theories.¹¹⁷ Both the defense and the government appealed the sentences imposed.¹¹⁸

The appeal before the Supreme Court focused on whether the court of appeals should review a district court departure theory *de novo* or use an abuse of discretion approach.¹¹⁹ The Supreme Court held that abuse of discretion was the correct standard of review, and instructed that at least two of the district court's creative departure theories "were well within the sound discretion of the District Court."¹²⁰ The Supreme Court concluded that the district court did not abuse its discretion when it used novel factors such as "susceptibility to abuse in prison" and "successive prosecutions" (the burden placed on Koon to face a federal conviction following a state acquittal on the same facts) as downward departures.¹²¹ The ultimate irony of the federal *Koon* case is that it provided the criminal defense bar and the district court judge with greater leeway in using departure theories.¹²² The *Koon* decision provided a little air pocket in the often stiflingly restrictive pre-Booker Sentencing Guidelines atmosphere.¹²³

The Rodney King beating case and its aftermath led to a series of government investigations, special commissions and other societal attempts to address the root causes of such upheaval. A few years later, the Ramparts police scandal gave the LAPD yet another black eye in terms of

116. *Id.*

117. *Koon*, 833 F. Supp. at 791-92 (sentencing Koon to thirty months, the low end of the prescribed Sentencing Guidelines range, reasoning that due to the "convergence of extraordinary factors in this case," a downward departure from the Sentencing Guidelines was necessary).

118. *Koon v. United States*, 518 U.S. 81, 90 (1996).

119. *Id.* at 91.

120. *Id.* at 113 (holding that "susceptibility to abuse in prison" and "successive prosecutions" were factors that properly could be considered by the sentencing court).

121. *Id.* at 111.

122. See, e.g., *United States v. Lipman*, 133 F.3d 726 (9th Cir. 1998). In *Lipman*, District Court Judge John Davies acknowledged "culture assimilation" as a possible departure from the Sentencing Guidelines in extraordinary circumstances. *Id.* at 731. *Lipman*, an adult defendant, illegally reentered the United States where he had been brought by his parents as a child. *Id.* at 729. *Lipman* reentered after he was deported because of his psychological ties to his disabled United States citizen daughter who had been sexually assaulted. *Id.* His defense counsel argued for the departure because of his "cultural assimilation into American Society," which was the only "real home country he had known." *Id.* The district court did not grant the departure because the facts were inadequate, but the Ninth Circuit upheld the validity of the departure theory under *Koon*. *Id.* at 730.

123. *United States v. Booker*, 543 U.S. 220, 264 (2005) (making the Federal Sentencing Guidelines advisory not mandatory).

police conduct, excessive use of force, and related civil rights violations. These incidents led to the federal consent decree entered into by the Department of Justice, City of Los Angeles, and the LAPD.¹²⁴ This consent decree was filed in June of 2001 and implementation ordered by Central District Court Judge Gary Feess.¹²⁵ While some speakers on earlier panels have criticized resorting to consent decrees in other contexts, such as the Century Freeway litigation,¹²⁶ I believe that the federal district court is a preferred non-political forum in which to enforce much-needed reforms within the LAPD.¹²⁷ Public confidence in the power and fairness of the federal judiciary is key.¹²⁸ Federal judges with life appointments may avoid the political pressure that can dissuade police review boards from imposing serious sanctions.¹²⁹ One would assume that a federal judge — especially a former Assistant United States Attorney from the Central District, such as Judge Feess — has the skill and judgment to oversee the reformation of the controversial practices of the LAPD and other agencies covered by the consent decree.¹³⁰

124. Consent Decree, *United States v. City of Los Angeles*, Civil No. 00-11769 GAF (C.D. Cal. June 15, 2001) [hereinafter *Los Angeles Consent Decree*], available at <http://www.usdoj.gov/crt/split/documents/laconsent.htm>.

125. *Id.*

126. Robert R. Detlefsen, *Government Consent Decrees and Paradox of "Consent": A Critical Case Study*, 18 JUST. SYS. J. 13, 26 (1995); cf. Lance Wilfred Shoemaker, *The Use of Equitable Tools Freeway Construction Litigation*, 28 TRANSP. L.J. 15, 18-19 (2000); but see Anthony N. R. Zamora, *The Century Freeway Consent Decree*, 62 S. CAL. L. REV. 1805, 1835-36 (1989).

127. Cf. Brandon Garret, *Standing While Black: Distinguishing Lyons in Racial Profiling Cases*, 100 COLUM. L. REV. 1815, 1842-43 (2000) (citing *City of Los Angeles v. Lyons*, 461 U.S. 95, 111-12 (1983)).

128. Jessica Conser, *Achievement of Judicial Effectiveness Through Limits on Judicial Independence: A Comparative Approach*, 31 N.C. J. INT'L L. & COM. REG. 255, 256 (2005).

129. See Shirley S. Abrahamson, *The Ballot and the Bench*, 76 N.Y.U. L. REV. 973, 987-89 (2001).

130. *Los Angeles Consent Decree*, *supra* note 124 (addressing law enforcement's force, initiation and investigation of citizen complaints, non-discriminatory policy, and motor vehicle and pedestrian stops, which are issues that represent recurring police-citizen points with accompanying conflicts).

V. SELECTIVE PROSECUTION: IN THE WAKE OF ARMSTRONG

Two Central District cases are cited repeatedly in reference to selective prosecution.¹³¹ *Wayte v. United States*¹³² and *United States v. Armstrong*¹³³ are good examples of the independent thinking of the jurists of the Central District. In both cases, the United States Supreme Court found judicial errors: Judge Terry Hatter erred in dismissing the indictment of draft resister David Wayte,¹³⁴ and Judge Consuelo B. Marshall erred in granting a defense motion for discovery from the Office of the United States Attorney.¹³⁵ The Supreme Court reasoned in both cases that the district court improperly analyzed the selective prosecution issues raised by the respective defendants.¹³⁶ In both cases, the Supreme Court was highly deferential to the Executive Branch's broad discretion to prosecute crime as it sees fit.¹³⁷ The Supreme Court expressed great reluctance to question and thereby interfere with the Government's legitimate exercise of executive power, since the decision to prosecute "is particularly ill-suited to judicial review[.]"¹³⁸ In the *Wayte* case, the defendant argued that he was indicted because he was a vocal, visible non-registrant for the 1980 draft and that the Government selectively prosecuted those who exercised their First Amendment rights.¹³⁹ Judge Hatter granted the defense discovery request, which the government obeyed only up to a certain point.¹⁴⁰ Judge Hatter finally dismissed the indictment on the ground that the Government failed to rebut petitioner's *prima facie* case of selective prosecution.¹⁴¹

The Supreme Court did not address the discovery issue in *Wayte*, but it did so eleven years later in the *Armstrong* case.¹⁴² Christopher Armstrong was indicted in court on federal crack cocaine and firearms charges.¹⁴³

131. *Doyle v. Crane*, 200 S.W.3d 581, 588 (Mo. Ct. App. 2006) (citing *Wayte v. United States*, 470 U.S. 598 (1985)); *State v. Streiff*, 673 N.W.2d 831, 835 n.3 (Minn. 2004) (citing *Wayte*, 470 U.S. 598); *United States v. Arenas-Ortiz*, 339 F.3d 1066, 1068 (9th Cir. 2003) (citing *United States v. Armstrong*, 517 U.S. 456, 464 (1996)); *United States v. DeCologero*, 364 F.3d 12, 22 (1st Cir. 2004) (citing *Armstrong*, 517 U.S. at 464).

132. 470 U.S. 598 (1985).

133. 517 U.S. 456 (1996).

134. *Wayte*, 470 U.S. at 598-99, rev'g 549 F. Supp. 1376 (C. D. Cal. 1982).

135. *Armstrong*, 517 U.S. at 456-57.

136. *Wayte*, 470 U.S. at 605-07; *Armstrong*, 517 U.S. at 468-71.

137. *Wayte*, 470 U.S. at 607; *Armstrong*, 517 U.S. at 464.

138. *Wayte*, 470 U.S. at 607.

139. *Id.* at 604.

140. *Id.*

141. *United States v. Wayte*, 549 F. Supp. 1376, 1382 (C.D. Cal. 1982).

142. See generally *Wayte*, 470 U.S. 598.

143. *United States v. Armstrong*, 517 U.S. 456, 458 (1996).

Armstrong alleged that he and his co-defendants were chosen for federal prosecution because they were African American.¹⁴⁴ To support their selective prosecution claim, the defendants submitted an affidavit stating that each of the twenty-four cases closed by the Federal Public Defender's Office for the Central District in 1991 involved an African American defendant.¹⁴⁵ The government provided some information in response,¹⁴⁶ but refused to fully comply with the district court's discovery order. The court dismissed the indictments as a sanction against the government.¹⁴⁷

In *Armstrong*, the United States Supreme Court focused on what standard must be met to obtain discovery in a selective prosecution claim based on race.¹⁴⁸ The Court reversed the Ninth Circuit *en banc* decision to use the "colorable basis" test.¹⁴⁹ Under this test, the Ninth Circuit relieved the defendant of the requirement of demonstrating that the government failed to prosecute others who are similarly situated.¹⁵⁰ The Supreme Court held, however, that the defendant must produce credible evidence that "similarly situated" defendants of other races could have been prosecuted, but were not.¹⁵¹

While the counsel for Armstrong may have presented underwhelming evidence to support the selective prosecution discovery motion,¹⁵² the approach adopted by the Supreme Court imposes an unrealistic burden on the average criminal defendant.¹⁵³ The Supreme Court in *Armstrong* never addressed the time and cost involved in gathering the statistical information that the Court hypothesized is available and must be produced to support a

144. *Id.* at 459.

145. *Id.*

146. *Id.* at 460-61.

147. *Id.* at 461.

148. *Id.*

149. *Armstrong*, 517 U.S. at 469-71.

150. *Id.* at 469.

151. *Id.* at 470 (criticizing the defendant's "Study" because it failed "to identify individuals who were not black and could have been prosecuted for the offenses for which respondents were charged, but were not so prosecuted").

152. *Id.* at 459. A "Paralegal Specialist" in the Office of the Federal Public Defender compiled a "study" identifying the race of the twenty-four defendants represented by the office during 1991 whose cocaine cases were closed. *Id.* These defendants had been prosecuted for violations of twenty-four § 841 or § 826 violations, the same crimes charged in the *Armstrong* indictment. *Id.*

153. Anne Bowen Poulin, *Prosecutorial Discretion and Selective Prosecution: Enforcing Protection After United States v. Armstrong*, 34 AM. CRIM. L. REV. 1071, 1099-1100 (1997); Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 FORDHAM L. REV. 13, 47 (1998).

discovery motion for a selective prosecution claim.¹⁵⁴ Without any explanation, the *Armstrong* majority opinion contended that, “[f]or instance, respondents could have investigated whether similarly situated persons of other races were prosecuted by the state of California, and were known to federal law enforcement officers, but were not prosecuted in federal court.”¹⁵⁵

But, once again Chief Justice Rehnquist never identified why the Court assumed that the state of California collects such data or is privy to which “similarly situated” non-minority persons are known to federal enforcement officers.¹⁵⁶ Moreover, the Court did not explain how an attorney representing a federal defendant could compel state authorities to cooperate and release this information if the state did have it.¹⁵⁷ The very nature of this data — persons known to federal law enforcement officers who were not prosecuted in federal court — is not found in the public record and could only be known to federal authorities who more than likely would not disclose the data to criminal defense counsel.¹⁵⁸ It would appear that defense counsel would need the power of the federal court to coax this data from the prosecution, which is in essence what the district judge did in *Armstrong*.¹⁵⁹ The district court granted the defense discovery motion, ordering that:

[T]he Government (1) provide a list of all cases from the last three years in which the Government charged both cocaine and firearms offenses, (2) to identify the race of the defendants in these cases, (3) to identify what levels of law enforcement were involved in the investigations of those cases, and (4) to explain its criteria for deciding to prosecute those defendants for federal cocaine offenses.¹⁶⁰

Justice Breyer, who concurred in part in the *Armstrong* judgment, made the following baffling comment: “Were the ‘selective prosecution’ defense valid in this case . . . , it should have been *fairly easy* for the defendants to find, not only instances in which the Federal Government prosecuted African-Americans, but also some instances in which the Federal Government did not prosecute similarly situated caucasians.”¹⁶¹ Again,

154. See generally *Armstrong*, 517 U.S. 456.

155. *Id.* at 470.

156. See generally *id.*

157. See generally *id.*

158. See Henry Paul Monaghan, *The Sovereign Immunity “Exception”*, 110 HARV. L. REV. 102, 172 (1996).

159. *Armstrong*, 517 U.S. at 459.

160. *Id.*

161. *Id.* at 476 (emphasis added).

Justice Breyer did not elaborate on how this “easy task” could be accomplished or how much it would cost to gather and interpret such data.¹⁶² The daunting nature of the data collection task cannot be minimized.¹⁶³ A public defender office, let alone a single appointed defense counsel, scarcely can finance a wide-ranging reliable investigation into the identity and race of all local cocaine dealers that federal law enforcement authorities know about, but decide to not prosecute.¹⁶⁴ Unlike the key facts at issue in *Yick Wo v. Hopkins*,¹⁶⁵ there is no public record to scour in order to determine how many federal cocaine prosecutions were declined by the local office of the United States Attorney.¹⁶⁶

The Supreme Court in *Armstrong* also indulges in a rebuttable presumption regarding the issue of selective prosecution that seems to defy the lessons learned from the *Batson-McCollum* line of cases.¹⁶⁷ The very existence of *Batson* establishes that the prosecution — the executive branch — is not above practices that raise the spectre of impermissible racial motivation.¹⁶⁸ Yet, the *Armstrong* majority is highly protective of the executive’s prosecution decision-making.¹⁶⁹ “A selective-prosecution claim asks a court to exercise judicial power over a ‘special province’ of the Executive . . . [and a]s a result, ‘[t]he presumption of regularity supports’ their prosecutorial decisions and, ‘in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties.’”¹⁷⁰

The *Armstrong* Court shared the *Wayte* Court’s grave concern about delaying criminal proceedings and chilling “law enforcement by subjecting

162. See *id.* at 471-76.

163. See Iris Jones, *Collecting and Analyzing Racial Profiling and Traffic Stop Data: Is It a Reliable Method of Detecting Racial Profiling?*, 35 URB. LAW. 707 (2003).

164. See Ronald F. Wright, *Parity of Resources for Defense Counsel and the Reach of Public Choice Theory*, 90 IOWA L. REV. 219, 235 (2004); see also Melissa L. Jampol, *Goodbye to the Defense of Selective Prosecution*, 87 J. CRIM. L. & CRIMINOLOGY 932, 961-62 (1997).

165. *Yick Wo v. Hopkins*, 118 U.S. 356, 374 (1886) (noting that the Chinese defendants could refer to the San Francisco public records to quantify the number of laundry license applications, thus enabling them to describe the number of Chinese applicants and non-Chinese applicants); cf. *Armstrong*, 517 U.S. at 466 (stating that *Yick Wo* demonstrates that the “similarly situated” requirement was possible to prove without acknowledging that the *Yick Wo* information was from public records and, therefore, readily available).

166. See Donna Coker, *Forward: Addressing the Real World of Racial Injustice in the Criminal Justice System*, 93 J. CRIM. L. & CRIMINOLOGY 827, 846-47, 859-60 (2003); see also Jampol, *supra* note 164, at 958-59, 961-62; see also Richard H. McAdams, *Race and Selective Prosecution: Discovering the Pitfalls of Armstrong*, 73 CHI.-KENT L. REV. 605, 607 (1998).

167. See *Batson v. Kentucky*, 476 U.S. 79 (1986); *Georgia v. McCollum*, 505 U.S. 42 (1992).

168. See *Batson*, 476 U.S. at 83-84.

169. *Armstrong*, 517 U.S. at 464.

170. *Id.*

the prosecutor's motives and decisionmaking [sic] to outside inquiry and [thereby] undermining prosecutorial effectiveness by revealing the Government's enforcement policy."¹⁷¹ Yet under *Batson*, in order to determine whether the prosecutor exercised preemptory challenges for a constitutionally impermissible reason, the prosecutor must at least describe his or her motivation in exercising a preemptory challenge to the satisfaction of the judge.¹⁷²

While a selective prosecution motion filed by a criminal defendant may well require court scrutiny of the prosecution charging pattern and may "chill" law enforcement's unfettered exercise of arrest power, the need for accountability requires the federal prosecutor to be conscious of the need to justify a campaign of arrest and prosecution of certain targeted minority groups.¹⁷³ Yet, the *Armstrong* holding discourages accountability regarding this issue of selective prosecution, which is an enduring concern in criminal prosecution.¹⁷⁴

Such prosecutorial accountability is consistent with both the high esteem in which the Supreme Court is willing to hold the executive branch and with the constitutional principles in *Batson*. Knowing that one must stand ready to explain a decision – be it the use of a preemptory challenge or why certain racial groups appear to have been subjected to federal prosecution so often – simply makes the prosecution and the supporting law enforcement agencies more conscious of why those decisions are made.¹⁷⁵ The Supreme Court in *Armstrong* dismissed the *Batson* analogy because in the *Batson* setting the "entire *res gestae* take place in front of the trial judge."¹⁷⁶ However, the district court judge has also seen a federal adjudication system in which minorities appear so infrequently in the jury box and so often at the defendant's table, that the need to ask the prosecution to explain the apparent "pattern" of charging seems logical.¹⁷⁷

171. *Id.* at 465 (quoting *Wayte v. United States*, 470 U.S. 598, 607 (1985)). Although the Court worried that the prosecution strategy might be revealed if discovery were ordered, the Court overlooked that the prosecution data results could be filed with the district court judge under seal. *Id.* at 468.

172. *See Batson*, 476 U.S. at 94.

173. *See Poulin*, *supra* note 153, at 1119-21 (advocating mandatory record-keeping by government prosecutors and agencies as an alternative to judicial intervention because "[n]ot only may such evidence bolster an individual claim of selective prosecution, it should also generate pressure for greater self-regulation by the executive. At a systemic level, government statistics will reveal whether troubling patterns of disparate treatment exist. Statistical information offers the benefit of insight without harmful intrusion into the prosecutor's decision making process").

174. *See Armstrong*, 517 U.S. at 465.

175. *See Poulin*, *supra* note 153, at 1119-21.

176. *Armstrong*, 517 U.S. at 467-68.

177. *See Phyllis Novick Silverman*, *Survey of the Law of Preemptory Challenges: Uncertainty*

In light of the plague of racism that has not been eradicated and can infect any autonomous decision maker,¹⁷⁸ society needs to know that someone – such as an Article III federal judge – is monitoring that decision-making process to insure that it is not tainted with racially motivated purposes. But, the legacy of the *Lyons* and *Armstrong* Supreme Court cases is a virtually unsurmountable barrier to the effective investigation of insidious racially-motivated abuses of power. These legal barriers place an overwhelming burden on the most likely victims – citizens who may be unable to fund the “proof” of such discrimination to the level that the Supreme Court demands.

VI. CONCLUSION

The brief survey of the criminal cases adjudicated by the Central District bench over the last forty years highlights how independent-minded the judges have been and how often these judges have used their discretion to advance progressive legal doctrine and to protect the due process rights of the accused.

in the *Criminal Law*, 44 U. PITT. L. REV. 673, 677-79 (1983); see also *Armstrong*, 517 U.S. at 459.

178. See Reginald Leamon Robinson, *Human Agency, Negated Subjectivity, and White Structural Oppression: An Analysis of Critical Race Practice/Praxis*, 53 AM. U. L. REV. 1361, 1397-98 (2004).

CLOSING REMARKS: PLACING THE CASES AND THE LAW IN PERSPECTIVE[†]

Barbara Jacobs Rothstein*

I am pleased to have the opportunity to give the closing remarks for this symposium, which has been, by all accounts, an extraordinary day. It has been packed with a many mind-expanding thoughts and I have tried to put together, not a summary - for that you would be here all night - but just some thoughts I had as the day went along, thinking that they might be of interest to you. What made today so unique for me was not just the recapitulation of the law and the interesting cases that the Central District has had, but a placing of those cases within the societal changes that have taken place over these forty years. And of course, they've been a dramatic forty years as today's panelists have made evident. The relationship between the law and these social changes was brought out beautifully by the judges on today's panels, some of whom presided over the landmark cases discussed here today, and by the professors, who were able to place these cases in a broader context. I found this discourse truly fascinating, and I am going to assume that whatever was fascinating for me was fascinating for you as well.

I would like to mention some of the ideas that today's comments have brought to mind. First, we heard a great deal about how judges now manage their calendars in a manner that would have been unheard of forty years ago. During these forty years, judges have become more and more

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responsible for managing their calendars and taking control of cases. I tend to get rather touchy when someone asks when I went on the bench. That's because I have been on the bench since 1980. But, of course, I went on at the age of twelve. Regardless of the number of years, when I went on the bench, most of my fellow judges said, "Look, our job is to try cases. It's up to the attorneys to mark them up for trial. They do the discovery and they get the cases ready, we just try them." Well, all of us know that this approach has undergone a radical change. But I came on the bench just at the cusp of this change, when our cases were waiting five years to get the trial. I, and others, thought, "There must be a better way." Well, there was a better way, and we judges began to actively manage cases.

One of the primary reasons for this change was that we became aware of what attorneys were doing with discovery. Now, this was not specifically discussed today, and maybe I should tread carefully since I am speaking to both present and future attorneys, but the fact is that many attorneys were grossly abusing discovery. Discovery had become an attorney's unemployment insurance policy, and many of us on the bench believed that some limits were needed. One of the primary principles of our legal system is that all parties deserve expeditious, speedy, and inexpensive access to justice. That, clearly, was not happening. And so, judges became managers, almost as a default position, to make sure that cases actually got to trial and that they did so in a way that people could afford.

A second factor that came into play was the changing nature of many cases on the federal docket, in appellate courts as well as on the trial level. More and more *pro se* cases were appearing. Now, any one of you who have dealt with a *pro se* case knows that, often, these cases involve frivolous claims that take up valuable court time and attention. As *pro se* cases began to constitute thirty percent of the appellate court docket, courts had to change the way these cases were processed. Courts cannot give adequate time to the important cases if judges are spending time on an overabundance of frivolous cases. Thus, techniques were introduced to do what in medicine is called "triage," that is, providing a manner for quickly assessing which cases deserve full judicial treatment and which cases should be dealt with more expeditiously. For example, not all cases require oral arguments. I believe that the courts have responded to these changes very well. In particular, the Ninth Circuit and the Central District have been in the vanguard of figuring out ways to distinguish between the cases that are repetitive and frivolous in nature, and the cases that deserve full court press, pun intended.

Let me turn to another topic that today's talks have inspired. As you all know, my job has changed in the last few years. I have moved from the West Coast, from my position on the bench, to the East Coast, to my current position as Director of the Federal Judicial Center. Being a Ninth Circuit person on the East Coast and traveling all around the country, I hear comments about the Ninth Circuit, about California judges, how liberal they are, and the strangeness of their decisions. I get quite offended when people say such things. There is a myth that the Ninth Circuit is reversed more than other circuits but percentage-wise that simply is not the case. Usually the Ninth Circuit has more cases in which cert has been granted. Today's panels have helped me understand this phenomenon. The fact of the matter is that the West Coast, particularly California and the Central District, is often the focal point of cutting edge developments and social change. California is growing in population so quickly, and the Los Angeles area, the central area of California, is one of the most diverse areas in this country.

California is on the front line of so many issues: there are environmental tensions, including questions of clean air; there are technology issues, including important copyright and patent developments occurring here every day; the desegregation cases, which were discussed in one of today's panels; the exciting criminal cases which were also discussed today; and science which I firmly believe is going to be one of those cutting edge areas in the future because of the booming science industry in California. This is a state that has passed laws about stem cell research while the rest of the country is still debating the issue. California is in the vanguard on issues concerning global warming. And it is inevitable that with these cutting edge issues, and with the type of conscientious and courageous judges that have frequented the bench of the Central District, there will be cases that are going to be controversial, that to certain parts of the country are going to look far out, but these cases are going to be there nonetheless and they are going to be the cases that set the trend for the future. To the extent that they create tensions with the rest of the country, so be it.

I am going to move from that to this whole notion of activist judges, because one of the ways in which the Ninth Circuit and California judges are criticized is they are labeled "activist judges." Well, someone has already said it today; all "activist judge" really means is that a judge has made a decision with which someone disagrees. But I cannot be up here without going through a mantra that I think almost every judge given a soapbox will do in this day and age, and that is reminding everyone here that the attitude, the existing relations between Congress, the executive and

the courts have real tension in them. I do not wish to say in our history these relationships have never been quite as tense and hostile as they are now, because if you look at the founding fathers and the relationship between Justice Marshall and the executive, you could probably find interesting similarities. The same can be said of FDR's time in office. But let's put it this way, the current situation is as bad as any of those times.

I find it unfortunate that judges are called activist with the implication that they are making decisions lawlessly or only to effect their personal ideology with disregard for the law. I agree with Chief Judge Alicemarie Stotler, I have never seen any judge do this. Every judge I know, whether you call him or her liberal or conservative, makes a concerted effort to follow the law. But, comments made by persons in the public arena that imply that judges are following their personal whims and not the law, diminish the faith of the public in their judicial system. And that, to me, is an unfortunate development. If the people begin to seriously doubt that their judges are following the law, there will be dangerous consequences. Judges have no way of enforcing their decisions. Judges are dependent upon the other branches, and upon public adherence to the law. We are fortunate to have a citizenry that respects the law, and respects its judges, and that believes that justice is served through the legal process. I find any attempt to undermine that in any way truly unfortunate.

I hope that many of you have read *A Man For All Seasons*, in which there is a famous passage in which Sir Thomas More explains why he will not violate the law even to save himself. I am not quoting it well, but basically he posits that if one struck down the law, if one undermined all the laws, when it's your turn to come before the law, where will you go? Where will the law be? Where will the courts be? And I'm constantly reminded of that when I see that, for short-term political gain, people will strike out at the courts and undermine the faith of the public in their judges and in the fact that justice is, in fact, being done. The tenor of the discussion on splitting the Ninth Circuit is another example, in my opinion, of that hostile relationship where politics is undermining the faith of the people in their courts.

I hope that, if nothing else, everyone here will come away from this symposium with a greater understanding of the courage and the dedication of the judges in this district over the past forty years. Our district judges have been appointed by every president since 1966. These judges all consistently did their best to follow the law, while conscientiously working to achieve outcomes that conform to justice, to precedent and to what would be the right outcome in the case before them. They have scrupulously tried to honor the trust placed in them to administer justice. I think today's

symposium has provided an extraordinary display of how that has been carried out over the last forty years. I am honored to have been invited to present today's closing remarks. Thank you.